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AN INDEX

TO

ALL THE REPORTED CASES

DECIDED IN THE SEVERAL

COURTS OF EQUITY AND BANKRUPTCY IN ENGLAND AND IRELAND,

&c., &c.

THE FOURTH EDITION.

VOL. VI.

CHITTY'S INDEX

TO

ALL THE REPORTED CASES

DECIDED IN THE SEVERAL

COURTS OF EQUITY IN ENGLAND,

THE PRIVY COUNCIL, AND THE HOUSE OF LORDS.

WITH A SELECTION OF IRISH CASES:

ON OR RELATING TO

THE PRINCIPLES, PLEADING, AND PRACTICE

OF

Equity and Bankruptcy;

FROM THE EARLIEST PERIOD.

THE FOURTH EDITION.

WHOLLY REVISED, RE-CLASSIFIED, AND BROUGHT DOWN TO END OF YEAR 1883.

BY

HENRY EDWARD HIRST, B.C.L., M.A.,

OF LINCOLN'S INN, ESQR., BARRISTER-AT-LAW.

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7. Appeal to the Chancellor of the Duchy of Lancaster, from a decree of the Vice-Chancellor dismissing the bill, affirmed by him on rehearing, on the petition of the plaintiff. *Omerod* v. *Hardman*, 5 Ves. 722.

8. Lands lying in the county palatine of Lancaster, becoming forfeited for being granted to superstitious uses, and A. afterwards obtaining a lease thereof under the Great Seal, it need not be also under the duchy seal. *Woollaston* v. *Att.-Gen.*, 5 Bro. P. C. 1.

9. *Semble*, the jurisdiction of the Chancellor of the Duchy of Lancaster, when reviewing the decrees or orders of the Vice-Chancellor there, is one strictly appellate, and not a rehearing. *Scarisbrick* v. *Skelmersdale* (*Lord*), 4 Y. & Coll. 78.

Held, also, that by analogy with the practice of the Court of Chancery, where a bill of review may be brought within twenty years, the party, notwithstanding a lapse of seventeen years, was in time. *Ib.*

10. The Court of Chancery of the county palatine of Lancaster has not, as to land and personal estate within its jurisdiction, power to appoint a new trustee in the place of a trustee who is of unsound mind, but who has not been so found by inquisition. *Re Ormerod*, 4 Jur., N. S., 1289; 28 L. J., Ch., 55.

The power to appoint new trustees in the place of trustees of unsound mind, but not so found by inquisition, is by the Trustee Acts given, not to the Court of Chancery, but to the Lord Chancellor, or other the persons intrusted with the care of lunatics. *Ib.*

11. The principle under which the jurisdiction *in personam* of the old Court of Chancery extends, in effect, to property wherever situate

applies to the Chancery Court of the county palatine of Lancaster. *Re Longdendale Cotton Spinning Co.*, 8 L. R., Ch. D., 150; 38 L. T., N. S., 776.

Therefore, where the defendants in an action in the Chancery Court of the county palatine of Lancaster were within but their property was beyond the boundary of the local jurisdiction:—Held, that the jurisdiction of that Court was the jurisdiction *in personam* of the old Court of Chancery within the boundary, and therefore that the palatine court could exercise jurisdiction over the property, and could enforce any order in the action by applying to the Supreme Court under the Court of Chancery of Lancaster Act 1854, s. 7, and Judicature Act 1873, s. 18, sub-s. 2, and motion by the defendants to stay the action for want of jurisdiction refused with costs. *Ib.*

1. The Vice-Chancellor of the county palatine has no jurisdiction to grant an injunction restraining proceedings in the High Court. *Re Alison, Re Johnson*, 8 L. R., Ch. D., 1; 47 L. J., Ch., 755; 26 W. R. 450.

Chancellor of Durham.] 2. By the 6 & 7 Will. 4, c. 19, the temporal jurisdiction, including all jura regalia of the bishopric of Durham, was transferred from the bishop to the crown, and by the 6th section of that Act the rights of any persons holding any office by patent were reserved, and the revenues of the see were made chargeable with the same fees and stipends in respect of any office in the county of Durham as the same had theretofore been subject to. Under the authority of the Acts constituting the ecclesiastical commissioners, and by an order in council in 1836, the surplus revenues of the see of Durham, after providing for the bishopric, were directed to be paid to the ecclesiastical commissioners, and such surplus was made chargeable with the payment of the fees and stipends granted out of the revenues of the see by the last or any preceding bishop to any officer of the palatinate who held his office by patent at the time of the passing of the Act 6 & 7 Will. 4, c. 19. The office of chancellor of the palatinate was created by patent before the time of Henry VIII., and the fees in respect of such office were about 27*l.* In the year 1788 the then bishop made a voluntary grant of 100*l.* to the chancellor, payable out of the revenues of the bishopric, for each sitting of the Chancellor's Court, and from that period down to 1836, 100*l.* was entered in the accounts of the bishopric under the headings, sometimes "new stipend" and sometimes "new stipend due this sitting." The ecclesiastical commissioners, having refused to pay the present chancellor, who was appointed in 1852, any more than the sum for which there was evidence of a grant by patent:—Held, that, having regard to the period during which the 100*l.* had been *de facto* paid, and irrespective of the question whether the payment of that sum could ever have been enforced by action at law, the surplus revenues of the bishopric in the hands of the ecclesiastical commissioners were liable for the payment of the sum of 100*l.* for each sitting of the chancellor. *Temple* v. *Ecclesiastical Commissioners*, 3 De G. M. & G. 418; 18 Jur. 45; 23 L. J., Ch., 673; 2 W. R. 112.

II. JURISDICTION OF COURT OF CHANCERY.

3. Court of Chancery is incident to county palatine. *Martin* v. *Marshall*, Hob. 63.

4. Upon a petition of appeal from an inferior Court the appellant need not assign particular errors as he must upon a bill of review. *Addison* v. *Hindmarsh*, 1 Vern. 442.

Bill of appeal from inferior Courts must be upon the same evidence, and there can be no examination *de novo*, any more than there may be on a bill of review; but in the spiritual courts they allow new evidence upon appeals. *Id.* 443.

Appeals lie from the Court of Equity at Lancaster to the Duchy Court. *Ib.*

5. An appeal will not lie in chancery from a decree in a county palatine. *Portington* v. *Tarbock*, 1 Vern. 177. *Jennet* v. *Bishop, id.* 184.

6. A *certiorari* bill may be brought to remove a cause out of a court of equity in a county palatine to this court. *Portington* v. *Tarbock*, 1 Vern. 178.

7. Proceedings can no more be removed out of a county palatine by a *certiorari* bill in chancery than by a writ of error at law, in case of a judgment there. *Duckenfield* v. *Nosworthy*, 6 Vin. Abr. 581, pl. 23.

8. If defendants charged upon account in Lancaster, they shall not answer here; if upon promise, they shall. *Wingfield* v. *Fleetwood*, Cary 113.

9. Suggesting prior incumbrances to persons living out of a county palatine, will entitle this Court to a jurisdiction concerning lands within the county palatine. *Hall* v. *Dowthwaite*, 1 Vern. 298.

10. Special injunction granted to stay proceedings in an action in the county palatine at Lancaster. *Hine* v. *Fiddes*, 2 Sim. & S. 370.

11. The fact of an administration decree having been obtained in the Court of Chancery of the county palatine of Lancaster is not a ground for staying proceedings for the administration of the same estate, where a portion of the estate is situate beyond the jurisdiction of the Lancaster Court. *Wynne* v. *Hughes*, 5 Jur., N. S., 165; 28 L. J., Ch., 283.

On appeal, the Court ordered all the proceedings in the suit to be stayed, the plaintiff to have the conduct of the suit in the court of limited jurisdiction, the plaintiff appearing in that Court for that purpose. S. C. 28 L. J., Ch., 485; 32 L. T. 326.

12. An injunction was granted by the Lords Justices, as the court of appeal from the Chancery Court of Lancaster, against a person out of the jurisdiction of that Chancery Court. *Downes* v. *Jackson*, 14 W. R. 907.

13. A person who has obtained a creditor's order for administration of a testatrix's estate in the palatine court of the Duchy of Lancaster, and who is neither a party to a suit in the high court for the same purpose, nor has proved his debt under an administration order therein made subsequently to the order in the palatine court suit, is a mere stranger to the high court suit, and a motion made by a person so circumstanced in the high court suit to stay proceedings therein, on the ground of the order made in the palatine court suit, was refused, with costs, upon the ground of his being such stranger. *Re Yates, Bradley* v. *Stelfox*, 3 De G. J. & S. 402.

1. Upon application *ex parte* by the plaintiff in a suit in the Court of Chancery of the county palatine of Lancaster, the lords justices of the High Court of Chancery, under the powers given to them by the Court of Chancery of Lancaster Act 1854 (17 & 18 Vict., c. 82), ordered that service of the claim in the suit should be effected upon one of the defendants out of the jurisdiction of the said county palatine; and directed such order to be drawn up by one of the registrars of the High Court of Chancery. *Waltham* v. *Goodyear*, 1 Jur., N. S., 197; 24 L. J., Ch., 587; 7 De G. M. & G. 76.

The fact of questions of legal difficulty arising in a suit instituted in the Court of Chancery of the county palatine of Lancaster is not sufficient reason for transferring it to the High Court of Chancery. S. C. *nom. Waltham* v. *Goodier*, 3 W. R. 352.

2. The 30 & 31 Vict., c. 64, for the dispatch of business in the Court of Appeal in Chancery, does not enable one of the lords justices sitting alone to act as a court of appeal from the Court of Chancery of the county palatine of Lancaster. *Kershaw* v. *Vickers*, 3 L. R., Ch., 513; 37 L. J., Ch., 488; 16 W. R. 772. S. P. *Jones* v. *Kilshaw*, 37 L. J., Ch, 277; 16 W. R. 295; 17 L. T., N. S., 485.

3. The sole defendant in an action commenced in the Court of Chancery of the county palatine of Lancaster resided out of the jurisdiction. On the 15th June the Court of Appeal, on the *ex parte* application of the plaintiff, gave the plaintiff leave to serve the writ out of the jurisdiction of the palatine court, on the plaintiff undertaking to consent to a transfer of the action to the High Court of Justice in case an application for such transfer should be made by the defendant. On the defendant subsequently applying for a transfer, the Court of Appeal made the order, and ordered the plaintiff to pay (in any event) the costs incurred in obtaining the order. *Re Watmough, Serjeeson* v. *Beloe*, 24 L. R., Ch. D., 280; 49 L. T. 220; 32 W. R. 101.

4. Order LVIII. of the Rules of Court 1875 applies to appeals from the court of the county palatine of Lancaster as well as to appeals from the High Court of Justice, and the time for appealing is now regulated by Rule 15 of that Order, and is no longer governed by the general orders of 1855 regulating appeals from the court of the county palatine. *Lee* v. *Nuttall*, 12 L. R., Ch. D., 61; 48 L. J., Ch., 616; 27 W. R. 805; 41 L. T. 4.

5. In 1874, a petition was presented in the court of the county palatine of Lancaster, for a guardian and maintenance of two infants, who were entitled for life to a very large property under their great-grandfather's will. Their mother and another were appointed guardians, and an allowance for maintenance was fixed, and was afterwards varied from time to time by the Court. In 1877, the mother, as next friend of the infants, obtained in the High Court a judgment for administration of the testator's estate, and then took out a summons in the action for the appointment of guardians and an allowance for maintenance. The summons was not served on the other guardian, but he heard of it, and by the direction of the Vice-Chancellor of the county palatine took out a summons for directions in the palatine court. On the summons being attended the Vice-Chancellor expressed strong disapprobation of the conduct of the mother in taking out the summons in the High Court, took an undertaking, which she voluntarily offered, not to proceed further with the summons in the High Court, and made a reference to the registrar as to revising the allowances for maintenance. Soon afterwards, the mother, as next friend of the infants, applied to the Vice-Chancellor of the county palatine to discharge the undertaking and to stay proceedings in the palatine court. This application having been refused, the mother, as next friend of the infants, appealed:—Held, that, although the High Court had full jurisdiction to appoint guardians and order maintenance, notwithstanding the previous orders made by the palatine court, such jurisdiction ought not to be exercised unless some special ground was shown, inasmuch as it was better for the infants that their maintenance and education should remain under the direction of the judge who had directed them for three years, and was fully acquainted with the case; and that the proceedings in the palatine court ought not to be stayed. *Re Allison, Re Johnsons*, 8 L. R., Ch. D., 1; 47 L. J., Ch., 755; 38 L. T. 304; 26 W. R. 450.

Held, also, that as the Vice-Chancellor of the county palatine had no jurisdiction to grant an injunction to restrain proceedings in the High Court, he ought not to have taken an undertaking to discontinue them, and the undertaking was accordingly discharged. *Ib.*

Of Exchequer Equity.] 6. As to the jurisdiction of Exchequer over matters arising within county palatine of Lancaster. *Cheetham* v. *Crooke*, 1 M'Clel. & Y. 307.

PARAPHERNALIA.

See ELECTION, II. IV.—EXECUTOR AND ADMINISTRATOR, XIII. IX.—XIV. VII.—HUSBAND AND WIFE, XII.

PARCENERS.

— *Presentation to Benefice by.* See ECCLESIASTICAL PERSONS AND PROPERTY, II. 3.
See also DESCENT—PARTITION.

PARDON.

— *Discharge of Attachment by.* See PRACTICE (ATTACHMENT AND PROCESS OF CONTEMPT).
See ESCHEAT AND FORFEITURE, IV. 4.

PARENT AND CHILD.

— *Purchase in Name of.* See ADVANCEMENT.
— *Gifts, Powers, or Trusts for Advancement of Children.* See TRUSTS.
— *Gifts by Child to Parent and Other Transactions between them.* See FAMILY ARRANGEMENTS—FRAUD, II. IV.
— *Lien, Construction, and Enforcement of Covenants by Parent to Settle Property on Children.* See SETTLEMENT, III.
See also GUARDIAN AND WARD—INFANT—PORTION — POSTHUMOUS CHILDREN—YOUNGER CHILDREN.

I. DEBTS BETWEEN PARENT AND CHILD. EXISTENCE OF, 5376.
II. ADVANCES BY PARENT TO CHILD, 5376.
1. *Hotchpot Clauses and Proviso for Deduction of Advances.*
1. *What Advances or Property Included*, 5376.
2. *Interest on Advances*, 5380.
3. *Statute-barred Debts or Advances*, 5381.
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III. *Hotchpot Clauses under Power of Appointment.* See POWER, XII. III.
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VI. SATISFACTION OF DEBT DUE TO CHILD BY LEGACY FROM PARENT. See LEGACY, V. IV. 1.
VII. SATISFACTION AND ADEMPTION IN CASE OF PORTIONS AND COVENANTS TO SETTLE PROPERTY ON CHILDREN. See PORTION, XI.

I. Debts between Parent and Child. Existence of.

1. Where an uncle gave his nephew an unlimited power of drawing on his bankers, and the evidence left it doubtful whether goods furnished in the way of his trade were intended as gifts, or not, the estate of the nephew was held in a suit for an account and administration of the uncle's estate liable for the amount of the advances and value of the goods. *Mortimer* v. *Trezevant*, 11 Bli. N. S. 191; 4 Cl. & F. 657.

2. A son, placed by his father in business, accounted to his father for all profits, deducting only the expense of his board, having made no demand for wages during his father's life, was held not entitled as a creditor after his father's death, or if he has a demand, it was held satisfied by a will, giving him a legacy to a greater amount, and other benefits. *Plume* v. *Plume*, 7 Ves. 258.

3. A father voluntarily paid a debt due to a bank from his son, and the father afterwards died insolvent:—Held, that there was no debt from the son to the father's estate. *Graham* v. *Wickham*, 31 Beav. 478.

4. Father receives his child's earnings while living with him, and becomes bankrupt; the child, by agreement, admitted a creditor for a particular sum to avoid an inquiry, but dangerous to lay down such a rule. *Exp. Macklin*, 2 Ves. 675.

5. A legatee, son-in-law to the testator, was held entitled to his legacy discharged from debts due by him to the testator, and a debt for which the testator was his surety upon evidence, from the testator's accounts, letters, and memorandums, in his handwriting: parol evidence of declarations in conversation was produced for the same purpose; but the Court appeared to rely on the evidence in writing. *Eden* v. *Smith*, 5 Ves. 341.

6. A father-in-law, who paid a mortgage debt secured on his son-in-law's property and took a receipt from the mortgagee, in which the mortgagee agreed to re-convey the property when required:—Held, not to have shown an intention to exonerate the property. *Fenwick* v. *Potts*, 8 De G. M. & G. 506.

II. Advances by Parent to Child.

I. *Hotchpot Clauses and Proviso for Deduction of Advances*, 5376.
II. *Satisfaction of Debt to Child by Advances Inter Vivos*, 5382.
III. *Hotchpot Clauses under Power of Appointment.* See POWER, XII. III.
IV. *Advancement under Statute of Distributions.* See DISTRIBUTION OF ESTATE. III. III. 2.

I. HOTCHPOT CLAUSES AND PROVISO FOR DEDUCTION OF ADVANCES.

1. *What Advances or Property Included*, 5376.
2. *Interest on Advances*, 5380.
3. *Statute-barred Debts or Advances*, 5381.
4. *Inquiry as to*, 5381.
5. *Other Cases*, 5381.

1. What Advances or Property Included.

7. Where money is expressed to be given in part of a portion, though of small amount, yet it is an advancement, and must be brought into hotchpot. *Morris* v. *Burroughs*, 1 Atk. 403.

8. By a settlement of trust funds for the benefit of a husband and wife for their lives, with remainder to the children of the marriage equally, it was provided, that if the husband should, during his life, advance or pay any money for or on account of the advancement or preferment in life of any child of the marriage, or in case any lands or tenements, money, goods, or chattels should descend or come by or from him unto or for the benefit of any such child, then such moneys, goods, and chattels, and the value of such lands or tenements, should be accounted as part or in full of the portion provided by the settlement,

unless the husband should by writing declare the contrary:—Held, that the advances and payments referred to in the first part of the provision should be construed advances and payments made *inter vivos*, perfected in the lifetime of the husband; and that the lands, tenements, moneys, goods, or chattels in the second part of the clause should be confined to matters not perfected, or not having effect until after his death: that property which, during the coverture, accrued to the husband and wife, in right of the wife, and by a settlement, to which the husband and wife were parties, was settled upon them for their lives with remainder to their children, as they or the survivor of them should appoint (but which was not otherwise received or reduced into possession by the husband), was not property to be accounted for, as part of their portion, by the children to whom the husband and wife, or the survivor of them, afterwards appointed it: that the value of a leasehold house assigned by the husband in his lifetime to one of the children of the marriage, for his more comfortable maintenance and support, did not affect the share of such child of the trust fund: and that an advance by the husband in his lifetime to one of his daughters of a sum of money for the purpose of apprenticing her son—the share of such daughter of the trust fund having been settled upon herself and her husband, with remainder to her children—did not affect the share of such daughter of the trust fund. *Douglas* v. *Willes*, 7 Hare 318.

1. Husband by marriage settlement secures a portion for daughters of the marriage, in default of issue male; there is one daughter only; the husband survives that wife and marries again; leaves issue by the second wife, and dies intestate; the daughter by the first marriage being an infant, and her portion not then due, if the daughter lives till the portion is due, it is an advancement *pro tanto*, and must be brought into hotchpot as to the other issue. *Edwards* v. *Freeman*, 2 P. W. 435.

A provision by a father for a child by will, not to be brought into hotchpot, nor a provision of land for an heir. *Ib.*

One settles a rent out of lands upon a younger child; this is an advancement *pro tanto*. *Ib.*

An annuity settled by a father upon a child, to commence after the father's death, is an advancement *pro tanto*, and must be brought into hotchpot. *Id.* 442.

A provision for a child by a father, though contingent, yet when the contingency happens, is an advancement *pro tanto*. So, a provision made for a child either by a voluntary settlement, or for a child either by a voluntary settlement, or for a good consideration, is an advancement *pro tanto*. So, though the portion be not paid, yet if secured to the child in the father's lifetime, although not payable till after the father's death. *Ib.*

Maintenance money for a child not taken to be an advancement, etc. *Id.* 449.

2. A., by a trust settlement, gave to his son "a like sum of 5,000*l.* sterling, payable, etc., after my decease, from which provision shall be deducted any sum that I have already advanced or may still advance for him to enable him to carry on his business." A. entered into a guarantee for 2,000*l.* for the firm of which his son was a partner. A. was compelled to pay that sum, and the firm afterwards becoming bankrupt, he obtained from its assets a small dividend:—Held, that this was an advance to the son which came within the description of money advanced to the son to enable him to carry on his business, and that the son could only claim the balance of the 5,000*l.* after deducting the sum thus advanced. The practice of allowing the costs in such a case to be paid out of the estate was disregarded. *Berry* v. *Morse*, 1 H. L. Ca. 71.

3. A testator gave a fund to four persons, or any of them, in such shares, etc., as A. B. should appoint, and in default equally. He directed that such four persons should bring into hotchpot the amount of advances he might make to any of them in his life:—Held, that the hotchpot clause operated only on the unappointed fund, if any. *Brocklehurst* v. *Flint*, 16 Beav. 100.

4. By a settlement executed on the marriage of a daughter a sum of 4,000*l.* was secured to her on her father's bond, to produce 200*l.* per annum, and he agreed to allow 150*l.* per annum besides. In his account books he for many years treated the 150*l.* per annum as a debt, but for some few years preceding and up to his death he entered it in his books as an advance. By his will he bequeathed a legacy of a large amount to his daughter and her husband and their children, and declared, that "inasmuch as he had already advanced to and for, and might during his lifetime advance, lend, or pay unto or for the use of his daughter or her husband, sums of money over and above what was secured to her and them by their marriage settlement, such advances with interest at 5 per cent. should be retained and deducted from the legacy;" and he directed that his "books of account should be conclusive evidence of the accounts and of the balances therein mentioned to be due and owing to him." He bequeathed the residue of his property between four of his sons. By a codicil he directed how the interest on the legacy was to be paid, "first deducting what had already been advanced." By another codicil he revoked two legacies, which he had given in a particular way and upon certain trusts to two sons, other than the four residuary legatees, and "in lieu of such legacies," he made the two sons residuary legatees:—Held, that the 150*l.* per annum agreed to be paid to the testator's daughter was not an advance, and ought not to be deducted from the legacy; and that, although the legacies to the two sons were clearly revoked, they did not take the shares of the residue in substitution for those legacies, but absolutely. *Hargreaves* v. *Pennington*, 10 L. T., N. S., 857; 34 L. J., Ch., 180; 10 Jur., N. S., 834; 12 W. R. 1047.

5. Upon the occasion of the marriage of one of his daughters, and shortly before leaving for the wedding excursion, the testator said jocularly that he would buy his son-in-law's snuff-box, and at the same time gave him with one hand 1,000*l.* in bank notes, and with the other hand took the snuff-box, saying that the notes were in exchange for the snuff-box. He had not previously expressed any intention to make such present. He shortly afterwards made his will, by which he gave to each of his

daughters, for her separate use, 1,000*l.*, but provided that in case any of his daughters should, during his life, have received, by way of marriage portion or advancement, 1,000*l.*, such daughters should not receive the legacy, or any part thereof:—Held, having regard to all the circumstances attending the gift of 1,000*l.*, that the daughter was entitled to the legacy. *M'Clure* v. *Dawson, or Evans*, 7 Jur., N. S., 204; 30 L. J., Ch., 295; 9 W. R. 428; 3 L. T., N. S., 870; 29 Beav. 422.

1. A testator, who had lent money to his son, J., bequeathed his residuary estate to J. and his other children equally for life, with remainder over to their children, and declared that neither of his children should receive anything until they should have accounted for any sum lent by him to them. The testator afterwards agreed to accept a composition on his debt, but which was not paid at his death. *Semble*, that the son was only liable to account for the composition; but:—Held, that the son's debt was not to be deducted from his children's interest. *Silverside* v. *Silverside*, 25 Beav. 340.

2. A. bequeathed trust funds to a married daughter, and declared, that in case he should make any advance of money to any of his children, or to the husbands of his daughters, which should not have been repaid, or the interest of which, if reserved, should not have been duly paid at the time of his death, such child or children should not be entitled to receive any part or share of his property until he, she, or they should have accounted for, and brought into hotchpot, such sum or sums of money as should have been so advanced, and interest:—Held (affirming 31 Beav. 583), that money agreed to be paid for a business sold by the testator to a son-in-law, but not payable until the expiration of five years, was not an advancement, the testator having died before the money was due. *Auster* v. *Powell*, 1 De G. J. & Sm. 99; 9 Jur., N. S., 421; 8 L. T., N. S., 73.

The proof of a debt, and receipt of a dividend by the testator, under the bankruptcy of his son-in-law, did not operate as an extinguishment of the debt. *Ib.*

The debt, less the amount of the dividend, was an advance within the meaning of the clause. *Ib.*

3. A testator directed his trustees to secure 1,500*l.* to his daughter for life, and to her children in fee; but with a proviso that payment in his lifetime should go in satisfaction of the gift. She received 1,000*l.* from the testator, and pre-deceased him. The Court of Session held that the children were, nevertheless, entitled to the full 1,500*l.*, without deducting the 1,000*l.* On appeal, this decision was reversed. *Hutchison* v. *Skelton*, 2 Macq. H. L. Ca. 492.

4. A husband gave real and personal property to trustees to convert, and after the death or second marriage of his wife to hold the proceeds for his child or children living at that time, and the issue then living of his child or children dying before that period, such objects to take as tenants in common according to the stocks, and not to the number of the individuals composing the class. His real estate was to be considered as converted from his death, and it was declared that no child, to whom or to whose husband he should have paid any portion in his lifetime, should participate in the trust property without bringing the portion so paid in his lifetime into hotchpot. On the marriage of one of his daughters in his lifetime, and before the date of the will, the testator covenanted to stand seised of a freehold house for her use, her heirs and assigns, for ever. She having died leaving issue:—Held, that the hotchpot clause could not be extended to the issue of the testator's children, so that the value of the house given to his daughter was not to be deducted from the share of her issue who should be living at the death or second marriage of his widow. *Hewitt* v. *Jardine*, 14 L. R., Eq., 58; 26 L. T., N. S., 546.

5. A father gave all his property equally among his three daughters, S., M., and J., and directed J., within twelve months after attaining twenty-one, to bring into hotchpot an estate (B.) to which she was separately entitled. On her marriage, subsequently to the date of the will, her estate, at the testator's instance, was settled on herself for life, remainder to her husband for life, remainder as she should appoint among her children, and was subsequently, also by the testator's advice, sold, and the proceeds held on the same trusts. In a suit to administer the testator's estate:—Held, that J. must bring into account the proceeds (less the costs of sale) of estate B. *Middleton* v. *Windross*, 16 L. R., Eq., 212.

6. A father, before the marriage of his son, stated in a letter to the father of the intended wife, "I will give C. one-third of my business, which will at present be sufficient to support them respectably and something to spare; and at my death he will have half the business and a child's share of what property I may be worth." The father in his lifetime, in consideration of love and affection, assigned a mortgage to the son, to take effect at the father's death, with a power of revocation reserved thereby to the father, which he did not exercise. He also advanced other property to others of his children at different periods during his life. By his will he left to his son C. "one shilling in full of all claims in reference to my property, having already given to him what I consider fair and reasonable;" he directed his debts to be paid, and divided his property among his widow and other children:—Held, that by the letter the father contracted a debt payable out of the assets which he left at his death, but that the son was bound to bring into account and give credit for the value of the mortgage which the son insisted on retaining. *Keays* v. *Gilmore*, 8 Ir. R., Eq., 290; 22 W. R. 465.

Held, also, that the other children were not bound to bring into account the advancements made to them. *Ib.*

7. A father gave to three of his sons, Thomas, John, and Peter, legacies of 500*l.* each, and to his daughter 200*l.*, and directed that neither of his sons, to whom he should have advanced any sums of money in his lifetime, should be entitled to receive his legacy without bringing such sums into hotchpot. The residue of his property he divided between his four sons, Charles, Thomas, John, and Peter, and his daughter. The father had advanced to Charles, at different periods before the date of his will, 500*l.*, 170*l.*, and

58*l.*, and to Thomas, after the date of his will, 500*l.* and 380*l.*:—Held, that the advances to Charles should not be taken into account against him, but that the sum of 500*l.* to Thomas was a satisfaction of his legacy, and the 380*l.*, being advanced after the date of the will, must be deducted from his share of the residue. *Re Peacock Owen* v. *Peacock*, 14 L. R., Eq., 236; 27 L. T., N. S., 472.

1. When a testator, who, before the date of his will, made advances to his sons, for some of which he took security, declared by his will "in case I shall at any time during my life" advance any sum, the sums so advanced shall be brought into hotchpot:—Held, that the words did not necessarily imply futurity, and that the advances made before the date of the will must be accounted for. *Davies* v. *Atkinson*, 18 W. R. 1016; 23 L. T., N. S., 41.

2. A husband gave the residue of his estate to trustees to pay the income of one moiety to his wife, and to divide the other moiety equally among his children. Subsequently to the date of his will, the testator advanced considerable sums to some of his children:—Held, that the widow was entitled to the income of a moiety of the actual residue only, but that in settling the shares of the children, they must account for the sums advanced to them by the testator in his lifetime. *Meinertzhagen* v. *Walters*, 26 L. T., N. S., 469; 4 L. J., Ch., 407; 20 W. R. 505. Affirmed 7 L. R., Ch., 670; 41 L. J., Ch., 801; 27 L. T. 326; 20 W. R. 918.

3. A father being indebted to the trustees of his daughter's settlement upon a covenant contained in the settlement, by his will directed his estate, after payment of debts, to be divided amongst his children equally; but if the net produce of his estate exceeded 40,000*l.*, then his sons were to have one-twentieth part more than the daughters; and he declared that the moneys due on the covenant should be taken in satisfaction *pro tanto* of the daughter's share, and should be brought into hotchpot, and accounted for accordingly. Upon realising the testator's estate, it was found that, if the moneys due upon the covenant were not to be brought into account for the purpose of distribution, but were to be treated as a debt, the estate would be under 40,000*l.*:—Held, that the moneys due upon the covenant must be brought into account and treated as part of the daughter's share, and that the sons were therefore entitled to one-twentieth more than the daughters. *Fox* v. *Fox*, 40 L. J., Ch., 182; 11 L. R., Eq., 142; 19 W. R. 151; 23 L. T., N. S., 584.

4. A deed of gift by father to son, whereby the father purports to deprive himself of everything which he has in the world, cannot be supported as an advancement. *Hughes* v. *Seanor*, 18 W. R. 108.

A deed purporting to be a sale cannot be supported as an advancement. *Ib.*

A deed which, on the face of it, does not show a fair and reasonable consideration, cannot be supported in equity. *Ib.*

An inadequate money consideration cannot be combined with a consideration of natural love and affection for the purpose of supporting a deed. *Ib.*

5. Life and reversionary interests must be brought into hotchpot under the usual hotchpot clause. *Eales* v. *Drake*, 1 L. R., Ch. D., 217; 45 L. J., Ch. D., 51; 24 W. R. 184. And see *Williamson* v. *Jeffreys*, 18 Jur. 1071.

6. By a deed of separation the husband covenanted to pay an annuity of 200*l.* to each of his daughters during their respective lives such annuities to cease if he should again cohabit with his wife, which event did not happen. The husband survived his wife, and died intestate. In the distribution of his personal estate among his children under the Statute of Distributions:—Held, that so much of the annuities to the daughters as were paid during their father's lifetime were not in the nature of advancements; and that the value of each annuity must be estimated as at the death of the intestate, and the amount brought into hotchpot. *Hatfeild* v. *Minet*, 8 L. R., Ch. D., 136; 47 L. J., Ch. D., 612; 38 L. T., N. S., 629; 26 W. R. 701.

7. Bequest of residue to A. for life with power thereout to advance her eldest son and a gift after A.'s death of the said residue to A.'s children equally:—Held, on the context, that the amount advanced to A.'s eldest son was not to be taken into account in the ultimate division of the remainder amongst A.'s children. *Upjohn* v. *Upjohn*, 15 Beav. 152.

8. A father directed that in the division of his property an estate belonging to one of his children should be brought into hotchpot. After the date of his will he acquiesced in the sale of this estate and the settlement of the proceeds on the child for life, with remainder to her children:—Held, that the condition was not thereby waived, and that in the division of the testator's property the estate must be brought into hotchpot. *Middleton* v. *Windross*, 42 L. J., Ch., 555; 16 L. R., Eq., 212; 21 W. R. 822.

9. A father directed his trustees to pay his son 3,000*l.* and to invest 28,000*l.* upon trust, as to 10,000*l.* for his widow during widowhood, and as to six sums of 3,000*l.* upon trust for his daughters and their children. The 10,000*l.* was to fall into the residue at the death or marriage of his widow. And the testator directed his trustees to divide the residue into as many equal shares as he should have children living at the time of the death or second marriage of his wife, or then dead leaving issue, and upon trust as to one of such shares to invest 1,000*l.* for his son and his son's widow and children, and he gave directions as to the settlement of the share given to one of his daughters; and the will provided that any money advanced to his children and not repaid at his death should be set off against their share of the residue. The testator's son was indebted to him for advances in a sum nearly equal to his share of the residue:—Held, that the legacy of 3,000*l.* to the son was not to be set off against his debt, but was to be paid immediately. *Smith* v. *Crabtree*, 6 L. R., Ch. D., 591; 25 W. R. 824.

Held, also, that the words in the will directing the residue to be divided between the children living "at the death or second marriage of his wife" must be struck out as being manifestly inconsistent with the form of the will and the intention of the testator;

and that all the children living at the death of the testator took vested interests in the residue. *Ib.*

Evidence of.] 1. A testator by his will, dated the 22nd day of November 1872, declared for the information of his trustees that the amount or values expressed in his ledger and entered on the twenty-first page and signed by him and dated the 8th November 1872, were, and were the only, advancements either by way of gift or loan made by him to any of his children before the 8th November 1872. The twenty-first page of the ledger was not admitted to probate. The sums entered therein were not in all instances the true amounts actually received by the children:—Held, that the will must be read as if the entries in the ledger were incorporated into it, and that the entries were conclusive for the purposes of the will. *Quihampton* v. *Going*, 24 W. R. 917.

2. A father gave his residuary estate upon trust for his two sons and four daughters equally, and declared that all such sums of money as he had then already advanced, or should thereafter advance, to or for the benefit of either of his children, as should appear in any account in his handwriting kept by him for that purpose, or as should be shown in any other manner, should be considered and taken in full for or, as the case might be, in part of his or her share of and in the trust estate. Subsequently to the date of his will the testator advanced to one of his sons 1,575*l.*, and to the other 1,560*l.* He afterwards wrote letters to each of them stating that it was his intention to make a present to them of sums of 640*l.* and 650*l.*, part of the 1,575*l.* and 1,560*l.* respectively, and requiring them to send him promissory notes for the balance:—Held, that these letters were not admissible in evidence to vary the operation of the proviso contained in the will, and that the sums of 640*l.* and 650*l.* must be brought into account by the sons. *Smith* v. *Conder*, 47 L. J., Ch. D., 878; 9 L. R., Ch. D., 170; 27 W. R. 149.

3. Testator directed that "all and every such sums of money which I have already advanced or covenanted to pay or may hereafter advance to my children as will appear in a statement in my handwriting, shall be brought into hotchpot." An unattested document signed by the testator and enumerating the advances made to his children was found amongst his papers:—Held, that this unattested document was admissible as *primâ facie*, but not as conclusive evidence of the advances made, the words in the will, "such sums of money," referring to the clause, "which I have already advanced," where the word "which" was clearly used instead of "as." *Whately* v. *Spooner*, 3 K. & J. 542.

For Proviso for Deduction of Advances in Case of Portions.] See PORTION, XI. IV.

2. Interest on Advances.

4. Interest at 4 per cent. directed to be computed on advancements made by a father to his children from the time when the father's property was divisible amongst them. *Andrewes* v. *George*, 3 Sim. 393.

5. A father gave to several of his eight children real estates, and bequeathed his residuary personal estate to all the eight, with a direction that their portions should be equal, and to that end that those of them to whom he had given the real estates should respectively take them on account of their shares at the estimated values mentioned in his will. The executor absconded with the personal estate in his hands, but after many years a considerable part of it was recovered:—Held, that the amount recovered must be treated as consisting of a principal sum, with interest thereon at 4*l.* per cent. per annum from the testator's death; that the devisees of the real estates must bring into account their estimated values as part of the principal; and that, the shares of principal having been thus ascertained, the part apportioned as interest must be divided between them in proportion to those shares. *Ackroyd* v. *Ackroyd*, 18 L. R., Eq., 313.

6. A father, after bequeathing a share of mixed residue to one of his sons, stated that he had advanced sums amounting to 2,550*l.* to the son, and directed his trustees and executors to deduct that sum from the share so bequeathed:—Held, that the son was chargeable with interest at 4*l.* per cent. on the sum from the death of his father, and not merely from the end of a year after the death. *Field* v. *Seward*, 5 L. R., Ch. D., 538.

7. A testator gave his residuary estate to trustees (whom he also appointed his executors) in trust for sale, and to stand possessed of the proceeds in trust for his six children, nominatim, in equal shares, including two sons, F. and J.; and after reciting that he had already advanced 4,000*l.* to his son F. and 500*l.* to his son J., he declared that "neither of my said sons, nor any of my children who shall receive from me any sum of money for their advancement in the world, shall be entitled to any part of my residuary estate without bringing the said sums of 4,000*l.* and 500*l.*, and all other sums so given to any of my said children, with interest thereon at 5*l.* per cent. per annum from the times of advancing the same respectively, into hotchpot." By a codicil the testator revoked the provision made by his will in favour of his son J., thereby causing a lapse of J.'s one-sixth of the residue. The testator died leaving his widow and his six children his next of kin:—Held, that the codicil must be read as if it expressly declared a trust in the executors of the lapsed share of residue for the testator's wife and children according to the Statute of Distributions; and accordingly (reading the will and codicil as one instrument) that the hotchpot clause applied to the shares taken by the children under the codicil, but that it did not apply to the widow so as to increase her share under the codicil. *Re Stewart, Stewart* v. *Stewart*, 15 L. R., Ch. D., 539; 49 L. J., Ch., 763; 43 L. T. 370.

The 4,000*l.* and 500*l.* advanced to F. and J. respectively, together with interest at 5 per cent. up to the testator's death, and interest at 4 per cent. on the aggregate amount in each case from the death, were therefore ordered to be brought into hotchpot in ascertaining their shares of residue. *Ib.*

In the absence of any direction by a testator

to the contrary, advancements to his children on account of their portions bear no interest up to his death, but from his death they bear interest at 4 per cent. *Ib.*

1. A husband by his will gave his property to his wife for life, and after her death equally between his children, subject to a proviso directing that his trustees should deduct from the share of his daughter B. 200*l.*, which he had advanced to her, and add it to his personal estate; and that if, at the period of distribution, B. "should be indebted to any or either of her brothers or sisters in respect of advances made to her, his trustees should be empowered to deduct all or any such debts or advances from her share, and pay the same to the brother or sister to whom the same might be owing." B. had borrowed from one brother 100*l.*, on a promissory note bearing interest, and had borrowed other sums from another brother. Nearly all these debts had, before the time of distribution, become barred by the Statute of Limitations:—Held, that the trustees were authorised to deduct from B.'s share all the debts, though barred by the statute, but that the intention of the testator was to put advances by brothers and sisters on the same footing as advances by himself, and that interest, therefore, ought not to be deducted. *Poole* v. *Poole*, 7 L. R., Ch., 17; 20 W. R. 133; 25 L. T. 770.

2. A testator gave his residuary estate to his widow for life, with remainder to his children equally, with a proviso, in the common form, for bringing into hotchpot all sums advanced to any of them by him during his lifetime. The testator made advances to some of his children. In distributing the residuary estate among the children after the death of the widow:—Held, that the advanced children must bring their advances into hotchpot, with interest at 4 per cent. per annum up to the distribution of the estate; such interest to be computed from the death of the widow, and not from the dates of the respective advances or from the death of the testator. *Re Rees*, *Rees* v. *George*, 17 L. R., Ch. D., 701; 50 L. J., Ch., 328; 44 L. T. 241; 29 W. R. 301.

3. Statute-barred Debts or Advances.

3. A testator directed his residuary estate to be divided amongst his six children. "And I direct that, in order to equalise my said residuary estate amongst my six children, in case it shall appear by my private ledger, that any, or either of them my said children, or the present or any future husband of any of my said daughters, are indebted to me at my decease in any sum of money, such debt shall be considered as forming part of my residuary estate, and the shares of my said children shall respectively become liable to pay such debt." One of his sons owed him a large debt, but part of it was barred by the Statute of Limitations:—Held, nevertheless, that the whole must be paid out of his share, and that the clause amounted to a hotchpot clause. *Rose* v. *Gould*, 15 Beav. 189; 21 L. J., N. S., Ch., 360.

4. A husband by his will gave his property to his wife for life, and after her death equally between his children, subject to a proviso directing that his trustees should deduct from the share of his daughter B. 200*l.*, which he had advanced to her, and add it to his personal estate; and that if, at the period of distribution, B. "should be indebted to any or either of her brothers or sisters in respect of advances made to her, his trustees should be empowered to deduct all or any such debts or advances from her share, and pay the same to the brother or sister to whom the same might be owing." B. had borrowed from one brother 100*l.*, on a promissory note bearing interest, and had borrowed other sums from another brother. Nearly all these debts had, before the time of distribution, become barred by the Statute of Limitations:—Held, by the Vice-Chancellor of the Duchy Court of Lancaster, that the trustees were authorised to deduct from B.'s share all the debts, though barred by the statute. *Poole* v. *Poole*, 7 L. R., Ch., 17; 25 L. T. 770; 20 W. R. 133.

4. Inquiry as to.

5. In administering the estate of an intestate who has made advances to his children in his lifetime, the inquiry as to advances should follow the words of the Statute of Distributions. *Re Ennis*, *Waterton* v. *Ennis*, 28 W. R. 885; 43 L. T. 748.

5. Other Cases.

6. A., having seven children, makes an executor in trust, and devises to each child one-seventh of his personal estate; one of the children dies in A.'s lifetime, and one of the six surviving children has been advanced in his lifetime; yet this child shall take his full share of the seventh part, without bringing what he had received before into hotchpot. *Cowper* v. *Scott*, 3 P. W. 124.

7. A testator gave his residuary estate to trustees (whom he also appointed his executors) in trust for sale, and to stand possessed of the proceeds in trust for his six children, nominatim, in equal shares, including two sons, F. and J.; and after reciting that he had already advanced 4,000*l.* to his son F. and 500*l.* to his son J., he declared that "neither of my said sons, nor any of my children who shall receive from me any sum of money for their advancement in the world, shall be entitled to any part of my residuary estate without bringing the said sums of 4,000*l.* and 500*l.*, and all other sums so given to any of my said children, with interest thereon at 5*l.* per cent. per annum from the times of advancing the same respectively, into hotchpot." By a codicil the testator revoked the provision made by his will in favour of his son J., thereby causing a lapse of J.'s one-sixth of the residue. The testator died leaving his widow and his six children his next of kin:—Held, that the codicil must be read as if it expressly declared a trust in the executors of the lapsed share of residue for the testator's wife and children according to the Statute of Distributions; and accordingly (reading the will and codicil as one instrument) that the hotchpot clause applied to the shares taken by the children under the codicil, but that it did not apply to the widow so as to increase her share under the codicil. *Re Stewart*, *Stewart* v. *Stewart*, 15 L. R., Ch. D., 539; 49 L. J., Ch., 763; 43 L. T. 370; 29 W. R. 275.

1. A husband directed his trustees to pay the income of one moiety of his residuary estate to his widow during her life, and to divide the other moiety between his children in equal shares, as tenants in common. Advances were made by the testator to some of his children after the date of his will:—Held, that the advances could only be brought into account for the benefit of the children among themselves, and that the widow was not entitled to have her income increased by having the advances brought into account in estimating the residue. *Meinertzagen* v. *Walters*, 7 L. R., Ch., 670; 41 L. J., Ch., 801; 27 L. T. 326; 20 W. R. 918. Affirming 41 L. J., Ch., 407; 20 W. R. 505.

2. A testator having directed an allotment of his residuary estate into particular shares among his children, recited that he had made provisions by advancement for some of them on marriage, and proceeded to direct that "such advances should be brought into hotchpot," adding a declaration of the principle on which the money was to be brought into hotchpot upon a statement of figures and calculation of the amount of advancement, and of his residuary property:—Held, that the calculation of the testator was only an illustrative example of his meaning, and that the bringing into hotchpot should be according to the legal meaning of that term. *Maclaren* v. *Stainton*, 7 Jur., N. S., 715; 30 L. J., Ch., 723; 9 W. R. 908; 4 L. T., N. S., 715.

3. By will, a testator divided his property between his son and two married daughters, and he declared that the debts due to him from his son and his two sons-in-law should be "paid or accounted for to his executors," before his children should receive any part of his estate. By a codicil he cut down his son's interest to a life estate, and gave interests in share to his wife and children:—Held, that the son was not bound to pay his debts for the benefit of his wife and children, but only to bring the amount into hotchpot as regarded his two sisters. *White* v. *Turner*, 25 Beav. 505.

4. A husband gave real and personal property to trustees to convert, and after the death or second marriage of his wife to hold the proceeds for his child or children living at that time, and the issue then living of his child or children dying before that period, such objects to take as tenants in common according to the stocks, and not to the number of the individuals composing the class. His real estate was to be considered as converted from his death, and it was declared that no child, to whom or to whose husband he should have paid any portion in his lifetime, should participate in the trust property without bringing the portion so paid in his lifetime into hotchpot. On the marriage of one of his daughters in his lifetime, and before the date of the will, the testator covenanted to stand seised of a freehold house to her use, her heirs and assigns for ever. She having died leaving issue:—Held, that the hotchpot clause could not be extended to the issue of the testator's children, so that the value of the house given to his daughter was not to be deducted from the share of her issue who should be living at the death or second marriage of his widow. *Hewitt* v. *Jardine*, 14 L. R., Eq., 58; 26 L. T., N. S., 546.

II. SATISFACTION OF DEBT TO CHILD BY ADVANCES INTER VIVOS.

5. Father having to pay a legacy to his daughter, gives her a greater sum on marriage, and no demand of the legacy, though knowledge of it during the daughter's life. This held a satisfaction, and the husband not entitled. *Seed* v. *Bradford*, 1 Ves. 501.

6. Implied satisfaction of a debt from a father to his child by a marriage portion of a greater amount. *Chave* v. *Farrant*, 18 Ves. 8.

7. The doctrine of satisfaction does not apply to a gift by a father to his daughter, when he had in his hands, by permission of the executor, a legacy bequeathed to the daughter by the executor's testator. *Acheson* v. *Fair*, 2 Con. & L. 208; 3 Dr. & War. 512.

8. A father, administrator *dur. minor.* of his daughter, who was executrix and the residuary legatee of her grandmother's estate, agreed, that when she married plaintiff she should have 800*l.*, which, in the settlement, was called a portion. Ld. Hardwicke refused to decree an account of the grandmother's estate, as she had been dead twenty years, but directed that the father's representative should account for his personal estate as to the 800*l.* only, and interest at 4*l.* per cent. from the marriage. *Wood* v. *Briant*, 2 Atk. 521.

9. A. being indebted, as his father's executor, to the trustees of his sister's marriage settlement, settled on her and her children a sum to a larger amount, in consideration of the natural love and affection he bore them:—Held, that this was not a satisfaction of the debt. *Drewe* v. *Bidgood*, 2 Sim. & S. 424; 4 L. J., Ch., 33.

10. A sum of 1,000*l.* was, by deed of 1805, vested in A. in trust for his daughter G. until she attained the age of twenty-five years, or married; and after attaining that age or day of marriage, to permit G. to receive the interest during her life, and after her decease for her issue, as she should appoint; and in default of appointment, equally; but in case she should die previous to twenty-five, or day of marriage, or without issue, then over to the other children of A. On the marriage of G., A. by settlement of 1824 vested in trustees securities for money exceeding 1,000*l.*, upon trust for the separate uses of G. for her life, and after her decease for the use of the children of the marriage, as the intended husband should appoint; and in default of appointment, equally; and in default of such issue, for the intended husband, his executors, etc. This settlement did not refer to the deed of 1805:—Held, that the provision made for G. by the settlement of 1824 was a satisfaction of her claims under the deed of 1805, though it did not appear that the husband was aware of his wife's claim thereunder. A provision by a father, on the marriage of his daughter, of a greater sum than he owes her, is in general to be deemed a payment of the debt, and it is not necessary that there should be an express stipulation to that effect, or to show that the husband knew of the debt. *Hayes* v. *Garvey*, 2 J. & L. 268; 8 Ir. Eq. R. 90.

11. A legacy of 150*l.* given by a collateral ancestor to the daughter of A., which was paid A., and who after gave her 1,000*l.* portion, settled a church lease on her, and maintained

her and her husband fourteen years, yet held no satisfaction. *Chidley* v. *Lee*, Pre. Ch. 228.

1. The assumption by a father of a debt due from his son to a partnership, in which the father and the son, along with other persons, were partners, was deemed an advancement of a portion to a less amount, to which the son would have been entitled upon the father's death. *Ansley* v. *Bainbridge*, 1 Russ. & M. 657.

2. Where a fund in trust for the father for life, remainder to his son and daughter, was sold out by the father, and who, on the marriage of the daughter, settled funds of much larger amount than the daughter's interest in the trust fund:—Held, to be presumed in satisfaction of her interest, and that such presumption was not affected by the ignorance or knowledge of her husband as to the rights of his wife in the trust fund; *semble*, that evidence might, however, be adduced to support or rebut the presumption. *Plunkett* v. *Lewis*, 3 Hare 316. And see S. C. 13 L. J., N. S., Ch., 295; 8 Jur. 682.

III. Release or Bequest of Debt due from Child to Parent.

3. *Semble*, the cases in which the Court has held a debtor liberated from his obligation to pay a debt which once existed, and from which he has not been discharged by any testamentary instrument, are, first, where the act or declaration relied on creates an immediate discharge, which the debtor might plead as a release, or by way of accord and satisfaction at law, or which he might enforce in equity as against the creditor; second, where the discharge, though not immediate and absolute, but conditional, becomes perfect by the condition having in the event been performed; third, where the creditor intended to discharge the obligation at his death, and communicated that intention to those who would, under this disposition, take or represent his interest upon his death, and relied upon their fulfilment of his intention; and fourth (in strictness belonging to another class of cases), where the transaction supposed to create the debt or obligation is rather in the nature of an advancement by one *in loco parentis*, or is part of a family arrangement. *Peace* v. *Hains*, 11 Hare 151; 17 Jur. 1091.

4. In 1841 4,500*l.* was advanced by a testatrix to her son B., but no security or acknowledgment was executed by B. No interest was directly paid, but an allowance covenanted to be paid to B. by the testatrix was set off against the interest, which, at 4 per cent., came to the same amount. In 1843 the testatrix made a codicil, containing a declaration that the 4,500*l.* was due and owing from B., and that his appointment as executor was not to have the effect of cancelling the debt. In 1854 a further codicil was made, revoking the appointment of B. as executor but confirming the will and codicils in all other respects. In 1855 the testatrix wrote to B. as follows: "You must know when I gave you the money I never could intend it as a loan, but as an absolute gift; and I hope you will live many years to enjoy it":—Held, that this letter being written under a misapprehension of the nature of the original transaction, and being inconsistent with the previous conduct of the parties, did not discharge the debt thereby created. *Knapp* v. *Burnaby*, 8 W. R. 305.

5. C., being indebted to his mother, and being under an obligation to execute a security to her, refused to do so. The mother then promised to bequeath the debt to her son if he would execute the security. This was done, but the mother died without having bequeathed the debt:—Held, that the promise to bequeath could not be enforced in equity, and that the debt formed part of the mother's estate. *Luxmore* v. *Clifton*, 17 L. T., N. S., 460; 16 W. R. 265.

6. Destruction by father of securities given by sons:—Held, under circumstances, an advance and release of debts thereby secured. *Gilbert* v. *Wetherell*, 2 Sim. & S. 254; 3 L. J., Ch., 138.

7. Testator gave to his son "all sum and sums of money due to me, from him, on bond or bonds, or any other security." The son was indebted to testator by bond at the date of the will, and afterwards became indebted to him by another bond. The bequest does not include the subsequent bond. *Smallmen* v. *Goolden*, 1 Cox 329.

8. Testator bequeathed his residuary estate in trust for son and daughter equally, and declared that certain sums which he had lent to his son should be deducted from his share of the residue, and that certain sums which he had lent to C. W., his daughter's husband, on bonds, should be taken and allowed in account as part of her share; and, if the balance should appear to be against C. W., the trustees were to refrain from putting the bonds in force against him, and to take a security from him for payment of the balance by instalments:—Held, nevertheless, that C. W. was released from the debts due from him, and was answerable only for the excess (if any) of those debts beyond the amount of a moiety of the residue. *South* v. *Williams*, 12 Sim. 566; 11 L. J., N. S., Ch. 410; 6 Jur. 332.

9. A testator by his will, after reciting that there was due to him from his son 1,440*l.* or thereabouts, secured to him by bills or notes, or otherwise, released his son from payment of any interest up to the time of his death, and directed that he should have time for payment of the principal by instalments. Some years after he made a codicil not containing any reference to the release. At the date of the will the son was indebted to his father in 1,400*l.*, and between the dates of the will and codicil that sum was paid off and a subsequent advance of 1,291*l.* was made to the son by the testator, which was owing at the time of his death:—Held, that the release of interest was equivalent to a specific legacy of the interest on the debt due at the date of the will; that the legacy had been adeemed, and that the release did not extend to the interest on the subsequent debt due at the date of the codicil. *Sidney* v. *Sidney*, 17 L. R., Eq., 65; 43 L. J., Ch., 15; 22 W. R. 101; 29 L. T., N. S., 569.

10. A father, after reciting that his son was "now indebted" to him in various sums of money in respect of advances, and that he was desirous that his son should be released from the said several sums, and that the securities held in respect thereof should be given up to

him, bequeathed to his son all the aforesaid several moneys, with the securities then in the testator's custody relating thereto, and also released him from all claims in respect of the aforesaid moneys, "and all other moneys due from him" to the testator. By a codicil the testator released the son from another specified debt for moneys misappropriated by the son: —Held, that the will must be construed as speaking from the death of the testator; and that the son was released from the repayment of money advanced to him by his father between the date of his codicil and of his death. *Everett* v. *Everett*, 7 L. R., Ch. D., 428; 47 L. J., Ch., 367; 26 W. R. 333: 38 L. T., N. S., 580. Reversing 25 W. R. 765; 6 L. R., Ch. D., 122; 36 L. T., N. S., 913.

IV. Set-off between Debt due from Child and Legacy from Parent.

1. A testator, who had advanced money to his son, and paid large sums on his account, bequeathed him a legacy without making mention of the debt:—Held, that the loan and unascertained balance must be set off against the legacy. *Smith* v. *Smith*, 3 Giff. 63; 7 Jur., N. S., 1140; 5 L. T., N. S., 302.

2. Executors of a testator, who was surety upon two promissory notes drawn by his son, borrowed 4,000*l.* to take up the notes, and stop proceedings by the creditors to obtain payment:—Held, that the share, to which the son was entitled as one of the residuary legatees under his father's will, was bound, as against subsequent mortgagees, to repay to the trustees, not only the principal due upon the notes, but also the interest upon the amount for which they were originally drawn. *Willes* v. *Greenhill*, 30 L. J., Ch., 808; 9 W. R. 217.

3. The testator gave his residuary personal estate to trustees, and directed the income to be paid to his son and three other persons during their joint lives; and that on the decease of his son, "the share of the income of the said residuary estate to which he would from time to time, if living, be or become entitled," was to be paid to his wife, Ann, for life; and on the decease of the survivor, "such a part or share of the principal as his said son would, if then living, from time to time, for the time being, be entitled to of the income," was to be for all the children of his said son. In another part of his will the testator, reciting that he had advanced his said son 284*l.* 10*s.*, declared that it should be treated as a debt due by him, and that he should account for it to his executors, who were to retain the same out of the share of his said son of the income of the said residuary estate. The son survived the testator, but died before his share of income (which had been duly retained by the executors) sufficed to satisfy the 284*l.* 10*s.*: —Held, that the executors were to retain the balance out of the income given to the wife. *Knight* v. *Sterry*, 18 Jur. 928.

V. Other Matters.

4. A parent's duty to provide for all his children will extend to posthumous ones. *Wallis* v. *Hodson*, 2 Atk. 116.

5. The father is the only judge of what is a proper advancement for his child. *Cook* v. *Arnham*, 3 P. W. 285.

6. Mother gave bond to son, conditioned to surrender copyhold estate to him, of which she was heiress:—Held, that she became a trustee for her son. *Alison's case*, 9 Mod. 62.

7. A second husband having, by letters in his lifetime, declared he was willing the daughter of his wife by her first husband should have the mother's whole fortune; as he is dead, these letters are to be taken as an appropriation of the fortune for the benefit of the infant. *Grosvenor* v. *Lane*, 2 Atk. 181.

The daughter is entitled to a provision out of her mother's fortune. *Ib.*

8. A son died before his father, leaving a widow, to whom he gave all his property. The son's estate being insufficient for the payment of his debts, the father, by a codicil to his will, directed his trustees and executors to pay the son's debts, and named the son of his son residuary devisee and legatee. The true construction of the father's codicil is, that he intended only the payment of such portion of the debts of the son as his son's estate would be insufficient to pay. *Walker* v. *Lodge*, 3 Russ. 459.

9. A father, by agreement, took all his son's property, undertaking to pay his debts:—Held, that, in the absence of proof to the contrary, the son was entitled to the surplus, if any. *May* v. *May*, 33 Beav. 81.

10. The Court will supply a defective conveyance in favour of children; but there is no case where the Court would decree satisfaction out of assets, if the father had no title to the thing he conveys to his child. *Saltern* v. *Melhuish*, Ambl. 251.

PARISH.

— *Proof in Bankruptcy against Overseers or Rate Collectors.* See BANKRUPTCY, XXIV. xxx.
— *Charitable Gifts for Parishioners.* See CHARITY, IV. v. 6—IX. ii. 2.
— *Acts of Churchwardens.* See ECCLESIASTICAL PROPERTY AND PERSONS, IX.
— *Assessment and Levy of Poor Rate.* See LOCAL GOVERNMENT, I. v.
— *Voting in Vestry, Mode of.* See LOCAL GOVERNMENT, VIII.
— *Rights of Parishioners in Endowed Schools.* See CHARITY, IX. i. 9.
See also POOR LAW.

11. The word "parishioners" takes in not only inhabitants of the parish, but occupiers of land that pay tithes and duties. *Att.-Gen.* v. *Parker*, 3 Atk. 577.

The word "inhabitants" takes in all housekeepers though not rated, and also such as have gained a settlement and so become inhabitants, though not housekeepers. *Ib.*

12. Under a charity scheme, sanctioned by the Court, by which a parish was empowered to elect children for Christ's Hospital, it was provided that no child should be eligible unless born in the parish, or unless his parents or one

of them should be or should have been parishioners or a parishioner of the parish:—Held, that the word "parishioner" must be taken in its ordinary sense of a person occupying premises which are liable to be rated in the parish. *Etherington* v. *Wilson*, 1 L. R., Ch. D., 160; 45 L. J., Ch., 153; 24 W. R. 303; 33 L. T., N. S., 652. Reversing 20 L. R., Eq., 606; 44 L. J., Ch., 637; 32 L. T., N. S., 789.

Therefore, when a man took a house temporarily, before the election, for the purpose of obtaining a qualification for his son, for which he paid rent and rates, and his son was elected by the parishioners:—Held, that the qualification was good, and the election valid. *Ib.*

1. The circumstance that property situate on the sea-shore, between a sea-side town and the sea, has not been assessed to the poor's rates of the parish in which the town is situate, is very slender evidence of the property not being within the parish. *Perrott* v. *Bryant*, 2 Y. & Coll. 61; 6 L. J., N. S., Exch. Eq., 26.

2. Land had been in the possession of the parish officers for nearly sixty years, and no evidence that it had ever been in the possession of any other person since the will of the testator, the date of which was unknown. There was some slight evidence of a house which once stood on it having been an almshouse. The Court treated it as parish land, and directed a mortgage to be made to repay funds borrowed for its improvement. *Re Dixon's Trust*, 1 W. R. 244.

3. Under the statute 59 Geo. 3, c. 12, lands belonging to the parish are vested in the churchwardens and overseers of the parish, as a corporation. Therefore, where feoffees to charitable uses were empowered to sell and convey their lands to the commissioners under the Improvement Act:—Held, that the petition for the investment of the purchase-money should be presented in the names of the churchwardens and overseers of the parish in which the charity was established. *Exp. Annesley*, 2 Y. & Coll. 350; 6 L. J., N. S., Exch. Eq., 81.

Semble, that churchwardens and overseers, having no corporate seal, have no power to execute a power of attorney, authorising a party to continue receiving the dividends of stock, notwithstanding fluctuations in the number and identity of the numbers of the corporation. *Ib.*

4. An account cannot be decreed against a parish: and a parish cannot, therefore, be made responsible for charity property applied during a long period to parish purposes under orders of the vestry. *Exp. Fowlser*, 1 Jac. & Walk. 70.

5. Parishioners are a body, and the churchwardens are only a name to sue by in personal actions, for the property is in the parishioners, and in all actions brought by churchwardens, it must be laid *ad damnum parochianorum*. *Whitmore* v. *Bridges*, 2 Eq. Abr. 204, pl. 5.

6. Bond given by parish officers for parish purposes, and under the authority of a vestry, not relieved against, and bill for contribution by the vestry dismissed. *Jacquet* v. *Lewis*, 1 Jur. 511.

7. Bill by a former churchwarden (trustee for an estate of the poor of the parish and forty-five inhabitants) against the parish officers to be reimbursed money laid out on account of the trust under an order of vestry, his accounts being passed and ordered to be paid on demand; Lord Chancellor expressed a strong inclination against the bill, and it not being signed by counsel, it was taken off the file. Plaintiff to pay costs. *French* v. *Dear*, 5 Ves. 547.

8. Where churchwardens, by order of the parish, commence a suit, the consent of the parish shall bind it, and the vestry book shall be allowed as evidence of the consent. *Radnor Parish case*, 4 Vin. Abr. 529, pl. 10.

9. Persons being churchwardens, overseers, and trustees of the poor, directed, in consequence of a resolution of the vestry, a prosecution to be instituted against certain persons accused of having concurred in the misapplication of parochial moneys: one of them having been compelled to pay the bill of costs of the attorney employed in the prosecution is entitled to contribution from the others. *Wrightston* v. *Masterman*, 5 L. J., Ch., 14.

10. It is not sufficient that the receiver-general swears to his accounts before the 5th of April to enable him to set *insuper* upon a parish, unless the account is declared and passed within that time. *Exp. Liskeard (Borough)*, Wightw. 97.

11. The inhabitant of a parish where a modus is insisted on, is *primâ facie* a bad witness: if he occupies no tithable land, he must show it. *Watson* v. *Lindsel*, Bunb. 40.

12. Where there is a dispute touching money given to parishioners, none of the inhabitants of the parish can be witnesses. *Dowdeswell* v. *Nott*, 2 Vern. 317.

PARLIAMENT.

— *Bills in, by Trustees Relating to Settled Estates.* See SETTLED ESTATES ACTS, VIII.—TRUSTS.
— *Liability of Members of. Bankrupt Laws.* See BANKRUPTCY, VII. xxiv.
— *Service of Process on Members of.* See PRACTICE (SERVICE).
— *Appeal to House of Lords.* See PRACTICE, (APPEAL TO HOUSE OF LORDS).
— *Oath of Members of.* See OATH.

See also PEER AND PEERAGE.

I. PRIVILEGE OF MEMBERS OF, 5385.
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    1. *Legality*, 5387.
    2. *Liability of Companies or Promoters*, 5388.
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  III. *Parliamentary Agent*, 5394.
  IV. *Practice in Committee*, 5395.
IV. ELECTION AGENT, 5395.
V. OTHER CASES, 5395.

I. Privilege of Members of.

13. If a member of parliament sues at law, and a bill is brought to be relieved against that

action, the Court will grant an injunction till answer, or further order. *Anon.*, 1 Vern. 329.

1. A parliamentary appearance may be entered against a member of parliament, under the 4 & 5 Will. 4, c. 78, and the Thirteenth General Order. *Denny* v. *O' Connell*, Sau. & Sc. 116.

2. Member of parliament refusing to enter an appearance, the Court appointed a clerk in court to enter an appearance for him under stat. 45 Geo. 3, c. 124. *Read* v. *Phillips*, 16 Ves. 436.

Trader having privilege of parliament, by not paying money under an order of Court, commits an act of bankruptcy by stat. 45 Geo. 3, c. 124. *Ib.*

3. Bill against a member of parliament, praying relief, may be taken *pro confesso*, under 45 Geo. 3, c. 124, which Act is not confined to bills of discovery only. *Logan* v. *Grant*, Madd. 626.

4. The authority to take the bill *pro confesso*, against a defendant having privilege of parliament, standing out process of contempt under stat. 45 Geo. 3, c. 124, s. 5, is confined to bill for discovery only. *Jones* v. *Davis*, 17 Ves. 368. But see *Logan* v. *Grant*, 1 Madd. 626.

5. Process may be entered, and the suit prosecuted against a member of the House of Commons during the session of Parliament. *Holmes* v. *Cave*, 2 Jones 104.

6. During sitting of parliament, members are considered as being in town: therefore service at house in country considered bad. *Att.-Gen.* v. *Stamford*, Dick. 744.

7. Subpœna served during sitting of parliament at a friend's house in town where member staying, though he lived in the country and had no regular town residence, held good. *East India Co.* v. *Rumbold*, Hind's Pr. 92.

8. *Ne exeat* to restrain member of parliament going to Ireland, refused. *Bernal* v. *Donégal* (*Marquis*), 11 Ves. 43.

9. Member of parliament committed for contempt in writing threatening letter to Master. *Lechmere Charlton's case*, 2 Myl. & C. 316; 6 L. J., N. S., Ch., 185.

10. Privilege of parliament is no protection against an attachment for any contempt which is of a criminal kind. *Wellesley* v. *Beaufort*, (*Duke*), 2 Russ. & M. 639.

11. The course against a member of parliament for non-payment of money is first to move for a sequestration *nisi*, upon notice. *Crawley* v. *Clarke*, 3 Bro. C. C. 373.

12. A judgment-debtor summons will not lie against a member of parliament, and the privilege of parliament is not affected by the circumstance that the member has not been sworn in. *European and American Finance Corporation* v. *M. P.*, 14 W. R. 135; 13 L. T., N. S., 447.

13. In cases where the process is sought against a member of parliament, it must be, that a distress may issue; instead of "that he may stand committed to the Fleet." *Re Harrey*, 6 L. J., N. S., Bky., 92.

14. Privilege of parliament exists at common law, and is not taken away by implication because a statute makes persons enjoying it subject to the law of bankruptcy, and does not specially reserve the privilege. *Newcastle* (*Duke*) v. *Morris*, 4 H. L. Ca. 661; 19 W. R. 26; 23 L. T., N. S., 569; 40 L. J., Bky., 4.

Before the Bankruptcy Act of 1861, traders having privilege of parliament were rendered liable to the bankrupt laws, but the privileg of freedom from personal arrest was expressl reserved to them. By s. 69 of that Act a debtors (non-traders as well as traders) wer made liable to the bankrupt laws. Nothin was said in the Act to reserve to debtors wh had privilege of parliament their freedom fro personal arrest:—Held, that the statute in cluded all debtors whatever, but that suc debtors as were entitled to privilege of parlia ment still continued to enjoy its protection. *Ib.*

15. The provisions of the Bankruptcy Ac 1869, ss. 121, 122, relating to the vacating o his seat in parliament by a member of th House of Commons who had been adjudge bankrupt, do not apply to the case of a membe whose affairs are in liquidation by arrangement *Exp. Pooley, Re Russell*, 41 L. J., Bky., 67; L. R., Ch., 519; 20 W. R. 735; 26 L. T., N. S., 81

The duty cast upon the Court of Bankruptc by s. 122, of certifying a member's bankruptc to the Speaker, is an ex-officio duty as betwee the Court and the House of Commons, and a application for such a certificate should not b made by a creditor. *Ib.*

16. On a motion for attachment of a membe of the parliament which was dissolved on th 24th of March, for contempt in not obeying a order of the Court to pay certain moneys, etc. to the liquidator of the company:—Held, tha the rule laid down in *Goudy* v. *Duncombe* (Exch. 430), that a member of parliament wa entitled to privilege from arrest for forty day both after and before the meeting of parlia ment, and whether after a prorogation or dissolution, applies to a person who was member of the old, but is not a member of th new parliament. *Re Anglo-French Co-opera tive Society*, 14 L. R., Ch. D., 533; 49 L. J., Ch. 388; 28 W. R. 580.

II. Qualification. Conveyances for

17. The Court will not assist a party in re covering an estate conveyed by him for a illegal purpose, such as to enable the grante to vote at an election, or sit in parliament *Groves* v. *Groves*, 3 Y. & J. 163.

18. Injunction granted to restrain the de fendant from suing for a rent-charge, grante to qualify him to sit in parliament, the purpos never having been answered. *Platamone* v *Staple*, Coop. 250.

19. Bill for re-conveyance of qualificatio to sit in parliament, given by father to his son dismissed with costs. *Curtis* v. *Perry*, 6 Ves. 747

20. Where a father assigned property to son for the purpose of giving a qualification and by a letter the son promised to pay th father a rent charge out of the lands equivalen to the rents, the Court refused to enforce th arrears of the rent-charge, holding the trans action to be only colourable. *Re Johnstone*, Ir. Eq. R. 227; 2 J. & L. 222.

21. P. being seised of an estate in a lease o lives renewable for ever, subject to a head-ren equal in amount to a rent which a sub-tenan of a moiety thereof held at, executed a agreement in writing to let the other moiet thereof, which was in his own possession, t D., his brother, for the lives of D. and tw others, and the life of the survivor, free fro

rent and assessments during D.'s life, and after that to be subject to a yearly rent of 350*l.*; leases to be executed at the request of either party. There was evidence that the object of this gift was to enable D. to qualify as member of parliament for the City of Cork, where the lands lay. P. died intestate, in possession, and without having executed the lease:—Held, that this agreement could not be enforced against the heir of P., the object of it being to give D. a qualification for parliament, and that there was no agreement for valuable consideration, and that as an imperfect gift the Court of Equity could not enforce it. *Callaghan* v. *Callaghan*, 8 Cl. & F. 374. And see 4 Ir. Eq. R. 441.

Courts of equity do not decree specific performance of incomplete gifts. *Ib.*

Courts of equity will not decree specific performance of an agreement, the object of which is uncertain. *Ib.*

1. A conveyance of property by a father to his son to give him a qualification to vote is not invalid, but is a bounty. *May* v. *May*, 33 Beav. 81.

III. Bill in.

I. *Contracts for Withdrawal of Opposition*, 5387.
II. *Injunction against Opposition to or Promotion of*, 5392.
III. *Parliamentary Agent*, 5394.
IV. *Practice in Committee*, 5395.

I. CONTRACTS FOR WITHDRAWAL OF OPPOSITION.

1. *Legality*, 5387.
2. *Liability of Companies or Promoters*, 5388.
3. *Enforcing*, 5392.

1. Legality.

2. Securities given to persons who would be prejudiced by the passing of a private bill in parliament, in consideration of their withdrawing their opposition to it, are not illegal. *Vauxhall Bridge Co.* v. *Spencer* (*Earl*), Jac. 64. Reversing 2 Madd. 356.

3. Where a person acting on behalf of the subscribers to a railway, who were then soliciting a bill in parliament, for the purpose of forming themselves into an incorporated joint-stock company, entered into a contract with the trustees of a road, whereby it was stipulated, that in consideration of the trustees withdrawing their opposition in parliament, and consenting to forego certain clauses, of which they had intended to press for the insertion in the Act, a formal instrument to the effect of the clauses should be executed under the seal of the company when incorporated, and the bill was accordingly allowed to pass unopposed, and without the clauses, an injunction was granted at the suit of the trustees, to prevent the company from violating the provisions contained in the omitted clauses. An agreement to withdraw or withhold opposition to a bill in parliament is not illegal, and a court of equity will enforce a contract founded on such a consideration. *Edwards* v. *Grand Junction Railway Co.*, 1 Myl. & C. 650; 7 Sim. 337; 6 L. J., N. S., Ch, 47.

4. A bill being introduced into parliament according to which the line would pass through Lord H.'s estates, and near his mansion, it was agreed between the plaintiffs (in error) and Lord H., that if he withdrew his opposition they would endeavour to deviate the line, and would, in six months after the bill passed, pay Lord H. 5,000*l.* for damage done to him by the railway made according to the deviated line, exclusive of compensation to be made to him if the deviated line was not adopted. Lord H. withdrew his opposition, and the bill passed; and, six months afterwards, Lord H. brought an action for the 5,000*l.* The plaintiffs (in error) pleaded that the agreement was secret and concealed from divers individuals through whose lands the railway was to pass, and from the legislature during the passing of the Act, and that Lord H. was a peer of parliament:—Held, that the agreement was valid, as Lord H., though a peer, had a right to bargain in his individual character for compensation for injury to his property, and it was not shown that the money was promised in consideration of giving or withholding his vote, or that any concealment was intended, or any fraud intended or committed by any body. *Simpson* v. *Howden* (*Lord*), 9 Cl. & F. 61. Affirming 10 Ad. & Ell. 793; 2 P. & D. 714; 8 L. J., N. S., Exch. Eq., 281; and, removing doubts raised in S. C. *sub nom. Simpson* v. *Howden* (*Lord*), 3 Myl. & C. 97; 6 L. J., N. S., Ch., 315; 1 Jur. 703; which overruled 1 Keen 583; 1 Jur. 117; 6 L. J., N. S., Ch., 315.

5. The S. & B. R. Co. opposed a bill brought into parliament by the L. & N. W. R. Co., seeking to authorise a lease to that company of a scheme by the S. U. R. Co., whereupon an agreement in writing was come to between the companies, that, in consideration of the withdrawal of the opposition by the S. & B. R. Co., an account should be kept of the profits received from the traffic on the lines of the S. & B. R., and S. U. R. Co., and that the profits to be received in respect of the traffic should be divided between them in certain proportions. By reason of the withdrawal of the opposition the bill was passed:—Held, that the agreement was not a fraud on parliament, the public and their subscribers, or illegal. *Shrewsbury & Birmingham Railway Co.* v. *London & North-Western Railway Co.*, 2 Macn. & G. 324; 2 H. & Tw. 257; 20 L. J., N. S., Ch., 90; 14 Jur. 921, 1125.

Held, also, that an agreement entered into by two companies, by which one of those companies agreed that it would not prejudice, or by an indirect or circuitous course interfere with the traffic passing on the direct line of the other company, was not illegal. *Ib.*

Held, also, on the construction of the Act of Parliament, that the operation of the agreement was not postponed until all the contemplated lines were completed; but that the rights and liabilities of the two companies *inter se*, on which the agreement with the third company depended, arose on the completion of any one of the contemplated lines.. *Ib.*

An Act of Parliament recited three other Acts, one only of which had relation to an agreement entered into between the plaintiffs and defendants. By the first section, on the completion of the works of the three lines of railways, by the recited Acts authorised to be

made, so as to be opened for public traffic, or at such other period as might be agreed upon, the S. U. R. Co. were empowered to grant to the L. & N. W. R. Co. a lease in perpetuity of the undertaking. By the eleventh section of the same Act, it was enacted, that as each of the lines of railway should be completed, the same should be worked and used by the L. & N. W. R. Co., and for the purposes of such working, the L. & N. W. R. Co. were to exercise the powers before given by the Act to the S. U. R. Co. in relation to every such completed railway. Other sections of the Act spoke of the "lease of the said railways," and the "making of such lease":—Held, that, according to the true construction of the Act, there was no postponement of the rights of the parties to the benefit of the provisions of the lease, until the whole of the three lines had been completed. *Ib.*

1. A company will not be bound by the contract of its promoters, where the thing contracted to be done is *ultra vires* of the company, and to that extent Lord Cottenham's doctrine, that a company is bound by the engagements of the promoters, must be taken to be overruled. *Shrewsbury* (*Earl*) v. *North Staffordshire Railway Co.*, 12 Jur., N. S., 63; 1 L. R., Eq., 593; 35 L. J., Ch., 156; 14 W. R. 220; 13 L. T., N. S., 648.

An agreement by the promoters of a railway to pay a sum of money to a landowner, through whose estate their line is to pass, for his countenance and support to the scheme, is *ultra vires* of the company when incorporated, and though adopted and acted on, will not be enforced against the company. *Ib.*

It is not illegal for the promoters of a railway to agree personally with a landowner, even (so long as there is no proof of corrupt influence on his vote) though he is a member of either house of parliament, to pay him a sum of money for withdrawing his opposition to their bill, or giving his countenance and support to their scheme; but such a payment is not an "expense incurred in obtaining the special Act, or incident thereto," within s. 5 of the Companies Clauses Act, and cannot so be upheld as a liability of the company. *Ib.*

2. In 1846, two competing lines of railway, the D. N. and the L. & Y., being before parliament, L. agreed with eleven persons (the promoters of the D. N. railway) to give them certain portions of land, at different prices; to withdraw all parliamentary opposition from them, and offer every description of opposition to the L. & Y. railway; and that if an amalgamation took place on any grounds, he would not oppose the amalgamated company. In case of the amalgamated company obtaining their bill, they were to adopt this agreement and all the covenants, etc., one of which was, that the D. N. Railway Company were to build a station near T., at a point to be approved by L., at which station all trains should stop. The two companies did amalgamate by the name of "the G. N. Railway Company." Litigation took place, both in equity and at law, upon the construction of the agreement, the validity of which was never impeached in such litigation. The G. N. Company now refused to stop their express trains at the T. station:—Held, first, that the agreement was legal in itself, and was now decided by authority; but *semble*, that if such authority had been wanting, it would not have been open to the defendants now to impeach it after having brought it forward as a defence in former litigation. Secondly, that the balance of inconvenience on stopping such trains was in favour of a specific performance of the agreement, and that the Court would not hesitate to interfere to restrain a breach of it on interlocutory application. Thirdly, that the amalgamated company's Act having been passed without opposition by L., which might reasonably be supposed to be in consequence of the agreement, acts done by the company under their Act were to be looked at as if done under the agreement. *Lindsay* (*Earl*) v. *Great Northern Railway Co.*, 17 Jur. 522; 22 L. J., Ch., 995; 10 Hare 665.

3. An agreement to give a sum of money as a bribe to buy off opposition to a railway bill in parliament cannot be enforced. *Scottish North-Eastern Railway Co.* v. *Stewart*, 3 Macq. H. L. Ca. 382.

2. Liability of Companies or Promoters.

4. The projectors of a railway pending a bill in parliament for incorporating them made an agreement on behalf of the proposed corporation, in consequence of which a threatened opposition to the bill was withdrawn:—Held, that the corporation having received the benefit of the agreement were bound by it. *Edwards* v. *Grand Junction Railway Co.*, 7 Sim. 337; 1 Myl. & C. 650; 6 L. J., N. S., Ch., 47.

The directors of a company, for the incorporation of which a bill was pending in parliament, had projected a railway to cross a certain turnpike road. The trustees of the road had taken measures for opposing the bill, unless clauses, restricting, with regard to such road, the general powers proposed to be granted in the bill, were introduced. The company, by their agent or manager, entered into an agreement with the trustees that, instead of such clauses being inserted in the Act, they should be embodied in an agreement between the company and the trustees. One of the terms was, that the trustees should not oppose the bill; and they accordingly made no opposition to it. The Act passed without the restrictive clauses originally contemplated by the trustees:—Held, that the incorporated company could not, as against the trustees, exercise a power conferred by the Act, in violation of the terms of the agreement. S. C. 1 Rail. Ca. 173.

5. The committee of certain subscribers applying for an Act to authorise the formation of a railway agreed with the plaintiff, a peer of parliament, through whose estates the railway had to pass, that in consideration of his withholding his opposition to their bill, the incorporated company, in the event of the railway being, under the powers of their Act, made to pass through the plaintiff's estates, in the line laid drawn on their parliamentary plan, should previous to entering thereon pay to the plaintiff the sum of 120,000*l.* for the value of the land, and for compensation; and that the company should, within three weeks after their incorporation, ratify the agreement. The plaintiff withheld his opposition to the bill, and it passed into an Act. The incor-

porated company refused to ratify the agreement; and, being empowered by their Act to take compulsorily the plaintiff's land in the line mentioned in the agreement, served on him a notice to treat for the same. Injunction granted, restraining the company from proceeding to assess the value of the land; and continued, notwithstanding the tender of an undertaking on the part of the company, not to enter on the land until the further order of the Court; and notwithstanding the time during which the company was authorised to take lands for the railway would have expired before the hearing of the cause. *Petre (Lord)* v. *Eastern Counties Railway Co.*, 1 Rail. Ca. 462.

1. A company associated for the formation of a railway were proposing to solicit a bill in parliament. Some communication passed between their agents and the plaintiff, as to the manner in which the railway was to interfere with a field and plantation belonging to him, situate near his mansion-house. The plaintiff, understanding that the railway would not pass through a certain part of his field and plantation, and that his field would not be taken for a terminus station, took no immediate steps for opposing the bill; but subsequently, in the absence of the plaintiff from England, his agent, in answer to a notice served on the plaintiff's land-steward, requiring the whole of the field for the purposes of the railway, returned a written dissent to the bill, and the plaintiff was treated as a dissenting landowner throughout the progress of the bill. The Act having passed, the company, in exercise of the powers thereby conferred, required of the plaintiff the whole of his field and plantation:—Held, that, inasmuch as the plaintiff, in the communication between him and the company's agent, did not preclude himself from opposing the bill; and as he was, by the act of his agent, treated as a dissentient landowner, the company were not bound by any representation made by their agents, for which they had received no consideration. *Hargreaves* v. *Lancaster & Preston Railway Co.*, 1 Rail. Ca. 416.

2. A railway company, wishing to obtain a bill for another railway, with a diverging line, which latter they could not make without the purchase of a particular property, which by their Act they had not the power to obtain, entered into an agreement with the tenant for life to purchase the same, and to perform all such acts as might enable him and the parties in remainder to sell the estate. All opposition to the proposed bill was withdrawn, and it passed, but with the omission of the diverging line, and the powers to buy this property. The tenant for life filed a bill for the specific performance of the agreement; and the company objected, that the plaintiff, being only tenant for life, had no title. The objection was overruled, and a decree for specific performance was made, and the defendants were ordered to pay the purchase-money into court. *Hawkes* v. *Eastern Counties Railway Co.*, 20 L. J., N. S., Ch., 243; 15 Jur. 979. Affirmed 22 L. J., N. S., Ch., 77; 16 Jur. 1051; 1 De G. M. & G. 736.

3. An agreement was entered into between A., a landowner, and B., chairman of the provisional committee of a projected railway company, whose line A. apprehended would injure his property, that, on A. withdrawing his opposition to the bill for the formation of the company when it was before Parliament, he should be at once paid his costs of such opposition by the promoters, and that he should also be paid, within one month after the passing of the Act, 250*l.*, and before the construction of the railway was commenced a further sum of 1,750*l.*, as for ascertained consequential damages. The Act passed, and A. brought an action against B., for the amount of his costs of opposing the bill before parliament, and for the 250*l.* In that action the company consented to a judge's order being made against them for the sums for which the action was brought. The company also commenced the construction of their railway without having paid A. the 1,750*l.*; whereupon A. filed a bill to enforce payment:—Held (overruling 24 Beav. 339; 3 Jur., N. S.,1014), that the company, by consenting to the judge's order, had adopted the agreement made between A. and B., and that the company was bound thereby, whether it would have been otherwise binding on them or not, and that it was not vitiated by one of its terms being that the company should pay the costs of the landowner's opposition to the bill. *Williams* v. *St. George's Harbour Co.*, 2 De G. & J. 547; 4 Jur., N. S., 1066; 27 L. J., Ch., 691.

4. A railway company, having applied for an Act to extend their line, was opposed by a landowner; whereupon an agreement was entered into between the solicitor of the company and the landowner that the latter should withdraw his opposition, and if the Act passed, that the company should purchase his land on certain terms. Neither the appointment of agent, nor the agreement, was under the seal of the corporation. The Act passed, but the company did not take the land. The Court, considering that the company had done no act to take the benefit of the contract, refused a decree for specific performance, and declined to order the company to admit the validity of the contract, in order to enable the plaintiff to try his right at law. *Gooday* v. *Colchester, etc., Railway Co.*, 17 Beav. 132.

5. Where the projectors of a railway company, in order to induce a landowner to withdraw his opposition to their bill, enter into a contract with him, in which the stipulation is that the contract is to be performed by the company after the company has obtained an act of incorporation from parliament, such contract to be valid ought to be one which might be lawfully made by the company after incorporation. *Preston* v. *Liverpool, Manchester, & Newcastle-upon-Tyne Junction Railway Co.*, 5 H. L. Ca. 605; 2 Jur., N. S., 241; 25 L. J., Ch., 421; 4 W. R. 383.

It is *ultra vires* of a corporation established for the purpose of making a railway, to enter into a covenant to pay a large sum of money to an individual for not opposing the passing of the company's bill in parliament. *Ib.*

P. was a landowner; a railway company was projected, and for the intended railway some of his land would be required. He threatened to oppose the bill. The projectors entered into an agreement with him, that "in case the company shall obtain an Act of incorporation, the company should pay him 1,000*l.* for all

lands required by the company for the due making of the railway, and 4,000*l.* for consequential injury to his estate and hall;" that a tunnel should be constructed in a particular manner through a part of his property, and that a passenger station should be made, etc. P. withdrew his opposition, and the bill passed; the railway was not made, nor were the lands required:—Held, that this was not a contract which on the mere passing of the bill entitled him to claim from the company payment of the money. *Ib.*

The cases of *Edwards* v. *Grand Junction Railway Co.* (1 Myl. & Cr. 650), and *Petre* (*Lord*) v. *Eastern Counties Railway Co.* (1 Rail. Ca. 462), impugned. *Ib.*

Afterwards, the projectors agreed to join with a rival company, calling itself the Liverpool, Manchester, & Newcastle Company, in applying for an Act for making a railway, the line of which, so far as the plaintiff's estate was concerned, was the same as the line of the projectors; and the two companies agreed to adopt the agreement with the plaintiff. The Act passed, and by it the two companies were incorporated by the name of the Liverpool, Manchester, & Newcastle Railway Company:—Held, that the incorporated company must be taken to be the parties on whose behalf the projectors entered into the agreement with the plaintiff. S. C. 1 Sim., N. S., 516; 21 L. J., N. S., Ch., 61.

The Court also was of opinion that, as the plaintiff had withdrawn his opposition to the bill in parliament, the company, according to the true construction of the agreement, were bound to pay the sums agreed to be paid to him, although they had not taken possession of any part of his estate. But the question as to the construction of the agreement being a legal one, a case was directed for the opinion of a court of law. *Ib.*

1. A landowner, being a peer of parliament, entered into an agreement with the projectors of a railway, stipulating among other things that they should take certain portions of his land, and pay him certain specified sums for the same, and by way of compensation for permanent injury to his mansion and estate, that they should execute certain works of utility and ornament on his property, and make and maintain a station adjoining or near to a particular road, at which all trains passing along the railway should stop for the accommodation of passengers, and for the receiving and unloading of goods, luggage, carriages, and horses; with a provision that the landowner should withdraw his opposition to the bill of the projectors and co-operate with them, and use his best endeavours to prevent the bill of a rival company from passing into law, but that if the bill of the rival company should pass, then the first-mentioned company should pay the plaintiff certain sums for the land the rival company might take, and recover from the latter and pay to the first-mentioned company the largest amount of price and compensation which could be obtained, and a provision that either of the parties might determine the agreement by notice to the other, if the bill of the first-mentioned company should not pass within six months: and a further provision that if the two projected companies should be amalgamated, the amalgamated company should pay certain sums to the plaintiff s purchase money and compensation; and tha the covenants and agreements concerning th purchase and taking of land, not makin deviations without the plaintiff's consent, an the making and maintaining such station, an all other the covenants and agreements ther inbefore contained on the part of the firs mentioned company, so far as the same shoul be applicable, should be performed by th amalgamated companies. By an Act passe within six months, the subscribers to the tw projected companies were incorporated in on body, and authorised to make certain of th projected lines of railway, and it was enacte that the shareholders of each company shoul be entitled in certain rates or proportions t the shares of the united company:—Held, tha notwithstanding the bill of the first-mentione company did not pass, the agreement could no be determined by a notice given by the pro jectors who were parties to the agreement, o by the amalgamated body. The amalgamate company having then taken the land referre to in the agreement, and paid for it the pric thereby stipulated, and having, in a suit i equity brought against them by the landowne claimed the benefit of the agreement, he filed hi bill for a specific performance of his contrac with the projectors of the first-mentione company, and moved for an injunction t restrain the incorporated company from per mitting any of their trains to pass a certai station near the road mentioned in the agree ment, without stopping thereat for the accom modation of passengers, etc.:—Held, that th union and incorporation of the shareholders o the two companies in one body, and the con solidation of their several shares under the Ac of Parliament, constituted an amalgamatio within the meaning of the agreement. Tha the amalgamated company was bound by th agreement entered into with the plaintiff b the projectors of the first-mentioned company That there was no objection to the agreemen in point of legality with reference to the positio of the plaintiff as a member of the legislature and that especially after the agreement had been the subject of consideration and con struction in the House of Lords and in the Court of Queen's Bench, this Court would no refuse to enforce it on any suggestion o illegality. That the plaintiff was therefore entitled to the injunction, and under the cir cumstances of the case, upon the interlocutory application before the hearing of the cause *Lindsay* (*Earl*) v. *Great Northern Railway Co.* 10 Hare 665; 17 Jur. 522; 22 L. J., Ch., 995.

Whether a corporation can be bound by the acts of an agent not appointed under seal, *quære*. But in this case the corporation was held bound at all events, as they had entered upon and taken possession of the land mentioned in the agreement, and otherwise asserted its validity. *Ib.*

The decision in the case of *Edwards* v. *Grand Junction Railway Co.* (1 Myl. & Cr. 650) did not proceed on the principle that the incorporated company was bound by the contract of a party acting as an agent for them prior to their corporate existence, but on the principle that the Court would not allow them to exercise powers acquired by means of such contract without carrying it into full effect;

and in the absence of any adoption of the contract of such a party by the incorporated company, or of any attempt to exercise the powers thereby acquired, or of any part performance, the Court might refuse to enforce specific performance of such a contract against the incorporated company; but if they adopt or avail themselves of the contract, or exercise the powers acquired by its means, the Court will in that case not only negatively but positively interpose, and compel the performance by them of every portion of the contract. *Ib.*

1. A., a landowner, through whose estate a part of a projected railway was to pass, became a party to a deed with the projectors of the railway, by which he covenanted to withdraw his opposition to their bill, and to oppose a rival bill, and they covenanted to pay him a certain sum of money in case their bill should pass within six months from the date of the deed, or to pay him a different sum if the rival bill should pass within eighteen months of the date of the deed. It was then provided that, if the bill of the projectors should not be passed within six months from the date of the agreement, either party might put an end to the agreement by a notice. The deed then contained a covenant on the part of these projectors, by which they agreed, if the two companies should be amalgamated, to pay a certain sum within three months after such amalgamation. The deed was dated on the 16th March 1846. The two companies were amalgamated in June 1846; but no bill ever passed at the instance of these projectors alone. In November 1846 these projectors gave a notice to put an end to the agreement. A. declared in covenant against these projectors on that clause of the deed by which he was to receive a sum of money within three months after the amalgamation of the companies. The defendants pleaded that their bill had never passed into a law, that at the end of six months they had given notice to put an end to the agreement, but that they had not taken the plaintiff's land:—Held, that this plea was no answer to the action. *Capper* v. *Lindsey (Earl)*, 3 H. L. Ca. 293.

2. Where upon an agreement for an intended railway between the proprietor of lands and the company, the latter, in consideration of withdrawing all opposition, and of the lands to be taken, and of compensation, etc., agreed to pay a certain sum in the event of the Act passing, and subsequently an opposition line was formed by another company, and upon both lines being referred by the House to decide on the more preferable, the agent of the latter company undertook that the adopted line should take the engagements entered into with the landowners by the rejected line. The line of the new company being adopted and the Act having passed without opposition on the part of the plaintiff, whose lands were taken nearly to the same extent by the new line:—Held, that the company were bound by the engagements of the original company with the plaintiff, and a demurrer to a bill for specific performance overruled. *Stanley* v. *Chester & Birkenhead Railway Co.*, 9 Sim. 264; 1 Rail. Ca. 58. Affirmed 3 Myl. & C. 773; 1 Rail. Ca. 67.

3. A contract entered into by the promoters of a railway company with a landowner to pay a certain sum for the portion of his lands to be taken for the intended railway and for consequential damage, in consideration of which agreement the landowner withdrew his opposition to the bill:—Held, to be binding, although, after the passing of the Act, the intention of making the railway be abandoned, and no part of the land be taken or required. *Webb* v. *Direct London & Portsmouth Railway Co.*, 9 Hare 129; 20 L. J., N. S., Ch., 566; 15 Jur. 697.

Specific performance decreed of an agreement to pay, for the lands to be taken for a railway, a certain sum, which included not only the purchase money of the lands, but compensation for the consequential damage to the property of the landowner; the case not being one in which compensation was, under the Act, a distinct subject of contract, but being merely an agreement by the landowner to accept a sum in full for the purchase and damage; the purchase being the substance of the agreement, and the damage an incident. *Ib.*

But, on appeal, specific performance was refused, as a decree would be productive of more injustice than justice in such a case. S. C. 1 De G. M. & G. 521; 21 L. J., N. S., Ch., 337; 16 Jur. 323.

The fact that the railway company had, by the lapse of time, lost the powers which the legislature had given them to take lands, did not deprive them of the right to hold lands which they had acquired during the existence of their powers, nor did it release them from their obligations which they had then contracted with reference to the purchase of land. *Ib.*

4. A bill in parliament to authorise a railway company to grant a lease in perpetuity to another railway company of certain projected lines was opposed by a third railway company, who withdrew their opposition on an agreement being come to that during the continuance of any lease to be authorised by the Act the companies should participate in portions of each other's profits, and that the two former companies should not take traffic on specified portions of their lines:—Held, differing from the opinion of Lord Cottenham on a demurrer (2 Macn. & G. 324), that the agreement was *ultra vires*, and ought not to be decreed to be specifically performed. Held, also, on the construction of the whole agreement, that if valid, it would have come into operation, although only a portion of the projected lines was completed. *Shrewsbury & Birmingham Railway Co.* v. *London & North-Western Railway Co.*, 4 De G. M. & G. 115; 17 Jur. 845; 22 L. J., Ch., 682.

The directors of a railway company are trustees (in an important sense of the word) of their statutory powers, and an agreement entered into by the company amounting to a breach of trust will not be enforced to the prejudice, or not according to the views, of all or some of the shareholders, at the instance of parties cognisant of the circumstances. This proposition is not inconsistent with *Hawkes* v. *Eastern Counties Railway Co.* (1 De G. M. & G. 737). *Ib.*

5. The promoters of a railway company contracted with a landowner, the tenant for life of settled estates, and a peer of parliament,

to pay him 20,000*l.* personally, for his countenance and support in obtaining their Act, such sum to be independent of the ordinary payment for land, severance, and other usual compensation. After the passing of the Act the directors of the company, when formed, ratified the contract, but having doubts whether, under the Lands Clauses Act, the landowner was entitled to the money personally, they covenanted by deed to pay interest upon the amount, which was to be retained by the company or paid into court. A separate agreement stipulated for the quantity of land to be taken for the railway, and the amount to be paid by the company:—Held, that the original contract and the contract by the directors after the formation of the company to pay a sum of money for countenance and support previously given in procuring the Act, were *ultra vires* of the company, and could not be enforced against the company as payment of expenses of obtaining the Act, under the Companies Clauses Act, s. 65, or otherwise. *Shrewsbury (Earl)* v. *North Staffordshire Railway Co.*, 1 L. R., Eq., 593; 12 Jur., N. S., 63; 35 L. J., Ch., 156; 14 W. R. 220; 13 L. T., N. S., 648.

The doctrine laid down by Lord Cottenham, that a company after formation is bound by the contracts of its promoters, disapproved of; and so far as it applies to anything to be done which is *ultra vires* of the company, must be considered as overruled. *Ib.*

3. Enforcing.

1. In 1847 a railway company being desirous of making a branch line through lands of the Marquis of B., in consideration of his withdrawing his opposition to their bill, by their agent E. D. entered into an arrangement, termed "heads of agreement," which referred to a map annexed, by which the company agreed to purchase certain portions of the land marked A., B., C., and D. The company was to give the following sums: as to A. 400*l.* an acre for land required for the railway, and an additional 100*l.* for making a road; as to B. 1250*l.* an acre; as to C. 400*l.* an acre for what was required; as to D. 250*l.* an acre; and to pay 1,000*l.* for depreciation of homesteads. And the agreement contained the following clause:—"The above prices refer to the quantities of land required for the railway, and to the contents of the roads and severed portions, which are respectively to be accurately measured." The Marquis having withdrawn his opposition, the bill passed on the 9th of July 1847. On the 1st of September 1847 a formal draft agreement was sent by the company to the Marquis's solicitor, which endeavoured to convert the "heads of agreement" into an agreement conditional on the company requiring the lands of the Marquis. A correspondence ensued of considerable length, which ended in nothing. The Marquis died on the 18th of March 1848, having appointed the plaintiffs his devisees in trust and executors. On the 14th of October 1848 notice of the abandonment of the railway was given; but although a correspondence between the parties went on, the claim was not filed until the 18th of June 1850, and was not brought to a hearing until the 21st of February 1852. The compulsory powers of the company ceased on the 9th of July 1850, but the time to complete the construction of the railway was extendible to the 9th of July 1832:—Held, that it was not a case for specific performance, and that the plaintiff should be left to his legal remedy, the defendants entering into certain undertakings necessary for the trial at law. *Stuart* v. *London & North Western Railway Co.*, 21 L. J., N. S., Ch., 450; 16 Jur. 531; 1 De G. M. & G. 721. Reversing 21 L. J., N. S., Ch., 451. n.; 16 Jur. 209.

2. Lessees of premises, occupied by them as a ropery, agreed to withdraw their opposition to a bill in parliament for a railway which would intersect the ropery. The agreement, among other stipulations, provided that the railway should be so constructed as that when finished the level of the ropery should not be altered, nor the surface of the ropery be in the least respect diminished:—Held, that the railway company were bound to restore the surface so as to be available for all purposes to which it might have been applied before the construction of the railway, and not for the purposes of a ropery only. *Harby* v. *East and West India Docks and Birmingham Junction Railway Co.*, 1 De G. M. & G. 290.

3. The promoters of an Act for making a railway entered into a contract with a landowner, which was afterwards confirmed by the company, whereby, after agreeing, in the first nine clauses, to do or abstain from doing certain things which had sole reference to the completion of the railway, by the tenth they agreed to pay the landowner a sum of 4,500*l.* as purchase-money for the lands to be taken by the company for the formation of the railway, not exceeding eight acres, and for consequential damages to the property, and in consideration of this contract the landowner withdrew his opposition to the bill:—Held, that on the abandonment of the railway by the company, after the passing of the Act, a court of equity ought not to compel the company specifically to perform the agreement, and that the landowner ought to be left to his remedy at law to obtain damages. Principles on which the Court decrees or refuses to decree specific performance. *Webb* v. *Direct London & Portsmouth Railway Co.*, 1 De G. M. & G. 521; 21 L. J., N. S., Ch., 337; 16 Jur. 323. Reversing 9 Hare 129; 20 L. J., N. S., Ch., 566; 15 Jur. 697.

II. INJUNCTION AGAINST OPPOSITION TO OR PROMOTION OF.

Opposing Bills.] 4. Under an Act of Parliament, by which the conservators of river banks were empowered to apply the funds under their control (which were raised by a rate upon the proprietors of adjacent lands) in doing, constructing, and executing all such works, acts, matters, and things, as they should, from time to time, deem necessary, proper, and expedient for putting the banks into and maintaining the same in a state of permanent stability:—Held, that they were authorised to apply a portion of the fund in watching, and, if necessary, opposing, a bill in parliament for a project lower down the river, which was likely to be injurious to the banks under their superintendence. *Bright* v. *North*, 2 Ph. 216; 16 L. J., N. S., Ch., 255.

1. The guardian of an infant, whose lands were intersected by railways and waggon ways, from which he received a considerable rental, obtained an order on petition, allowing him to oppose a projected company's bill in parliament, without a clause for compensation, in case of taking any of his lands, for loss or diminution in profits, by the transfer of the traffic to the company's railway. *Monypenny* v. *Monypenny*, 4 Rail. Ca. 226.

2. *Semble*, where the right of a party to petition parliament against a bill pending there depends solely upon his having some private interest which is likely to be affected by it, this Court has the same jurisdiction to restrain him by injunction from so petitioning as it would have to restrain him from bringing an action at law or asserting any other right connected with such interest. *Stockton & Hartlepool Railway Co.* v. *Leeds & Thirsk & Clarence Railway Co.*, 2 Ph. 666; 5 Rail. Ca. 695; 12 Jur. 735. Reversing Rail. 5 Ca. 691; 12 Jur. 713.

Promoting Bills.] 3. A court of equity will not, at the instance of a shareholder, restrain a joint-stock company, incorporated by Acts of Parliament, which prescribe its constitution and objects, from applying in its corporate capacity to parliament, and from using its corporate seal and resources to obtain the sanction of the legislature to the remodelling of its constitution, or to a material alteration and extension of its object and powers. *Ware* v. *Grand Junction Water Co.*, 2 Russ. & M. 470.

An injunction to restrain the Grand Junction Waterworks Company from applying to parliament for an Act authorizing the company to procure its supply of water by means of an aqueduct from the river Colne, instead of the Thames, as authorized by the existing Acts under which it was incorporated, was refused. *Ib.*

4. Commissioners under a local Act of Parliament, the object of which was to supply the town of S. with water, were empowered to raise funds by assessment, to be applied in certain specified ways, having immediate reference to the purposes of the Act, and in otherwise carrying the Act into execution:—Held, that although the commissioners might have properly applied the funds raised in resisting a proceeding in parliament prejudicial to the object of the Act; yet they were not justified in applying them to defray the expense of obtaining another Act of Parliament, giving more extensive powers for carrying out the object of the existing Act. *Att.-Gen.* v. *Andrews*, 2 Macn. & G. 225; 2 H. & Tw. 431; 20 L. J., N. S., Ch., 467; 14 Jur. 905.

5. A railway company, on the terms of being permitted to proceed with certain works, pending a trial at law of the question, whether such works were in conformity with the directions of an Act of Parliament, undertook to deal with the works as the Court of Chancery should afterwards direct. Before the trial had taken place, the company, without notice to the other parties in the cause, petitioned the House of Commons for leave to bring in a bill, one of the clauses of which proposed to provide that, in all proceedings at law and in equity, the works which had been done should be considered as a compliance with the Act of Parliament, and that there should be no power at law or in equity to compel the removal thereof. The petition was received, and the bill containing such clause was introduced into the House of Commons:—Held, that, although the conduct of the company was a violation of the undertaking entered into by them, the Court had no jurisdiction to restrain them from further soliciting the bill, which, having been entertained by the House of Commons, had become the proceeding of the legislature, and not of the petitioners. *Att.-Gen.* v. *Manchester & Leeds Railway Co.*, 1 Rail. Ca. 436.

6. A corporate body, constituted for the improvement of the district under their control, by resolutions promoted a bill for the annexation of an adjoining district to their township, and caused the corporate seal to be affixed to a resolution for that purpose, which was *ultra vires*. The Court granted an interlocutory injunction pending the hearing of the cause, to restrain them as such corporate body from promoting the bill, and from using the corporate seal for that purpose. *Att.-Gen. (Ireland)* v. *Rathmines and Rathgar Commissioners*, 5 L. R., Ir., 114.

7. When commissioners appointed by a private Act are authorized to do all things necessary for carrying out the object of the Act, that will not give them authority to apply to parliament for a further Act, so as to allow their applying funds raised for the purposes of the first Act in discharging the expenses of obtaining the second Act. *Att.-Gen.* v. *West Hartlepool Improvement Commissioners*, 18 W. R. 685; 39 L. J., Ch., 624.

8. Applications to parliament on public and on private grounds distinguished; the latter may, in a proper case, be restrained; the former cannot, in any case, be restrained by injunction. *Lancaster & Carlisle Railway Co.* v. *North-Western Railway Co.*, 2 Kay & J. 293; 25 L. J., Ch., 223; 2 W. R. 220.

The Court has undoubted jurisdiction to prevent the breach of an agreement not to apply for an Act of Parliament, but where the agreement was not to apply to parliament for a measure affecting the public benefit, the Court declined to interfere. *Ib.*

Quære, whether such an agreement is void, as being against public policy. *Ib.*

The defendants (a railway company) agreed with the plaintiffs (also a railway company) not to apply to parliament to make any line, or branch line, connecting the defendants' with the plaintiffs' railway, except a certain main line and branches, and certain deviations, for which application had been made to parliament by the defendants. And, in consideration of the premises, the plaintiffs, who had previously opposed, agreed to support the defendants' application, and, if required, to petition parliament in its favour. The plaintiffs performed their part of the agreement, and the defendants obtained their Act. The Court refused to restrain the defendants from applying to parliament for power to make a further deviation, on the ground that the bill, if passed, would be passed on public grounds, which this Court could not try, and with full knowledge of the agreement; while, if rejected, the inconvenience of opposing the bill would be compensated in damages for a breach

of the agreement, assuming the agreement to be legal. *Ib.*

1. The Court has undoubted jurisdiction to restrain by injunction an application to parliament, but it is extremely difficult to conceive any case in which it would be proper to exercise that jurisdiction. *Steele* v. *North Metropolitan Railway Co.*, 36 L. J., Ch., 540; 2 L. R., Ch., 237; 16 L. T., N. S., 192; 15 W. R. 597.

A railway company, in consideration of a landowner withdrawing his opposition, agreed to purchase his land at a stipulated price, and the agreement was confirmed by and embodied in an Act of Parliament. The company, being afterwards desirous of abandoning their line, gave notice to the landowner of their intention to apply to parliament for an Act repealing the section of the previous Act which confirmed the agreement. The Court refused, at the instigation of the landowner, to interfere by injunction to restrain the application. *Ib.*

2. Though it is clear that the Court of Chancery, by means of its jurisdiction *in personam*, can restrain an application to parliament for a private Act, it is almost impossible to conceive a case in which that jurisdiction would be exercised. *Exp. Hartridge, Exp. London, Chatham, & Dover Railway Co.*, 17 W. R. 946; 20 L. T., N. S., 718; 5 L. R., Ch., 671.

Accordingly, where the Vice-Chancellor had restrained the directors (appointed under the provisions of a special Act) of a company from further promoting a bill in parliament, for referring the affairs of the company to arbitration, which had been passed by the House of Commons, and read a first time by the House of Lords, having been, before it was introduced into the House of Commons, approved by general meetings of the shareholders and mortgagees of the company, though very much altered in its progress through the House of Commons; on appeal, the injunction was dissolved. *Ib.*

An order that the directors of the company should pay into court moneys in their hands which had arisen from the tolls of the company, was also, on appeal, discharged. *Ib.*

3. Although the Court will in a proper case exercise its jurisdiction by injunction, touching proceedings in parliament for a private bill, or a bill respecting property, yet it has no power to interfere to deprive a party of the right of applying to parliament for a special law to supersede the rules of property by which he finds himself bound, whether arising from contract or otherwise. A party agreed with a railway company to withdraw his opposition to their bill in parliament, in consideration of their completing their line in a particular manner. The company finding themselves unable to carry out their contract gave notice of an intention to apply to parliament for authority to abandon their scheme. The Ld. Ch. dissolved an injunction granted by the V.-Ch., at the suit of the party with whom the company had contracted, restraining the company from making the application. *Heathcote* v. *North Staffordshire Railway Co.*, 2 Macn. & G. 100; 2 H. & Tw. 382; 6 Rail. Ca. 358; 14 Jur. 859.

4. A company was formed in California for purposes connected with land in that country, but nearly all the shareholders were residen in England. A resolution was passed at meeting of English shareholders, authorizin the trustees to take steps for increasing th preference shares to an extent not allowed b the existing constitution of the company There was no intention to create preferenc shares, except with the sanction of the Cali fornian legislature:—Held, that an injunctio ought not to be granted to restrain the compan from acting on the resolution, for that th Court will not in general restrain parties fro applying to the legislature, whether of this c of a foreign country. *Bill* v. *Sierra Nevad Lake Water & Mining Co.*, 1 De G. F. & J 177; 6 Jur., N. S., 184; 29 L. J., Ch., 176.

See also LOCAL GOVERNMENT, I. v. 4.

III. PARLIAMENTARY AGENT.

5. The lien of a parliamentary agent attache to books and papers intrusted to him by th law clerk of the trustees of a public road t obtain a renewal of their Act of Parliament *Ridgway* v. *Lees*, 25 L. J., Ch., 584.

A parliamentary agent, though nominate by the law clerk, has, in the absence of an agreement, a right to be paid his bill by th trustees directly, and not through the la clerk who nominated him. *Ib.*

A claim by a parliamentary agent to partici pate in the profits of a solicitor's bill wa rejected, as no such agreement was proved t have been made. *Ib.*

6. The opposers of a private bill had cost awarded to them under 28 & 29 Vict., c. 27 against the plaintiffs and another compan who were joint promoters, and they obtaine from the taxing officer of the house a certifi cate of the amount of such costs, but withou giving the plaintiffs any notice of the appoint ment for taxation, or any opportunity o being heard. The statute provides that th certificate shall be conclusive evidence as wel of the amount of the demand as of the titl of the party therein named to recover th same from the party therein stated to be liabl to the payment; and that the validity of th certificate shall not be called in question i any Court:—Held, nevertheless, that a cour of equity would restrain proceedings agains the plaintiffs upon a certificate thus obtained and that the other joint promoters were no necessary parties to the suit. *Swansea Cana Navigation Co.* v. *Great Western Railway Co.* 37 L. J., Ch., 238; 16 W. R. 1034; 18 L. T. N. S., 78; 5 L. R., Eq., 444.

7. Claims in respect of expenses incurred b parliamentary agents in getting the bill of projected railway company passed through parliament, and for moneys advanced by th intending contractor for the same purpose, ar debts which have been incurred on account o the promotion of the company; and the Court under the discretion given by The Railway Abandonment Act 1869, s. 5, will not hold i reasonable, as between such creditors and th surety to the bond, that their debts should b paid out of the bond, which, by the warran for the abandonment of the railway, has beer directed to be applied as part of the asset of the company. *Re Brampton & Longtown*

Railway Co., 10 L. R., Eq., 613; 39 L. J., Ch., 681; 18 W. R. 994; 23 L. T., N. S., 356.

1. A Board of Trade warrant of abandonment of a railway, under the Abandonment of Railways Act 1850, and the Railway Companies Act 1867, was made with a condition that moneys deposited in the Court of Chancery as security should be applied as part of the assets of the company:—Held, that the solicitor and parliamentary agent, not being promoters of the company, were entitled to be paid thereout their costs and charges for obtaining the Act. *Re Kensington Station Act*, 20 L. R., Eq., 197; 23 W. R. 463; 32 L. T., N. S., 183.

2. A., a parliamentary agent, sued B. for work and services, in obtaining the passing of a private Act of Parliament. B. pleaded that it was part of A.'s employment to prepare and submit to parliament a clause in the bill for providing for the payment of the costs of passing the bill, out of moneys to be raised in pursuance of same, and that, by reason of the carelessness, negligence, unskilfulness, and default of A., the clause was so incorrectly framed, that after the passing of the Act containing such clause, it became impossible to enforce the payment of the costs in the manner thereby contemplated:—Held, that the omission of A. to prepare an efficient clause for the above purpose materially affected the quality of the entire work, so as to exclude the possibility of a part performance, and consequently, that the matter of defence was a good bar to the entire action, and did not merely go in reduction of damages. *Baker* v. *Milward*, 8 Ir. Ch. R. 514.

Held, also, that the fact of the imperfect clause having received the sanction of the legislature, did not excuse the act of A., in having prepared and submitted the same for their adoption. *Ib.*

Taxation of Bill of Costs of.] See SOLICITOR, XVI.

IV. PRACTICE IN COMMITTEE.

3. The practice of the committees of the Houses of Parliament in not insisting on the insertion of special clauses in bills, at the instance of persons alleging grounds for their introduction, if agreements have been entered into between the promoters and the persons asking for the special clauses, whereby the promoters engage that the company when incorporated shall give to the persons asking for the insertion of the special clauses the same benefit as if such clauses were introduced into the bill, observed upon. *Caledonian & Dumbartonshire Junction Railway Co.* v. *Helensburgh Harbour Trustees*, 2 Jur., N. S., 695; 4 W. R. 671.

IV. Election Agent.

4. It is unlawful for any election agent or sub-agent, except the expense agent, to make payments on behalf of the candidate even for current disbursements, and such payments cannot be recovered from the candidate. An election sub-agent, who was a solicitor, employed canvassers for the work of the election, and paid them out of his own moneys. The expense agent having disallowed these payments, the sub-agent brought an action against the candidate in the district registry for the money expended. The candidate obtained the common order to tax the plaintiff's account as a solicitor's bill of costs, and then obtained an order to stay further proceedings in the action pending the taxation. On the taxation the candidate objected to the payments as illegal under the 2nd section of the Corrupt Practices Act 1863 (26 & 27 Vict., c. 29):—Held, that the payments were illegal; that although the sub-agent had an implied authority to employ canvassers, he had no implied authority to pay them, and, therefore, he could not recover the amount expended from the candidate. *Re Parker*, 21 L. R., Ch. D., 408; 52 L. J., Ch., 159; 47 L. T. 633; 32 W. R. 212.

Held, also, that the candidate could take the objection of illegality on the taxation of the bill of costs. *Ib.*

Whether the order to stay proceedings in the action pending the taxation was regular, *quære*. *Ib.*

V. Other Cases.

5. The committee of a projected railway company agreed to subscribe for a certain number of shares, in order to comply with the standing orders of the House of Commons, stipulating, at the same time, that in the event of the project failing, they were to receive the amount so subscribed in full, without any deduction:—Held, that such agreement was a fraud on the House of Commons, and therefore the stipulation for the repayment in full of the sum subscribed was void. *Clements* v. *Bowes*, 1 Eq. Rep. 553.

PARLIAMENTARY DEPOSITS.

See also RAILWAY, VII.

I. RETURN OF, 5395.
II. INVESTMENT, 5397.

I. RETURN OF.

6. An order was made by the Vice-Chancellor on petition for payment to certain persons of a sum of money deposited on behalf of a projected railway company, in compliance with the Standing Orders of the House of Commons; but on a statement of circumstances rendering it improper that such payment should be made, an injunction to restrain the parties from receiving the sum deposited was granted by Vice-Chancellor, notwithstanding the order. *Castendieck* v. *De Burgh*, 4 Rail. Ca. 386.

7. Five of the directors of a projected railway company by petition prayed the payment out of court of a large sum standing in their names in the Bank of England, which had been paid in by them, in compliance with two standing orders, to two bankers and the

gentlemen (not petitioners). The order was made. *Exp. Boston & Sheffield Railway Co.*, 4 Rail. Ca. 230.

1. An injunction had been obtained, restraining the members of the managing committee of a railway company from obtaining payment of the deposit out of court, on account of alleged misconduct on the part of the company. It afterwards appeared that the deposit had been paid out of a fund which was the joint property of that railway company and of two others which had been amalgamated with it. The injunction was dissolved as to a part of the deposit, proportionate to that part of the fund which was the property of the other companies. *Goodman* v. *De Beauvoir*, 10 Jur. 938.

2. A railway company (whose bill at the close of a session of parliament was before the House of Lords) sought by petition to get the deposit lodged by them in the Bank of England, previously to the session, paid out to one of the five directors, in whose name the deposit had been made:—Held, that this case came within the alternative contained in s. 4 of the 1 & 2 Vict., c. 117, and the order was made for payment to the five directors, it not appearing that the one director returned in the prayer of the petition had been by all appointed to receive it. *Exp. Wilkinson, Re London & Portsmouth Direct Railway Co.*, 4 Rail. Ca. 78.

3. Injunction granted to restrain the payment out of court to the directors of a railway company of the parliamentary deposit. *Gilbert* v. *Cooper*, 4 Rail. Ca. 396; 10 Jur. 580. *Lewis* v. *Cooper*, 4 Rail. Ca. 413; 10 Jur. 602.

4. Committee-men of a provisionally registered railway company entered into an agreement with two incorporated canal companies for the purchase of the canals by the railway company, in the event of power being obtained from parliament for that purpose, with a proviso that the committee-men should provide out of their own moneys a deposit, which was to be forfeited if no Act should be obtained. The deposit was paid by a cheque headed with the name of the railway company, signed by three committee-men, and countersigned by the secretary. It was paid by means of a credit transferred to the account of the railway company from that of another provisionally registered railway company, by some of the committee-men who were directors of both. This transaction was not within their powers in either capacity, but the money was subsequently repaid to the latter railway company out of the funds of the former. No Act was obtained, the first-mentioned railway company was dissolved, and was ordered to be wound up:—Held, that notwithstanding the unauthorized transfer of credit, the deposit was trust money of the first-mentioned railway company, as between its subscribers and the canal companies: also, that the form of the cheque, and the circumstances under which it was received, affected the canal companies with notice of the trust; and held, that a suit sanctioned by the Master under the Winding-up Act, by one of the subscribers to the first-mentioned railway company, on behalf of himself and the other subscribers, except those who were defendants, against the canal companies, the committee-men, and the official manager of the railway company for the recovery of the deposit, was properly constituted. *Bryson* v. *Warwick & Birmingham Canal Co.*, 4 De G. M. & G. 711; 18 Jur. 47; 23 L. J., Ch., 133.

5. Where a bill is introduced into parliament for the construction of several railways, and the money is paid into court under the standing orders of parliament, and afterwards the bill is withdrawn as to some of the railways, the Court will not order a proportioned part of the fund in respect of the abandoned railways to be paid out to the promoters, as such withdrawal is not within the meaning of s. 5 of the 9 & 10 Vict., c. 20. *Re Aberystwith Railway Co.*, 7 Jur., N. S., 510, 564; 30 L. J., Ch., 674; 4 L. T., N. S., 537.

6. It is not contrary to the policy of the 9 & 10 Vict., c. 20, providing for a deposit in respect of the estimated cost of works for which parliamentary authority is sought, to make the deposit with borrowed funds. *Scott* v. *Oakley*, 10 Jur., N. S., 648; 33 L. J., Ch., 612; 12 W. R. 728; 4 N. R. 258.

A bank advanced a sum of money on behalf of a railway company for the deposit required by parliament from the promoters, upon an agreement that unless the money was previously repaid, the bill should not be read a third time in the House of Lords. The money was accordingly deposited in the Court of Chancery on behalf of two persons, one of whom was named by the bank, and the other by the promoters. Afterwards the bank, without receiving the money, consented to the third reading of the bill in the House of Lords upon an understanding that the directors of the company would as soon as practicable procure a bond (upon the execution of which the deposit was by the special Railway Act made returnable) to be given to the Lords of the Treasury, and that the nominee of the company should concur in such acts as would be requisite to obtain a return to the bank of the deposit. The Act passed, and a bond was executed to the Lords of the Treasury; but the nominee of the company refused his consent to any application to obtain a return of the deposit. Upon a bill by the bank against the two nominees and the railway company:—Held, that the case was properly one for a bill in equity; that the agreement was neither illegal nor against public policy; and that the directors of the company were not necessary parties in their individual capacity. *Ib.*

Held, also, by the Master of the Rolls, that the mere fact of the deposit being with the Accountant-General of the Court of Chancery was sufficient to attract the jurisdiction of that Court. *Ib.*

7. A certificate of the withdrawal of a railway bill, signed by the Deputy Speaker, is sufficient to warrant the Court in making an order for the return of a parliamentary deposit, though there is no evidence that the certificate is signed during the illness of the Speaker. *Exp. Stockbridge Railway Co.*, 2 L. R., Eq., 364; 12 Jur., N. S., 465; 14 W. R. 826.

The Court will, for this purpose, notice the standing orders of the House of Commons. *Ib.*

8. A petition for payment of the parliamentary deposit to the solicitor of a railway company, if sealed with the common seal, is sufficient authority, and a power of attorney

is unnecessary. But the Court will not act upon any other documents, not being part of the petition, although sealed with such common seal. *Re Dartmouth & Torbay Railway Co.*, 9 W. R. 609.

1. The promoters of a railway company paid their deposit into court, under the Railways Construction Act 1864, upon obtaining the usual certificate of the Board of Trade. The bill had passed through the House of Commons, and had passed the first reading in the House of Lords; but no further progress could be made, in consequence of the rules of the House requiring certain stages to be passed at an earlier period of the session:—Held, upon petition for payment of the deposit out of court, that although this case was omitted from the Railways Construction Act, the Court had power to make the order. *Re Widnes Railway Co.*, 15 L. R., Eq., 108; 42 L. J., Ch., 352.

2. A railway company in 1873 obtained an Act of Parliament authorizing them to construct a branch line, the parliamentary deposit being paid by B., who was the principal proprietor in the company, and the Act containing the usual provisions for return of the deposit, if, as happened, the requirements of the Act were not complied with. In 1875 a receiver of the branch undertaking was appointed, and in 1876 an Act was obtained extending the time for completion of the line to May 1881. In 1880 an Act was obtained for the abandonment of the undertaking providing that rights to compensation should not be affected thereby, and that, subject to such rights, and the protection of the company's creditors, the Court might order the deposit money to be repaid to the persons named in the parliamentary warrant. There were no creditors' claims in respect of the branch undertaking, but the costs of the Act of 1876 and the Abandonment Act were owing to B., who had paid them, and the general creditors of the company had large claims. On the application of B., as representing the persons named in the warrant, for the payment to him of the deposit money:—Held, that the deposit money had become part of the general assets of the company, and must be applied for the benefit of the general creditors. *Re Manchester & Milford Railway Co.*, 45 L. T. 129.

3. A company, incorporated under the Companies Acts, obtained a provisional order to construct a tramway. No tramway was ever commenced, and the company was ordered to be wound up. The only shareholders were the subscribers to the memorandum of association; the only debt due from the company was less than the amount of the deposit fund. The Court, on the petition of the official liquidator, under the discretion given by the Tramways Act 1870, rule 26, ordered the deposit fund to be paid out to the petitioner, to be applied by him for the benefit of the company's creditors, and refused to consider it forfeited to the Crown. *Re Tynemouth Borough Tramway Co.*, 33 L. T., N. S., 8.

4. A private Act of Parliament incorporating a company provided that on non-completion of the proposed works or failure to pay up and expend on the works half the authorized capital, the parliamentary deposit should (if not required for compensation to landowners or for damage to public roads) be either forfeited to Her Majesty, or, "in the discretion of the Court, if the company is insolvent and has been ordered to be wound up or a receiver has been appointed," be wholly or in part paid to such receiver or to the liquidators of the company, or be otherwise applied as part of the assets of the company "for the benefit of the creditors thereof." The works were not executed, a small portion only of the capital was paid, and the company was ordered to be wound up on the ground that it was unable to pay its debts. There were no claims for compensation:—Held, that the winding-up order was not a proof that the company was insolvent within the meaning of the Act, and that the discretion to apply the deposit in payment of the company's debts would not arise until calls to the extent of the whole authorized capital still unpaid had been made upon the contributories. *Re Bradford Tramways Co.*, 25 W. R. 88; 4 L. R., Ch. D., 18; 46 L. J., Ch., 89; 35 L. T., N. S., 827.

The order of the Vice-Chancellor (2 L. R., Ch. D., 373; 24 W. R. 815; 34 L. T., N. S., 478) directing payment to the liquidators was therefore discharged, without prejudice to any future application by the liquidators if they could show that, after using all the assets which could reasonably be got in, they were still unable to pay the debts. *Ib.*

5. The intention of the Board of Trade regulations under the Tramways Act 1870, relative to the ultimate disposal of the deposit made by a tramway company on obtaining a provisional order authorizing the construction of their tramway, is, first, that the promoters of the company are not, by any subterfuge or device, to get back the deposit, either directly or indirectly, if the tramway is not completed; secondly, that, on an application under the 28th rule for application of the deposit, the creditors only are to be considered, and not the shareholders; and, thirdly, that the only creditors to be considered are meritorious creditors, coming with a *bonâ fide* case. Otherwise the deposit will be forfeited to the Crown. *Re Lowestoft, Yarmouth, & Southwold Tramways Co.*, 6 L. R., Ch. D., 484; 46 L. J., Ch., 393; 25 W. R. 525; 36 L. T., N. S., 578.

6. An application for payment out of a parliamentary deposit not previously payable is long vacation business. *Re Wigan Junction Railway Act*, 44 L. J., Ch., 774; 10 L. R., Ch., 541.

II. INVESTMENT.

7. Where, by the prayer of a petitioner, the required parliamentary deposit of a railway company is sought to be invested in Exchequer bills, the Court will give the parties liberty to lay out the same in any of the parliamentary stocks by the accountant-general, or in Exchequer bills from time to time, as may be most convenient to the parties. *Re Manchester, Huddersfield, & Great Grimsby Railway Co.* 4 Rail. Ca. 204.

8. In 1 & 2 Vict., c. 117, the term "government securities" will include new 3*l.* 5*s.* per cent. bank annuities. *Exp. Newport, Abergavenny, & Hereford Railway Co.*, 11 Jur. 160.

1. Parliamentary deposits may be invested in India stock. *Re Southwold Railway Company's Bill*, 45 L. J., Ch., 800; 24 W. R. 293; 1 L. R., Ch. D., 697.

2. A sum of money deposited in the Bank of England pursuant to 9 Vict., c. 20, is not cash under the control of the Court within the order of the 1st of February 1861, and can only be invested in consolidated or reduced bank annuities, or in Government securities, as provided by s. 4. *Exp. Great Northern Railway Co.*, 9 L. R., Eq., 274.

An application for an order for investment of such a fund in Bank Stock or New East India Stock (in which trustees are authorized to invest by the 30 & 31 Vict., c. 132) refused. *Ib.*

3. An application by the promoters of a new railway that the parliamentary deposit might be invested by a private broker, who offered more advantageous terms than the paymaster-general's broker, was refused. *Exp. Bolton Junction Railway Co.*, 24 W. R. 451. S. P. *Re Bolton Tramways Act*, 34 L. T., N. S., 230.

4. An application by the promoters of certain new railways, that the parliamentary deposits might be invested by a private broker, who offered more advantageous terms than the paymaster-general's broker, was acceded to. *Re West Riding & Lancashire Railways Undertaking*, 24 W. R. 357; 34 L. T., N. S., 168.

PAROL.

— *Parol Promises and Representations in Respect of Marriage.* See SETTLEMENT.
— *Variation of Contract by.* See LANDLORD AND TENANT, I. IV.—SPECIFIC PERFORMANCE.
— *When the Parol may demur.* See PRACTICE (JUDGMENTS, DECREES, AND ORDERS).
See also PRACTICE (EVIDENCE).

PARTIAL EXECUTION OF POWER.

See POWER.

PARTICEPS CRIMINIS.

5. A party to a fraud cannot file a bill against his accomplice to prevent him from taking more of the spoil than his share, for the Court will not interfere to enforce honour among thieves. *Hamilton* v. *Ball*, 2 Ir. Eq. R. 191.

6. A., the proprietor of a newspaper, prevailed on B. to make and deliver to the Stamp Office, an affidavit, that he, B., was the proprietor of the paper. B. afterwards agreed to sell the paper to D. A. having become insolvent, his assignees filed a bill to set aside the sale for fraud:—Held, that as B. had, at A.'s instance violated the 38 Geo. 3, c. 78, which requires th true names of the proprietors of newspapers t be inserted in the affidavit, his assignees wer not entitled to the relief as required. *Harme* v. *Westmacott*, 6 Sim. 284.

7. A petitioning creditor fraudulently sue out a commission, and prevails upon twelv persons to make proofs on fictitious debts, fo the purpose of carrying the choice of assignee: which object was attained, in opposition t the *bonâ fide* creditors. These assignees ar afterwards removed, but not till one of ther absconds with a large sum belonging to th bankrupt's estate; and when the whole frau is at length discovered, the proofs are ordere to be expunged, and the dividends received o them repaid. Two of the parties, however, hav in become insolvent, are unable to repay the divi dends, and the estate in other ways sustain considerable loss from fraudulent proofs. Th fresh assignees, who had been appointed unde an order of the Court, petitioned that five of th party who had made such fraudulent proof might be ordered to make good the sum at stracted by the defaulting assignee, and all th other loss which had thus been occasioned t the estate. *Semble*, 1st. That as there was n proof of a general conspiracy among thes parties to put any one fictitious debt on th proceedings, but merely a conspiracy of eac individual, with the petitioning creditor, t prove his own fictitious debt, the Court coul not make the order prayed for. 2nd. That a it did not appear that any of the parties con templated the abstraction of the funds, by th defaulting creditor, at the time of their respec tive proofs, the Court had no jurisdiction t order them to make good the loss experience by his default, which was only a substantiv ground of charge against him, in his characte of assignee. *Exp. Brand*, 1 Dea. 308; 2 Mont & A. 707; 5 L. J., N. S., Bky., 57.

8. A person who is *particeps criminis* is no entitled to the costs of setting aside bond given for an illegal consideration. *Morgan* v *Bruen*, Ll. & G. *temp.* Sugd. 180.

9. Fraud affects only as far as it extends the Court will not say *participes criminis* shal have no benefit of the agreement in any par *Lane* v. *Page*, Ambl. 235.

10. Where once a fraud has been committe not only is the person who has committed th fraud precluded from deriving any benefit fro it, but every innocent person is so likewise unless there has been some consideratio moving from himself. *Scholefield* v. *Templer* 1 Johns. 155; 5 Jur., N. S., 619; 28 L. J., Ch. 452.

By seeking to derive any benefit under suc a transaction, or to retain any benefit resultin therefrom, a third person, however innocent o the fraud in its inception, becomes *particep criminis*. *Ib.*

It is otherwise when there has been con sideration moving from the innocent party *Ib.*

11. Stock was settled on a wife, for her sepa rate use, for life, with a power of appointmen by will. The trustees, at the request of hus band and wife, sold out the stock, and pai the proceeds to the husband, who afterward became bankrupt. The wife filed a bill t compel the trustees to replace the stock, an

obtained a decree, under which the trustees transferred part of the stock into court, and they were allowed time to transfer the remainder. The wife died, having by her will appointed the stock to her husband, and appointed him her executor. He filed a bill of revivor and supplement against the trustees and his assignees, claiming the stock under the appointment, and praying the same relief as his wife might have had. But, as he had received proceeds of the stock sold out, his bill was dismissed. *Nail* v. *Punter*, 5 Sim. 555.

1. This Court will entertain a bill for a discovery, and to perpetuate evidence, in aid of a defence to an action at law on a contract, although the discovery and evidence are to establish that the contract was void, as corrupt, illegal, and unconstitutional, and that both parties were *in pari delicto*. *Longfield* v. *Aubrey*, 1 Hog. 300.

2. The Court would not enforce the terms of a contract between two solicitors, whereby the one, who was solicitor for minors in a matter and several causes, agreed, without notice to the Court or the friends of the minors, to hand over to the other, and the other to undertake, the business on behalf of the minors, to be conducted by the latter in the name of the former, on the terms of getting half the profits, although the latter had, in pursuance of the contract, conducted the business for a year, and made large expenditures, such contract being at variance with the interests of minors and the policy of the Court. Both parties to such a contract being *in pari delicto*, the Court would not act for either of them. *Exp. Leech*, 5 Ir. Eq. R. 371.

3. An agreement between an insolvent debtor and his assignee, by which an estate of the insolvent is to be held in trust by the assignee, to pay out of the rents and profits, annuities to the insolvent and his wife, and the surplus towards the extinction of a debt owing to the assignee, is a transaction which, being brought before a court of equity, at the instance of the insolvent himself, must be rescinded, on the ground of public policy. *M'Neill* v. *Cahill*, 2 Bligh. 229.

4. Parties to a fraudulent assignment by trader, cannot sue out a commission of bankruptcy founded thereon. *Exp. Kilner*, Buck. 104.

5. The commission of a petitioning creditor, who with the knowledge of two or three of the creditors, received his debt from the bankrupt, superseded under the stat. 5 Geo. 2, c. 30, s. 24, at the petition of a creditor privy to the transaction. Whether that creditor will be permitted to sue out a new commission, *quære*. *Exp. Brine*, Buck. 19.

6. Party assenting to deed creating act of bankruptcy is incompetent as petitioning creditor. *Back* v. *Gooch*, 1 Holt 13. But see *Doe* v. *Anderson*, 1 Stra. 262.

7. Creditor assenting and acting under absolute bill of sale for benefit of creditors, but who do not sign deed, cannot sue out commission against debtor, on ground of bill of sale or commission of bankruptcy. *Exp. Shaw*, Madd. 598.

8. The rule "*in pari delicto melior est conditio possidentis*" preventing suit is not universal, admitting degrees of guilt by concurring in the same criminal act. *Osborne* v. *Williams*, 18 Ves. 379.

9. In general cases, where a debt is cut down by the policy of the law, the complaint may be by *particeps criminis*. *Exp. Kirk*, 15 Ves. 469.

10. Relief given to *particeps criminis* on ground of public policy. *Hatch* v. *Hatch*, 9 Ves. 292; 1 Smith 226. But no costs. *Debenham* v. *Ox*, 1 Ves. 277.

11. Smuggling transactions, or illegal dealings in stock, shall be brought into an account, though the Court would not execute the contract. *Watts* v. *Brooks*, 3 Ves. 613. But see *Knowles* v. *Haughton*, 11 Ves. 168; 1 Ball. & B. 360.

12. Where parent had objected to daughter's marriage with an individual, and she entered into a secret bond to forfeit 500*l*. if she did not marry him in thirteen months after parent's death: on her application for relief against bond, decreed that it should be cancelled, such a transaction being encouragement to disobedience and fraud on parents. *Woodhouse* v. *Shepley*, 2 Atk. 535.

13. This Court will decree money overpaid in pursuance of an usurious contract to be accounted for, notwithstanding the agreement of the oppressed party to allow such payments. *Bosanquett* v. *Dashwood*, Forrest. 38.

In the case of money lost at gaming and paid, possibly this Court will refuse relief, the plaintiff in equity being *particeps criminis*. *Ib.*

14. *Particeps criminis*, in the case of fraud, is the most proper person to discover and prove it, especially when what he so proves turns to his own prejudice. *May* v. *Harman*, 4 Bro. P. C. 156.

15. A., entrusted by B. to receive the interest on tallies, receives the principal and fails, and afterwards compounds with his creditors; but B. would not come in without having a greater composition than the rest, which A. agrees to give; A. brings a bill to be relieved against this underhand agreement, but he having been guilty of a great fraud and breach of trust, and having agreed to make some satisfaction, the Court would not relieve him, but dismissed the bill. *Small* v. *Brackley*, 2 Vern. 602.

16. Account decreed where one party had freighted ship with contraband goods. *Dover* v. *Opey*, 2 Eq. Abr. 7.

17. Parties to a contract which is against public policy or illegal, are not always regarded as being *in pari delicto*, but public policy is sometimes considered as advanced by allowing either or the more excusable of the parties to sue for relief against the transaction. *Reynell* v. *Sprye*, *Sprye* v. *Reynell*, 8 Hare 275. Affirmed 1 De G. M. & G. 660; 21 L. J., N. S., Ch., 633.

18. Where a party filed a bill to be relieved from a deed, made in consideration of future cohabitation, and in pursuance of an alleged contract to provide for the woman only during the connection, and the bill was so framed as to make it the gist of the complaint, that the immoral contract had not been performed on the part of the woman, the bill was dismissed. *Batty* v. *Chester*, 5 Beav. 103.

19. Merchants who, by the direction of an executor, their commercial correspondent, applied a fund which they knew to be part of testator's assets, in satisfaction of advances

made by them in the course of trade to relieve the embarrassments of their correspondent, were held to be responsible for the fund so applied, to general pecuniary legatees, under the will of the testator. *Wilson* v. *Moore*, 1 Myl. & K. 337.

1. Where the time for opening a fiat expires by the voluntary act of the petitioning creditor, and it appears that it was issued under suspicious circumstances, namely, for effecting a compromise with the creditors, and not with a *bonâ fide* intention of working it; and a second fiat is issued by another creditor under Lord Loughborough's General Order, the Court will not supersede the second fiat merely because it was issued by a creditor who was a party to the intended compromise under the first; unless it is clearly for the advantage of the general creditors that the first should stand and the second be superseded. *Exp. Anger*, 2 Dea. & Ch. 67.

2. If, at a meeting of creditors, one of the creditors dissent from the execution of a deed of assignment, *quære*, whether he can issue a commission upon it. *Exp. Bayly*, Mont. & M. 438.

3. Where a liability arises from the wrongful act of several parties, each is liable for all the consequences, and there is no contribution between them, and each case is distinct, depending upon the evidence against each party. *Att.-Gen.* v. *Wilson*, Cr. & Ph. 1; 10 L. J., N. S., Ch., 53; 4 Jur. 1174. And see S. C. on demurrer, 9 Sim. 30; 7 L. J., N. S., Ch., 76; 1 Jur. 890.

4. Contribution between co-trustees for breach of trust. *Robinson* v. *Evans*, 7 Jur. 738.

5. One makes a lease, and the lessee covenants to pay the rent and to repair; the lessee makes 100 under-leases. The rent is behind, and the premises out of repair; the original lease is avoided for non-payment of rent. Some of the under-lessees bring a bill to be relieved against the forfeiture; equity will not apportion the rent; but the plaintiffs must pay the whole rent in arrear and repair all the houses, and may compel the other under-lessees to contribute. *Webber* v. *Smith*, 2 Vern. 103.

6. Contribution enforced among assignees in bankruptcy, to reimburse a payment by one under an order for a loss occasioned by their joint act; and the objection that the defendants acted only for conformity upon the representation and advice of the plaintiff, did not prevail. *Lingard* v. *Bromley*, 1 Ves. & B. 114.

No contribution between wrongdoers upon entire damages, for a part. *Ib.*

7. The principle that no rights of indemnity and contribution exist as between wrongdoers is confined to cases where the transaction is actually illegal or void, or where the fraud is so great that on moral grounds the Court will not entertain a suit for the relief of the malfeasors. The principle is further limited to cases where the fraudulent or illegal transaction is itself the basis of the claim, and does not apply where the transaction, though leading to that which is the basis of the claim, is separable from it. *Power* v. *Hoey*, 19 W. R. 916.

8. M. wrote to B. to the effect that he had forged B.'s name by putting it with his own to a bill of exchange for 100*l.*, which would become due in a few days. He implored B. to meet the bill, and offered, if he would d so, to give him a bill of sale of all his propert to secure what he owed him. B., who wa already an unsecured creditor of M. for 100*l* paid the 100*l.* bill, and took a bill of sale o all M.'s property to secure 200*l.* Three week later B. entered and sold the property an satisfied his debt. The following month M was adjudicated a bankrupt, the act of bank ruptcy alleged being the execution of the bil of sale. The trustee applied for an order tha B. should refund the proceeds of sale receive by him, on the ground that the bill of sal was void as being given only for a past debt and as being the price of a bargain for th concealment of a felony:—Held, that th wrong done not being an offence against th bankrupt law, the trustee was in no bette position than the bankrupt would have been and that, the latter having been a party t the wrong, the maxim *In pari delicto potio est conditio possidentis* would have applied and no action could have been maintained *Exp. Butt, Re Mapleback*, 46 L. J., Bky., 14; L. R., Ch. D., 150; 13 Cox C. C. 374; 35 L. T. N. S., 503; 25 W. R. 103. Reversing 35 L. T. N. S., 172.

Semble, that the transaction did not amoun to compounding a felony, or to misprision o felony. *Ib.*

PARTICULARS.

See PRACTICE (PARTICULARS).

PARTICULARS OF SALE.

See VENDOR AND PURCHASER.

PARTIES.

See PRACTICE (PARTIES).

PARTIES ABROAD.

See FOREIGNER AND FOREIGN LAW—PRACTICE (PARTIES).

PARTITION.

— *Conversion by.* See CONVERSION, I. II. 5.
— *Revocation of Wills by.* See WILL.
— *Presentation to Benefice after.* See ECCLESIASTICAL PERSONS AND PROPERTY, II. 3.

See also BOUNDARIES.

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II. IN WHAT CASES, 5402.

See also III. *post.*

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2. *Where Remedy at Law*, 5402.
3. *Where Power of, or Trust for, Sale or Exchange*, 5403.

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6. *Tenants for Life or Remaindermen*, 5406.
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See III. *ante.*

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X. PROCEEDINGS FOR.
1. *Pleading*, 5415.
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3. *Costs*, 5416.
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5. *Parties.*

See III. *ante.*

XI. CONVEYANCES 5419.

XII. OTHER MATTERS, 5420.

I. GENERAL PRINCIPLES.

1. Decree for partition is matter of right. *Parker* v. *Gerrard*, Ambl. 236.

2. A series of decisions has settled that a commission of partition is due of common right to every tenant in common, however minute his share, even though the division might diminish, or possibly destroy the value to both. *North* v. *Guinan*, Beat. 342.

3. Difficulty in making a partition no objection to a decree for it. *Warner* v. *Baynes*, Ambl. 589.

4. The estate of a tenant in common cannot be so settled on marriage as to prevent the right of the others to make partition. *Abel* v. *Heathcote*, 2 Ves. J. 100; 4 Bro. C. C. 276.

5. Partition is a proceeding at common law; but chancery entertains suits for it, though no original jurisdiction, and no express authority is given by the statute as to joint tenants. *Mundy* v. *Mundy*, 2 Ves. J. 124.

6. No objections to partition that other persons may come into *esse* and be entitled. *Wills* v. *Slade*, 6 Ves. 498.

7. On bill for partition and account of rents and profits, a decree for that purpose will be made, and relief will not be confined merely to a partition. *Lorimer* v. *Lorimer*, 5 Madd. 363.

8. Partition between tenants in common and joint tenants, by statute 31 Hen. 8 (extended by statute 32 Hen. 8), though limited interests, for life or years; and the same right in equity, by bill, as at law by writ. *Baring* v. *Nash*, 1 Ves. & B. 555.

Bill for partition by lessee for years. *Id.* 551.

No objection to a partition from the minuteness of the interest, the inconvenience, difficulty, or reluctance of the other tenants in common. *Id.* 554.

Equity has a concurrent jurisdiction in partition. *Id.* 555.

Partition is discretionary in court in case of suspicious title; but if clear it is a matter of right. *Ib.*

9. Jurisdiction in cases of partition confined to statute 31 Hen. 8. *Scott* v. *Fawcett*, Dick. 299.

10. On a partition in chancery, every part of the estate need not be divided, but sufficient if each tenant in common, etc., have an equal share of the whole. *Clarendon* v. *Hornby*, 1 P. W. 446.

11. On a bill for a partition, when there is a small failure in proof of title, or when the shares of the parties are alone doubtful, the Court will grant an inquiry; but where there is a material omission in the proof, the plaintiff's title to the bill will be dismissed with costs. This course was pursued, though the plaintiff had recovered in ejectment a portion of the estate from the defendant, it not appearing what were the circumstances of that proceeding, or whether the plaintiff's title, as alleged, was therein proved. *Jope* v. *Morshead*, 6 Beav. 213; 12 L. J., N. S., Ch., 190.

12. Difference between partition at law and in equity. The former operates by the judgment of a court of law, conclusive on the parties, the latter proceeds on conveyances to be executed between the parties, and cannot be effectual if the parties be incompetent to execute. *Whaley* v. *Dawson*, 2 Sch. & Lef. 372.

13. A partition will be decreed in equity only where the plaintiff would be entitled to a partition at law. *O'Hara* v. *Strange*, 11 Ir. Eq. R. 262.

14. Where in a suit for partition the defendants are desirous that there shall be no partition of their several shares, the partition may be confined to the aliquot share of the plaintiff. *Hobson* v. *Sherwood*, 4 Beav. 184.

15. A court of equity, in decreeing a partition, does not act ministerially and in obedience to the call of those parties who have a right to the partition, but upon its general jurisdiction, and will therefore adjust the equitable rights of all the parties interested in the estate, and for that purpose give special instruction to the commissioners of partition, and even in cases of necessity nominate the commissioners. A court of equity, in decreeing a partition, will have regard to the provisions of the stat. 8 & 9 Will. 3, c. 31, s. 4. *Story* v. *Johnson*, 2 Y. & Coll. 586.

II. IN WHAT CASES.

1. *Of what Property*, 5402.
2. *Where Remedy at Law*, 5402.
3. *Where Power of, or Trust for, Sale or Exchange*, 5403.

1. Of what Property.

1. A commission for partition of a house decreed. *Turner* v. *Morgan*, 8 Ves. 143.

2. Decree for partition among several joint proprietors; and no objection from a covenant not to enclose without general consent, rights of common, and the inequality and uncertainty of the shares, in proportion to other estates. The decree directed a reference to the Master to inquire whether the plaintiff and defendants, or any and which, are entitled; and in what shares, according to the respective values of the other estates; and then a commission to divide accordingly; the costs of the partition to be borne by the parties in proportion to the value of their respective interests; and no previous or subsequent costs, by analogy to the proceeding at law. *Agar* v. *Fairfax*, 17 Ves. 533.

3. Bill for partition will lie as to tithes, demurrer overruled. *Gibson* v. *Montfort*, 1 Ves. 494.

4. In the year 1809 S. O. S. died in the possession of a fee simple estate, intestate and leaving one sister, M. A. B., and four nieces him surviving; in the following year an ejectment upon the title was brought, on the part of the four nieces, for a moiety of the estate; to this ejectment defence was taken, but no further proceedings were had. In 1834 a new ejectment was brought by the same parties. The defendants set up as their defence, first, that S. O. S. and his sister (the mother of the four nieces) were illegitimate; secondly, the Statute of Limitations. A verdict was found for the lessors of the plaintiff, but was subsequently set aside as to one-fourth, on the ground that, as to such one-fourth, a party, in whose name a devise in the ejectment ought to have been laid, had been omitted. In 1837 an ejectment was brought for this one-fourth, in the name of the omitted party: a verdict was obtained for the lessor of the plaintiff, but was set aside, in consequence of the misdirection of the judge upon the question of adverse possession. In 1839 a third ejectment was brought, and a verdict for the lessor of the plaintiff; and this latter verdict was subsequently, upon argument, supported by the Court of Exchequer: —Held, upon a bill filed on the part of some of the nieces for a partition, that, having regard to all the circumstances of the case, neither of the questions could be considered as open to the defendants, and that the plaintiffs were entitled to a decree for a partition. *O'Sullivan* v. *M'Sweeny*, 1 Dr. 213; 2 Con. & L. 486. And see S. C. at law, Jon. & C. 295; L. & T. 111.

5. Four persons bought some land with the view of selling it in lots as building ground according to a specified plan, and agreed that none of the four should dispose of his share except in a certain manner:—Held, in a suit by the representatives of one of the four against the survivors, that the agreement barred the right to a partition. *Peck* v. *Cardwell*, 2 Beav. 137.

Copyholds and Manors.] 6. Chancery has no jurisdiction to grant partition between tenants in common of copyhold. *Scott* v. *Fawcet*, Dick. 299.

Jurisdiction in cases of partition confined to statute. *Ib.*

7. A bill in equity will not be for a partition of copyholds. *Horncastle* v. *Charlesworth*, 11 Sim. 715; 10 L. J., N. S., Ch., 35; 4 Jur. 1179.

8. On a bill for a partition, when there is a small failure in proof of title, or when the shares of the parties are alone doubtful, the Court will grant an inquiry; but where there is a material omission in the proof of the plaintiff's title, the bill will be dismissed with costs. This course was pursued, though the plaintiff had recovered in ejectment a portion of the estate from the defendant, it not appearing what were the circumstances of that proceeding, or whether the plaintiff's title, as alleged, was therein proved. *Jope* v. *Morshead*, 6 Beav. 213; 12 L. J., N. S., Ch., 190.

Independently of the 4 & 5 Vict., c. 35, s. 85, a court of equity has no jurisdiction to direct the partition of copyholds, nor of customary freeholds. *Ib.*

9. A specific performance of an agreement between joint tenants of copyhold estate for partition enforced, and a decree for mutual surrenders, although no jurisdiction to decree partition of copyholds before 4 & 5 Will. 4, c. 35. *Bolton* v. *Ward*, 4 Hare 530; 14 L. J., N. S., Ch., 361; 9 Jur. 591.

10. The partition of a manor may be compelled in equity. *Hanbury* v. *Hussey*, 14 Beav. 152; 20 L. J., N. S., Ch., 557; 15 Jur. 596.

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Lands abroad.] 12. A commission to make partition, cannot be awarded into Ireland. *Cartwright* v. *Pettus*, 2 Ch. Ca. 214.

13. On a bill for a partition of lands in Ireland, and an account of waste committed there, a demurrer was allowed as to the partition, and overruled as to the account. *Kennedy* v. *Cassillis* (*Earl*), 2 Swan. 323.

2. Where Remedy at Law.

14. A plaintiff filed a bill for a partition (as between the defendant and himself) of real property devised by the will of the testator in the cause. The defendant had for some time been in exclusive receipt of the rents and profits:—Held, that his remedy was at law, and that the bill must be retained for a year, with liberty to the plaintiff to bring an action against the defendant. *Bolton* v. *Bolton*, 17 L. T., N. S., 556.

The Court, intimating an opinion adverse to the plaintiff upon the construction of the will, dismissed the appeal with costs. S. C. 19 L. T., N. S., 298.

15. A person claiming to be legally entitled to an undivided share in a freehold estate, filed a bill for partition, raising the question whether, upon the construction of the settlor's will, the estate passed under a specific or under a residuary devise:—Held, that the Court had no jurisdiction to try such a question in such a suit, and the bill was ordered to be retained for a year, with liberty to the plaintiff to bring such action as he might be advised. *Slade* v. *Barlow*, 7 L. R.,

Eq., 296; 38 L. J., Ch., 369. S. P. *Bolton* v. *Bolton*, 7 L R., Eq., 298. n.; 17 W. R. 366; 20 L. T., N. S., 10.

Application that the defendant might be put on terms not to set up the defence of the Statute of Limitations was refused. *Ib.*

1. A bill in equity for partition ought not to be made the means of trying a title, which should properly be tried at law. But, although a plaintiff on such a bill must prove his title to that part of the property which he seeks to have divided, there is no rule that a bill for a partition cannot be maintained, if the defendant denies the title of the plaintiff, and that title is purely a legal one. If, in such a case, the partition of the property is the primary object of the bill, and the establishment of the plaintiff's title is incidental only to that relief, the Court will make a decree for a partition, and with costs. *Giffard* v. *Williams*, 38 L. J., Ch., 597; 8 L. R., Eq., 494; 18 W. R. 56; 21 L. T., N. S., 575.

When in a partition suit the question is one of disputed legal title, and the plaintiff has not established his claim by clear and satisfactory evidence, the Court will not decide on his claim, but will retain the bill for a year, with liberty to him to bring such action as he may be advised. S. C. 39 L. J., Ch., 735; 5 L. R., Ch., 546; 18 W. R. 776.

2. Where the title was disputed, a demurrer was overruled and the bill retained for a year, that the plaintiff might take the necessary steps to confirm her title. *Ward* v. *Ward*, 18 W. R. 87; 21 L. T., N. S., 699.

3. A bill alleging that the plaintiff is entitled to an undivided share in certain lands, and the entirety of certain other lands, and that he had been ousted by one of his co-tenants, and praying a partition, discovery, and account of profits is demurrable, the remedy being at law. *Moore* v. *Kempston*, 18 W. R. 803.

4. In a suit for partition a question of law arose; but the Court, no one objecting, exercised jurisdiction, but ordered the decree to be prefaced with a statement of the desire of all parties, other than that of an infant, that the case should be decided. *Burt* v. *Hellyar*, 14 L. R., Eq., 160.

3. Where Power of, or Trust for, Sale or Exchange.

5. Power of sale not well executed by a partition. *M'Queen* v. *Farquhar*, 11 Ves. 467.

Power of exchange or partition does not include a power of sale. *Id.* 473.

6. Partition of an estate in common a good execution of a power to sell or exchange. *Abel* v. *Heathcote*, 2 Ves. J. 98; 4 Bro. C. C. 278.

7. *Semble*, that a devise on trust to sell and dispose of property, consisting partly of an undivided share, does not authorise the trustees to concur in a partition. *Brassey* v. *Chalmers*, 4 De G. M. & G. 528; 16 Beav. 223.

But where trustees had under such a trust concurred in a partition which was shown to be beneficial to the *cestuis que trustent*, who were infants, the Court, on a claim to which the infant *cestuis que trustent* were parties, made a decree that the lands should be taken to be divided according to the partition already made. *Ib.*

8. A power to sell and exchange merely, does not so clearly authorise a partition that the Court will force on a purchaser a title taken under it. *Bradshaw* v. *Fane*, 3 Drew. 534; 24 L. J., Ch., 413; 4 W. R. 422; 2 Jur., N. S., 247.

But where a power was to make sale and dispose of, or convey in exchange, and the powers to revoke and limit new uses for carrying these powers into effect also referred to disposition, and the declaration as to the application of the money to be obtained referred also in terms to partition:—Held, that on the whole context there was a good power to partition, and the title taken under it was a good title. *Ib.*

9. A decree for the partition of property can be granted notwithstanding the existence of a power given to trustees to sell the property for the purpose of a division. *Boyd* v. *Allen*, 24 L. R., Ch. D., 622; 53 L. J., Ch., 701; 48 L. T. 628; 31 W. R. 544.

10. The Court has no jurisdiction at the instance of the tenant for life and reversioners, *sui juris* and beneficially interested to the extent of a moiety, to direct a sale or partition under the Partition Acts of property, over which there is a discretionary power of sale in trustees still subsisting. *Biggs* v. *Peacock*, 20 L. R., Ch. D., 200; 51 L. J., Ch., 555; 46 L. T. 582; 30 W. R. 615. Affirmed 52 L. J., Ch., 1; 47 L. T. 341; 31 W. R. 148; 22 L. R., Ch. D., 284.

A testator directed the trustees of his will, at such times and in such manner as they should think fit, to sell his copyhold estate, and to hold the proceeds in trust for his widow for life, and after his death for his children. He left six children, all of whom attained a vested interest and were *sui juris*. The widow and three children brought an action for partition of the estate; the other children, who were defendants, demurred:—Held, that the trustees had a trust for sale, and not a mere power; and that it was not put an end to by all the reversioners attaining a vested interest; and therefore the Court had no jurisdiction to decree a partition under the Partition Act. *Ib.*

11. When the testator has himself fixed the period at which the trustees of his will are to sell his real estate and divide the proceeds, the Court has no jurisdiction to anticipate that period by directing a sale in a partition action at the request of persons equitably entitled to an undivided moiety of the property. *Swaine* v. *Denby*, 14 L. R., Ch. D., 326; 49 L. J., Ch., 734; 28 W. R. 622.

12. *Semble*, a power to exchange does not warrant a partition. *Att.-Gen.* v. *Hamilton*, 1 Madd. 214.

13. A power of exchange of lands is properly executed by a partition. *Re Frith and Osborne*, 3 L. R., Ch. D., 618; 35 L. T., N. S., 146; 45 L. J., Ch., 780; 24 W. R. 1061.

Therefore, where an undivided moiety of lands was vested in A., B., and C., as trustees of a settlement which expressly authorised a partition, and the other moiety was vested in D., E., and F., as trustees of a settlement, with power to sell, dispose of, convey, and assign the hereditaments for such a price in money, or for such an equivalent or recompense in lands and hereditaments as to the trustees should seem reasonable, and for that

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14. A plaintiff filed a bill for a partition (as between the defendant and himself) of real property devised by the will of the testator in the cause. The defendant had for some time been in exclusive receipt of the rents and profits:—Held, that his remedy was at law, and that the bill must be retained for a year, with liberty to the plaintiff to bring an action against the defendant. *Bolton* v. *Bolton*, 17 L. T., N. S., 556.

The Court, intimating an opinion adverse to the plaintiff upon the construction of the will, dismissed the appeal with costs. S. C. 19 L. T., N. S., 298.

15. A person claiming to be legally entitled to an undivided share in a freehold estate, filed a bill for partition, raising the question whether, upon the construction of the settlor's will, the estate passed under a specific or under a residuary devise:—Held, that the Court had no jurisdiction to try such a question in such a suit, and the bill was ordered to be retained for a year, with liberty to the plaintiff to bring such action as he might be advised. *Slade* v. *Barlow*, 7 L. R.,

Eq., 296; 38 L. J., Ch., 369. S. P. *Bolton* v. *Bolton*, 7 L. R., Eq., 298. n.; 17 W. R. 366; 20 L. T., N. S., 10.

Application that the defendant might be put on terms not to set up the defence of the Statute of Limitations was refused. *Ib.*

1. A bill in equity for partition ought not to be made the means of trying a title, which should properly be tried at law. But, although a plaintiff on such a bill must prove his title to that part of the property which he seeks to have divided, there is no rule that a bill for a partition cannot be maintained, if the defendant denies the title of the plaintiff, and that title is purely a legal one. If, in such a case, the partition of the property is the primary object of the bill, and the establishment of the plaintiff's title is incidental only to that relief, the Court will make a decree for a partition, and with costs. *Giffard* v. *Williams*, 38 L. J., Ch., 597; 8 L. R., Eq., 494; 18 W. R. 56; 21 L. T., N. S., 575.

When in a partition suit the question is one of disputed legal title, and the plaintiff has not established his claim by clear and satisfactory evidence, the Court will not decide on his claim, but will retain the bill for a year, with liberty to him to bring such action as he may be advised. S. C. 39 L. J., Ch., 735; 5 L. R., Ch., 546; 18 W. R. 776.

2. Where the title was disputed, a demurrer was overruled and the bill retained for a year, that the plaintiff might take the necessary steps to confirm her title. *Ward* v. *Ward*, 18 W. R. 87; 21 L. T., N. S., 699.

3. A bill alleging that the plaintiff is entitled to an undivided share in certain lands, and the entirety of certain other lands, and that he had been ousted by one of his co-tenants, and praying a partition, discovery, and account of profits is demurrable, the remedy being at law. *Moore* v. *Kempston*, 18 W. R. 803.

4. In a suit for partition a question of law arose; but the Court, no one objecting, exercised jurisdiction, but ordered the decree to be prefaced with a statement of the desire of all parties, other than that of an infant, that the case should be decided. *Burt* v. *Hellyar*, 14 L. R., Eq., 160.

3. Where Power of, or Trust for, Sale or Exchange.

5. Power of sale not well executed by a partition. *M'Queen* v. *Farquhar*, 11 Ves. 467.

Power of exchange or partition does not include a power of sale. *Id.* 473.

6. Partition of an estate in common a good execution of a power to sell or exchange. *Abel* v. *Heathcote*, 2 Ves. J. 98; 4 Bro. C. C. 278.

7. *Semble*, that a devise on trust to sell and dispose of property, consisting partly of an undivided share, does not authorise the trustees to concur in a partition. *Brassey* v. *Chalmers*, 4 De G. M. & G. 528; 16 Beav. 223.

But where trustees had under such a trust concurred in a partition which was shown to be beneficial to the *cestuis que trustent*, who were infants, the Court, on a claim to which the infant *cestuis que trustent* were parties, made a decree that the lands should be taken to be divided according to the partition already made. *Ib.*

8. A power to sell and exchange merely, does not so clearly authorise a partition that the Court will force on a purchaser a title taken under it. *Bradshaw* v. *Fane*, 3 Drew. 534; 24 L. J., Ch., 413; 4 W. R. 422; 2 Jur., N. S., 247.

But where a power was to make sale and dispose of, or convey in exchange, and the powers to revoke and limit new uses for carrying these powers into effect also referred to disposition, and the declaration as to the application of the money to be obtained referred also in terms to partition:—Held, that on the whole context there was a good power to partition, and the title taken under it was a good title. *Ib.*

9. A decree for the partition of property can be granted notwithstanding the existence of a power given to trustees to sell the property for the purpose of a division. *Boyd* v. *Allen*, 24 L. R., Ch. D., 622; 53 L. J., Ch., 701; 48 L. T. 628; 31 W. R. 544.

10. The Court has no jurisdiction at the instance of the tenant for life and reversioners, *sui juris* and beneficially interested to the extent of a moiety, to direct a sale or partition under the Partition Acts of property, over which there is a discretionary power of sale in trustees still subsisting. *Biggs* v. *Peacock*, 20 L. R., Ch. D., 200; 51 L. J., Ch., 555; 46 L. T. 582; 30 W. R. 615. Affirmed 52 L. J., Ch., 1; 47 L. T. 341; 31 W. R. 148; 22 L. R., Ch. D., 284.

A testator directed the trustees of his will, at such times and in such manner as they should think fit, to sell his copyhold estate, and to hold the proceeds in trust for his widow for life, and after his death for his children. He left six children, all of whom attained a vested interest and were *sui juris*. The widow and three children brought an action for partition of the estate; the other children, who were defendants, demurred:—Held, that the trustees had a trust for sale, and not a mere power; and that it was not put an end to by all the reversioners attaining a vested interest; and therefore the Court had no jurisdiction to decree a partition under the Partition Act. *Ib.*

11. When the testator has himself fixed the period at which the trustees of his will are to sell his real estate and divide the proceeds, the Court has no jurisdiction to anticipate that period by directing a sale in a partition action at the request of persons equitably entitled to an undivided moiety of the property. *Swaine* v. *Denby*, 14 L. R., Ch. D., 326; 49 L. J., Ch., 734; 28 W. R. 622.

12. *Semble*, a power to exchange does not warrant a partition. *Att.-Gen.* v. *Hamilton*, 1 Madd. 214.

13. A power of exchange of lands is properly executed by a partition. *Re Frith and Osborne*, 3 L. R., Ch. D., 618; 35 L. T., N. S., 146; 45 L. J., Ch., 780; 24 W. R. 1061.

Therefore, where an undivided moiety of lands was vested in A., B., and C., as trustees of a settlement which expressly authorised a partition, and the other moiety was vested in D., E., and F., as trustees of a settlement, with power to sell, dispose of, convey, and assign the hereditaments for such a price in money, or for such an equivalent or recompense in lands and hereditaments as to the trustees should seem reasonable, and for that

purpose to revoke the old uses and to limit other uses and trusts, and a partition deed, purporting to be in exercise of the powers, was executed by the trustees of the two moieties:—Held, that the partition was properly effected by D., E., and F., under their power. *Ib.*

III. PARTIES INTERESTED.

1. *In General*, 5404.
2. *Absent*, 5404.
3. *Infants*, 5405.
4. *Lessees*, 5405.
5. *Lunatics*, 5406.
6. *Tenants for Life and Remaindermen*, 5406.
7. *Tenants in Tail*, 5407.
8. *Married Women*, 5407.
9. *Mortgagors and Mortgagees*, 5407.
10. *Trustees*, 5408.

1. In General.

1. Right of defendants under a decree reserving costs, to a continued representation of all the original plaintiffs (though not necessary parties), as a security for costs. *Blackburn* v. *Jepson*, 3 Swan. 138.

Objections for want of parties, removed by acts of defendants. *Id.* 139.

Parties to a bill for a partition. *Ib.*

2. The bill alleged that the plaintiff had purchased the entirety of a messuage, but that the defendants claimed a moiety thereof, and refused to produce the instrument under which they claimed; and that the plaintiff, believing their claim to be good, had joined with them in granting a lease; and it prayed a discovery and partition. Demurrer for want of equity overruled. *Potter* v. *Waller*, 16 L. J., N. S., Ch., 480; 11 Jur. 464.

3. In decreeing a partition, the Court will have regard to the convenience of any subpurchasers from either of the parties. *Story* v. *Johnson*, 2 Y. & Coll. 586.

4. Tenants or persons having partial interests not necessary parties to suit for partition. *O'Reilly* v. *Vincent*, 2 Moll. 330.

5. One tenant in common having leased his share on a bill for partition, the lessee is a necessary party, and his costs must be borne by the lessor. *Cornish* v. *Gest*, 2 Cox 27.

6. A reversioner in fee expectant on a lease of lives renewable for ever is a proprietor within the meaning of the 5 Geo. 2, c. 9, and must be served with a copy of the petition to divide bog. *Kelly* v. *Shelton*, 1 Jones 555.

The Court has jurisdiction to amend a petition order and commission of partition, under the 5 Geo. 2, c. 9, by inserting therein the name of the party served with the conditional order. S. C. 2 Jones 351.

7. A bill in equity for partition is an analogy to the proceedings at law, and should be so framed that there shall be a party substantially interested, plaintiff and defendant. *Lowe* v. *Franks*, 1 Moll. 137.

8. It is essential to partition to have the legal title before the Court. *Miller* v. *Warmington*, 1 Jac. & Walk. 493. But see *Swan* v. *Swan*, 8 Price 518.

9. *Semble*, a partition may be made as between more than two tenants in common or coparceners. *Bradshaw* v. *Fane*, 4 W. R. 422; 3 Drew. 534; 25 L. J., Ch., 413; 20 Jur. 247.

10. In a partition suit, where the plaintiff and defendant, each claiming a moiety of the estate, produce evidence of title, the Court will not, at the instance of co-defendants who set up a claim to the property, and produce no evidence of title, but allege illegitimacy on the part of the defendant, adjourn the question for further inquiry. *Backhouse* v. *Paddon*, 14 W. R. 273; 13 L. T., N. S., 625.

2. Absent.

11. The 31 & 32 Vict., c. 40, does not render it compulsory upon the Court to pronounce a decree in the absence of any of the parties interested. *Dodds* v. *Gronow*, 17 W. R. 511; 20 L. T., N. S., 104.

12. The Court will not allow a sale, which has been decreed under the Act, to be proceeded with until all persons interested have been served with notice of the decree, but will allow such service to be effected by advertisement upon persons out of the jurisdiction, and who cannot be found, with liberty for the plaintiffs to apply as to proceeding with the sale in case the absent parties do not come in after the advertisement. *Peters* v. *Bacon*, 38 L. J., Ch., 571; 8 L. R., Eq., 125; 17 W. R. 782.

Certain persons interested in property ordered to be sold under the provisions of the Partition Act 1868, had not been made parties to the suit, and were out of the jurisdiction, their addresses being unknown:—Held, that the provisions of the 15 & 16 Vict., c. 86, s. 42, rule 8, and the Consolidatad Order XXXV., rule 18, as to the service of notice of decree, applied to such a case. S. C. 20 L. T., N. S., 729.

13. The Court has jurisdiction to direct an immediate sale in a partition suit in the absence of parties interested in the property, but shown to be out of the jurisdiction. But where it was uncertain whether such absent parties were or were not within the jurisdiction, an inquiry was directed as to the persons interested in the property and their shares therein, and whether such persons were out of the jurisdiction. *Silver* v. *Udall*, 9 L. R., Eq., 227; 39 L. J., Ch., 118; 18 W. R. 665; 21 L. T., N. S., 660.

14. When one of the parties, entitled to a small fraction of an estate, was out of the jurisdiction, and had not been served, and it did not appear that any attempt had been made to serve him:—Held, that a decree for sale could not be made in his absence. *Hurry* v. *Hurry*, 10 L. R., Eq., 346; 39 L. J., Ch., 824; 18 W. R. 829; 22 L. T., N. S., 577.

15. An immediate decree for sale may be made, although one of the parties interested is out of the jurisdiction; but the decree must be served on the absent party before the sale is proceeded with. *Teall* v. *Watts*, 11 L. R., Eq., 213; 40 L. J., Ch., 176; 23 L. T. 884; 18 W. R. 317.

16. The Court will not make an order for payment out to trustees of money produced by a sale under the above Act, where it has been paid into court, and some of the persons interested are married women, and resident in Australia. *Aston* v. *Meredith*, 13 L. R., Eq., 492; 26 L. T., N. S., 281.

17. On the further consideration of a partition

suit it appeared from the chief clerk's certificate that it was not known whether one of the parties who, if living, would be entitled to one-twenty-fourth of the property was alive or dead. He had not been heard of for fourteen years. All the other persons interested appeared and asked for a sale. A sale was ordered accordingly. *Jackson* v. *Lomas*, 23 W. R. 744.

1. An order for sale of real estate under the Partition Act 1868 cannot be made at the hearing, unless all persons interested in the property are parties to the cause. *Mildmay* v. *Quicke*, 20 L. R., Eq., 537.

2. The decree in a partition suit may order a sale, if all parties interested in the estate are parties to the cause, or have been served with notice of decree, and none of them object to a sale. *Harper* v. *Bird*, 32 L. T., N. S., 428; 23 W. R. 646.

3. In a suit for partition or sale the minutes of decrees should contain a direction for sale if it appears that all persons interested are before the Court, and that those representing a moiety of the property desire a sale. *Underwood* v. *Stewardson*, 20 W. R. 668; 26 L. T., N. S., 688.

3. Infants.

4. An infant being entitled to one-ninth of a real estate, and it being for her benefit, the Court, instead of directing a partition, declared the cost a charge on the infant's share, and ordered a sale of the whole estate. *Davis* v. *Turvey*, 32 Beav. 554; 2 N. R. 151.

5. Partition decreed at the hearing without a commission upon the affidavit of two surveyors, with evidence of the partition of the property, showing the fairness of the proposed division, all parties except an infant defendant desiring it, and his father deposing that the proposed partition was for the infant's benefit. *Stanley* v. *Wrigley*, 3 Sm. & G. 18; 1 Jur., N. S., 695; 24 L. J., Ch., 176; 3 W. R. 202; 3 Eq. Rep. 448.

6. A partition decreed without a commission, in a case in which infants were interested, upon satisfactory evidence of the value. *Greenwood* v. *Percy*, 26 Beav. 572.

7. In a suit for the partition of property in which infants are interested, the Court will refuse to enforce a partition not made under a commission; even at the instance of the infants, and on the allegation of their counsel that it will be for their benefit. *Semble*, in such a case, the proper course is to direct a commission to issue. *Howard* v. *Barnwell*, 1 N. R. 172.

8. On a suit for the partition of property in which an infant is interested, the Court will direct a reference to chambers without a commission. *Bull* v. *Bull*, 18 L. T., N. S., 870.

9. Where part of an estate held in undivided shares (one share belonging to an infant), is contracted to be sold, and a bill is filed to carry out that contract and incidentally asks a partition: the Court will direct a sale of the whole by consent, the infant's costs being a charge on his share. *Smith* v. *Birch*, 18 L. T., N. S., 174.

10. In a suit under the Partition Act 1868, for the confirmation of a conditional contract for sale of land to which the infant plaintiff and the infant defendant were entitled as coheiresses, subject to the dower of their mother, an order was made confirming the original contract and directing a sale, and the decree was prefaced by a recital that a sale appeared more beneficial than a division, and that the infant plaintiff requested a sale. *Grove* v. *Cowyn*, 18 L. R., Eq., 387; 22 W. R. 723.

11. When infants prayed for a declaration that premises were divisible amongst them and a defendant, and that the costs of the suit might be taxed, and the plaintiffs' costs declared to be a charge on their shares; for a partition, or sale, and, after payment of the costs, for a division of the proceeds; the Court made a declaration as to the rights of the parties, and directed a sale, but declined to make any order as to the costs until the further consideration of the cause. *Davey* v. *Wietlisbach*, 15 L. R., Eq., 269.

12. In a partition action the request for sale on the part of an infant (Partition Act 1876, s. 6) may be made by his next friend or guardian *ad litem*, as being the "person authorised to act" on his behalf in the action: the word "guardian" in the section meaning guardian *ad litem*. *Rimington* v. *Hartley*, 14 L. R., Ch. D., 630; 43 L. T. 15; 29 W. R. 42.

The Court will not comply with a request for sale made on behalf of an infant under the above section unless it is satisfied that a sale is for the benefit of the infant. *Ib.*

13. The consent required by s. 6 of the Partition Act 1876, of an infant to a sale must be made by the infant's guardian, and not by a next friend or a guardian *ad litem*. So, where a sale was desired in a partition action, and the infant parties had no guardian, the Court intimated that it would appoint their mother on an affidavit of fitness, and directed that the order should appoint the guardian, and recite that the infants by their guardians requested a sale, and go on to order a sale accordingly. *Platt* v. *Platt*, 28 W. R. 533.

14. When a partition suit was instituted by the owners of three undivided sevenths of freehold premises for a sale of the whole, and such sale was not opposed by the guardian *ad litem* of three minors, who, under their father (who directed that no sale should take place until the youngest attained twenty-one), were owners of the remaining four-sevenths, and one of them had come of age before the hearing of the suit, and also desired a sale; the Court made a decree as prayed, directing an inquiry as to whether the acceptance of an offer for the premises would be for the benefit of the minors, and ordered the costs of all parties to be paid ratably out of the purchase money, according to their respective interests. *Thompson* v. *Richardson*, 6 Ir. R., Eq., 596.

Costs.] See X. 3 *post*.

Conveyances.] See XI. *post*.

4. Lessees.

15. Partition between tenants in common, and joint tenants by stat. 31 Hen. 8, extended by stat. 32 Hen. 8 to limited interests, for life or years; and the same right in equity by bill

as at law by writ. *Baring* v. *Nash*, 1 Ves. & B. 555.

1. A partition of a house, held under a lease for the unexpired residue of a term of years, subject to a rent and covenant, refused, the nature of the property and the interest of the parties not warranting a partition. For if it were decreed, the landlord might immediately apply for an injunction to restrain the parties from executing it by any act amounting to waste, and the Court could not protect one of the tenants in common from a breach of covenant, which might be committed by the other. *North* v. *Guinan*, Beat. 342.

Under the English stat. of 32 Hen. 8 the termor of an undivided share might have a partition, though it would only bind during the term. *Id.* 345.

2. One of two tenants in common of an estate agreed to grant a lease of the mines under it:—Held, that the lessee was entitled to a decree for specific performance, and for a partition of the estate. *Heaton* v. *Dearden*, 16 Beav. 147.

5. Lunatics.

3. The circumstance of a tenant in common being a person of weak intellects, will not prevent the Court from making a decree for a partition as against such party. *Hollingworth* v. *Sidebottom*, 8 Sim. 620; 7 L. J., N. S., Ch., 2.

One of three tenants in common was incapable, through weakness of intellect, of making a conveyance, but no commission was in force against her; a commission of partition was nevertheless granted at the suit of the other two tenants, so that the lands might be held in severalty. *Ib.*

4. A bill for a partition or a sale cannot be filed on behalf of a person of unsound mind not so found by inquisition. *Halfhyde* v. *Robinson*, 43 L. J., Ch., 398; 22 W. R. 448; 9 L. R., Ch., 373; 30 L. T., N. S., 216.

When in the case of a small estate it is desired to deal with a lunatic's realty, without incurring the expense of an inquisition, the proper course is to proceed under the summary powers of the Lunacy Regulation Act 1853, s. 120. *Ib.*

5. Under the Partition Act 1876 (39 & 40 Vict., c. 17), s. 6, a person of unsound mind not so found by inquisition may, by his next friend, be plaintiff in an action instituted for the purpose of obtaining a sale. *Watt* v. *Leach*, 26 W. R. 475.

6. The Court, under its lunacy jurisdiction, has power to bar the estate tail of a lunatic tenant in tail; but it is the duty of the Court so to exercise it as not to affect the rights of the persons entitled in remainder to the estate. Where a lunatic was tenant in tail of an undivided share of an estate, and an action was brought for the partition of the estate, the Court, under s. 6 of the Partition Act 1868, authorised the committee of the lunatic to request a sale and to join in conveying the estate to the purchaser, but directed that the proceeds of the sale should be subject to the same uses as the lunatic's estate was subject to before the sale. *Re Pares, Lillingston* v. *Pares*, 12 L. R., Ch. D., 333; 41 L. T. 574; 28 W. R. 193.

Conveyances.] See XI. *post.*

6. Tenants for Life and Remaindermen.

7. A tenant for life of an undivided share of an estate with remainders to his unborn sons in tail, may file a bill for a partition, and the decree will be binding on the sons when *in esse*. *Gaskell* v. *Gaskell*, 6 Sim. 643.

8. A party having a life estate determinable on his marriage in one-fifth of an estate is entitled to a decree for partition. *Hobson* v. *Sherwood*, 4 Beav. 184.

Where in a suit for partition the defendants are desirous that there shall be no partition of their several shares, the partition may be confined to the aliquot share of the plaintiff. *Ib.*

9. Partition between tenants in common, and joint tenants by stat. 31 Hen. 8, extended by stat. 32 Hen. 8 to limited interests for life or years; and the same right in equity by bill as at law by writ. *Baring* v. *Nash*, 1 Ves. & B. 555.

10. A joint tenant or a tenant in common, in reversion or remainder, cannot maintain a suit for partition. *Evans* v. *Bagshaw*, 39 L. J., Ch., 145; 5 L. R., Ch., 340; 18 W. R. 657. Affirming 8 L. R., Eq., 469.

Where the wife of a bankrupt was entitled in fee to an undivided share of real estate, and she and her husband joined in mortgaging it, and afterwards she, her husband, and the mortgagee filed a bill for partition against the owners of the other shares:—Held, that the suit could not be maintained, although the mortgagee, after bill filed, got in the estate outstanding in the assignee of the bankrupt, and the bill was amended by stating this fact. *Ib.*

11. Under a will two persons were equally entitled to real property for life, with remainder to their children and issue, who were not yet ascertained. The trustees of the will had, during the lives of the tenants for life, powers of working a quarry on the estate, and making roads, etc., over the property for the purpose, and were directed to work the quarry, and divide the profits among the persons entitled:—Held, that while the over-riding power and trust existed, the Court had no jurisdiction to make a decree for partition or sale under the Partition Acts. *Taylor* v. *Grange*, 13 L. R., Ch. D., 223; 49 L. J., Ch., 24; 28 W. R. 93; 41 L. T. 465.

12. The Court, under its lunacy jurisdiction, has power to bar the estate tail of a lunatic tenant in tail; but it is the duty of the Court so to exercise it as not to affect the rights of the persons entitled in remainder to the estate. Where a lunatic was tenant in tail of an undivided share of an estate, and an action was brought for the partition of the estate, the Court, under the 6th section of the Partition Act 1868, authorised the committee of the lunatic to request a sale and to join in conveying the estate to the purchaser, but directed that the proceeds of the sale should be subject to the same uses as the lunatic's estate was subject to before the sale. *Re Pares*

Lillingston v. *Pares*, 12 L. R., Ch. D., 333; 41 L. T. 574; 28 W. R. 193.

1. The Court will not, in a partition case, order the party objecting to the non-service of reversioner to disclose his name, etc., to the petitioner, but will not give him the costs of the day, unless he undertakes to do so. *Kelly* v. *Shelton*, 1 Jones 555.

The petition will be allowed to stand over to give the petitioner time to effect such service. *Ib.*

7. Tenants in Tail.

2. Partition between tenants in tail, though only by parol, shall bind the issue. *Thomas* v. *Gyles*, 2 Vern. 233.

3. Bill for writings and a partition, defendant insists the plaintiff has no title, and there is an entail subsisting. The Court gave the plaintiff a year's time to try his title. And upon a trial in ejectment, verdict for the plaintiff, upon coming in upon the equity reserved, it was insisted, this being a matter of right of inheritance, defendant ought not to be bound by one trial, *sed non allocat'*, it being a decree only for a partition. *Sed quære.* *Blynman* v. *Brown*, 2 Vern. 232.

Conveyances.] See XI. *post.*

8. Married Women

4. A sale was directed in a partition suit of a freehold estate in which a married woman was interested, for her separate use without power of anticipation; the Court having first made her costs a charge on her share, and directed them to be raised by a sale. *Fleming* v. *Armstrong*, 34 Beav. 109; 11 L. T., N. S., 470; 5 N. R. 181.

5. In a partition action by a married woman and her husband her request for sale may be made by her counsel authorised to act on her behalf. *Crookes* v. *Whitworth*, 10 L. R., Ch. D., 289; 27 W. R. 149; 39 L. T. 348. S. C. *nom.* *Crookes* v. *Whitaker*, 27 W. R. 149; 39 L. T., N. S., 348.

6. In a partition action a request for sale on the part of a married woman, under s. 6 of the Partition Act 1876, should be made by a person especially authorised to act on her behalf in the action: a request by her counsel is not sufficient. *Crookes* v. *Whitworth* (10 L. R., Ch. D., 289) not followed. *Wallace* v. *Greenwood*, 16 L. R., Ch. D., 362; 50 L. J., Ch., 289; 43 L. T. 720.

7. In a partition action a request for sale on behalf of a married woman was directed to be made in writing, signed by her, authorising and requesting her solicitor to instruct counsel to ask for a sale. *Grange* v. *White*, 18 L. R., Ch. D., 612; 50 L. J., Ch., 620; 45 L. T. 128; 29 W. R. 713.

8. A wife must be separately examined in order to request a sale. *Leigh* v. *Edwards*, 42 L. J., Ch., 892.

9. A decree for sale having been made in a partition suit in which a married woman had been erroneously described as single, leave was given to amend by adding a next friend as plaintiff and making the husband a defendant, he consenting to be bound by all the proceedings. *Sherratt* v. *Sherratt*, 21 W. R. 572.

10. The share of a married woman in the proceeds of the sale of real estate devised to her in fee, which has been sold under an order in a partition action, may be paid to her husband on her electing by examination in Court to take the money as personal estate. *Standering* v. *Hall*, 11 L. R., Ch. D., 652; 48 L. J., Ch., 382; 27 W. R. 749.

11. The Court will under the Partition Act 1868 (31 & 32 Vict., c. 40), make a decree for sale, instead of partition, at the request of a feme coverte. *Higgs* v. *Dorkis*, 13 L. R., Eq., 280; 41 L. J., Ch., 150; 25 L. T. 903; 20 W. R. 279.

9. Mortgagors and Mortgagees.

12. Person entitled to only part of money due on mortgage, cannot file bill of foreclosure for that part only of mortgaged premises. *Palmer* v. *Carlisle* (*Earl*), 1 Sim. & S. 423.

13. Mortgagee is not a necessary party to bill for partition. *Swan* v. *Swan*, 8 Price 518.

14. Where one tenant in common has mortgaged his interest in the property to another tenant in common, the mortgagor cannot enforce a partition or sale of the property against the will of the mortgagee, except on the terms of paying off the mortgage, and this rule is not affected by sub-s. 2 of s. 25 of the Conveyancing and Law of Property Act 1881. *Gibbs* v. *Haydon*, 47 L. T. 184; 30 W. R. 726.

15. Mortgagees to the extent of one moiety in value of certain property, in a partition action, desired a sale of the property and a distribution of the proceeds instead of a division of the property. The owners of the equity of redemption opposed:—Held, upon further consideration, that the mortgagees were "persons interested" under ss. 3 and 4 of the Partition Act, and that being "persons interested to the extent of one moiety or upwards," it was the duty of the Court, under s. 4 of the Act, at their request, to order a sale of the property; also that the Court in any case had a discretion under s. 3 of the Act. *Davenport* v. *King*, 49 L. T. 92; 31 W. R. 911.

16. Where a tenant in common of real estate, which was subject to a mortgage in fee, procured an assignment of the mortgage, and obtained possession under it:—Held, in a partition action, that this did not take away the right of his co-tenant to a decree for sale, subject to the incumbrance. *Waite* v. *Bingley*, 21 L. R., Ch. D., 674; 51 L. J., Ch., 651; 30 W. R. 698.

10. Trustees.

17. Ord. XVI., r. 7, of the Rules of Court 1875, enabling trustees to represent their beneficiaries in an action, applies to an action under the Partition Acts 1868 and 1876. *Simpson* v. *Denny*, 10 L. R., Ch., 28; 27 W. R. 280.

18. In an action for sale and partition, the plaintiffs were trustees for sale of two-thirds

of leasehold property, and the defendants were trustees for sale of the remaining third part after the death of a tenant for life. The *cestuis que trustent* not being parties:—Held, that the trustees for sale sufficiently represented their *cestuis que trustent*, and a sale and partition were directed without notice to the parties beneficially interested. *Stace* v. *Gage*, 8 L. R., Ch. D., 451; 47 L. J., Ch., 608; 26 W. R. 605; 38 L. T., N. S., 843.

IV. AGREEMENTS FOR.

1. Bond given by parceners to pay to the other parcener, his executors or administrators, an annual sum during the life of J. S. for owelty of partition, shall go to the executor and not to the heir. *Hulbert* v. *Hart*, 1 Vern. 133.

2. Partitions between tenants in tail, though only by parol, shall bind the issue. *Thomas* v. *Gyles*, 2 Vern. 233.

3. The agreement of husband for partition of his wife's estate was not binding on her. *Ireland* v. *Rittle*, 1 Atk. 542.

A parol agreement for an equality of partition of a long standing, by persons who had right to contract, and accordingly put in execution, will be established. And if a joint tenant upon equality of partition think proper to accept of a contingent uncertain advantage, where one moiety is of superior value to the other, it will not vacate the agreement. *Ib.*

4. Two tenants in common of a copyhold estate in tail agree upon a partition; each surrenders the part allotted to the other:—Held, the entail was barred only as to a moiety. *Oakley* v. *Smith*, Ambl. 368; 1 Eden 261.

5. Agreement for a partition established against a conveyance and against a device, it operating as a revocation by depriving the testatrix of all interest in the estate devised. *Knollys* v. *Alcock*, 5 Ves. 648.

6. Conveyance to trustees in trust to sell and purchase other estates, to be settled. Those entitled under the limitations directed of the estates to be purchased, have equitable interests co-extensive until sale. Therefore a specific performance was decreed of an agreement for partition, against an objection to a title under a fine by a person who would have been tenant in tail of the estates to be purchased, the effect being an election to keep the estate, binding the trustees; though it may be questionable, whether they could take upon themselves to convey in fee to a person entitled to an estate tail only. *Pearson* v. *Lane*, 17 Ves. 101.

7. A. and B., devisees in common under their father's will, make a verbal agreement, which is afterwards carried into effect and acted on during their joint lives, to divide the land devised to them, A., the elder brother, taking the larger share in consideration of a right alleged on his part to take the whole by virtue of a supposed entail. A. was actually at the time so entitled, with remainder in tail to his brother B. Upon the death of A. without issue, B., whose title under the entail thereby accrued, and who was not proved to have been aware of such title till after the death of A., repudiated the agreement and brought ejectment for the whole of the lands. He was decreed, at the suit of A.'s devisees, to carry into effect the agreement by cutting off the entail, on the ground that it was a family arrangement acted on for many years, and that A. was prevented by the agreement from inquiring further, and so discovering and enforcing his title to the whole. *Neale* v. *Neale*, 1 Keen 672. Affirmed *Id.* 684. n.

8. The Court might enforce the specific performance of an agreement between joint tenants of a copyhold estate to divide the land and hold the respective parts in severalty, and decree the parties to make mutual surrenders for that purpose; although before the stat. 4 & 5 Will. 4, c. 35, the Court had not jurisdiction, in a mere suit for partition, to decree the partition of copyholds. *Bolton* v. *Ward*, 4 Hare 530; 14 L. J., N. S., Ch., 361; 9 Jur. 591.

9. A partition by parol and separate possession cannot be questioned after being acted on for more than twenty years. *Paine* v. *Ryder*, 24 Beav. 151.

V. COMMISSION.

1. *Issue of*, 5408.
2. *Commissioners' Powers, Duties, and Return*, 5409.
3. *Fees*, 5410.

1. Issue of.

10. In a suit for partition, if a reference is necessary to ascertain the interest of the parties, the direction for the commission ought to be postponed until the hearing for further directions. *Cole* v. *Sewell*, 15 Sim. 284.

11. After decree in a partition suit, and before the return of the writ of partition and commission of perambulation, one of the commissioners, and one of the defendants who was entitled to a part of the lands, died. The cause having been revived by suggestion, and the Master having approved of a new commissioner, the Court on motion directed a renewal of the writ and commission, and directed the part allotted by the decree to A. to be allotted to his widow and children, pursuant to his will as stated in the suggestion. *Valentine* v. *Middleton*, 2 Ir. Ch. R. 93.

12. The Court will not make a decree for a partition of copyholds, without directing a commission. *Bowles* v. *Rump*, 9 W. R. 370.

13. The Court, in a suit for partition, will not in general direct a commission to issue, but will make a declaration that the estate ought to be divided, with liberty to the parties entitled to bring before the judge at chambers proposals for a partition. *Clarke* v. *Clayton*, 2 Giff. 333; 6 Jur., N. S., 1238.

14. The usual and proper course in a summons to have commissioners appointed for a partition where the parties cannot agree, is for each side to name a certain number (generally two), and for a portion of them to be struck out by the opposite side, and, if necessary, in order to secure an uneven number, for one

commissioner to be appointed by the Court. *Howard* v. *Barnwell*, 2 N. R. 414.

See also III. 3 *ante*.

2. Commissioners' Powers, Duties, and Return.

1. Commissioners making different returns, a new commission of partition ordered; but the defendants should not have excepted but moved to suppress the returns; the deposit therefore ordered to be paid to the plaintiff. *Corbet* v. *Davenant*, 2 Bro. C. C. 252. See 6 Price 332. n.

2. Under commission of partition to four commissioners, two different returns were made by each two commissioners; the Court would not act on either, but directed new commission to five commissioners. *Watson* v. *Northumberland*, 11 Ves. 153.

3. On a commission under a partition decree as between co-heiresses, the eldest has no right of choice. The commissioners are to exercise their own discretion, and may take into account, in allotting, eldership or any other circumstance, and should only draw lots if they cannot on any grounds make a discretionary allotment. *Canning* v. *Canning*, 2 Drew. 43; 18 Jur. 640; 23 L. J., Ch., 879; 2 Eq. Rep. 1147; 2 W. R. 661.

Upon their continuing to disagree, a new commission was directed, and a third commissioner appointed, in order to avoid the necessity of making a partition by drawing lots. S. C. 23 L. J., Ch., 879.

4. Commissioners of partition have no power to award sums to be paid for owelty of partition. *Mole* v. *Mansfield*, 15 Sim. 41.

5. Surveyors in partition having allotted by mistake a piece of land to one to whom it belonged previously, and several allotments having been sold, before mistake discovered, Court decreed pecuniary compensation to be made to him. *Dacre* v. *Gorges*, 2 Sim. & S. 454; 4 L. J., Ch., 50.

6. Commissioners of partition may annex to one allotment a new right of way over another allotment, the right of way being occasional and for the purpose of repairs, may direct new fences to be made to divide the allotments at the expense of the different parties entitled, and may award the mansion house to the heir at law, though the rest of his allotment was at a distance. *Lister* v. *Lister*, 3 Y. & Coll. 540.

The Court will not suppress or vary the certificate of commissioners by reason of alleged irregularity in the allotments, except on the ground of fraud or of negligence amounting to fraud. *Ib.*

7. Jurisdiction and practice of the Court with respect to proceedings under commissions of partition. *Manners* v. *Charlesworth*, 1 Myl. & K. 330; Coop. *temp.* Brough. 52.

8 Exceptions will not lie to the return of commissioners in a suit for partition, on the ground of inequality of value in the lots. In all cases of improper conduct in the commissioners, a motion must be made to suppress the return. *Jones* v. *Totty*, 1 Sim. 136; 5 L. J., Ch., 105.

Where schedule written on paper was returned with commission of partition, the plaintiff's clerk in court was allowed to engross it on parchment and file engrossment, with return, in analogy to practice where foreign depositions are returned on paper. S. C. 2 Sim. & S. 219.

9. Where commissioners of partition are directed to divide lands equally between the parties entitled, it is their duty, after dividing the lands into proportions of equal value in the market, to assign them to those parties respectively to whom they would be of most value, with reference to their respective situations in relation to the property before the partition took place. Therefore where commissioners were directed to divide lands equally between A., B., and C., and they accordingly divided the lands into portions of equal value in the market, but assigned to A. an inn of which C. had been for many years the occupier, upon which he had expended money in improvements, and adjoining to which he had purchased property for the purposes of his occupation:—Held, that the adjudication of the commissioners was wrong, and that a commission should be directed to the new commissioners, to be approved of by the Master. Gross error in judgment, without positive proof of impartiality, is sufficient to enable the Court to set aside an adjudication made by the Commissioners of partition. *Story* v. *Johnson*, 1 Y. & Coll. 538; 5 L. J., N. S., Exch. Eq., 9.

A court of equity in decreeing a partition does not act ministerially, and in obedience to the call of those parties who have a right to the partition, but founds itself upon the general jurisdiction given to courts of equity. It will, therefore, on a bill of partition, adjust the equitable rights of all the parties interested in the estate, and will for that purpose give special instructions to the commissioners of partition, and even in cases of necessity nominate the commissioners. And in decreeing partition will have regard also to the provisions of the 8 & 9 Will. 3, c. 31, s. 4. *Ib.*

10. After a petition under a decree, the Court cannot give a party any right as to the property which the certificate of the commissioners and the deeds of partition do not give him, nor will it interfere to reform the deeds in order to give a party the more convenient and complete use or enjoyment of his portion of the premises. *Burley* v. *Moore*, 5 L. J., Ch., 120.

11. A road was set out by two tenants in common of property, for the convenience of their respective dwelling houses for ever; the Court, in a partition suit, though of opinion that it ought not to be interfered with, declined giving any special direction on the subject to the commissioners. *Morris* v. *Timming*, Beav. 411.

12. On a partition in Chancery, every part of the estate need not to be divided, but sufficient if each tenant in common, etc., have an equal share of the whole. *Clarendon* v. *Hornby*, 1 P. W. 446.

13. On a suit previous to the 4 & 5 Vict., c. 55, s. 85, for a partition of freeholds and copyholds, the Court directed the copyholds to be allotted in entirety to one of the parties. *Dillon* v. *Coppin*, 6 Beav. 217. n.

1. On a bill for partition, there is no occasion to examine witnesses before the hearing. Said *arguendo*, that the commissioners may examine witnesses under the commission *ore tenus*, or take their depositions in writing, as they shall think fit, and found their partition on such evidence. *Meers* v. *Stourton* (*Lord*), Dick. 21.

2. The Court will interfere and direct partition commissioners in the exercise of their discretion in case of miscarriage by them; but an application to the Court to give such directions must be made by one of the tenants in common, and be founded on something the commissioners have done, or on some dealing between the tenants in common. The Court has no jurisdiction to interfere upon the application of a stranger, or of a tenant in common, founded on dealings between one of the tenants in common and such stranger. *Wright* v. *Vernon*, 1 Dr. & Sm. 231; 8 W. R. 724.

3. A partition will not be set aside on light grounds, or for light matters, or for mere inequality of value of the allotments, if, in making it, the commissioners have honestly exercised their own judgment. *Peers* v. *Needham*, 19 Beav. 316. S. C. *nom. Pearse* v. *Needham*, 2 W. R. 514.

It is not necessary that, in making a partition, an aliquot share of each species of property, or of each house, if it be house property, should be allotted to each of the tenants in common. But where, under a decree for partition amongst three tenants in common, which did not empower the commissioners to order owelty of partition, the commissioners, upon some previous understanding that two of the tenants in common were willing to take one of the two houses comprising the property without severance, allotted that house to them, and the other to the third tenant in common, the return was suppressed. *Ib.*

4. Objections being made to a partition, first, because a leasehold estate forming part of the property had been divided and the rents apportioned; and secondly, because the commissioners had not directed or permitted the parties to draw lots:—Held, that both objections were untenable. *Ames* v. *Comyns*, 16 W. R. 74; 17 L. T., N. S., 163.

3. Fees.

5. Commissioners under a commission of partition, have no lien on the commission for their charges. *Young* v. *Sutton*, 2 Ves. & B. 365.

VI. SALE OR PARTITION.

1. *When Ordered*, 5410.
2. *Under Partition Act*, *s.* 4, 5411.
3. *Sale or Valuation* (*Partition Act*, *s.* 5), 5411.
4. *On Admissions in Pleadings*, 5412.
5. *Judgment for and Proceedings thereon*, 5412.
6. *Operation of Judgment for*, 5413.
7. *Parties.*

See III. *ante.*

1. When Ordered.

6. Circumstances under which a sale will be ordered, instead of a partition of real estate. Form of order when one of the defendants is an infant, and another is out of the jurisdiction. *Hubbard* v. *Hubbard*, 2 Hem. & M. 38; 9 L. T., N. S., 606.

7. The Court refused to make a decree for the sale of freehold estate to which several persons were beneficially entitled as tenants in common, unless all the tenants in common concur in the sale, though it will always decree a partition at the instance of any or either of them. *Griffies* v. *Griffies*, 11 W. R. 943; 8 L. T., N. S., 758.

Where one of the tenants in common is in the occupation of the estate, he cannot be made liable for rent or for waste. *Ib.*

The costs of the partition to come out of the estate up to the decree, and afterwards according to the relative interests of the parties. *Ib.*

8. The Court has power to order a sale instead of a partition where it would be difficult to divide the property, and it would be to the advantage of the parties interested, even where some of them are infants. *Richards* v. *Richards*, 15 W. R. 380; 36 L. J., Ch., 176; 16 L. T., N. S., 562.

9. In a partition suit the Court may under the statute direct a sale of part of the property and a partition of the remainder. *Roebuck* v. *Chadebet*, 38 L. J., Ch., 488; 8 L. R., Eq., 127; 20 L. T., N. S., 940.

10. If the majority of the parties entitled to an estate desires a partition, it is for the minority to prove, if they wish a sale, that it will be more to the advantage of all. To succeed in that, they should show that the majority is either perverse in their views, or has mistaken their true interests, otherwise a partition will be decreed. *Allen* v. *Allen*, 42 L. J., Ch., 839.

11. A husband left, by his will, his real estate to his wife for her life, or until her second marriage; on her death or marriage the estate to be sold and the proceeds to be divided amongst his three daughters. One daughter married and her share was settled; the other two daughters were of age, and filed a bill for sale or partition, the widow consenting:—Held, that the Court had no jurisdiction to order a sale. *Cass* v. *Wood*, 30 L. T., N. S., 670.

12. A father devised freeholds to his daughter and all the children he might have by his then wife; in case all his children should die without issue, then over. He left issue three daughters. On a bill for partition and sale being filed by two of the daughters, who were married and had issue living, against the other daughter who was unmarried, the Court decreed a sale, subject to the executory devise. *Groves* v. *Carbert*, 29 L. T., N. S., 129.

13. Under a will two persons were equally entitled to real property for life, with remainder to their children and issue, who were not yet ascertained. The trustees of the will had, during the lives of the tenants for life, powers of working a quarry on the estate, and making roads, etc., over the property for the purpose, and were directed to work the quarry and divide the profits among the persons entitled:—Held, that, while the overriding power and trust existed, the Court had no jurisdiction to

make a decree for partition or sale under the Partition Acts. *Taylor* v. *Grange*, 13 L. R., Ch. D., 223; 49 L. J., Ch., 24. Affirmed 15 L. R., Ch. D., 165; 49 L. J., Ch., 794; 43 L. T. 233.

1. In a suit for partition a question of law arose; but the Court, no one objecting, exercised jurisdiction, but ordered the decree to be prefaced with a statement of the desire of all parties, other than that of an infant, that the case should be decided. *Burt* v. *Hellyar*, 14 L. R., Eq., 160; 41 L. J., Ch., 430; 26 L. T. 833.

2. When a partition suit was instituted by the owners of three undivided sevenths of freehold premises for a sale of the whole, and such sale was not opposed by the guardian *ad litem* of three minors, who, under their father (which directed that no sale should take place until the youngest attained twenty-one), were owners of the remaining four-sevenths, and one of them had come of age before the hearing of the suit, and also desired a sale; the Court made a decree as prayed, directing an inquiry as to whether the acceptance of an offer for the premises would be for the benefit of the minors, and ordered the costs of all parties to be paid ratably out of the purchase money, according to their respective interests. *Thompson* v. *Richardson*, 6 Ir. R., Eq., 596.

2. Under Partition Act 1868, s. 4.

3. The fact that the owner of a portion of an estate is in occupation of part of the premises, and carrying on a business there for which it would be impossible to obtain other suitable premises in the neighbourhood, is not a sufficiently "good reason" within s. 4 of the Partition Act (31 & 32 Vict., c. 40), for the Court to decree a partition in opposition to the wish of an owner to the extent of one moiety, who desires a sale. *Roughton* v. *Gibson*, 25 W. R. 269; 36 L. T., N. S., 93; 46 L. J., Ch., 366.

4. The plaintiff and B. purchased nineteen leasehold houses as tenants in common. B. died, having bequeathed his moiety to trustees on trusts under which his widow was entitled to the rents in specie for her life. The plaintiff brought this action against B.'s trustees, and as owner of a moiety claimed a sale. It appeared that there would be no difficulty in effecting a partition, that the effect of a sale would be to diminish the income received by B.'s widow by one half, and that the action would probably not have been brought but for ill-feeling existing between the parties:—Held, that those circumstances were a "good reason to the contrary" within the meaning of the Partition Act, s. 4, and in the exercise of its discretion the Court directed a partition instead of a sale. *Saxton* v. *Bartley*, 48 L. J., Ch., 519; 27 W. R. 615.

5. Under s. 4 of the Partition Act of 1868 (31 & 32 Vict., c. 40), it is the right of a plaintiff entitled to a moiety of the property to have a sale instead of a partition, notwithstanding the opposition or disability of a defendant who is entitled to the other moiety, unless such defendant shows "good reason to the contrary." *Rowe* v. *Gray*, 5 L. R., Ch. D., 263; 46 L. J., Ch., 279; 25 W. R. 250.

Upon the request of a plaintiff so entitled, the Court decreed a sale instead of a partition of ten leasehold houses held under one lease, although it was objected on behalf of an infant defendant entitled to the other moiety that his income would be thereby materially diminished. *Ib.*

6. An estate consisting of a mansion house and 185 acres belonged to the plaintiff and the defendant in equal moieties. It was almost surrounded by a larger estate, of which the plaintiff was tenant for life, and with which it was formerly united as part of the same family estate. In an action for partition or sale, the plaintiff desired a partition under which the mansion house and part of the land contiguous thereto should be allotted to him, alleging that its value would be depreciated if severed from the larger estate; he offering to pay what should be necessary for equality of partition. The defendant, who was also a neighbouring landowner, desired a sale, and had offered, on the writ being issued, to submit to an immediate decree for sale:—Held, that under s. 4 of the Partition Act 1868 (31 & 32 Vict., c. 40), as "no good reason to the contrary" of a sale had been adduced, a sale must be directed. *Porter* v. *Lopes*, 7 L. R., Ch. D., 358; 37 L. T., N. S., 824.

7. The dissent of one of six joint owners, though an important matter for consideration, is not, *per se*, good reason against a sale instead of a partition, within the Partition Act 1868, s. 4; and in the absence of good reason to the contrary, the section is mandatory to the Court. *Re Langdale*, 5 Ir. R., Eq., 572.

8. The fact that the owner of one moiety of an estate is yearly tenant of the whole property, and occupies it for commercial purposes, and also resides thereon, is no sufficient reason why a sale of the property should not be decreed under the Partition Act 1868, s. 4. *Wilkinson* v. *Joberns*, 16 L. R., Eq., 14; 42 L. J., Ch., 663; 21 W. R. 644; 28 L. T., N. S., 724.

9. The 4th section of the 31 & 32 Vict., c. 40, is retrospective. *Lys* v. *Lys*, 7 L. R., Eq., 126; 17 W. R. 394; 19 L. T., N. S., 409.

Accordingly in a partition suit instituted before the passing of the Act by the owners of two undivided fourths of the property and praying a sale, which was opposed by the owners of the remaining fourths:—Held, that the *onus* was thrown upon the parties opposing, and in the absence of any sufficient cause shown against it a sale was ordered. *Ib.*

10. Where the owners of a moiety of the estate desire a sale, the Court is bound under the Partition Act 1868, s. 4, to decree a sale, unless it sees good reason to the contrary, however large the estate may be, and notwithstanding the opposition of the parties entitled to the residue. *Pemberton* v. *Barnes*, 40 L. J., Ch., 675; 6 L. R., Ch., 685; 25 L. T., N. S., 577; 19 W. R. 988.

3. Sale or Valuation (Partition Act 1868, s. 5).

11. The 3rd and 4th sections of the Partition Act 1868 are not controlled in their operation by s. 5. *Drinkwater* v. *Ratcliffe*, 20 L. R., Eq., 528; 44 L. J., Ch., 605; 33 L. T., N. S., 417; 24 W. R. 25.

The undertaking to purchase mentioned in s. 5 cannot be given by a married woman whose husband does not join therein. *Ib.*

Property consisting of a farmhouse and

buildings and thirty acres of land was divisible into thirty-six shares; fifteen of them were vested in eight persons who desired a sale, six of them being entitled to one-thirty-sixth share each; the remaining twenty-one were vested in a married woman living apart from her husband. She was in occupation of the farm and opposed a sale, and was willing to give an undertaking to purchase the fifteen shares, but her husband did not join therein. There was evidence that the property would sell advantageously for other than agricultural purposes:—Held, that the owners of the fifteen shares were entitled to a sale, because the owner of the remaining shares could not give a valid undertaking to purchase their shares. *Ib.*

Held, also, that a sale ought to be directed under the 3rd section, on account of the nature of the property and the number of the parties interested, and because in the opinion of the Court a sale would be more beneficial for the parties interested than a division among them. *Ib.*

1. When in a partition suit one of the part owners asks for sale and others ask for partition, the Court has not, under 31 & 32 Vict., c. 40, s. 5, power to order that the part owner who asks for a sale shall sell to the others his share at a valuation, and to order that a partition amongst the others shall then be made. *Williams* v. *Games*, 10 L. R., Ch., 204; 44 L. J., Ch., 245; 32 L. T., N. S., 414; 23 W. R. 779.

2. A plaintiff in a partition action was owner of one-fourth of the property, the subject of the action; he claimed a right to purchase at a valuation under the 31 & 32 Vict., c. 40, s. 5:—Held, that the owner of the other three-fourths was entitled under s. 4 to have a sale by auction. *Roughton* v. *Gibson*, 46 L. J., Ch., 366.

The larger owner in case of purchase by her was directed to pay into court one-half the purchase money only. *Ib.*

3. Owners of three-sixteenths of a property sought to have a sale of it; owners of thirteen-sixteenths of it objected to a sale and offered to purchase the shares of the others at a valuation. In the Court of the Vice-Chancellor a valuation was ordered under the provisions of the 5th section of the 31 & 32 Vict., c. 40. The Court of Appeal decided that the case fell under the 3rd section of the Act; that the 5th section did not qualify or control the third nor operate as a proviso upon it, and so the decision below was reversed, and a sale was directed:—Held, that the decision of the Court of Appeal was correct, and must be affirmed. *Pitt* v. *Jones*, 5 L. R., App. Cas., 651; 49 L. J., Ch., 795; 43 L. T. 385; 29 W. R. 33. Affirming S. C. *sub nom. Gilbert* v. *Smith*, 11 L. R., Ch. D., 78; 48 L. J., Ch., 352; 27 W. R. 719; 40 L. T. 635. And reversing 8 L. R., Ch. D., 548; 26 W. R. 905; 38 L. T., N. S., 706.

A party asking for a sale is not compellable to part with his share on a valuation. *Ib.*

4. Having regard to the decision of the House of Lords in *Pitt* v. *Jones* (5 L. R., App. Cas., 651), that the remedies granted by ss. 3 and 5 respectively of the Partition Act 1868 are entirely distinct from each other, a plaintiff in a partition action, who desires a sale instead of a partition, must expressly state in his pleadings that a sale will be more beneficial, so as to give notice to the opposite party that this is the relief which he is claiming under s. 3. The mere statement of facts which tend *primâ facie* to show that a sale will be more convenient, but which do not exclude the operation of s. 5, will not debar the defendant from insisting, under the latter section, on a partition, on his offer to buy up the plaintiff's interest. *Evans* v. *Evans*, or *Evans* v. *Jones*, 52 L. J., Ch., 304; 48 L. T. 567; 31 W. R. 495.

4. On Admissions in Pleadings.

5. An order for sale may be made in a partition action on a motion upon admissions in the pleadings under Rules of Court 1875, Ord. XL., r. 11. In such an order the Court will direct an account of rents and profits received by the plaintiff, where he has been in possession, and adjourn further consideration. *Burnell* v. *Burnell*, 11 L. R., Ch. D., 213; 48 L. J., Ch., 412; 27 W. R. 749.

6. When in an action for partition the plaintiff's title and that of the other parties had been admitted on the pleadings, the necessary inquiry as to the persons interested, for effecting a sale, was ordered on motion under Rules of Court 1875, Ord. XL., r. 11. *Gilbert* v. *Smith*, 2 L. R., Ch. D., 686; 45 L. J., Ch., 514; 35 L. T. 43; 24 W. R. 568.

5. Judgment for and Proceedings thereon.

7. On a sale by auction under a decree, the Court will, under certain circumstances, allow the party having the conduct of the sale to bid. *Pennington* v. *Dalbiac*, 18 W. R. 684.

8. The Court has authority to order trustees to sell an estate and divide the purchase money between the parties entitled, direct, without directing the sale to take place in Chambers. *Haywood* v. *Smith*, 20 L. T., N. S., 70.

9. Where inquiries are directed, the Court will not make an order for sale on the hearing of the cause. The order must be made on further consideration. *Buckingham* v. *Sellick*, 22 L. T., N. S., 370.

10. Form of judgment in an action under the Partition Acts where the parties to the action are persons entitled to less than a moiety of the property and request a sale. *Sykes* v. *Schofield*, 14 L. R., Ch. D., 629; 49 L. J., Ch., 833; 42 L. T. 822; 29 W. R. 68.

Where such an action is intituled in the Chancery Division and a district registry, the usual inquiries may be made in the district registry, but the application for a sale should be made in the Chambers of the judge of the Chancery Division to whom the action is attached. *Ib.*

11. When in a partition action, parties claiming under a derivative title proposed to take a judgment directing inquiries, as to the persons interested, with an order for sale of the estates dependent upon the result of those inquiries:—Form of judgment in such an action. *Senior* v. *Hereford*, 4 L. R., Ch. D., 494; 25 W. R. 223.

12. The power given to the Court of Chancery

by the Partition Act 1868, to order a sale, cannot be exercised until the inquiries directed by the decree have been made. *Powell* v. *Powell*, 23 W. R. 70; 31 L. T., N. S., 467.

Therefore, when a sale is made before the finding of the chief clerk's certificate, the purchaser may refuse to complete, whatever may be the state of facts disclosed by the certificate. *Ib.*

A decree, directing the usual inquiries and ordering a sale if it shall appear that it would be more beneficial than a partition and that all the persons interested are bound, is not improper, although the Act in terms contemplates the order for sale as being made on "further consideration." *Ib.*

1. When a sale has been directed by the Court, and the conduct of it given to one party, no other party has a right to interfere in any way in the sale without the leave of the Court. Thus, where the Court directed a sale and gave the conduct of it to an independent solicitor, both plaintiff and defendant having liberty to bid, the plaintiff was restrained by injunction from issuing and circulating advertisements that the sale was about to take place. *Dean* v. *Wilson*, 10 L. R., Ch. D., 136; 48 L. J., Ch., 148; 27 W. R. 377.

2. When real estate was held by a complicated title under which the parties interested were very numerous and unborn issue might become entitled to legal estates:—Held, that all persons in existence who were interested in the estate being parties to a suit for partition, and the title being proved at the hearing, an immediate decree for sale might be made without any preliminary inquiry; that a declaration might be made that the parties to the suit were, and that unborn issue upon coming into existence would be, trustees of their shares and interests, within the meaning of the Trustee Act 1850; but that the appointment of a new trustee, and consequent vesting order, ought to be the subject of a subsequent application, and ought not to be made by the decree. *Lees* v. *Coulton*, 20 L. R., Eq., 20; 44 L. J., Ch., 556; 23 W. R. 544.

3. In a partition action the Court cannot, in addition to dispensing with service on parties out of the jurisdiction, dispense also with the advertisements directed by s. 3 of the Partition Act 1876. *Hacking* v. *Walley*, 51 L. J., Ch., 944.

4. In a partition action, the Court, or indering a sale at the request of the parties to the action, will not, in the absence of the other parties interested, preface the judgment order for sale with an expression of its opinion that a sale is more beneficial than a partition. Form of judgment order for sale in a partition action providing that service of the judgment may be dispensed with under s. 3 of the Partition Act 1876. *Re Hardiman, Pragnell* v. *Batten*, 16 L. R., Ch. D., 360; 50 L. J., Ch., 272; 43 L. T. 749; 29 W. R. 495.

6. Operation of Judgment for.

5. Under a will an undivided share of real estate stood limited in remainder after certain life estates and estates tail to the right heirs of A. In a partition suit to which A. was a party, a decree for sale was made under the Partition Act 1868:—Held, that the interests of the persons or person who on the death of A. would become the right heirs or right heir of A. were bound in equity by the decree. *Basnett* v. *Moxon*, 20 L. R., Eq., 182; 44 L. J., Ch., 557; 23 W. R. 945.

Held, also, that such persons were "unborn" persons within the meaning of the Trustee Act 1850, s. 30. *Ib.*

6. A decree in a partition suit directed inquiries as to the persons interested, and whether a sale would be more beneficial than a partition, and if so found directed a sale. The sale took place before the certificate was made:—Held, that the purchaser was entitled to be discharged, but that the decree was not wrong in directing a sale without reserving further consideration. *Powell* v. *Powell*, 10 L. R., Ch., 130; 44 L. J., Ch., 122; 31 L. T., N. S., 737; 23 W. R. 201.

7. By a decree for administration in a county court a sale of real estate devised to A. and six other persons, parties to the suit, was ordered, and an inquiry was directed before the registrar of the court as to A., who had not been heard of for many years. On an affidavit being produced to the registrar showing that A. had not been heard of for seventeen years, the sale was effected without any certificate as to the result of the inquiry being made. The sale produced more than 500*l.*, and the cause was transferred to the Court of Chancery. On motion by the purchaser to be discharged and to have his costs paid, on the ground that the sale was invalid as having been made before a certificate in answer to the inquiries had been made:—Held, that A. must be presumed to be dead without issue; and that as all parties interested were in fact before the Court at the hearing, and were willing to convey, and a good title could be made independently of the Partition Act 1868, the purchaser was bound to accept such a title, and could not rely upon the technical informality in the decree. *Rawlinson* v. *Miller*, 1 L. R., Ch. D., 52; 46 L. J., Ch. D., 252.

8. In 1864 a decree was made for a partition, liberty being given to carry in proposals for a sale before the commission should be issued. No commission was issued, and after the Partition Act of 1868 had come into operation a supplemental bill was filed praying for a sale or a partition:—Held, that the rights of the parties under the decree were not taken away by the Partition Act, and that the Court had not now power to compel a sale. *Pryor* v. *Pryor*, 10 L. R., Ch., 469; 44 L. J., Ch., 535; 32 L. T., N. S., 713; 23 W. R. 738 Affirming 19 L. R., Eq., 595; 32 L. T., N. S., 146; 23 W. R. 483.

9. Under an order of the Court in a partition action, leasehold property settled upon trust for A. for life with remainders over was sold, and the proceeds paid into court, and invested in consols, the dividends of which were much less in amount than the yearly rents received from the leaseholds:—Held, that A. was not entitled to any allowance out of the corpus to make up the deficiency in her annual income. *Langmead* v. *Cockerton*, 25 W. R. 315.

10. On a sale by the Court, in a partition

suit, one of the conditions of sale provided that if any purchaser should make any objection or requisition which the vendors should be unable or unwilling for reasonable cause to remove or comply with, the vendors should be at liberty, with the leave of the judge, and notwithstanding any intermediate negotiation, or attempt to comply with or remove such objection or requisition, to cancel the contract, which should thereupon be delivered up, and the deposit returned without interest and without costs on either side. The sale was held to be irregular, and a purchaser thereupon took out a summons to be discharged from his purchase with a return of his deposit, and 4*l.* per cent. interest and his costs. The vendors submitted to the purchaser being discharged, but contended that under the condition he was only entitled to a return of his deposit without interest and costs:—Held, that the condition did not apply, and that the purchaser was entitled to be paid the consols, in which his deposit had been invested, and the dividends which had accrued thereon, and his costs. *Powel* v. *Powel, Exp. Bevan*, 23 W. R. 482; 32 L. T., N. S., 148; 19 L. R., Eq., 422; 44 L. J., Ch., 311.

VII. COMPENSATION AND ACCOUNT.

1. On bill for partition and account of rents and profits, a decree for that purpose will be made, and relief will not be confined merely to a partition. *Lorimer* v. *Lorimer*, 5 Madd. 363. And see *Twiner* v. *Morgan*, 8 Ves. 143.

2. Commissioners of partition have no power to award sums to be paid for owelty of partition. *Mole* v. *Mansfield*, 15 Sim. 41.

3. Where it is stated, by answer to bill for partition, that defendant has laid out money in improving premises, Court will not decree partition without reference to Master to take an account. Money laid out in improving premises does not, however, in strictness, create a lien on premises; but it is sufficient ground for equity to refuse to interfere. *Swan* v. *Swan*, 8 Price 518.

4. Surveyors in partition having allotted by mistake a piece of land to one to whom it belonged previously, and several allotments having been sold before mistake discovered, Court decreed pecuniary compensation to be made to him. *Dacre* v. *Gorges*, 2 Sim. & S. 454; 4 L. J., Ch., 50.

5. By a deed between A. and B., A. was to pay B. a sum of money in four months, which he also secured by confessing a judgment; A. did not pay it, and B. had him arrested; the deed provided for the attendance of the parties before the arbitrators and their examination:—Held, that the imprisonment of A. being the consequence of his own breach of contract, gave him no better equity. *Dimsdale* v. *Robertson*, 7 Ir. Eq. R. 536; 2 J. & L. 58.

Compensation was to be awarded to A. out of X., for any inequality in a partition of Y.; X., by an event contemplated at the time, became insufficient:—Held, that A. could not be relieved on that ground. *Ib.*

6. The Court will not make any special directions in a partition suit, because a party has laid out money on property in which he has no legal right, it being his wife's, who ha only a life interest in it. *Heath* v. *Bostock* 5 L. J., N. S., Exch. Eq., 20.

7. A., one of several tenants in commor had been in the personal occupation of par of the property. In a suit by another tenan in common, for partition and an account o rents:—Held, that unless A. was charged wit an occupation rent, he could not be allowe for substantial repairs and lasting improve ments made by him on any part of the prc perty. *Teasdale* v. *Sanderson*, 33 Bea 534.

8. Freehold and leasehold property belong ing to two sisters, as tenants in common, wa settled upon their respective marriages in th usual way. An agreement was afterward come to by which the property was to be pai titioned and held in severalty on the trusts o the two marriage settlements, a sum of mone being paid for equality of partition. Tha sum was never paid, but interest was paid o it. The parties entitled under each settle ment took possession of the property allotte to them, and expended money in improving i and, as the result of larger expenditure on th property which was originally the most valu able, its value increased to a greater exten than did that of the less valuable property Children having been born of each marriage an action for partition on the basis of th agreement was commenced:—Held, that i calculating the amount to be paid for equalit of partition, one moiety of the differenc between the present values of the propertie should be taken, expenditure by both sides o permanent improvements having been firs deducted. *Watson* v. *Gass*, 51 L. J., Ch., 480 45 L. T. 582; 30 W. R. 286.

VIII. CUSTODY OF DEEDS.

9. There is no general rule as to which o the co-parceners is entitled to the custody o a partition deed. The custody was given t three of the co-parceners to whom one-fourt of the estate had been allotted, upon thei entering into joint and several covenants fo production, and with a direction that the dee should be inrolled in Chancery. *Bayly* v *Elton, Elton* v. *Elton*, 6 Jur., N. S., 136; 2 Beav. 632.

Where the parties are equally interested the practice is to give the custody of the deed to the plaintiff; but where they are not, the they are usually given to the person having th greatest interest. *Ib.*

Many persons being interested in a par tition deed, it was directed to be enrolled with liberty to any party to have a duplicat at his own expense. *Ib.*

10. The plaintiff in a partition suit was en titled to six-sevenths of the estate, and ha the title deeds:—Held, that the proper form of decree as to the documents of title wa for the delivery to the defendant of such o them as related exclusively to the land whic should be allotted to him, and for the retaine by the plaintiff of the rest, he undertaking t abide by any order which the Court migh make as to the same, with liberty for eithe party to apply. *Jones* v. *Robinson*, 3 De G. M & G. 910.

IX. SETTING ASIDE.

1. A partition will not be set aside on light grounds, or for light matters, or for mere inequality of value of the allotments, if, in making it, the commissioners have honestly exercised their own judgment. *Peers* v. *Needham*, 19 Beav. 316.

It is not necessary that, in making a partition, an aliquot share of each species of property, or of each house, if it be house property, should be allotted to each of the tenants in common. But where, under a decree for partition amongst three tenants in common, which did not empower the commissioners to order owelty of partition, the commissioners, upon some previous understanding that two of the tenants in common were willing to take one of the two houses comprising the property without severance, allotted that house to them, and the other to the third tenant in common, the return was suppressed. *Ib.*

2. Objections been made to a partition, first, because a leasehold estate forming part of the property had been divided and the rents apportioned; and secondly, because the commissioners had not directed or permitted the parties to draw lots:—Held, that both objections were untenable. *Ames* v. *Comyns*, 16 W. R. 74; 17 L. T., N. S., 163.

See also V. 2 *ante*.

X. PROCEEDINGS FOR.

1. *Pleading*, 5415.
2. *Evidence*, 5415.
3. *Costs*, 5416.
4. *Receiver*, 5418.
5. *Parties*.

See III. *ante*.

1. Pleading.

3. A bill in equity for partition is in analogy to the proceeding at law, and should be so framed that there shall be a party substantially interested, plaintiff and defendant. *Lowe* v. *Franks*, 1 Moll. 137.

4. On a bill for a partition, plaintiff must show a title in himself, and not allege generally that he is in possession of a moiety. *Cartwright* v. *Pulteney*, 2 Atk. 380.

5. Bill for a partition against D.; D. by his answer sets up a partition made several years ago, as evidence whereof (amongst other things) he states that plaintiff acted upon a moiety of the premises, as his several estates, and particularly that he made a lease of part thereof to C.; plaintiff amends his bill, making C. a party, charging, that the lease to him was made under circumstances of fraud and imposition, and praying, as against C., that the lease may be set aside, still praying a partition only as against D.; demurrer by D., to the whole bill, for that it is exhibited against several persons, for several and distinct matters, allowed; plaintiff ought first to have filed his bill against C., only to impeach the lease. *Whaley* v. *Dawson*, 2 Sch. & Lef. 367.

6. The bill stated that the lands of B., part of which contained 159 acres, and part 46 acres, had been for many years previous to 1794 held by the same tenants, so that the boundaries became confused; that, in 1804, A. was seised in fee of the 159 acres, and held the 46 acres under a lease of H. for a term; that the measurings and boundaries of the 46 acres had not since been ascertained, the entire of the lands having been since the lease, as they had been for 100 years before, held by the same persons who were owners of the fee-simple lands; that they had been so mixed up, that it was impossible to discover the boundaries, or to ascertain where the 46 acres were situated. The bill, after reducing the title of the plaintiff from it, stated that the defendant claimed to be entitled to the 46 acres as assignee of H., and that the plaintiff's interest under the lease had determined, and prayed a partition, or a commission to ascertain the boundaries:—Held, on a demurrer, that it could not be sustained for a partition, as no title to a partition at law was shown, nor as a bill to ascertain boundaries, as the parties were independent proprietors, the inference being, that the defendant was in possession of the 46 acres, and that the owner of the fee-simple lands, and not the defendant, was responsible for the confusion of boundaries. *O'Hara* v. *Strange*, 11 Ir. Eq. R. 262.

7. In a suit for a sale under the Partition Act 1868, the bill ought to pray for partition as well as sale. *Teall* v. *Watts*, 11 L. R., Eq., 213; 40 L. J., Ch., 176; 23 L. T., N. S., 884; 19 W. R. 317.

8. A sale may be decreed although the bill contains no prayer for partition. *Aston* v. *Merodith*, 11 L. R., Eq., 601; 40 L. J., Ch., 241; 24 L. T., N. S., 128.

9. A bill for a sale of property under the same Act ought to pray for a petition also. *Holland* v. *Holland*, 13 L. R., Eq., 406; 41 L. J., Ch., 220; 20 W. R. 290; 26 L. T., N. S., 17.

2. Evidence.

10. On a bill of partition no occasion to examine witnesses previously to hearing. *Meers* v. *Stourton* (*Lord*), Dick. 21.

11. On a bill for a partition, where there is a small failure in proof of title, or when the shares of the parties are alone doubtful, the Court will grant an inquiry; but where there is a material omission in the proof of the plaintiff's title, the bill will be dismissed with costs. This course was pursued, though the plaintiff had recovered in ejectment a portion of the estate from the defendant, it not appearing what were the circumstances of that proceeding, or whether the plaintiff's title, as alleged, was therein proved. *Jope* v. *Morshead*, 6 Beav. 213; 12 L. J., N. S., Ch., 190.

12. When in a partition action, parties claiming under a derivative title proposed to take a judgment directing inquiries as to the persons interested, with an order for sale of the estates dependent upon the result of those inquiries:—Held, that the only evidence necessary (in addition to the will whereby the tenancy in common was created) was a general affidavit concisely verifying the statement of claim. *Senior* v. *Hereford*, 4 L. R., Ch. D., 494; 25 W. R. 223.

Form of judgment in such an action. *Ib.*

3. Costs.

1. If a bill be brought in equity for a partition, there can be no costs given on either side, because it is an amicable suit. *Anon.*, 6 Vin. Abr. 332, pl. 31; it being for the benefit of both parties to have their shares in severalty. *Metcalfe* v. *Beckwith*, 2 P. W. 377.

On a bill to settle the boundaries of a manor, it was decreed that each party should give to the other a note of their boundaries, and that it should be tried in a feigned issue; and the issue being found for the defendant on the first, second, and third trials the defendant was not only allowed the costs of all the trials at law but also the costs in equity, in regard the defendant had no bill, and the plaintiff might have tried it at law without coming into equity: on a bill of partition no costs on either side, because it is for the benefit of both parties. *Ib.*

2. On a bill for partition, the costs of executing the commission, and of all necessary proceedings in the cause, must be defrayed by the parties in proportion to their interests. *Calmady* v. *Calmady*, 2 Ves. J. 567.

3. The question was as to the costs of one of the parties, and it was held that they must be paid by his landlord, who was the occasion of his being brought before the Court. *Cornish* v. *Gest*, 2 Cox 27.

It is perfectly settled that each party pays his own costs on a bill of partition, and that without reference to the quantity of interest that each has in the estate. *Ib.*

4. In cases of partition where the parties entitled unequally, if the plaintiff be entitled to the smaller share, the costs shall be borne equally. *Sed quære* if the plaintiff be entitled to the larger share. *Hyde* v. *Hindley*, 2 Cox 408.

The Master of the Rolls said, that if a party entitled to forty-nine fiftieths of an estate were to bring the party entitled to the other fiftieth into court for a partition, he should hesitate much before he made such a defendant pay half the costs. *Ib.*

5. In a partition suit costs at law are not given on either side at the hearing; but where a defendant set up an agreement in bar of the right of the plaintiff to a partition, he was directed to pay so much of the costs as were occasioned by that part of the defence. *Morris* v. *Timmins*, 1 Beav. 411.

6. One tenant in common leased his undivided share subject to partition being made. The lessee was made a party to a bill for partition:—Held, he was not entitled to his costs as against his lessor. *Cornish* v. *Gest* (2 Cox 27) observed on. *Herbert* v. *Eyre*, 2 Jones 803.

7. On a bill for partition, the costs of executing the commission, and of all necessary proceedings in the cause, must be defrayed by the parties in proportion to their interests. *St. Paul's* (*Canons*) v. *Crickett*, 2 Ves. J. 567.

8. In *Nevis* v. *Levene* (Ambl. 237), it is said that partition was to be at the expense of both parties; but Mr. Beames (Costs, 48. n.) suggests that this may be the same case with *Norris* v. *Le Neve*, 3 Atk. 82, and that, though stated by Ambl. as a case of partition, it was a case respecting settling boundaries.

9. Though the interest of one party is more inconsiderable than that of the other, yet they shall equally bear the expense a commission for settling boundaries, a separating freehold from copyhold. *Nor* v. *Le Neve*, 3 Atk. 83.

10. In a partition suit, the parties m contribute to the costs of inrolling the fi decree, though it be a proceeding before t issuing of a commission. *Brunker* v. *Stein* Hay & J. 410.

11. In partition suits in future all parties a to abide their own costs until the issuing the commission, but the costs of issuing a executing same, and of the final hearing a decree, are to be bound by the parties in p portion to their respective interests. *M'Br* v. *Malcomson*, 2 Dr. & Wal. 700.

12. The general rule as to costs of partiti seems to be, that as the party comes into equ for his own convenience instead of going law, the rule of law should be adopted, a therefore, no costs should be given until t commission, that the costs of issuing, executi and confirming the commission should borne by the parties in proportion to t value of their respective interests; and th should be no costs of subsequent proceedi *Agar* v. *Fairfax*, 17 Ves. 533, 558.

13. Held, the habit of Court is not to g costs to hearing; and to divide expense conveyance, and partition in proportion interests. *Baring* v. *Nash*, 1 Ves. & B. 554.

14. A moiety of an estate was devised, subj to legacies, to A. for life, remainder to his fi and other sons in tail:—Held, that the tena for life, tenant in tail, and legatees were bear their own costs of a partition suit, a that the tenant for life had no equity to c on the tenant in tail to contribute to the co of the suit. *Greer* v. *Mercer*, 4 Ir. Eq. R. 7(

15. Where a bill being filed for a partitic a purchaser of an undivided moiety of the d fendant is made a party by amendment, he entitled to have his costs paid by the plainti *Williams* v. *Williams*, 10 W. R. 609.

16. In partition suits the costs up to and i cluding the costs of the first hearing are bor by the parties to the suit respectively, and t costs of all parties properly and necessari incurred after the first hearing and up to a including the second hearing, should be taxe and the total amount of such costs should borne ratably by the parties, according their respective interests. *Leslie* v. *Dunganu* (*Lord*), 12 Ir. Ch. R. 205.

17. Where an order has been made in a su for partition, and the costs of the suit are be paid, some of the parties entitled bei under disability, the Court will order an inqui whether it is for their benefit that the estat or any and what part of it, should be so before partition. *Capewell* v. *Lawrence*, L. T., N. S., 603.

18. Subsequent costs in a partition su ordered to be borne by the parties accordi to the value of their respective shares. *Elt* v. *Elton*, 27 Beav. 632.

19. In a suit for partition the plaintiff claime as heir of a deceased tenant in common. Th defendant ignored the plaintiff's title as hei and at the original hearing an inquiry as the fact was directed, which was found i favour of the plaintiff:—Held, that the defen ant was not liable to pay the costs of th inquiry, except so far as they might have bee

increased by independent evidence adduced by the defendant in opposition to the plaintiff's title. *Lyne* v. *Lyne*, 21 Beav. 318.

On the case coming on for further consideration the defendant, who was entitled to a moiety, insisted that she was a purchaser for valuable consideration of the other moiety:—Held, that although no such point had been raised by her answer, she was still entitled to make it available, and an inquiry was directed. *Ib.*

1. A respondent in a partition suit resisted the petitioner's claim, alleging that the petitioner was not seised of any portion of the land in question. Considerable expense was thus imposed on the petitioner: but that expense was entirely incurred before, and at the first hearing at which a decree for partition was made, and further directions and costs reserved. At the hearing, on the return to the writ of partition and further directions:—Held, that the petitioner was not entitled to be paid by the respondent any portion of his costs up to and including the first hearing. *Knox* v. *May*, 11 Ir. Ch. R. 265.

2. In a suit for partition and an account, the defendant improperly disputed the plaintiff's title: ordered to pay so much of the costs as related to the account, and to the proof of the plaintiff's title. *Hill* v. *Fullbrook*, Jac. 574.

3. Where a defendant to a partition suit contests the plaintiff's title, he will be decreed to pay so much of the costs as have been occasioned by such contest, but the remaining costs must be borne by the parties themselves. *Wilkinson* v. *Castle*, 16 W. R. 501.

4. Where the property was held in equal shares, the costs of all parties, on a decree for sale, were ordered to be paid out of the estate. *Miller* v. *Marriott*, 7 L. R., Eq., 1; 19 L. T., N. S., 304; 17 W. R. 41.

5. The Partition Act has not altered the practice of the Court with respect to the costs of a partition suit. *Landell* v. *Baker*, 6 L. R., Eq., 268.

Where, therefore, at the hearing of a partition suit a sale was ordered under the Act:—Held, nevertheless, that each party must pay his own costs up to the hearing. *Ib.*

6. A and B. being entitled to fourteen freehold houses as tenants in common in undivided moieties, entered into an agreement for partition, by which A. was to take and hold in severalty seven of the houses, and B. the other seven. Both died before a deed of partition was executed. The survivor specifically devised the seven houses agreed to be held in severalty by him, but allowed the legal estate in one moiety of the other seven houses to devolve on his heir-at-law:—Held, that the costs of carrying the agreement for partition into effect (including the costs incurred in getting in the outstanding legal estate) must be borne by his devisees, and not by his personal estate. *Re Tann, Tann* v. *Tann*, 7 L. R., Eq., 434.

7. When a sale was directed under 31 & 32 Vict., c. 49, and the property was divisible in unequal shares, the Court ordered the costs of all parties to be paid out of the estate. *Leach* v. *Westall*, 17 W. R. 313.

8. In the absence of special circumstances, the entire costs of a partition suit ought to be borne by the parties in proportion to the value of their respective shares. *Cannon* v. *Johnson*, 40 L. J., Ch., 46; 11 L. R., Eq., 90; 19 W. R. 175; 23 L. T., N. S., 583.

9. Since the passing of the Partition Act the Court is no longer bound by the old rule as to the costs of partition suits. *Simpson* v. *Ritchie*, 16 L. R., Eq., 103; 42 L. J., Ch., 543; 21 W. R. 666; 28 L. T., N. S., 548.

In a suit for sale under the Partition Act the plaintiffs were owners of one moiety, and the defendants of one-fourth of the estate; and the owners of the remaining fourth were served with the decree:—Held, that the costs of all parties ought to be paid out of the estate. *Ib.*

10. A firm of solicitors were employed throughout the proceedings in an action for partition and sale of certain hereditaments of which the defendants were in possession, and for an account of the rents and profits of one-third part thereof for six years prior to the issue of the writ. By the decree the plaintiffs were declared entitled to one-third part of the hereditaments, and to an account and payment by the defendants of one-third of the said rents and profits, and the premises were ordered to be sold, and the plaintiffs' costs up to and including the hearing were ordered to be costs in the action. The account was not completed and the property was not sold when the plaintiffs threatened to change their solicitors and to compromise the action. The share of the plaintiffs in the property and rents was insufficient to pay the plaintiffs' costs. On a petition by the plaintiffs' solicitors asking for a declaration that they were entitled to a charge on the whole property in respect of the plaintiffs' costs, as such costs had been made costs in the action:—Held, that no order having been made for payment of the costs of the action out of the proceeds of sale, the Court could not anticipate such order, and that the solicitors could only be treated as having a lien on the plaintiffs' share recovered by them in the action. An injunction was granted to prevent the plaintiffs from receiving any money in the action, or by way of compromise, without notice to the solicitors. *Lloyd* v. *Jones*, 27 W. R. 655; 40 L. T. 514.

11. In a suit for partition under the Partition Act 1868, the plaintiffs and defendants were together absolutely entitled to the whole of the legal and equitable fee of the estate, and the relief asked and obtained was partition and not sale:—Held, that the whole costs of the action should be borne by the parties ratably and in proportion to the value of their respective shares. *Bowes* v. *Bute* (*Marquis*), 27 W. R. 750.

12. As a general rule, the costs of a partition action should be borne by the parties in proportion to their interests as declared by the judgment. *Ball* v. *Kemp-Welch*, 14 L. R., Ch. D., 512; 49 L. J., Ch., 528; 43 L. T. 116.

The costs of a partition action can be taxed as between solicitor and client only by the consent of the parties; otherwise they must be taxed as between party and party. *Ib.*

13. A wife and her husband had severed in their defence, and the wife's solicitors had obtained a charging order and stop order on the fund in court for the costs due to them in the suit, and appeared on the present hearing on further consideration:—Held, that they must

bear their own costs of appearance by counsel as well as of the stop order. *Mildmay* v. *Quicke*, 20 L. R., Eq., 357; 46 L. J., Ch., 667.

1. Certain estates were, as to one undivided fourth part, limited to C. B. in tail, the tenant in possession; remainder to J. D. B. in tail, an infant; remainder to E. C. and others in tail, in co-parcenery; remainders over in tail. C. B. was found a lunatic by inquisition. In a suit for partition by A. S., who was entitled to one other undivided fourth part, E. C. and her husband were made parties. On objection, that inasmuch as a conveyance could be obtained from the lunatic under the Trustee Act 1850, they were unnecessary parties, the Court held that the powers given by the Act to the Lord Chancellor were discretionary, and that E. C., the tenant in tail in remainder, was not an unnecessary or improper party. Where C. B., the first tenant in tail in possession, was a lunatic, the second tenant in tail in remainder an infant, and E. C., the third tenant in tail in remainder, being made a party to the suit, by her answer did not disclaim, but said that she made out the interest which she claimed by referring to the statements in the plaintiff's bill, in which such interests were stated to be correctly set forth, and the prayer of the bill was for a conveyance of the shares, when allotted, to the parties nominatim, including E. C., the Court held that E. C. was not an unnecessary party; but inasmuch as E. C. could not derive any present benefit from the suit, her costs up to the hearing were decreed to be a charge upon the fourth part which should be allotted to the lunatic, in respect of which E. C. was interested. The costs of C. B., the lunatic, and of the infant tenant in tail in remainder, were also decreed to be a charge upon the lunatic's fourth part of the estates. *Singleton* v. *Hopkins*, 1 Jur., N. S., 1199; 4 W. R. 107; 25 L. J., Ch., 50.

Quære, whether a Vice-Chancellor has in such a case jurisdiction to make an order charging a lunatic's estate with costs. *Ib.*

Where Infants Interested.] 2. In a suit for partition, costs of infants, including as well the costs incurred for the issuing of the commission as those incurred subsequently thereto, charged upon and ordered to be raised out of the shares allotted to such infants respectively in severalty. *Cox* v. *Cox*, 3 Kay & J. 554.

3. In a suit for partition of property in which an infant was interested, the estate was sold:—Held, that the costs subsequently to the first decree ought to be borne by the aggregate amount of the purchase-moneys. *Coventry* v. *Coventry*, 34 Beav. 572.

4. In a partition suit, where some of the parties interested were under disability, the Court declared the costs of each party to be a charge upon their respective shares; and it appearing to be for the benefit of the infants, the Court ordered a sale of the entirety, without partition, for the purpose of raising and paying costs. *Davis* v. *Turvey*, 9 Jur., N. S., 954; 11 W. R. 679; 8 L. T., N. S., 378; 2 N. R. 151.

5. Where some of the parties to a suit for partition are under disability, and it appears to be for their benefit that the costs of the suit be raised out of the estate before partition, the shares of all parties being properly chargeable with their costs, the Court will direct a sale of the entirety of the estate for the purpose of paying costs. *Thackeray* v *Parker*, 8 L. T., N. S., 602; 1 N. R. 567.

6. When a partition suit was instituted by the owners of three undivided sevenths of freehold premises for a sale of the whole, and such sale was not opposed by the guardian *ad litem* of three minors, who, under their father (which directed that no sale should take place until the youngest attained twenty-one), were owners of the remaining four-sevenths, and one of them had come of age before the hearing of the suit, and also desired a sale the Court made a decree as prayed, directing an inquiry as to whether the acceptance of an offer for the premises would be for the benefit of the minors, and ordered the costs of all parties to be paid ratably out of the purchase money, according to their respective interests *Thompson* v. *Richardson*, 6 Ir. R., Eq., 596.

7. Where part of an estate held in undivided shares (one share belonging to an infant) is contracted to be sold, and a bill is filed to carry out that contract and incidentally asks a partition: the Court will direct a sale of the whole by consent, the infant's costs being a charge on his share. *Smith* v. *Birch*, 18 L. T., N. S., 174

8. When real estate of an infant is ordered to be sold for payment of costs or any other special purpose, and more is sold than is required, the surplus proceeds of sale are converted into personal estate, and on the death of the infant go to his personal representatives *Steed* v. *Preece*, 18 L. R., Eq., 192; 43 L. J. Ch., 687; 22 W. R. 432.

9. Where the defendants were infants the Court, on making a decree for sale under the Act, ordered the costs of all parties to be paid out of the estate. *Osborn* v. *Osborn*, 6 L. R. Eq., 338; 37 L. J., Ch., 656; 18 L. T., N. S., 678

10. On a bill filed by infants against an infant for partition or sale of land, an order was made for sale, and the infants' costs were charged on the respective shares. *France* v. *France*, 41 L. J., Ch., 150; 13 L. R., Eq., 173 20 W. R. 230; 25 L. T., N. S., 785.

11. When infants prayed for a declaration that premises were divisible amongst them and a defendant, and that the costs of the suit might be taxed, and the plaintiffs' costs declared to be a charge on their shares; for a partition, or sale, and, after payment of the costs, for a division of the proceeds; the Court made a declaration as to the rights of the parties, and directed a sale, but declined to make any order as to the costs until the further consideration of the cause. *Davey* v. *Wietlisbach*, 15 L. R., Eq., 269.

Form of decree in *Young* v. *Young* (13 L. R., Eq., 175. n.), and *France* v. *France* (13 L. R. Eq., 173), not adopted. *Ib.*

4. Receiver.

12. A receiver will not be granted on a bill of partition filed by one tenant in common against another, unless a case of exclusion is shown. *Spratt* v. *Ahearne*, 1 Jones 50.

13. In an action for partition, where one of the co-owners is in occupation, though not in exclusive occupation, of the property, the Court has jurisdiction under the Judicature Act 1873, s. 25, sub-s. 8, to appoint a receiver until the hearing. *Porter* v. *Lopes*, 7 L. R., Ch. D., 358; 37 L. T., N. S., 824.

XI. CONVEYANCES.

1. It is essential to partition to have the legal title before the Court. *Miller* v. *Warmington*, 1 Jac. & Walk. 493.

2. Difference between partition at law and in equity. The former operates by the judgment of a court of law, conclusive on the parties, the latter proceeds on conveyances to be executed between the parties, and cannot be effectual if the parties be incompetent to execute. *Whaley* v. *Dawson*, 2 Sch. & Lef. 372.

3. On a partition between A., B., and C., A. refused to execute a conveyance to B. unless B. and C. executed a conveyance to him:—Held, that he was only entitled to require a conveyance from B. to himself as the condition of his executing a conveyance to B. *Orger* v. *Parker*, 9 W. R. 180.

4. A right merely dependent on ownership cannot be reserved over the entirety after partition. *Charlesworth* v. *Garsted*, 3 N. R. 54.

5. Under a power to make a partition in a marriage settlement, certain lands in Wales ("mines and minerals" excepted) were partitioned by an agreement, and deeds of partition were afterwards executed carrying out the agreement upon a valuation and report of two surveyors. The property was divided into moieties, one moiety consisting to a great extent of limestone rock, which, though of small value when the partition was made, became afterwards very valuable. The plaintiffs, who were now the owners of the other moiety, claimed a participation in the royalties and rents arising from the lime pits or quarries, on the ground that lime-rock was included in the term "mines and minerals;" and on bill filed to determine the question whether lime-rocks were minerals:—Held, that they were not, and bill dismissed. *Semble*, a mineral refers to the mode in which the substance is worked, a mine being a covert working; a quarry, *sub dio*. *Darvel* v. *Roper*, 3 W. R. 467; 3 Drew. 294; 3 Eq. Rep. 1004.

6. Upon a partition, the shares of the parties were very minute and complicated. The Court, to save expense, and instead of directing a conveyance of the several shares, declared each of the parties trustees as to the shares allotted to them, and then vested the whole trust estate in a single new trustee, under the Trustee Acts, with directions to convey to the several parties their allotted shares. *Shepherd* v. *Churchill*, 25 Beav. 21.

7. After a sale under a decree for partition in a suit under the Partition Act of 1868, it appeared that one-sixth of the estate was vested in B. (one of the parties to the suit), a bachelor, for life, with remainders to his issue in tail, with ultimate remainders to the right heirs of the plaintiff:—Held, that the power (to make declarations as to the interests of unborn persons, and that such persons on coming into existence would be trustees) given by the Trustee Act 1850, s. 30, which is incorporated in the Partition Act 1868, enabled the Court to make an order to appoint a person to convey the legal estate in the one-sixth limited to the right heirs of the plaintiff. *Basnett* v. *Moxon*, 44 L. J., Ch., 556; 20 L. R., Eq., 20; 23 W. R. 544. And see *Lees* v. *Coulton*, 20 L. R., Eq., 20; 44 L. J., Ch., 556; 23 W. R. 544.

8. Section 1 of the Trustee Extension Act 1852 (15 & 16 Vict., c. 55), applies to sales under the Partition Acts 1868 and 1876, and is not limited to cases of persons under disability. *Beckett* v. *Sutton*, 19 L. R., Ch. D., 646; 51 L. J., Ch., 432; 46 L. T. 481; 30 W. R. 490.

Infants.] 9. Partition between an adult and the infant, the latter having time till of age to show cause, Court orders the conveyance from the adult to be respited till that time. *Luckfield* v. *Buller*, Ambl. 197.

10. There being on bill for partition, infant *cestuis que trustent*, conveyance respited till they come of age. *Att.-Gen.* v. *Hamilton*, 1 Madd. 214.

11. Lands conveyed to trustees in trust, as to one moiety to B. (who is of age) in tail, A., the infant, brings a bill for a partition. Decreed a partition, but the trustees not to convey till the infant is of age, that he might join in confirming the partition. *Brook* (*Lord*) v. *Hertford* (*Lord*), 2 P. W. 518.

12. In a partition suit to which minors are parties, they may be declared trustees of the portions not allotted to them, and their proportion of the costs declared a charge upon the estate of the minors in the land. *St. Leger* v. *Ferguson*, 10 Ir. Ch. R. 488.

13. Where infants are parties to a suit for a partition, the form of the decree since the stat. 13 & 14 Vict., c. 60, is to declare that, after partition, the infant is a trustee of the parts allotted in severalty to the other parties. *Bowra* v. *Wright*, 4 De G. & Sm. 265; 15 Jur. 981; 20 L. J., Ch., 216. S. C. *nom.* *Bowra* v. *Whight*, 20 L. J., N. S., Ch., 216; 15 Jur. 981.

Lunatics.] 14. Where a decree had been made by a Vice-Chancellor for a partition of lands of which a lunatic was entitled to an undivided share as tenant in tail in possession, the Court, on the committee appearing and expressing his opinion that the partition would be for the benefit of the lunatic, made an offer, intituled in the Trustee Act 1850, the Lunacy Regulation Act, 16 & 17 Vict., c. 70, the matter of the lunacy, and the suit in which the decree had been made, directing the partition to be carried out, and a conveyance to be executed by the committee. *Singleton* v. *Hopkins*, *Re Blomar* or *Bloomar*, 2 De G. & J. 88; 4 Jur., N. S., 546; 27 L. J., Ch., 173; 6 W. R. 178.

15. Where, in a suit for partition of lands to which a lunatic was entitled to an undivided share, a partition had been made, and the lunatic had been declared a trustee within the Trustee Act 1850:—Held, on a petition by the owner of the other undivided moiety, that the Court had jurisdiction to carry out the petition by a vesting order under the Trustee Act 1850, notwithstanding the doubt attributed to the Court in *Re Bloomar* (2 De G. & J. 88). *Re Molyneux*, 10 W. R. 512; 4 De G. F. & J. 465.

16. A decree having been made for partition of lands, an undivided share in which was vested in a lunatic, as tenant-in-tail, an order was made in lunacy and in Chancery, directing the committee to execute all necessary assurances for giving effect to the partition. *Re Sherard*, *Lowther* v. *Cuffe*, 1 De G. J. & Sm. 421.

17. It is irregular for a bill to be filed by a person of unsound mind not so found by inquisition, by his next friend, for the purpose of dealing with the real estate of the person of unsound mind. *Halfhide* v. *Robinson*, 9 L. R., Ch., 373; 22 W. R. 448; 30 L. T., N. S., 216.

A bill was filed by a person of unsound mind not so found, by his next friend, for a partition or sale of real estate, and a decree for sale was made. A petition was afterwards presented under the Trustee Act 1852 for an order vesting the estate of the plaintiff in the purchaser. The Court refused to make the order, considering that the suit was irregular, but as the plaintiff's share was only 200*l.*, and she had no other property, the Court directed an application to be made in lunacy, under the Lunacy Regulation Act 1862, s. 13, for a sale, and permitted the petition to be amended for that purpose. *Ib.*

1. The Court, under its lunacy jurisdiction, has power to bar the estate tail of a lunatic tenant in tail; but it is the duty of the Court so to exercise it as not to affect the rights of the persons entitled in remainder to the estate. Where a lunatic was tenant in tail of an undivided share of an estate, and an action was brought for the partition of the estate, the Court, under the 6th section of the Partition Act 1868, authorised the committee of the lunatic to request a sale and to join in conveying the estate to the purchaser, but directed that the proceeds of the sale should be subject to the same uses as the lunatic's estate was subject to before the sale. *Re Pares, Lillingston* v. *Pares*, 12 L. R., Ch. D., 333; 41 L. T. 574; 28 W. R. 193.

XII. OTHER MATTERS.

2. By long custom, four measures of corn were distributed to the poor of two parishes by the owners of the M. estate. In 1795 a bill for partition was filed, and subsequently an Act of Parliament to effect the same was passed, and lot 2 in the schedule was allotted to W., and in the same schedule the above measures of corn were mentioned as attaching to that lot, though it was not expressly said that they were a charge on the land. For thirty years the owner of lot 2 paid a sum of money in respect of the measures of corn, and on F. W., the son of W., succeeding to lot 2, he opposed further payment, though for two years later the money had been paid by the agents of F. W. On an *ex officio* information being filed against F. W. he insisted that the payments had been all along merely voluntary, and for the last two years without his authority, but Romilly, M. R., declared the value of the measures of corn were a charge on the land in lot 2, which was affirmed on appeal. *Att.-Gen.* v. *West*, 27 L. J., Ch., 789; 5 Jur., N. S., 77.

Waste and Trespass.] 3. After a decree has been made in a partition suit there is juisdiction in the suit, upon motion, to restrain by injunotion one of the parties to the suit from wasting the property, or doing anything amounting to an alteration of it. *Bailey* v. *Hobson*, 18 W. R. 124; 5 L. R., Ch., 180; 39 L. J., Ch., 270; 22 L. T., N. S., 594.

But where, after a decree for sale had been made in a partition suit, one of the parties, who was in possession of the whole property, but not under any tenancy, was about to sell off the property certain crops, and there was evidence only to show that by the custom of the country, as between landlord and tenant, those crops could not be sold by the tenant off the land:—Held, that no injunction to restrain the sale could be granted. *Ib.*

4. Pending a partition suit, the Court will not interfere with the property, nor allow it to be interfered with by the parties, until the partition has been completed; and, therefore, it refused an injunction to restrain the defendant, who was in occupation of the portion allotted to the plaintiff, from proceeding with an action of trespass against the plaintiff for a forcible entry. *Hughes* v. *D'Arcy*, 8 Ir. R., Eq., 71.

Previously to the execution of the mutual conveyances on partition, one of several tenants in common will not be restrained from distraining for his proportion of the rent which had accrued due before the certificate, embodying the partition, has been made. *Ib.*

Incorporation of s. 23 *of Settled Estates Act* 1856 (19 & 20 Vict., c. 120).] 5. The words of the 23rd section of the Settled Estates Act when imported into the 8th section of the Partition Act 1868 (31 & 32 Vict., c. 40), are not to be restricted to a sale of estates in settlement, but apply to all sales effected under the Partition Act. *Re Barker*, 17 L. R., Ch. D., 241; 50 L. J., Ch., 334; 44 L. T. 33; 29 W. R. 873.

The payment of the money into court to the credit of the lunacy was not a payment "to a person becoming absolutely entitled" within the meaning of the 23rd section of the Settled Estates Act. *Ib.*

PARTNERSHIP.

— *Inspector in Bankruptcy.* See BANKRUPTCY, VI.
— *Act of Bankruptcy by.* See BANKRUPTCY, VIII. xvii.
— *Adjudication Against.* See BANKRUPTCY, XII. x. 3.
— *Annulling Adjudication against.* See BANKRUPTCY, XV. vi.
— *Property of, in Bankruptcy.* See BANKRUPTCY, XVII. xxvi.
— *Allowance to on Bankruptcy.* See BANKRUPTCY, XXX. v.
— *Order and Disposition.* See BANKRUPTCY, XIX. xviii.
— *Protected Transactions.* See BANKRUPTCY, XX. ix.
— *Proof.* See BANKRUPTCY, XXIV. iv. 23—XXIV. xxviii.
— *Set-off and Mutual Credit.* See BANKRUPTCY, XXVI. x.—SET-OFF, III.
— *Composition by.* See BANKRUPTCY, XLII. xiii.
— *Rights in Respect of Goodwill.* See GOODWILL, IV.
— *User of Name, or Style by.* See TRADE, II. 3.
— *Right in Respect of Trade Marks.* See TRADE MARK, I.
— *Cost-Book Mining.* See MINES AND MINERALS, V.
— *Executor Carrying on Business.* EXECUTOR AND ADMINISTRATOR, X. vii.
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I. Constitution.

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II. *By Sharing Profit and Loss*, 5424.
III. *Joint Adventures*, 5426.
IV. *By Loans*, 5427.
V. *Partner or Servant*, 5430.
VI. *Partnership as to Third Parties*, 5432.

See also IV. & V. *supra.*

I. IN GENERAL.

1. Partner without participation of profit by lending his name, though contracting that he shall suffer no loss. *Exp. Langdale*, 18 Ves. 300.

2. Where A.'s name is used in partnership by other partners as a partner, but he receives no part of profits, etc., nor are any articles of partnership entered into by A. and others:—Held, but a nominal partnership. *Jacobsen* v. *Hennekenius*, 5 Bro. P. C. 482.

3. A draft of articles of partnership, together with a stated account and payment of money by acting partner to others:—Held, sufficient evidence of partnership to ground decree for account. *Worts* v. *Pern*, 3 Bro. P. C. 548.

4. A partnership cannot be established by the evidence of the partners and their private communications. The fact must be proved *aliunde*. For want of such proof a commission against the ostensible partners only was sustained. *Exp. Benfield*, 5 Ves. 424.

5. A public declaration in an advertisement of dissolution constitutes a partnership. *Exp. Matthews*, 3 Ves. & B. 125.

6. Part owners of a ship are tenants in common, but jointly interested in her use, and the law as to the earnings of a ship follows the general law of partnership. *Green* v. *Briggs*, 6 Hare 395; 17 L. J., N. S., Ch., 323; 12 Jur. 326.

7. A. being as a partner entitled to a share of extensive iron works, and of the lands and premises on which they were carried on, agreed for valuable consideration to assign to B. his interest in the property and business: B. interfered and acted as a partner, but afterwards he assigned his share and gave notice to the other partners that he had withdrawn from the business, and when called on to complete his purchase, resisted the performance of the contract successfully, on the ground that a good title could not be shown:—Held, that B., as between him and his other partners, was to be treated as a partner, and was to contribute to the partnership losses until the time when he gave notice of his withdrawal from the concern, and assigned his share; that his liability ceased upon his assigning his share and giving notice to the other partners of his withdrawal from the concern; that the assignment of his share, though made to an insolvent person, was not for that reason the less effectual in putting an end to his liability; that the assignee not having been acknowledged a partner or permitted to act as such did not, by his acceptance of the assignment, incur any liability as between himself and the co-partners. *Jefferys* v. *Smith*, 3 Russ. 158.

8. A. by his will (after declaring his intention to assign the lease of a hotel in which he carried on business, and the effects therein and the business thereof, in trust for his son and daughter, in consideration of an annuity to be paid to him for life), bequeathed the residue of his personal estate and effects to his son and daughter in equal shares. The testator died without having effected the purpose declared in his will. The daughter, being executrix, carried on the business until she married in 1819. In the following year, the son filed a bill praying an account of the profits of the business from the death of the testator until 1819, and that half the profits and half the assets might be paid to him as residuary legatee and partner. The Vice-Chancellor and Lord Chancellor decided that a partnership existed from the death of the testator to the marriage of the daughter. Against this decree the defendants appealed to the House

of Lords, and insisted that an issue should be directed to try whether a partnership existed. The House affirmed the decree, on the ground that it was then too late to ask for such an issue. *Burnand* v. *Nerot*, 2 Bli., N. S., 215; 4 Russ. 247; 6 L. J., Ch., 81.

1. R., being in possession of mines and iron-works, under leases of unequal duration, by will bequeathed 25,000*l.* to B. "as a capital for him to become partner with my executors of one-fourth share in trade of all those works so long as the lease endures," with a devise to H. and his wife of residue of his estates, real and personal. By codicil testator gave to W. three-eighths of concern of iron-works: "the partnership will stand at my death, W. three-eighths, H. three-eighths, B. two-eighths." After R.'s death W., H., and B. carried on works for two years, selling iron manufactured not only from the produce of the mines, but from other sources:—Held, that codicil revoked residuary clause in favour of H.'s wife as to the trade, and that concern was a partnership in trade. *Cranshay* v. *Maule*, 1 Swan. 495; 1 Wils. 181.

2. Interests in partnership trade, under articles, for widows of the partners for their respective lives, and after the decease of the widows to be equally divided among their respective children:—Held, not vested in children who died in life of mother on account of nature of the subject; the primary object being to constitute a partnership and ascertain the succession, and a provision for the family being only a secondary object through that medium. *Balmain* v. *Shore*, 9 Ves. 500.

3. Joint ownership of property accompanied with joint occupation distinguished from partnership, and one of the joint owners held not entitled to a lien on the property for money advanced by him and laid out on it. Duties of guardians of infants, whether wards of court or not, stated. *Kay* v. *Johnston*, 21 Beav. 536.

4. *Semble*, that a company for building a corn exchange is not a partnership so as to affect the shareholders with unlimited liability. *Worcester Corn Exchange Co.*, 1 W. R. 171; 22 L. J., Ch., 593.

5. A., who was the proprietor of a wholesale woollen and cloth establishment in Dublin, entered into an agreement with B. to become the managing partner in a separate and larger concern in the same trade, in Huddersfield, which had been previously conducted by B. the sole owner. B. having offered to become a partner in the Dublin establishment of A., it was arranged, though upon no definite or conclusive agreement, that B. should superintend the Dublin concern, with the object of testing its capacity, and ascertaining whether it was sufficiently profitable to be continued. It was further agreed that, at the expiration of a year, B. should have the option of entering into a partnership in the Dublin business, and should be entitled to a share of the profits of that year, but should not receive any remuneration or any portion of the profits, if, at the end of that time, he elected not to become a partner. B. came to Dublin, and for some time took part in the superintendence and management of the Dublin establishment. He never exercised, however, his option of becoming a partner but having apparently abandoned all interest in the concern, died before the expiration of the year of trial:—Held, that a partnership in the Dublin business did not exist between A. and B.; and that consequently a claim made by the executors of B. to be admitted as creditors of the estate of A., on his bankruptcy, for goods sold and cash supplied by the Huddersfield house to the Dublin concern, should be disallowed. *Re Hall*, 15 Ir. Ch. R. 287; 11 L. T., N. S., 579.

6. A covenant by B. to admit a nominee of C. as a partner with him will not of itself create a partnership between them. *Exp. Davis, Re Harris*, 9 Jur., N. S., 859; 32 L. J., Bky., 68; 8 L. T., N. S., 745; 4 De G. J. & S. 523.

An agreement was entered into between A. and B., whereby in effect A. was to carry on a certain business in the name of A. & Co., for the benefit of himself and any person whom B. might at any time within eight years nominate; B. was to make certain advances to A. for the purpose of the business, and become surety for him to a certain company; A. was to give B. promissory notes for his advances and any sums he might pay as surety, and to carry on the business in partnership with B.'s nominee for twenty-one years on certain specified terms: the profits of the business were to be for the first eight years applied in paying A. 100*l.* a year, and then in paying B. his advances with interest; and the residue was to be divided between A. and B.'s nominee in certain specified proportions, and losses were to be borne in the same proportions. The agreement gave B. a right to see the accounts relating to the business, and contained other special clauses under which B. might at any time within the eight years have nominated himself a partner. Before the eight years had elapsed, and before any nomination had been made by B., A. became bankrupt, being indebted to B. for advances. There being no person who claimed to be a joint creditor of A. and B.:—Held, that B.'s executor was entitled to prove against A.'s estate for the advances, the agreement not having constituted A. and B. partners as between themselves. *Ib.*

7. E. experimented in sewage, B. in yeast, and W. supplied both of them with money for the purpose. The three traded ostensibly as partners under the names of Stuart & Co., Ward & Co., and Hofmann & Co., and ultimately under that of Hofmann, Bowing, Ellis, & Co. Prior to 1869, the terms of the ostensible partnership subsisted in parol only, the two businesses being speculative and hazardous; but in 1869, success in the yeast manufacture appearing to have been at last obtained, a draft deed of partnership was prepared, but before its execution a rupture occurred among the partners or intending partners, and the deed remained unexecuted. B. and W. expelled E. forcibly from the premises, and subsequently took out a patent for the yeast invention in their own names. E. filed a bill claiming to be restored to the partnership and to have the benefit of the patent, and an injunction and an account. It was proved that no yeast had ever been sold:—Held, that these circumstances showed no partnership between E. and W. and B. *Ellis* v. *Ward*, 21 W. R. 100.

8. J. gave to a bank a guarantee for 1,000*l.* in favour of A. & Co., representing at the time to

the bank manager that he was a partner in fact in that firm, but that he wished the fact of his partnership to be kept secret. The guarantee described him as a partner in the firm. Some time afterwards A. alone, as A. & Co., filed a liquidation petition, and the bank tendered a proof in the liquidation for advances which they had made to A. & Co. after the guarantee. After this the bank sued J. for 5,659*l.*, alleging him to have been a partner with A. J. filed a bill in chancery to restrain the proceedings in the action, denying the alleged partnership. A compromise was entered into between the bank and J., by which 2,818*l.* was paid to them in satisfaction of their claim against J. and of a claim which they made against S., who had also given them a guarantee on behalf of A. & Co. J.'s guarantee was given up to him, a receipt for 1,000*l.* being indorsed on it by the bank manager "in payment and discharge of the within guarantee, and also of all claims against J. in reference to or in connection with A. & C.":—Held, that J. must be taken to have been an actual partner with A., but that the receipt did not operate to release J., so as to preclude the bank from maintaining a proof against A.'s estate. *Exp. Good, Re Armitage*, 5 L. R., Ch. D., 46; 46 L. J., Bky., 65; 25 W. R. 422; 36 L. T. 338.

1. An ordinary partnership is a partnership composed of definite individuals, bound together by contract between themselves to continue combined for some joint object, either during pleasure or during a limited time, and is essentially composed of the persons originally entering into the contract with one another. A company is the result of an arrangement by which parties intend to form a partnership which is constantly changing, a partnership to-day consisting of certain members and to-morrow of some only of those members, along with others who have come in; so that there will be a constant shifting of the partnership, and with the intention that, so far as the partners can, by agreement between themselves, bring about such a result, the new partnership shall succeed to the assets and liabilities of the old partnership. *Semble. Smith* v. *Anderson*, 15 L. R., Ch. D., 273; 50 L. J., Ch., 39; 43 L. T. 329; 29 W. R. 21.

Statute of Frauds.] 2. An agreement to become partners in a colliery which was to be demised upon royalties, and the royalties to be divided in certain proportions, is an interest in land within the Statute of Frauds, 29 Car. 2, c. 3, and must be in writing, signed by the parties. *Caddick* v. *Skidmore*, 3 Jur., N. S., 1185; 6 W. R. 119.

Receipts signed by the party sought to be charged, which partly disclosed the nature of the agreement, held not sufficient to take the case out of the statute. *Ib.*

3. A partnership agreement between A. and B. that they shall be jointly interested in a speculation for buying, improving for sale, and selling lands, may be proved without being evidenced by any writing signed by, or by the authority of, the party to be charged therewith, within the Statute of Frauds, and such an agreement being proved, A. or B. may establish his interest in land, the subject of the partnership, without such interest being evidenced by any such writing. *Dale* v. *Hamilton*, 5 Hare 369; 16 L. J., N. S., Ch., 126; 11 Jur. 163. And see S. C. on appeal, 2 Ph. 266; 16 L. J., N. S., Ch., 397; 11 Jur. 574.

An agreement between B. and C. was communicated by one of the parties to A. After applications in writing from A., for the signature of the other parties to a memorandum, expressing his interest as a partner in the transaction relating to the land, the subject of the agreement, the Court held that the agreement so communicated must be taken, not as an original proposal, but as an acknowledgment of a pre-existing right in A., and that A. might avail himself of the acknowledgment, notwithstanding the agreement between B. and C. was *res inter alios acta*, and notwithstanding A. objected to some of the terms in that agreement, as not truly expressing his partnership contract. *Ib.*

II. BY SHARING PROFIT AND LOSS.

4. Partnership by agreement for participation in profits or their application. *Exp. Langdale*, 18 Ves. 300.

5. Partner constituted by a share in profits without interest in capital. *Exp. Hodgkinson*, 19 Ves. 291.

6. Agreement between two traders, that one shall advance the fund and the other superintend the business, the profit to be equally divided, but the entire loss, if any, to be borne by the latter, not usurious, but *nudum pactum* as to the last clause, and such an agreement ought to be construed as constituting a partnership, the loss to be borne, as well as the profits shared equally. *Brophy* v. *Holmes*, 2 Moll. 1.

7. A. and B. were tailors; A. employed B. to obtain orders for him, and agreed to allow him a share of the profits by way of commission upon such orders. B. carried on the business with A., but his name was not joined with that of A. All goods were ordered and paid for by A., and all debts were paid to him alone. B. set up a partnership:—Held, that a right to a share of the profits did not necessarily create a partnership, and there was no evidence to prove a partnership on the part of B. *Andrews* v. *Pugh*, 24 L. J., Ch., 58.

8. An agreement between underwriters to act in concert, and share equally the profit and loss of all insurances, constitutes a partnership, though each underwrote policies in his own name for distinct sums. *Brett* v. *Beckwith*, 3 Jur., N. S., 31; 26 L. J., Ch., 130.

The 35 Geo. 3, c. 63, requiring the names of insurers to be written upon policies, will not prevent the insured from recovering from persons engaged as partners in underwriting though each of the partners signed in his own name in distinct sums, and not on behalf of a firm. *Ib.*

9. The proper test of liability as a partner is not whether the party sought to be charged has stipulated for the participation in profits as such, but whether the person by whom the trade was actually carried on, carried it on in the capacity of agent for him. *Wheatcroft* v. *Hickman*, *Cox* v. *Hickman*, 8 H. L. Ca. 268; 7 Jur., N. S., 105; 30 L. J., C. P., 125.

A. and B., who carried on the business of

ironmasters in co-partnership by a deed, purporting to be made between A. and B. of the first part, five persons named as trustees of the second part, and the several persons whose names were contained in a schedule as creditors for the sum therein mentioned, and who should execute the deed of the third part, reciting that A. and B. were indebted to the several persons, parties thereto of the third part, and that they had agreed to assign all their estate and effects for the benefit of such creditors, assigned the works and all their property and effects to the trustees upon trust to carry on the business under the name of the Stanton Iron Company, and out of the profits to pay interest on mortgages, etc., and to pay and divide the net income of the business remaining after answering the purposes aforesaid, unto and among all and singular the creditors of A. and B. in ratable proportions according to the amount of their respective debts:—Held, that, under this deed, the creditors executing it did not become liable as partners for debts contracted by the trustees in carrying on the trade. *Ib.*

1. A policy-holder, participating in the profits of the society, is not necessarily a partner in it. *Cox* v. *Hickman* (8 H. L. Ca. 268) followed. *Re English and Irish Church and University Assurance Society*, 2 N. R. 107.

2. At a meeting in 1852 between A. and B., two solicitors, it was agreed that the professional business connected with the formation of a new line of railway should be apportioned between them; that they should co-operate as solicitors in getting up the company, and obtaining an Act of Parliament at their own risk; that each should provide the cash for his own disbursements, such disbursements to be repaid in the first instance, and any profits should be equally divided between them. The company was formed, and the Act obtained; and at a meeting of the company in March 1855, a proposal in writing was made by A. and B., and confirmed by the company, that they should be allowed 1,500*l.* in paid-up shares, in addition to their disbursements, such 1,500*l.* to be received in full for all professional business up to that time, but to be subject to revision in case the line should be completed. In 1856 part of the line was commenced, but the works were stopped for the want of funds. These funds were afterwards supplied by B. and others, A. not being able to contribute. In 1858 a small part of the line was completed, and A., early in 1859, pressed the company for payment on account of his costs. In May 1859 the company paid him 450*l.* in cash and 740*l.* in paid-up shares, and took from him a release of all claims. From that time A. ceased to act as solicitor to the company. B. said that some time in 1858 he told A., when he was pressing the company, that he (B.) should henceforth decline undertaking any fresh business of the company in co-operation with him; and that since the date of the release he had had nothing whatever to do with A. He admitted A.'s right to have the profits attending obtaining the Act of Parliament, but insisted that the memorandum of March 1855, and the payments and release of May 1859, settled all questions between A. and himself. He denied that any partnership was ever constituted. Stuart, Vice-Chancellor, held, that the parties were entitled to share equally in all profits derived from all business transacted by them, or either of them, for the company from the meeting in 1852 up to the date of the decree. On appeal, held, that the release did not put an end to the agreement between the parties, and that A. was entitled to a decree for an account to April 1859. *Hanslip* v. *Kitton*, 8 Jur., N. S., 835, 1113; 7 L. T., N. S., 291.

3. Where two solicitors, who are not in partnership, are employed in the same matter for a client, as in the defence of an action, the *primâ facie* inference of law is, that they are partners as to that particular matter, and entitled to an equal share of the joint profits, irrespective of the quantity of work performed by each. *Robinson* v. *Anderson*, 20 Beav. 98; 7 De G. M. & G. 239.

Where the contrary is alleged, the burden of proof is on him who alleges it. *Ib.*

4. A company was formed in India to carry on the business of insurance, and A., residing in the Mauritius, gave special verbal instructions to B., who was the agent for the company in India, to execute the partnership deed for A., which was done, and A.'s name appeared in the list of shareholders. Afterwards, on the insolvency of the company, A. set up the defence that he was not a shareholder, for no power by deed was given to B. to execute the deed in his name:—Held, that a partner might become liable in that character without having executed the partnership deed, if his name was put on the list of shareholders with his consent, so as to entitle him to share in the profits. *Leishman* v. *Cochrane*, 12 W. R. 181; 9 L. T., N. S., 104.

5. From 1849 R. resided with his father, and assisted him in his business. The sign-board, the invoices, and the banking account were in the name of "R. & Son." They drew and accepted bills under the same title, and executed a deed which described them as co-partners:—Held, nevertheless, after the death of the son, in 1862, that they were not partners *inter se*. The circumstances relied on were, the absence of any division of profits in the books, which were kept by the son; the absence of proof of the son's having any capital or being entitled to receive any share of the profits; the fact of his having, when he ceased to reside with his father, made no request for an account of the profits, but accepted 1*l.* a week as a remuneration until his death, six months afterwards; and the testimony of the members of the family. *Rudcliffe* v. *Rushworth*, 33 Beav. 484.

6. When an association of two or more persons is formed for the purpose of carrying on or continuing to carry on business, and those persons are to share indefinitely the profits of the business, they are to be treated as partners in that business, unless there are surrounding circumstances to show that they are not really partners. *Pooley* v. *Driver*, 36 L. T., N. S., 79; 4 L. R., Ch. D., 458; 46 L. J., Ch., 466; 25 W. R. 162.

In the absence of something in the contract to show a contrary intention, the right to share profits, as profits, constitutes, according to English law, a partnership. *Ib.*

7. Although a right to participate in the

profits of a trade is a strong test of partnership, and there may be cases where, from such perception alone, it may as a presumption, not of law, but of fact, be enforced; yet, whether that relation does or does not exist, must depend on the real intention and contract of the parties. *Mollwo* v. *Court of Wards*, 4 L. R., P. C., 419.

1. A father, whose son was about to become a member of Lloyds and to commence the business of an underwriter, became security for him, in compliance with the rules of Lloyds, to the amount of 10,000*l*. The son executed a written agreement, which contained a recital of the security given by the father, and by which the son covenanted with the father that S., and no other person, should underwrite at Lloyds in the name of the son; that S. should be paid 200*l*. a year and one-fifth of the net profits of underwriting; that the father should be at liberty to withdraw the whole of his security on notice being given to the son and other necessary parties, and immediately after such notice S. should cease to underwrite for the son or in his name; and that half the net profits of underwriting, deducting the share of S., should, together with 25*l*. per annum, be considered as owing, and should be paid to the father by the son. The business was carried on in the son's name alone, the creditors not knowing that the father was in any way connected with it:—Held, that no partnership was constituted between the father and the son. *Exp. Tennant, Re Howard*, 6 L. R., Ch. D., 303; 25 W. R. 854; 37 L. T., N. S., 284.

Participation in profits is not conclusive evidence of the existence of a partnership. It is very cogent evidence, and, if it stands alone, may be conclusive evidence of a partnership. But the effect of participation in profits may be outweighed by other circumstances. *Ib.*

2. An agreement to share the profit and loss of a business entitles each party as against the other to the general rights of a partner, including an interest in the good-will; and the agreement would have this legal effect notwithstanding a stipulation that the parties should not be partners. *Pawsey* v. *Armstrong*, 18 L. R., Ch. D., 698; 50 L. J., Ch., 683.

3. An agreement to share profits and losses is not, at any rate as between the parties to the agreement, conclusive as to their being partners; the question of partnership depends on the intention of the parties as shown by the agreement. *Pawsey* v. *Armstrong* (18 L. R., Ch. D., 690) observed upon. *Walker* v. *Hirsch*, 27 L. R., Ch. D., 460; 51 L. T. 581; 32 W. R. 992.

III. JOINT ADVENTURES.

4. A. and B., etc., were common carriers from L. to F., a separate portion of the road being allotted to each, and it having been stipulated also, that no partnership should exist between them; A. for himself and the other parties, agrees with the Mint to carry coin from L. to F., and afterwards makes another agreement with the Mint to carry other coin to places not on the road:—Held, that all the parties were entitled to share in the profits of this agreement. *Russell* *Austwick*, 1 Sim. 52.

5. Where a bill was brought for the cu tomary tithes of oysters, alleging the customa payment to be in the owners and occupiers boats employed in the fishery and usuall moored within the parish:—Held, that it wa not necessary to make the dredgers for th oysters, who had no interest in the boats, bu who shared in the profits of the oysters, parti to the bill. Oyster dredgers agreeing receive from the owners of the boats, wh were their employers, a stipulated share the profits arising from the sale of the oyster —Held, not to be co-adventurers with th owners. *Perrott* v. *Bryant*, 2 Y. & Coll. 61 6 L. J., N. S., Exch. Eq., 26.

6. The plaintiffs and four other firms merchants, by a written memorandum, whic was signed by them all, and stated that th plaintiffs had ordered their agents to contra for 1,200 tons of sugar, agreed that they shou have one-fifth interest each: that as the bil would be drawn on the plaintiffs they shou have a power of sale; that the various parti interested agreed to pay their shares of th marginal drafts; and finally, that "the pu chase should be at the risk of the undersigne in the proportion of one-fifth each." Th cargo arrived, but the result was a heavy los and two of the firms became unable to me their engagements:—Held, that this was joint mercantile adventure on the part of a five firms, and that the deficiency arising fro the failure of two of them was a loss whic must be borne equally by the three solve firms, and not by the plaintiffs alone. *M'Inr* v. *Hargrove*, 16 L. T., N. S., 509; 15 W. R. 77

7. By an agreement entered into in 18 between M. and the trading firm of Schach Brothers, M. agreed to pay them 2,000*l*., whic was to be invested by them in the purchase a steamer, to be used for purposes of trad For this sum M. was to receive interest at th rate of 5 per cent. per annum, and to ha one-eighth interest in the steamer; *i.e.*, have one-eighth of the annual results aft there had been deducted therefrom the abov mentioned 5 per cent., all expenses of equi ment, and a further sum of 10 per cent. account of the annual depreciation in value the steamer. M. also agreed to pay Schach Brothers, within a year from the date of th agreement, a further sum of 4,000*l*.; and, payment of the last-mentioned sum, M. w to become interested in all the business of th firm of Schacher Brothers to the extent three-sixteenths of the whole, and was cease to have the said one-eighth interest the steamer. M. duly paid to Schach Brothers the 2,000*l*., and also paid them, different times, various sums, not howev amounting altogether to 4,000*l*:—Held, th the agreement did not constitute M. a partn with the firm of Schacher Brothers in respe of the special venture, *i.e.*, the one steam *Meyer* v. *Schacher*, 38 L. T., N. S., 97.

8. Two defendants, who carried on busine in partnership as ship and insurance broke and the plaintiff, who carried on business alo as a merchant and commission agent, joint agreed to supply arms to a foreign governmer In the first contract with that governme the defendants were described only by the

partnership name, and it was signed on their behalf in that name. The second contract was signed by an agent of the plaintiff and the defendants, who was described in it as acting on behalf of the defendants (giving only the name of the firm) and the plaintiff, and as "agent of the two houses above named":—Held, that on the form of these contracts, in the absence of evidence to the contrary, the adventure must be considered to have been undertaken by the defendants as one person and the plaintiff as another person, and not by the three as individuals, and that the plaintiff was entitled to a moiety of the profits. *Warner* v. *Smith*, 1 De G. J. & Sm. 337; 32 L. J., Ch., 573; 11 W. R. 392; 8 L. T., N. S., 221.

1. An agreement between two persons to divide the profit or loss upon a sale of goods which are to be bought and paid for by one of them does not create a joint property in the goods. *Alfaro* v. *De la Torre*, 24 W. R. 510; 34 L. T., N. S., 122.

Y., a merchant in Costa Rica, obtained from A. an introduction to T., a merchant in London, upon an agreement that A. should share the profit or loss upon all consignments made by Y. to T. Y. purchased produce with his own moneys and consigned it for sale on his account to T., drawing bills against the consignments, and at the same time informing T. of the interest which A. had in the transaction. A. (without the knowledge of Y.) wrote a letter to T., pledging his interest in the consignment to secure an antecedent debt of his own to T. T. having failed to meet the bills, and the goods consigned not having been resold, T. claimed an interest in the goods under the pledge by A.:—Held, that the arrangement between Y. and A. constituted no such partnership as to entitle A. or any one claiming under him to an interest in the goods themselves as against Y. *Ib.*

2. A. entered into an agreement with B., that B. should work his patent at A.'s expense, first by way of experiment; and if A. was satisfied, and expressed his satisfaction in writing, then the patent was to be worked on certain terms of payment to B., B. undertaking to devote his time; and there were provisions for terminating the agreement in case the profit of the manufacture fell below a certain sum. A bill, filed in equity, made a case that experiments had been made; that the defendant represented the invention would answer, and led the plaintiff into expense; but it did not allege that the plaintiff was satisfied, or had expressed his satisfaction in writing, nor did it distinctly allege any fraudulent misrepresentation by the defendant; it prayed a dissolution of the joint concern, and a lien on the patents for the money expended by A.:—Held, on demurrer, that there was no partnership; that the agreement was merely for an experiment until A. should have expressed his satisfaction in writing. *Osborne* v. *Jullion*. 3 Drew. 596; 26 L. J., Ch., 6.

3. Certain persons joined together for the purpose of forming a company, and with that view purchased property, and incurred debts and expenses. The project became abortive; and upon a bill filed for an account on the footing of a partnership:—Held, that this was not a partnership, and the bill was dismissed. *Hamilton* v. *Smith*, 28 L. J., Ch., 404.

4. An agreement in reference to a building speculation upon the S. estate, bought with the money of A., provided that B., in consideration of his services to enable A. to realize the estate, should be paid one-half of the profits after A. had made certain payments; that B. should bring in a third of certain fees which he might receive from builders, and bear one-half of any losses, and generally it was agreed that he should receive and bear one-half of the profits and losses upon the whole transaction; but the agreement was not in any way to be construed into a partnership between the parties, and should wholly and solely relate to the S. estate. B.'s services were to be the consideration for the agreement, and he was not to charge for his time and trouble, but only actual disbursements made by him for the benefit of the estate and for realizing it for A. and B.'s mutual benefit:—Held, that the agreement constituted a partnership between the parties, and a dissolution was declared. *Moore* v. *Davis*, 11 L. R., Ch. D., 261; 27 W. R. 335; 39 L. T. 60.

IV. BY LOANS.

5. Where there had been a treaty for a partnership between the bankrupt and A., and articles drawn up which A. had refused to sign, but one of such articles was that A. should advance a sum of 2,000*l.*, and A. did in fact make such an advance, and the addition of "and Co." was made to the name of the firm, the advance appearing to have been taken as a loan, and the addition to have been made without the concurrence of A.:—Held, that there was no partnership. *Exp. Turquand, Re Vanderplank*, 2 M. D. & De G. 339; 11 L. J., N. S., Bky., 1; 6 Jur. 67.

6. A father advanced 1,000*l.* in a partnership concern, for the benefit of his sons A. and B., reserving to himself power if they died, to substitute two other sons for them. The partner gave credit in his books to A. and B. for 500*l.* each. A. and B. both died under age; and after their death the partner, by the father's direction, transferred two sums of 500*l.* each, in his books, to C. and D., two other sons, but without adding any interest or profit thereto from the accounts of A. and B. The business was, by the father's directions, carried on in the partner's own name, and the profits carried in his books to his own account:—Held, that there was no trust created for C. and D.; that the partnership was with the father, and the share of the profits were his assets. *Pilsworth* v. *Mosse*, 14 Ir. Ch. R. 163.

7. In 1856 an agreement was entered into between H. and D., under which the former was to carry on business during twenty-one years for the benefit of himself, and of any person whom the latter might name within eight years. D. was to make advances, and to become surety to a bank for H.'s drafts, and the profits were to be applied, first, in payment of a salary and allowances to H., then in repayment of the advances made by D. with interest, and subject thereto were to belong as to one-third to H., and as to two-thirds to the nominee of D. D. died in 1861, without exercising his right of nomination, and in 1863 H. became bankrupt. On an application

by the executors of D. to prove under the bankruptcy for the amount due to his estate under the arrangement:—Held, that the agreement did not constitute a partnership between H. and D.; and that the executors of the latter were entitled to prove. *Exp. Davis*, 32 L. J., Bky., 68; 9 Jur., N. S., 859; 8 L. T., N. S., 745.

1. K. advanced money to G. on the faith of a letter which he insisted constituted a contract of partnership in the profits of the business of the Italian Opera at Covent Garden. G. insisted that it amounted to nothing but an agreement to pay the amount of the loan and the interest on it out of the profits (if any should arise), but that the concern remained his alone. The letters which passed between the parties were held to bear this construction, and, therefore, an account as of the profits of a partnership was refused. *Knox* v. *Gye*, 5 L. R., H. L., 656. Affirming 10 Jur., N. S., 908; 12 W. R. 1125.

The advance was made with reference to the business of the Italian Opera at Covent Garden, the lease of which theatre was in the name of G. alone. That theatre was burnt down in 1856, and G. hired another theatre (the Lyceum) and carried on the business of the Italian Opera there, and in two years' time returned to a new theatre at Covent Garden which had been built in the interval, and of which the lease, as in the former case, had been granted in his name alone:—Held, that the true construction of the letters between the parties showed that the agreement between them was confined to the old Covent Garden theatre alone, and, therefore, an account of profits alleged to have arisen at the Lyceum and the new Covent Garden theatres was refused. *Ib.*

T. advanced 12,000*l.* to G. on the terms of partnership. T. made a will, leaving this money equally between K. and G. T. died in December 1854, before old Covent Garden was burnt, which event took place in March 1856. There had been, before December 1854, negotiations between G. and one H. to allow G. the use of Her Majesty's Theatre, but though a sum of 5,000*l.* (part of T.'s 12,000*l.*) had been paid to H. under these negotiations he had never performed his contract. G. finally brought an action against H., and recovered judgment for 5,000*l.*, but ultimately (after the death of T., yet within six years of the date of a bill filed by K. for an account) consented to accept 2,500*l.* as a compromise. K. in December 1864 filed a bill against G. for an account of profits in the partnership with T., and of what was due to K. in respect thereof under T.'s will:—Held, that the right of K. under T.'s will began in December 1854, and was barred in equity by analogy to the Statute of Limitations, the bill not having been filed till 1864. *Ib.*

Held, also, that the surviving partner being a trustee for the executors of his deceased partner, the payment of the 2,500*l.* from H. within six years from the filing the bill did not take the case out of the Statute of Limitations. *Ib.*

2. W., being in difficulties, mortgaged to M. certain patents, to secure advances previously made for the purpose of developing the patents, and paid him, out of the proceeds of the patents, 6*l.* a week:—Held, that this payment did not constitute a partnership between *Exp. Macmillan, Re Whittaker*, 24 L. T., N. S. 143.

3. Agreement in writing entered into between W. & Co., British merchants, carrying on business at Calcutta with a Hindoo rajah by which, in consideration of moneys already advanced, and which might be thereafter advanced by the rajah to them, they agreed to carry on the business subject to the control of the rajah in several particulars, stipulating that the rajah should receive a commission of fifty per cent. on all profits made by the firm until the whole amount of the debt due to him should be paid off, with twelve per cent interest upon all cash advances which had been or might be thereafter made by him to the firm. Further advances having been made by the rajah to the firm, W. & Co. executed to him a mortgage of certain tea plantations to secure the then amount of his advances, and the rajah by a deed released his right to commission and interest under the original agreement between them. No proceeds of the business were ever received by the rajah, although he was credited in the books of the firm with a considerable sum, that sum was never received by him, and was afterward written back in the books of the firm. The rajah did not interfere or exercise any such control in the business as to make him a ostensible partner in the firm:—Held, that having regard to the restrictions and modifications made of late in the rule of law formerly prevailing, that participation in the net proceeds of the business made the participant liable as a partner to third parties; and looking at the whole scope of the agreement the primary object was to give security to the rajah as a creditor of the firm of W. & Co., and that the participation given him in the net profits of the business was not sufficient to establish a partnership between W. & Co. and the rajah, as regarded third parties. *Mollw* v. *Court of Wards*, 4 L. R., P. C., 419.

Although a right to participate in the profits of a trade is a strong test of partnership, and there may be cases where, from such perception alone, it may as a presumption, not of law, but of fact, be enforced; yet whether that relation does or does not exist must depend on the real intention and contract of the parties. *Ib.*

4. In 1872 A. entered into a written agreement to lend B. 2,000*l.* as capital to enable him to develop certain coal and iron mines the lease of the mines to be deposited with A as security for the moneys advanced. The agreement also provided that A. was to be paid 3*d.* per ton on all coal and ironstone by way of commission; that B. was to receive salary, which was not to commence until all the moneys advanced by A. had been repaid that "after payment of the above, and the royalties, and rents, and costs of raising and preparing, and delivering to market the produce of the mines," A. was to be entitled to three-fourths, and B. to one-fourth, of the net profits; and A. was to be free from all liability except in respect of the money advanced by him. B. worked the mines under the name of a company. In 1874 A. died, and there was then due to him the sum of 11,000*l.*, in respec

of advances made by him to B. under the agreement. The mines proved a failure, and the creditors of the company, B. being insolvent, sent in their claims to the executors of A., alleging that A. was a partner in the company by virtue of the agreement, and by reason of his interference in the management and working of the company:—Held, that, upon the agreement, no partnership existed between A. and B.; and that, upon the evidence, there was no ground for inferring that A. had held himself out in any way to any person as a partner in the company. *Dean* v. *Harris*, *Harris* v. *Butterfield*, 33 L. T., N. S., 639.

1. A loan was made to a trader at a rate of interest varying with the profits of his business, the amount of the loan and the interest being secured by a mortgage to the lender of the lease of the house where the business was carried on, and of the goodwill of the business. The trader became bankrupt:—Held, that the rights of the mortgagee under his mortgage were in no way affected by s. 5 of the Partnership Law Amendment Act 1865, 28 & 29 Vict., c. 86 (Bovill's Act). *Exp. Sheil, Re Lonergan*, 4 L. R., Ch. D., 789; 36 L. T., N. S., 270; 25 W. R. 420; 46 L. J., Bky., 62.

2. The Partnership Law Amendment Act does not apply to any contract unless the advance of money under it would, independently of that Act, have created the relation of debtor and creditor as distinguished from the relation of partners. *Pooley* v. *Driver*, 4 L. R., Ch. D., 458; 46 L. J., Ch., 466; 25 W. R. 162; 36 L. T., N. S., 79.

An unsigned contract for an advance by way of loan to a trader is not "a contract in writing with a person" within s. 1, though it is admissible in evidence as showing the terms upon which the advance was made. *Ib.*

The Act does not protect persons lending names, for partnership purposes, under agreements to share in the profits, unless the true relation of the parties towards each other is that of creditors and debtors, and not of active and dormant partners; and such agreements, in order to be effectual, must be in writing and signed by the parties. *Ib.*

Messrs. A. advanced a loan to a firm for the purposes of the partnership, under a deed of contract which was expressed to be made under 28 & 29 Vict., c. 86, and provided that they might inspect and take copies of the partnership account; that the partners should, during the continuance of the loan, pay to Messrs. A. on account of the profits certain proportions of the yearly profits; and that within six months after the expiration or sooner determination of the partnership (which was for a term of fourteen years) a settlement of accounts should be made by the partners, who were then to repay the loan, less any sum overpaid on account of the profit, with an arbitration clause:—Held, that Messrs. A. were liable as partners for the debts of the firm, notwithstanding the Act. *Ib.*

3. A., in June 1869, borrowed 250*l.* from B., and, at the time, signed a paper in the following words: "In consideration of 250*l.* this day paid to me, I hereby undertake to execute a deed of co-partnership to you for one-eighth share in the profits of the Oxford Music Hall and Tavern, to be drawn up under the Limited Partnership Act of the 28 & 29 Vict., c. 86, called an 'Act to amend the Law of Partnership'":—Held, that this paper (which contained no provision as to the date or duration of the partnership) constituted a partnership at will; and that it was not put an end to by a letter, dated in August 1872, in which A. promised to repay B. on the 1st of September 1872 the principal, together with interest thereon (treating it only as a loan) such as should, as on a calculation of one-eighth of the profits, be found to be due to B. on that day. This letter was followed by a tender, which was not accepted. *Syers* v. *Syers*, 1 L. R., App. Cas., 174; 24 W. R. 970; 35 L. T., N. S., 101.

On a bill by B. for specific performance of the agreement to execute a partnership deed for one-eighth share of the profits, A. put in an answer in which he denied that there had been a partnership at all, but submitted that if any partnership had ever existed it was only a partnership at will, of one-eighth share of the profits (payment of which he offered to make), and he submitted that this partnership had been determined by the letter of August 1872:—Held, that it had not been determined by that letter, but that the answer had the effect of putting an end to it; and that accounts must be directed to be taken as up to the day of filing the answer, and that these accounts must include the principal, the eighth share of the profits, and also the eighth share of the assets up to that day. *Ib.*

A co-partnership in profits is a co-partnership in the assets by which the profits are made. *Ib.*

In order to bring a case within the 28 & 29 Vict., c. 86, there must be a contract in writing, and the document must show on the face of it that the transaction is one of loan: and parol testimony to vary it is inadmissible. *Ib.*

4. The effect of s. 5 of the Partnership Law Amendment Act is to prevent the lender of money to a trader, on the terms of receiving a share of the profits of his business, from proving for the loan in the bankruptcy of the borrower in competition with any of his creditors—not merely those creditors whose debts were contracted in relation to the business in respect of which the loan was made, or while that business was being carried on, but any of the creditors who are entitled to prove in the bankruptcy. Till all the other creditors have been paid in full, such a lender is not entitled to prove for any purpose whatever. *Exp. Taylor, Re Grason*, 12 L. R., Ch. D., 366; 41 L. T. 6; 28 W. R. 205.

5. M. lent certain sums to T., a trader, under a written agreement pursuant to 28 & 29 Vict., c. 86, by which he was to receive, in lieu of interest, 40*l.* per cent. on the profits of T.'s business, and after a certain period was to have liberty to determine the agreement at any time, in which event the money was to be repaid by instalments secured by bills of exchange. While this agreement was in force M., in conjunction with H., lent T. other sums of money, for which interest at 10*l.* per cent. was to be paid. M. determined the agreement, and T. gave M. bills of exchange for the moneys advanced under it, except certain profits, which were carried over to the 10*l.* per cent. account; but M. and H. went on advancing to T. other sums on the 10*l.* per

cent. account. After all the trade debts of T. which had been due during the pendency of the agreement had been paid, T. became bankrupt. M. carried in a proof for the moneys advanced under the agreement, and M. and H. carried in another for the balance on the 10*l.* per cent. account:—Held, that M. could not prove for the moneys advanced under the agreement, though all other debts existing during its continuance had been paid. *Exp. Mills, Re Tew*, 8 L. R., Ch., 569; 28 L. T., N. S., 606; 21 W. R. 557.

Held, also, that M. and H. could prove for all moneys lent at interest without any stipulation as to profits, whether such moneys were advanced before or after the determination of the agreement, and that although there could not have been a proof for the whole of the balance if it had in part consisted of profits, yet, as according to the ordinary mode of attributing payments in an account current the profits carried to this account had been discharged by payments made by T. on account, the balance could not be treated as in any measure arising from profits, and the proof must be for its whole amount. *Ib.*

1. Though an agreement is expressed to be an agreement for a loan to a partnership under 28 & 29 Vict., c. 86, s. 1, and contains a declaration that the lender shall not be a partner, he will nevertheless be a partner if the result of the agreement, fairly construed as a whole, independently of the reference to the Act and the declaration, is to give him the rights and impose on him the obligations of a partner. *Exp. Delhasse, Re Megevand, Re D'Hauregard & Co.*, 7 L. R., Ch. D., 511; 47 L. J., Ch., 65; 38 L. T., N. S., 106; 26 W. R. 338. Affirming 37 L. T., N. S., 440; 26 W. R. 20.

The Act applies only to a loan made upon the personal responsibility of the trader or traders to whom it is made, and not to a loan made on the security of the business. *Ib.*

Under an agreement dated in June 1869, after reciting that M. and S. had agreed to become partners together in business upon the terms with each other and with D. thereinafter contained, and that D. had agreed to lend them 10,000*l.* for the purpose of investing the same in the business, it was agreed that M. and S. should be partners together under the name of D'H. & Co. for three years, from 1st July 1869; that the capital should consist of 10,000*l.* and any further advances by either party: such 10,000*l.* and further advances to bear interest at 5*l.* per cent.; that the 10,000*l.* were advanced by D. by way of loan under the Partnership Amendment Act 1865; that yearly accounts current should be remitted to D., and the yearly profit or loss divided between D., M., and S. in certain proportions; that in case of the death of any partner, or in case his original capital should be reduced by losses to one-half, D. should have the option of dissolving the partnership; and that in case of his death his executors should not withdraw his capital until the partnership was dissolved. This agreement was renewed in 1872, and again in 1875 for three years. Upon the liquidation of D'H. & Co. in 1876, D. sought to prove against the firm for 6,717*l.*, being further advances made by him in addition to the 10,000*l.* originally advanced: —Held, that he could not prove in competition with the creditors of the firm, for that the agreement constituted him a dormant partr *Ib.*

2. Money was advanced to a trader in ret for a share in the profits of his business. agreement under which the advance was m was expressly under the Partnership L Amendment Act 1865, and stipulated fo mortgage of the business premises. Sub quently these premises were conveyed t trustee for the lender by way of mortgage secure the advance. The mortgagor beca bankrupt:—Held, that thereupon, by s. 5, mortgagees were postponed to the other cre tors of the mortgagor, and they were orde to concur with the bankrupt's trustee in sell the mortgaged premises for the benefit of other creditors. *Exp. Macarthur, Re Ramsa* 40 L. J., Bky., 86; 19 W. R. 821.

V. PARTNER OR SERVANT.

3. By a memorandum in writing, the fendant, a general merchant, agreed with plaintiff, in consideration of the general vices in business of the latter, to allow him addition to a fixed salary, one-fifth of the profits on all new business entered into throu him. *Semble*, a partnership was thereby c stituted between the parties:—Held, also, t at any rate the plaintiff thereby acquire right, as against the defendant, to an acco of profits, and the appointment of a recei *Katsch* v. *Schenck*, 18 L. J., N. S., Ch., 386; Jur. 668.

4. Bill by A. for an account against B. C., alleging himself a partner with them. and C., by their answer, deny the partnersl and state that A. was employed by them their foreman, but that on account of its be contemplated to take A. into partnership, accounts had been made out in the joint nar of B., C., and A., the tools, etc., marked w their names. They admitted having served with a notice to dissolve partnership, and admitted a specification of certain buildi and other work which was required by th which specification described the work requi to be done as being upon the property of C., and A.:—Held, that there was suffici evidence of the existence of a partnership tween B., C., and A. *Smith* v. *Sherwood*, Jur. 214.

5. Where a bill was brought for the cust ary tithes of oysters, alleging the custom payment to be in the owners and occupie boats employed in the fishery, and usu moored within the parish:—Held, that it not necessary to make the dredgers for oysters, who had no interest in the boats, who shared in the profits of the oysters, par to the bill. Oyster dredgers agreeing to rece from the owners of the boats, who were th employers, a stipulated share of the pro arising from the sale of the oysters, held to be co-adventurers with the owners. *Per* v. *Bryant*, 2 Y. & Coll. 61; 6 L. J., N. Exch. Eq., 26.

6. An arrangement made by A. B. w C. D., to give him a moiety of the profits the business, instead of a previous salary his services, constitutes him a partner. *E Digby*, and *Exp. Buckton*, 1 Dea. 341; 2 Mc & A. 735.

1. A trader borrowed 580*l.* under an agreement, by which the lender was to become his clerk at a salary of 222*l.* 10*s.* a year; the trader agreed to produce his accounts and balance-sheet to the lender, who was to get in the debts, and alone to draw the cheques on the banking account. If the balance was in the trader's favour at any time, he might draw to the amount of it. On payment of the loan, or on proceedings being taken to recover it, the agreement was to be at an end. The lender was to have the option of becoming a partner. On the trader becoming bankrupt:—Held, that the lender was a clerk, entitled to three months' payment in full. *Exp. Harris*, 1 De G. 165; 14 L. J., N. S., Bky., 26; 9 Jur. 497.

2. By indenture between the plaintiff of the one part, and the defendants, who were partners in a certain manufacture of which the plaintiff had been the patentee, of the other part, it was stipulated that the plaintiff should have the conduct and management of the business, and that the remuneration which he should receive in respect of his services should be such a sum of money as would be equal to 40 per cent. upon the net profits, that a reduced amount should be paid to his executors in the event of his death, until the expiration of the licence, that the plaintiff might purchase the business on certain terms, that the defendants might determine the plaintiff's engagement as manager if he should not in every respect perform the covenants contained in the indenture, but that so long as he continued to observe them his appointment as manager should be irrevocable during the continuance of the licence, and that nothing therein contained should extend to constitute a partnership:—Held, there being an absence of every incident of partnership except that of sharing in the profits, that that circumstance alone did not constitute the indenture a contract of partnership, but that it amounted only to a contract of hiring and service. *Stocker* v. *Brocklebank*, 3 Macn. & G. 250; 20 L. J., N. S., Ch., 401; 15 Jur. 591.

The plaintiff being dismissed by the defendants from their service, filed his bill for an injunction to restrain the defendants from excluding him from the management:—Held, discharging the injunction which had been granted by the Vice-Chancellor, that the contract, being of hiring and service, was one of which specific performance could not be enforced. *Ib.*

3. In June 1844 A. entered the service of B., as book-keeper and cashier, and so continued until December 1848, without coming to any agreement as to the amount of his salary. It was stated by A. that in December 1848 it was agreed between him and B. that the salary should be at the rate of 250*l.* a year, from June 1844, and that the reason that such arrangement was not made before was that B. was engaged in making experiments in a certain manufacture, from which he hoped to derive a considerable fortune, out of which A. expected to be paid. B. became bankrupt in February 1849:—Held, that A. was a clerk, and not a partner, and was entitled to prove for his salary. *Exp. Hicken*, 3 De G. & Sm. 662; 14 Jur. 405; 19 L. J., Bky., 8.

4. The plaintiff and the defendant were tailors; the plaintiff employed the defendant to obtain orders for him, and agreed to allow him a certain share of the profits by way of commission upon such orders. The defendant carried on the business with the plaintiff, but his name was not joined with that of the plaintiff. All goods were ordered and paid for by the plaintiff, and all debts were paid to him alone. The defendant set up a partnership; but it was held that a right to a share of the profits did not necessarily create a partnership, and there was no evidence to prove a partnership on the part of the defendant. *Andrews* v. *Pugh*, 24 L. J., Ch., 58; 3 W. R. 50.

5. In April 1854 A. contracted with the Admiralty for conveyance of mails by steam vessels. The contract was to continue till October 1858, and should then determine, if either party should have given twelve months' notice, or it might continue longer, being determinable on similar notice at any time. On 30th November 1854 A. engaged B., during the existence of this contract, as superintending engineer of the vessels employed in performing it, at a yearly salary, and, in addition thereto, a sum equivalent to 10 per cent. on the net profits. On 20th June 1855 A.'s contract with the Admiralty was annulled, and a fresh one was entered into, determinable in 1863:—Held, that the contract between A. and B. was one of hiring and service, and not a partnership. *Harrington* v. *Churchward*, 6 Jur., N. S., 576; 29 L. J., Ch., 521; 8 W. R. 302.

Where under a contract of hiring and service, a salary is to be paid in proportion to the profits, a court of equity will entertain a bill for an account of the profits, if such account is too complicated to be taken by a jury at common law. *Ib.*

C. having agreed to employ H. during the existence of his contract with the Government, afterwards entered into a fresh contract with the Government for the same service, but for a longer period than the first contract; and by the second contract the first contract was annulled. C. then gave H. notice of dismissal:—Held, that the contract between C. and H. must be considered in equity as subsisting during the period of the original contract with the Government. *Ib.*

6. An agreement dated in August 1864 (previously to the passing of 28 & 29 Vict., c. 86) provided that an underwriting account at Lloyds' should be carried on in the name of the defendant, and the subscription paid in his name; that all policies, losses, and averages should be signed and settled by the defendant, or by the plaintiff as his agent; that the plaintiff should apply the whole or such part of his time and attention to the business as might be required for conducting the same; that proper books of accounts should be kept by the plaintiff, he obtaining such assistance from time to time as he might find necessary, subject to the approval of the defendant; that the plaintiff should be paid or allowed a salary of 150*l.* by the defendant; that the profits should be divided between the plaintiff and the defendant in the following proportions, viz., that the defendant should be entitled to four-fifths and the plaintiff to one-fifth; that if in any one year the business should not yield any profit, but a loss should accrue to the defendant, then he alone should bear and

pay the loss, and the plaintiff should be entirely exempt from bearing or paying any part or proportion thereof, and any profit arising from the business of any one year should not be set off against or reduced by the loss in any other year; and that if after the division of profits in any one year any unexpected claim or demand should be made upon the partners, they should advance and pay their respective proportions, nevertheless so that the plaintiff be not called upon to pay any greater sum of money in respect of the business of any one year than the amount of the sum he should then have received as and for his share of the profits in respect of the business for that same year:—Held, that the contract was one of hiring and service, and not of partnership. *Ross* v. *Parkyns*, 20 L. R., Eq., 331; 44 L. J., Ch., 610; 24 W. R. 5; 30 L. T., N. S., 331.

1. Where a former servant claims to be a partner, his case must be made out by strong evidence. *Pawsey* v. *Armstrong*, 18 L. R., Ch. D., 698; 50 L. J., Ch., 683.

VI. PARTNERSHIP AS TO THIRD PARTIES.

2. A., induced by the fraudulent representation of B. as to the profits of his business, gives him a certain sum of money for a share of it; on the discovery of the fraud, A. files a bill in equity for an account, to have the partnership declared void, and for a receiver. The receiver was ordered. B. becomes bankrupt; petition by A. to be admitted to prove under his commission refused, with liberty to make a claim. *Exp. Broome*, 1 Rose 69.

Although A., as against B., might have an equity to say he never was a partner, it would be difficult to say so as against third persons. *Ib.*

3. Persons may be partners towards the world without being partners between themselves, but if they be partners between themselves they are undoubtedly partners in respect of the public. *Re Stanton Iron Co.*, 21 Beav. 164; 2 Jur., N. S., 130; 25 L. J., Ch., 142; 4 W. R. 159.

A. and B., who had carried on business in partnership as ironmasters, having become embarrassed, executed an assignment of all their works and other property to trustees, upon trust to carry on their business under the style of "the Stanton Iron Company," with power to take fresh leases of the property, to erect new buildings as occasion might require, to keep down the interest upon mortgages and other incumbrances out of the gross income, and to divide the net profits ratably among the creditors, parties thereto, according to the amount of their debts. The trustees were to keep books of account, which were to be open for the inspection of the creditors. The creditors were empowered, at a meeting to be held as therein provided, to direct the discontinuance of the business, which was then to be wound up accordingly; and after payment of the costs of management and other liabilities, the trustees were to divide the residue ratably among the creditors; and when and so soon as the whole of the debts of the creditors were satisfied, the trustees were to hold the residue of the trust estate in trust for A. and B.:—Held, that this deed d not constitute a partnership between the pa ties within the Winding-up Acts. *Ib.*

4. The proper test of liability as a partn is not whether the party sought to be charg has stipulated for the participation in profi as such, but whether the person by whom tl trade was actually carried on carried it on the capacity of agent for him. *Wheatcroft Hickman*, and *Cox* v. *Hickman*, 9 C. B., N. 47; 8 H. L. Ca. 268; 7 Jur., N. S., 105; L. J., C. P., 125; 8 W. R. 754.

A. and B., who carried on the business iron-masters in co-partnership by a deed, pu porting to be made between A. and B. of t first part, five persons named as trustees the second part, and the several persons who names were contained in a schedule as cre tors for the sum therein mentioned and wl should execute the deed of the third part, reciting that A. and B. were indebted to t several persons, parties thereto of the thi part, and that they had agreed to assign their estate and effects for the benefit of su creditors, assigned the works and all the property and effects to the trustees upon tru to carry on the business under the name the Stanton Iron Company, and out of t profits to pay interest on mortgages, etc., a to pay and divide the net income of the bu ness remaining after answering the purpos aforesaid, unto and among all and singul the creditors of A. and B. in ratable prop tions according to the amount of their resp tive debts:—Held, that, under this deed, t creditors executing it did not become liable partners for debts contracted by the trust in carrying on the trade. *Ib.*

The law as to partnership is a branch the law of principal and agent. A partn embraces both characters; and where a m orders another to carry on trade, whether his own name or not, to buy and sell, and pay over all the profits to him, he is t principal, and the person so employed is t agent; and the principal is liable for t agent's contracts. This is the true princi of partnership liability. *Semble. Ib.*

5. Partnership is only a branch of the l of agency. *Ernest* v. *Nicholls*, 6 H. L. 417; 3 Jur., N. S., 919.

6. L., a broker, was introduced to P. & Co pany by A., and was at the interview direct by P. & Company to make purchases under t superintendence of A. Thereupon L. ma large purchases under the sole order a direction of A., sending him the bought a sold notes and contracts, and receiving fr him the necessary moneys for payments, a generally treating him as principal, no dir communication taking place between L. a P. & Co., and such course of dealing was mitted by P. & Co. to have been according their intentions up to a certain period, and notice was given by them to L. of any deter nation of the authority of A.:—Held, that had a right, from what took place at the int view, and the uniform course of action on part of A., to consider him as the authori agent or a partner of P. & Co., until expres informed of the determination of his author or of the partnership. *Pole* v. *Leask*, 33 L. Ch., 155; 9 Jur., N. S., 829; 8 L. T., N. S., 6

7. The law of partnership is a branch of

law of agency, and the test of partnership is not simply whether the alleged partner was to receive a share of profits, but whether he constituted his alleged co-partners his agents for carrying on business. The receipt of profits is only important as a consequence of such agency, and a ground for inferring it in certain cases. *Re English and Irish Church and University Assurance Society*, 1 Hem. & M. 85; 11 W. R. 681; 8 L. T., N. S., 724.

Under a deed of settlement of an insurance society, the directors had power to contract debts, and a fund was to be set apart for the payment of the general liabilities of the society. There were two classes of policy holders: those holding common policies, and those holding policies with a clause of participation in the profits of the company. There was a deficiency of assets, and the company was in process of winding-up:—Held, that the general creditors of the company had no priority over the claims of policy holders against the specific fund. *Ib.*

Held, also, that policy-holders with a right to participation of profits were not necessarily partners in the concern. *Ib.*

1. A company was formed in India to carry on the business of insurance, and A., residing in the Mauritius, gave special verbal instructions to B., who was the agent for the company in India, to execute the partnership deed for A., which was done, and A.'s name appeared in the list of shareholders. Afterwards, on the insolvency of the company, A. set up the defence that he was not a shareholder, for no power by deed was given to B. to execute the deed in his name:—Held, that a partner might become liable in that character without having executed the partnership deed, if his name was put on the list of shareholders with his consent, so as to entitle him to share in the profits. *Leishman* v. *Cochrane*, 12 W. R. 181; 9 L. T., N. S., 104; 1 Moo. P. C., N. S., 315.

2. S., a builder, who was engaged in building eight houses, under an ordinary building contract, entered into an agreement (dated in 1877) with H., which recited that S. was indebted to H. in the sum of 88*l.*, and had requested H. to supply him with 50,000 bricks at a certain price, and to make further advances, and had agreed to enter into that agreement for the purpose of giving security for the re-payment of the moneys then owing and for the 50,000 bricks, and any further advances, and also "certain benefits to H., as a consideration for such advances," and whereby it was agreed that S. would, on demand, pay the 88*l.*, the price of the 50,000 bricks, and the further advances; that S. would forthwith proceed with two of the eight houses, and keep accounts of his expenditure in respect of them, which accounts were to be open to the inspection of H.; that S. would deposit his building contract with H. as security; that S. would use the 50,000 bricks in the erection of the two houses only; that S. would procure the leases of the two houses to be granted to the nominees of H.; that the leases should be sold at prices to be fixed by H., and the proceeds applied in payment of the moneys owing from S. to H.; that H. "should be entitled also, as a further consideration, and in addition to the said advances thereinbefore mentioned, absolutely to one moiety of the profit on the said two houses," such profit to be the difference between the net cost price of erection and the proceeds of sale; and that if the proceeds of sale of the two houses should be insufficient to pay the moneys owing to H. and the moiety of the profit before mentioned, the remaining houses should be charged therewith. The plaintiffs had supplied S. with timber for the erection of the two houses:—Held, that (independently of the statute 28 & 29 Vict., c. 86, s. 1), the agreement entered into between S. and H. did not constitute H. a partner with S. in respect to the two houses, so as to render H. liable to the plaintiffs for the timber supplied by them. *Kelly* v. *Scotto*, 49 L. J., Ch., 383; 42 L. T. 827.

See also IV. & V. *supra.*

II. Agreements between Partners.

I. *Articles*, 5433.
II. *Fraud and Misrepresentation*, 5436.
III. *Specific Performance*, 5437.
IV. *Arbitration Clause.* See XIII. II. *post.*

I. ARTICLES.

1. *Variation of*, 5433.
2. *Expiration of Term, Operation of Old Articles on*, 5434.

1. Variation of.

3. Partners may be held, by their conduct, to have changed the terms of a written agreement, into which they have entered, for carrying on the concern, and to have substituted the terms to which they have adhered, instead of the terms contained in the original agreement. *Const* v. *Harris*, T. & R. 523.

Parties claiming under a partner who has assented to the substituted terms, cannot revert back to the original terms. Where in carrying on a concern, there is any material change to be made, notice must be given to all parties of what the change is, and at what time it is to be taken into consideration. *Id.* 524.

Articles agreed on to regulate a partnership, cannot be altered without the consent of all the partners; but the continuance or discontinuance of a practice not stipulated for, nor made the subject of covenant, must be decided by the majority of the partners. The negative of the minority, in such cases, of no avail, if they have had a proper opportunity of considering the matter. An agreement by a majority of partners, to overrule the minority, will not be permitted. The Court will not interfere on every breach of adherence to the rules of a partnership concern. *Id.* 518.

4. The transactions of partners with each other cannot be considered merely with respect to the express contract between them. The duties and obligations arising from the relation between the parties are regulated by the express contract between them so far as it extends and continues in force; but if it, or so

much of it as continues in force, does not reach to all those duties and obligations, they are implied and enforced by law. And it is often matter to be collected and inferred from the conduct of the parties whether they have held themselves, and ought or not to be, bound by the particular provisions in the express agreement. Where it is insisted that the conduct of one partner entitles the other to a dissolution, the Court must consider, not merely the specific terms of the express contract, but also the duties and obligations which are implied in every partnership contract. *Smith* v. *Jeyes*, 4 Beav. 503.

1. Partners may make constant variations in the terms of their partnership agreement, which may be evidenced not only by writing but by their conduct. *England* v. *Curling*, 8 Beav. 129.

2. A clause of a partnership deed, however precise, may be waived by the conduct of all the partners; but a waiver of the stipulations of a company's deed by the directors is not sufficient, unless it is shown that the body at large made the directors their agents for that purpose. *Keene's Executors' case*, 3 De G. M. & G. 272.

3. Bonds executed by partners to each other, relating to their rights as partners, of the same date as the partnership deed, read with the deed as part of the partnership contract. *Morison* v. *Moat*, 9 Hare 260; 20 L. J., N. S., Ch., 513; 15 Jur. 787. And see 16 Jur. 321.

4. Where the terms of the partnership were unduly onerous to the surviving partner, and a more beneficial arrangement offered for the estate of the deceased partner, infants being interested, the articles of partnership were ordered to be varied. *Martindale* v. *Martindale*, 1 Jur., N. S., 932.

5. A father took his two sons into partnership under articles, by which it was agreed that the business should be carried on with the father's capital, which should remain his, that yearly stock-taking should be made, that the partners should share profits and loss equally in thirds, that each of the sons besides his own share of the profits should have 150*l.* a year out of the father's share, but repairs and other outgoings in respect of the business premises should be paid out of the profits, that before division of the profits, the father should have interest at 4*l.* per cent. on his capital, and that in estimating profits a certain discount should be taken off the mills and machinery. The partnership lasted ten years, during the whole of which time in the yearly stock-taking the mills and machinery were valued as they stood without any discount, as provided in the articles, and without distinguishing the increase of value arising from additions and improvements, and the expenses of additions and improvements were charged against the partnership; the 150*l.* a year to each son was charged against the business, not against the father's share of profits; each partner was credited with interest on the capital standing to his credit at the beginning of the year, and the profit was then divided into thirds, and the shares carried to the credit of the partners respectively:—Held, that this mode of keeping the accounts, and the division of profits according to it, evidenced a new agreement between the parties, and tha the account must be taken on that footing, an not on the footing of the articles; and tha whether the mills and machinery were, accord ing to the articles, the property of the fathe or of the partnership, they must be treated a being under this agreement the property o the partnership. *Pilling* v. *Pilling*, 3 De G. J & S. 162.

The bill made no reference to the accoun having been kept in a mode inconsistent witl the articles, and the decree directed an accoun of all dealings between the parties as partner under the articles dated 30th December 1850 —Held, that this was not a direction to tak the accounts according to the articles, an that they ought to be taken according to th books. *Ib.*

The partners being entitled by agreement t interest on their capitals:—Held, that suc interest must run till the principal was paid although the partnership had been dissolve for several years. *Ib.*

6. Although articles of partnership may be presumed from the dealings of the partners t have been waived, a single instance of depar ture from them is not sufficient for such a presumption. *Austen* v. *Boys*, 2 De G. & J 626; 4 Jur., N. S., 719; 27 L. J., Ch., 714; W. R. 729.

7. When articles of partnership are clea and distinct, then partners are bound by them when they are ambiguous or silent, the cours of dealing between the partners regulates the mode by which the Court must deal with them and in some cases the Court has allowed the constant usage of partners to supersede the articles. *Coventry* v. *Barclay*, 33 Beav. 1; 2 N. R. 375. And see S. C. on appeal, 3 N. R 224; 12 W. R. 500; 3 De G. J. & S. 320; 9 Jur., N. S., 1331; 9 L. T., N. S., 406.

8. By articles of partnership it was agreed that the settlement of accounts should be made half-yearly, at Lady-day and Michaelmas and that on the death of a partner his share of the assets should be taken at the amount settled by the last half-yearly account preceding his death. By a subsequent parol agreement it was arranged that the accounts should be settled once a year only, viz., at Michaelmas:—Held, that this variation in the partnership articles did not affect the money interests of the partners; and that upon the death of a partner in the month of May the accounts must be settled up to the previous 25th of March. *Lawes* v. *Lawes*, 9 L. R., Ch. D. 98; 38 L. T. 709; 27 W. R. 186.

2. Expiration of Term, Operation of Old Articles on.

9. Articles of partnership do not survive for the benefit of executors, etc., without an express provision for such purpose. *Pearse* v *Chamberlain*, 2 Ves. 33.

10. The trade duly continued by surviving partner to wind up the concerns is not the partnership trade, but in the nature of a trust and if carried on otherwise as a continuing trade, it is at the risk of the surviving partner liable to the option of the representative of the deceased partner. Partnership by deed continued by the partners after the expiration

of the original partnership term, without a new agreement, the effect is that all the old covenants are infused into the new relation, with the exception of the clause for duration; for either party may instanter dissolve the prolonged partnership, but all the other original stipulations are continued. *Booth* v. *Parks*, 1 Moll. 465.

1. Surviving partners held, by inference deduced from their conduct, to have carried on their business on the same terms as the original partners. *King* v. *Chuck*, 17 Beav. 325.

In a partnership between A., B., and C., there was a stipulation, that if one died the survivor should take the business and pay his executors his capital, as appearing on the last account. A. died, and B. and C. continued to carry on the business without articles. B. afterwards died. The Court, from the conduct of the parties, inferred that B. and C. carried on their business on the same terms, as to winding-up on the death of either, as those which applied to the first partnership between A., B., and C., and decreed C. to pay to B.'s executors his capital, as appearing on the last account. *Ib.*

2. When partners carry on business under a deed of partnership, if they continue it after the period fixed for its duration, they will, in the absence of any other agreement, be held to continue it upon the terms of the original deed, and in the event of dispute the business will be wound up under its provisions. *Parsons* v. *Haward*, 8 Jur., N. S., 474, 924; 31 L. J., Ch., 666; 10 W. R. 531, 654; 6 L. T., N. S., 523, 628; 31 Beav. 199; 4 De G. F. & J. 474.

If a partnership is carried on beyond the term fixed for its duration, it can only be dissolved by special notice, and in its absence no notice to dissolve will be implied. *Ib.*

A. and B. entered into a partnership for seven years; the business was carried on by and in the name of A. alone, B. being a mere sleeping partner. A. continued the business, after the expiration of the term, on the same premises:—Held, that B. was entitled to a share of the subsequent profits. *Ib.*

3. Where a partnership for a term is continued after its expiration without express renewal, although the assumption is that it is continued on the same general footing as before, this only extends to such of the stipulations in the original articles as are properly applicable to the new contract. *Clark* v. *Leach*, 9 Jur. N. S., 165; 11 W. R. 227; 32 Beav. 14. Affirmed 9 Jur., N. S., 610; 32 L. J., Ch., 290; 11 W. R. 351; 8 L. T., N. S., 40; 1 De G. J. & S. 409; 1 N. R. 155.

A provision that a negligent partner should upon notice quit the business for the benefit of the other, is not applicable after the original term has run out. *Ib.*

Where one of the articles of a partnership for a term provided that either partner might, in the event of specified conduct on the part of the other, dissolve the partnership by notice, and that the latter partner should in that event, be considered as quitting the business for the benefit of the former, this article is not properly applicable to a continuation of the partnership after the expiration of the term without any agreement for renewal. *Ib.*

4. At the expiration of articles of partnership the partnership was carried on without new articles. A particular mode of sale of the partnership assets had been provided by the articles at the expiration of the term, or upon notice of dissolution by any of the partners:—Held, that such mode of sale was not applicable to the determination of the continuing partnership at will. *Woods* v. *Lamb*, 35 L. J., Ch., 309.

5. A., being seised in fee of warehouses and land on which he carried on his trade, upon taking his son into partnership, for twenty-four years, conveyed to him in fee certain shares in the houses and land; and by the articles of partnership, it was stipulated that the shares in the land given to the son, as also those reserved by the father, should be taken as part of the joint-stock in the trade, and in the event of either party dying before the expiration of the twenty-four years without disposing of his shares, the same were to be sold, a right of pre-emption being reserved to the survivor. Both parties outlive the twenty-four years, and continue after that to carry on business, but without renewing the articles, when A. dies:—Held, that as between his real and personal representatives his shares in the land were not converted into personalty. *Cookson* v. *Cookson*, 8 Sim. 529; 6 L. J., N. S., Ch., 337; 1 Jur. 621.

6. Two persons seised of freeholds, agreed to carry on business in partnership upon the premises for fourteen years, and that if either died during that term, the survivor should purchase the freeholds at the stated price. The fourteen years having expired, they, by parol agreement, continued the partnership "on the old terms." One afterwards died intestate:—Held, that the stipulation as to purchase was binding, and that the freeholds were converted into personal estate, and did not pass to the heir. *Essex* v. *Essex*, 20 Beav. 442.

7. When, after the expiration of the term limited by partnership articles, the business is carried on by the partners without the execution of fresh articles, all those provisions of the old articles which are not inconsistent with a partnership at will continue to apply to the partnership at will thus constituted. Under such circumstances:—Held, that a provision in the articles that, on the decease of one of the partners before the expiration of the partnership term, the surviving partner should pay to his executors the sum of 1,500*l.*, as the purchase-money for his interest in the goodwill of the business, applied to the partnership at will constituted by the carrying on of the business without fresh articles after the expiration of the partnership term. *Essex* v. *Essex* (20 Beav. 442) followed; *Cookson* v. *Cookson* (8 Sim. 529) not followed. *Cox* v. *Willoughby*, 13 L. R., Ch. D., 863; 49 L. J., Ch., 237; 42 L. T. 125; 28 W. R. 503.

8. When a partnership for a term is continued after its expiration without express renewal, although the assumption is that it is continued on the same general footing as before, this only extends to such of the stipulations in the original articles as are properly applicable to the new contract. *Hogg* v. *Hogg*, 35 L. T., N. S., 792.

A. and B. entered into partnership for a term. The articles provided that, in case either partner should die before the expiration

of the partnership term, the surviving partner should settle and adjust all accounts, matters, and things relating to the partnership, and should become the purchaser of the share of the deceased partner, at the amount fixed as the value, on the last annual statement of account, and should pay the same by certain instalments. On the expiration of the term, A. and B. continued to carry on the business without any reference to the partnership articles. A. died. B. then expressed his determination to carry on the business alone, and, under an arrangement with A.'s administratrix, stated an account of the value of the business as a going concern at the death of A., and took over the business and A.'s share, at the amount appearing by the account to be the value thereof, and paid sums on account. On the death of B. the partnership assets were sold at a considerable loss, and it was insisted by B.'s representatives that this loss ought to be borne ratably by A.'s and B.'s estates:—Held, that as B. had insisted on his right under the articles to purchase A.'s share at a valuation stated by himself, A.'s administratrix was entitled to prove against B.'s estate for the balance due under the stated account. *Ib.*

1. Partnership articles, executed in 1864, gave power to the majority, upon not less than six months' notice, to enforce the retirement of any partner if should they be so desirous, and also power to the others to expel any partner immediately on his committing certain specified offences, and also provided for partial dissolution on retirement or death of any partner, and for total dissolution, and for the taking and settlement of annual accounts by the partners, and for the ascertainment, under the provisions for taking the annual accounts, of the sum standing to the credit of any partner going out on any partial dissolution. Accounts were taken annually, but not in accordance with the articles. In 1873, a six months' notice of enforced retirement, which in fact was informal, was given to the plaintiff, who accepted an offer contained therein to become a partner again in the firm subject to a change in his position, and to certain restrictions, and to the cesser of his interest in the event of proceedings on his part similar to those which led to the notice, the existing articles to be "taken as the guide of a partnership so formed." No new articles were drawn up:—Held, that the power of enforced retirement at the desire of the majority was retained in the new partnership. *Steuart* v. *Gladstone*, 26 W. R. 657; 38 L. T., N. S., 557; 47 L. J., Ch., 423.

In 1875 the majority gave due notice of enforced retirement to the plaintiff, after he had been invited but had refused to make full disclosures as to the matters which were then giving anxiety to his co-partners. After the notice, but before the date thereby fixed for the retirement of the plaintiff, his co-partners furnished him with an account intended by them to ascertain the sum to his credit under the articles; that account was, and rightly so, taken subsequently to the giving of the notice, but it was inaccurate, and, therefore, not binding on the plaintiff, and it did not contain a valuation of the goodwill:—Held, that the goodwill ought to have been valued as part of the estate and effects of the partnership, and as being susceptible of valuation. *Ib.* Reversed on this point, 10 L. R., Ch. D., 626; 27 W. R. 512; 40 L. T. 145.

Held, also, that the notice being valid when given could not be invalidated by an error in accounts to be taken subsequently, and that the accounts must be taken by the Court. *Ib.*

II. FRAUD AND MISREPRESENTATION.

2. A., induced by the fraudulent representations of B. as to the profits of his business, gives him a certain sum of money for a share of it. On the discovery of the fraud, A. files a bill in equity for an account, to have the partnership declared void, and for a receiver. The receiver was ordered. B. becomes bankrupt. Petition by A. to be admitted to prove under the commission refused, with liberty to make a claim. Although A. as against B. might have an equity to say he never was a partner, it would be difficult to say so as against third persons. *Exp. Broome*, 1 Rose 69.

3. Misrepresentation of material facts is a ground for setting aside a partnership contract. *Rawlings* v. *Wickham*, *Wickham* v. *Rawlings*, 1 Giff. 355; 4 Jur., N. S., 990. Affirmed 3 De G. & J. 304; 5 Jur., N. S., 278; 28 L. J., Ch., 188; 6 W. R. 509.

B. and W., who were partners in a bank, agreed to take R. into partnership with them. W., who took no actual part in the business, and was known to R. not to do so, joined with B. in producing to R. during the negotiation, as a true account of the affairs of the bank, a paper stating the amount in which it was indebted to customers to be 11,000*l.*, the amount being in fact 20,000*l.* R. entered into the partnership without examining the books, and continued in it for four years, taking no part in the business, and never examining the books. At the end of that time the bank turned out to be insolvent. R. then filed a bill against B. and the executors of W., asking to have the agreement for partnership rescinded, and to have an indemnity against the debts of the concern:—Held, that the delivery of the paper to R. as a true account of the state of the bank was such a misrepresentation as entitled R. to have the contract rescinded. *Ib.*

Held, that the case as regarded W. was not varied by the facts that W. took no part in the affairs of the bank, and was known by R. not to do so, and did not know the representation to be untrue. *Ib.*

A representation made by a party, not knowing that it is false, is binding upon him and if the other party enters into a contract on the faith of its truth, the Court will set aside the same altogether, and not merely rectify it. Though the other party does not examine the books for four years during which the partnership continued, it not being his duty to do so, it will not bar him of relief on the score of negligence or acquiescence. *Ib.*

Although the means of ascertaining the truth of representations may be within the power of a plaintiff, yet he is not, in order to entitle him to rescind his contract, bound to show that he has resorted to all the means of information within his power. *Ib.*

Whether the guilty foundation of the con

tract lay with W. or B., or with a person who was a clerk of both, was of no consequence, as both W. and B. were answerable for the effects of the falsehood. *Ib.*

Held, also, that R. having brought an action against B. and W. for the misrepresentation, and recovered damages against B., did not take away his right against W.'s estate. *Ib.*

Held, that the lapse of time was no bar to the plaintiff; for that although he had means of ascertaining the representation to be untrue, he was entitled as between him and the persons who made it to believe it to be true, and was not bound to make inquiry until there was something to raise suspicion. *Ib.*

The costs of the plaintiff were not allowed by the Vice-Chancellor, in consequence of his conduct not being free from blame, and in consequence of his case having been greatly overstated in the bill, but this order was varied on appeal. *Ib.*

1. B. entered into partnership with a merchant on representations which he alleged to be fraudulent. He afterwards found that the merchant adulterated the article of food they dealt in, but continued the partnership for two months longer, when, the business not being successful, he filed a bill to have the partnership set aside on the ground of fraud, and the capital which he had advanced returned:—Held, that he was not entitled to relief. *Riddel* v. *Smith*, 12 W. R. 899; 10 L. T., N. S., 561.

2. A person agreed to purchase a share in a partnership business, on the footing of a balance sheet prepared by an accountant employed by the vendor, which all parties believed (with the exception of slight errors) to be, and was treated as, generally correct. It turned out to be grossly inaccurate in regard to the existing liability. The Court set aside the contract. *Charlesworth* v. *Jennings*, 34 Beav. 96.

3. A partner, who superintended exclusively the accounts of the concern, agreed to purchase his co-partner's share of the business, for a sum which he knew, from accounts in his possession (but which he concealed from his co-partner), was an inadequate consideration. The agreement was set aside. *Maddeford* v. *Austwick*, 1 Sim. 89. Affirming 2 Myl. & K. 279.

4. A. and B. entered into a joint adventure for the purchase of goods to be shipped to China, to be there sold, and the proceeds of the sale invested in a homeward cargo. A. was to render himself liable for the payment of the goods purchased, and B. was to supply A. with a share of the money by a fixed time, so as to enable A. to meet this liability. At the time fixed, A. applied to B. for the money, but B. failed to supply it. In consequence of this, and after some negotiation on the subject, A. offered to allow B. to withdraw from the adventure altogether, and this offer was ultimately accepted. Down to the time when A. applied to B. for the money, A. had communicated to B. all the information which he possessed relative to the adventure and to its chances of success, which then appeared very doubtful; but while the negotiation was going on, A. received two letters from his correspondents in China, through whom the business was managed, the contents of which he did not communicate to B.:—Held, in a suit impeaching the arrangement by which B. gave up his share of the adventure, that, considering the relative situation of the parties, there was no obligation on the part of A. to communicate to B. the letters in question; and that, there being no proof of misrepresentation by A., the arrangement could not be set aside merely on the ground of the non-communication of the letters. *M'Lure* v. *Ripley*, 2 Macn. & G. 274.

5. B., a practising surgeon, took C. into partnership, having represented to him that his practice produced about 700*l.* a year. C. paid a premium. It was afterwards discovered that the practice did not amount to more than half the amount stated, and also that B. had, the year previously to the partnership, made a return to the commissioner of the property tax that his income amounted only to 350*l.* per annum. The Master of the Rolls ordered a dissolution of the partnership, and that B. should repay C. half the premium he had paid:—Held, that sufficient misrepresentation had been proved to uphold the decree. *Jauncey* v. *Knowles*, 1 L. T., N. S., 116; 29 L. J., Ch., 95.

6. A plaintiff, by his statement of claim, claimed to have an agreement for a partnership with the defendant in a land speculation cancelled, on the ground that he had been induced to enter into it by the misrepresentation of the defendant, and in ignorance of its real effect; or, in the alternative, that the partnership created by the agreement might be dissolved and the accounts taken, and the defendant restrained from interfering with the management of the works in violation of the agreement. The defendant moved for an order for the plaintiff to amend his statement of claim by confining it to one of the alternative claims:—Held, that there was no inconsistency in the alternative claims, or in the allegations in support of them: and the motion was refused. *Bagot* v. *Easton*, 7 L. R., Ch. D., 1; 47 L. J., Ch., 225; 37 L. T. 369; 26 W. R. 66.

7. The plaintiff was induced by the fraud of the defendant to purchase a share of his business, and to enter into partnership with him. Judgment being given for the rescission of the agreement, and the dissolution of the partnership:—Held, that the plaintiff was entitled, in respect of the purchase-money which he had paid, to a lien on the surplus of the partnership assets after satisfying the partnership debts and liabilities, and that, in respect of any sums which he had paid or might pay in satisfaction of partnership debts, he was entitled to stand in the place of the partnership creditors to whom he made the payments. *Mycock* v. *Beatson*, 13 L. R., Ch. D., 384; 49 L. J., Ch., 127; 42 L. T. 141; 28 W. R. 319.

III. SPECIFIC PERFORMANCE.

8. The Court decreed specific performance of agreement to let plaintiff into partnership. The Court refused to direct an account of the profits from the time the plaintiff ought to have been admitted; his remedy for that being at law. *Anon.*, 2 Ves. 630.

9. No specific performance of agreement for partnership. *Percy* v. *Birch*, 9 Ves. 357.

10. Agreement for a partnership decreed to

be specifically performed by the execution of a proper partnership deed. *England* v. *Curling*, 8 Beav. 129.

1. Where the articles provided for the continuance of the partnership for 21 years, determinable upon the death of both partners, and also for the introduction by deed or will of a relation of either of them, but made no provision for the case (which happened) of the death of one of them during the term, or for the amount of capital to be used:—Held, that the provisions for the continuance of the partnership during the remainder of the term could not be enforced in equity against the representatives of the deceased partner. *Downs* v. *Collins*, 6 Hare 418.

2. By agreement between A., B., and C., and D. a minor, it was agreed that a partnership should be formed for nine years, unless sooner dissolved by mutual consent; C. to pay 1,000*l.* as her proportion of the capital; D. to be paid 50*l.* a year salary for his services. At the expiration of the third year, if D. should have conducted himself honestly and truly in the discharge of his duty, "and to the reasonable satisfaction of A. and B.," he should from thence become entitled to B.'s share in the capital, and be substituted for her as a partner, his salary then ceasing. If C. should cease to be a partner before the end of three years, her share to become the property of D., if he should not previously have misconducted himself in the office which he held in the partnership. After D. attained his age, and before the expiration of the three years, he was refused further maintenance and interference in the business. D. filed a bill for specific performance of the articles, and to enjoin a dissolution of the partnership:—Held, on general demurrer, first, that D., by filing his bill after his majority, was bound by the agreement, so as to make it mutual; secondly, that there was sufficient consideration moving from the plaintiff to entitle him to enforce the agreement; thirdly, that there was not such ambiguity in the services to be rendered by him as to prevent the agreement being specifically mutual; but, fourthly, that the performance of these services to the reasonable satisfaction of A. and B. was essential to the plaintiff's right, and that they alone were the judges of this, and therefore the plaintiff could not enforce the contract against them. *Milliken* v. *Milliken*, 8 Ir. Eq. R. 16.

3. *Quære*, whether a court of equity will enforce the specific performance of an agreement that, upon the retirement of a solicitor from a co-partnership, the remaining partner shall carry on the business in the name of the retiring partner. *Thornbury* v. *Bevill*, 1 Y. & Coll. C. C. 554; 6 Jur. 407.

4. In the month of May 1843 a parol agreement was entered into between A. and B., for a partnership between them, as to certain land intended to be used for building purposes; and a lease of it was afterwards executed by the lessor to B. only, the lessor declining to grant a lease to two persons. Certain acts of ownership were exercised by A. shortly after the agreement was entered into; but afterwards A. permitted B. to lay out his money in the erection of buildings on the land, without interfering therewith. After a lapse of eighteen months, A.'s solicitor applied to B. to perform the agreement, which B. repudiated. Six months afterwards A. filed his bill against B., seeking specific performance of the agreement:—Held, that the circumstances were such as to exclude A. from insisting on the specific performance of the agreement by B.; but, in the order dismissing the bill with costs, directions were given to the Master to disallow the defendant the costs occasioned by his setting up the Statute of Frauds, and disputing the parol agreement and part performance thereof. *Cowell* v. *Watts*, 2 H. & Tw. 224; 19 L. J., N. S., Ch., 455.

5. Agreement, dated in March 1840, for a dissolution of partnership, upon terms that the continuing partner should secure by his bond an annuity of 100*l.*, payable quarterly for three years, from the 25th March 1840, to the retiring partner, if he should so long live. A draft of the agreement was signed by both partners, and the retiring partner entered into possession of the partnership effects. No accounts were rendered, or payment in respect of the annuity made, to the retiring partner, who died in February 1843. Various accounts were afterwards rendered to the plaintiff as administrator of the retiring partner, and in June 1847, the continuing partner professed his willingness to settle his part of the account on being released by the plaintiff. In February 1849 the bill was filed against the continuing partner for the accounts, on the footing of the agreement of March 1840, and for payment of the arrears due to the estate of the retiring partner in respect of the annuity. The defendant, by his answer, admitted the agreement of 1840, but submitted, that, as the annuity was not apportionable as between the grantor and the annuitant, the last payment in respect thereof had become due at Christmas 1842, more than six years prior to the filing of the bill, and that the claim in respect of arrears was barred by the Statute of Limitations:—Held, at the hearing, that the right to an account and to payment of the annuity formed part of the agreement, which was admitted by the defendant, and which the plaintiff was, therefore, entitled to have performed *in toto*. *Murray* v. *Parker*, 19 L. J. N. S., Ch., 530; 14 Jur. 664.

6. The Court will entertain a bill to compel partners to act according to the provisions of instruments into which they have entered, and where it will interfere for that purpose, will take care that the decree shall not be defeated by anything done in the meantime. Thus where, in 1812, the then proprietors of Covent Garden Theatre executed a deed, by which they covenanted and agreed that the profits of the theatre should be exclusively appropriated to particular purposes, and that the treasurer, for the time being, should be irrevocably directed so to apply the profits; and in 1822, parties then entitled under the former proprietors to seven-eighths of the theatre, entered into an agreement, which provided, in some respects, for a different application of the profits, and otherwise affected the rights of a party interested in the remaining eighth, who was not consulted on the subject; the Court, upon a bill filed by that party, for the specific performance of the covenants and agreements contained in the deed of 1812, appointed a receiver. *Const* v. *Harris*, T. & R. 496.

1. Agreement between A. and B. to enter into partnership for a period of five or seven years, B. to pay into the partnership 10,000*l.* at such dates as might be agreed upon. If B. failed to carry out his agreement, he was to lend to A. 5,000*l.* at a certain rate of interest. Demurrer to a bill by A. for specific performance allowed, with costs. *Sichel* v. *Mosenthal*, 8 Jur., N. S., 275; 31 L. J., Ch., 386; 10 W. R. 283; 5 L. T., N. S., 784.

2. As a general rule, the Court will not decree specific performance of a contract for partnership. *Scott* v. *Rayment*, 7 L. R., Eq., 112; 38 L. J., Ch., 48.

Where the plaintiff's appropriate remedy is an action, where there are no legal difficulties in his way which the Court can remove, and where there has been no part performance, the Court will not decree specific performance of a contract for partnership. In a case in which, before Lord Cairns' Act (21 & 22 Vict., c. 32), the Court would not have interfered, it will not, since that Act, assess damages. *Ib.*

3. A bill does not lie for specific performance of a partnership agreement, where the sole relief sought is the payment of a sum of money, for which there is a remedy by action. *Bagnell* v. *Edwards*, 10 Ir. R., Eq., 215.

4. An agreement to become partners in a colliery which was to be demised upon royalties, and the royalties to be divided in certain proportions, is an interest in land within the Statute of Frauds, 29 Car. 2, c. 3, and must be in writing, signed by the parties. *Caddick* v. *Skidmore*, 3 Jur., N. S., 1185.

Receipts signed by the party sought to be charged, which partly disclosed the nature of the agreement:—Held, not sufficient to take the case out of the statute. *Ib.*

III. Illegal Partnerships.

5. *Quære*, whether a legal partnership could exist in the profits of the offices of a sworn clerk or side clerk of the Court of Exchequer, as those offices were formerly constituted, or whether such a partnership can at present exist in the profits of the office of clerk of the rules of that Court. Where a personal office or employment is purchased with the partnership funds for the benefit of the partnership, the partner in whose name it is purchased is not necessarily a trustee of the profits of the office for the other partners, after the term of the partnership has expired. *Clarke* v. *Richards*, 1 Y. & Coll. 351; 4 L. J., N. S., Exch. Eq., 49.

6. An agreement for a secret partnership is a contravention of the laws made for regulating the business of a pawnbroker, and no legal partnership is thereby constituted. *Armstrong* v. *Armstrong*, *Lewis* v. *Armstrong*, 3 Myl. & K. 45; 3 L. J., N. S., Ch., 101.

7. Profits of partnership in underwriting was illegal by 6 Geo. 1., c. 18, s. 12, and could not be subject of account in equity; but that part of statute is repealed by 5 Geo. 4, c. 114. *Knowles* v. *Haughton*, 11 Ves. 168. See also *Watts* v. *Brooks*, 3 Ves. 612, and *Ottley* v. *Brown*, 1 Ball & B. 360.

8. Upon the dissolution of partnership between H. and A., solicitors, it was agreed that H., continuing the business on his own account, should grant to A. an annuity, and be at liberty to continue his name in the firm, guaranteeing him against all liability by reason thereof:—Held, that such an agreement is not void as being against public policy. *Aubin* v. *Holt*, 2 Kay & J. 66; 25 L. J., Ch., 36; 4 W. R. 112.

9. A joint-stock company, formed for working gold mines in North America, the shares of which might be increased to an unlimited extent, and were made assignable at the discretion of the holders, was held to be illegal and fraudulent, and a demurrer to a bill filed by one of the shareholders against the others, for the purpose of carrying into effect a dissolution of the company, was allowed. *Blundell* v. *Windsor*, 8 Sim. 601; 6 L. J., N. S., Ch., 364; 1 Jur. 589.

10. The Courts of this country will not refuse to administer justice between joint importers of any article of commerce, merely upon proof that, in the production or exportation of such article, some fiscal law of the country of produce has been violated. *Sharp* v. *Taylor*, 2 Ph. 801.

One of two partners who has possessed himself of the property of the firm cannot be allowed to retain it by merely showing that, in realising it, some provision of some Act of Parliament has been violated or neglected. *Ib.*

11. Two persons entered into an agreement to be partners in the business of pawnbrokers, to be carried on under the firm of one of them; and, in pursuance of the articles of agreement, that one's name alone was painted over the door of the premises; the licence also was taken out, and the tickets to the customers were issued in his sole name; while the other partner (carrying on another business) attended occasionally to inspect the books of the firm, and drew a percentage on his share of the capital out of the profits:—Held, that the agreement constituted a secret partnership, and was therefore illegal and void, as being in contravention of the policy of 39 & 40 Geo. 3, c. 99. *Gordon* v. *Howden*, 12 Cl. & F. 237.

12. No play can lawfully be acted for hire, gain, or reward, within twenty miles of London, without the authority of letters patent from the king, or of a licence from the Lord Chamberlain; and no such letters patent or licence can be granted, so as to authorise the performance of plays at any place, except within the city or liberties of Westminster, or where the king may happen to reside. An agreement, therefore, for a partnership in acting plays at a theatre situated within twenty miles of London, but not within the city or liberties of Westminster, or in the place of the king's residence, is one to which the Court will not give effect. *Ewing* v. *Osbaldiston*, 2 Myl. & C. 53; 6 L. J., N. S., Ch., 161; 1 Jur. 50.

13. A contract of partnership in blockade-running is not contrary to the municipal law of this country. *Exp. Chavasse*, *Re Grazebrook*, 6 N. R. 6; 4 De G. J. & S. 655; 11 Jur., N. S., 400; 34 L. J., Bky., 17; 13 W. R. 627; 12 L. T., N. S., 249.

IV. Premium.

I. *When Due and Payable*, 5440.
II. *Return of*, 5440.

I. WHEN DUE AND PAYABLE.

1. Where A., carrying on business alone, took B. and C. into partnership, which was covenanted to be carried on for eighteen years, in consideration of a sum of money to be paid to A. by B. and C. by instalments; and within six months after the commencement of the partnership, and when one only of the instalments had become due, A. became bankrupt:—Held, that notwithstanding the bankruptcy, B. and C. were liable to pay the remaining instalments at the times when they would have become due if the partnership had continued. *Akhurst* v. *Jackson*, 1 Wils. C. C. 47.

2. Articles for a co-partnership, by which the plaintiff agreed to take the defendant as a partner, and give him half the interest in the lease of the house, to commence from and after the 29th September; the defendant covenanted to pay 300*l.* on or before that day, as a premium to be admitted a partner; on nonpayment of the money at the day the plaintiff may sue, averring his readiness to have taken the defendant as a partner, without executing or tendering articles of co-partnership or a conveyance of the lease. *Walker* v. *Harris*, 1 Anstr. 245.

II. RETURN OF.

3. Where A., an attorney, had prevailed on B., a young man about to be admitted, to become his partner in business for a certain term, and to pay him as a consideration a certain sum of money, part to be paid on the execution of the articles, and the remainder by instalments, and A. sued out, in the character of petitioning creditor, a commission of bankruptcy against and made B. a bankrupt, whereby the partnership was dissolved; A. was restrained from proceeding for the instalments, and ordered to refund what was already received, except as far as was commensurate to the period of actual duration of the partnership. The same equity was held to apply to the assignees of A. on his bankruptcy, and to a *bonâ fide* creditor, to whom the security of the instalments had been assigned. *Hamil* v. *Stokes*, 4 Price 161.

4. A. and B. having entered into an agreement for a partnership, B. to pay A. a consideration of 2,500*l.*, of which a moiety was paid down, but no deed ever actually executed; personal quarrels having ensued within a few months from the commencement of the partnership, A. unjustifiably excluded B. from entering upon the premises, or taking any part in the concern; and upon a bill filed for a dissolution and account, and a return of part of the premium, in consequence of which the notice of dissolution was gazetted, but before any further step taken A. became bankrupt:—Held, that in taking the accounts with the assignees, B. was to be credited with the entire premium, but debited with the moiety unpaid, and a proportional part of the whole premium calculated upon the actual duration of the partnership. *Bury* v. *Allen*, 1 Colly. 589.

5. A. and B. entered into a partnership for ten years, A. paying 1,000*l.* premium. At the expiration of eight years, A. filed a bill for a dissolution of the partnership. The Court being of opinion that the dissolution of the partnership was rendered necessary by mutual incompatibility of temper, A. was held entitled to a return of 200*l.* in respect of the unexpired portion of the term. *Pease* v. *Hewitt*, 8 Jur., N. S., 1166; 10 W. R. 535; 7 L. T., N. S., 11; 31 Beav. 22.

6. Where, on the dissolution of a partnership, one of the partners is entitled to a return of a proportion of the premium on the ground of failure of the consideration, the Court, in determining the proportion, will not always fix it by reference exclusively to the whole period for which it was agreed that the partnership should last, but will have regard to the conduct of the partners and the amount of benefit already obtained. *Bullock* v. *Crockett*, 3 Giff. 507; 8 Jur., N. S., 502; 5 L. T., N. S., 822.

7. Where a partnership, after differences had arisen between the partners, has been dissolved by mutual consent, and without any conditions, before the efflux of the time fixed for the duration of the partnership, the partner who has paid a premium has no right to ask that any proportion of it may be returned. *Lee* v. *Page*, 7 Jur., N. S., 768; 30 L. J., Ch., 857; 9 W. R. 754.

8. Under the provisions of a partnership deed between two medical men, the plaintiff paid to the defendant 100*l.* as a premium on the purchase of one-third of his business. The defendant had offered the plaintiff, before the purchase, an opportunity of seeing the nature of the business, but of that offer he had not availed himself, and he retained out of the purchase-money so much as amounted to his estimated share of the business for the first year. Upon a bill for a dissolution of the partnership, for repayment of the 100*l.*, for assessment of the plaintiff's damages, for an indemnity, an injunction, and a receiver:—Held, both parties desiring it, that there must be a dissolution of the partnership, but no return of the 100*l.*, or assessment of the plaintiff's damages; the defendant to be receiver of the debts of the business, and an account to be taken of all the profits, but under the circumstances no costs on either side. *Airey* v. *Borham*, 4 L. T., N. S., 391; 29 Beav. 620.

9. By articles of partnership, A. agreed to enter into partnership with B. in the profession of surgeon for seven years from the date of the articles. The articles recited that A. and B. had separately practised as surgeons in the neighbourhood of C.; but that the practice of A. had been greater than that of B., and that it had been agreed that B. should pay to A. a premium of 900*l.* as a consideration for A. and B. entering into the partnership. A. became bankrupt in a year and a half after the commencement of the partnership. In a suit by B. against the assignees of A. for an account of the partnership dealings:—Held, that the consideration for which the 900*l.* had been paid having failed B. was entitled to an allowance

of a sum proportionate to the period of the partnership which remained, with a lien for that amount on the partnership assets. *Freeland* v. *Stansfield*, 2 Sm. & G. 479; 1 Jur., N. S., 8; 23 L. J., Ch., 923; 2 W. R. 575; 2 Eq. Rep. 1181.

Notwithstanding the Bankrupt Act 1849, s. 152, a receiver was appointed on the motion of the insolvent partner. *Ib.*

Semble, that an assignee of a bankrupt partner who, by giving notice to the debtors to the partnership, prevents the payment of the debts to the solvent partner, who is answerable for the partnership debts, and thus gives occasion to a suit by the solvent partner, is liable to the costs of the suit. *Ib.*

1. A. and B., in 1856, enter into partnership as surgeons, B. paying A. 750*l.* premium, upon the representation that A.'s profits were 700*l.* per annum. Disputes subsequently arose, and it was alleged by B. that the profits of A. were not half the amount represented, an allegation which was supported by A.'s income tax return and other evidence. There was no evidence of the actual receipts of A. The M. R. decreed a dissolution of the partnership, and a return of one-half the premium; and this decision was affirmed on appeal, on the ground of the misrepresentation as to the amount of A.'s profits previously to the partnership. *Jauncey* v. *Knowles*, 29 L. J., Ch., 95; 1 L. T., N. S., 116.

2. A. agreed to pay 1,000*l.* for a share in a partnership for fourteen years. The partners disagreed, and the partnership was dissolved by the Court, with the assent of both the partners. There being faults on both sides, the Court directed a due proportion of the premium to be returned. *Astle* v. *Wright*, 23 Beav. 77; 2 Jur., N. S., 849; 25 L. J., Ch., 864; 4 W. R. 764.

3. Where it was provided by the articles of partnership that, if the profits of the partnership within twelve months should not amount to 1,000*l.*, the return of the premium of 500*l.* brought in by the partner who survived should be made to him, the other partner having died within that time. On a bill by the surviving partner against the administrator of the deceased partner, such return of premium was decreed to be paid out of the amount received under effected policies of insurance, this being in priority to the other debts of the intestate. *Andrews* v. *Jones*, 12 L. T., N. S., 229.

4. M. agreed with P. to pay him 1,250*l.*, part in money and part in bills, as the consideration for a partnership as a medical practitioner, for twenty-one years, P. to introduce M. to his patients, and to be allowed to be absent for three months, but to take an active part in the business for three years. P. was afflicted at the time with Bright's disease, was absent for six months, and died of apoplexy. P.'s representative sued M. upon the bills, and he filed a bill for an injunction for an account and return of part of the consideration, alleging non-introduction to patients, protracted absence of P., and ignorance that he suffered from Bright's disease:—The Court restrained the defendant from suing on the bills, and directed the usual partnership accounts, with a declaration that the plaintiff was entitled to be remitted a reasonable portion of the premium. *Mackenna* v. *Parkes*, 36 L. J., Ch., 366; 15 L. T., N. S., 500; 15 W. R. 217.

5. A. and B. entered into partnership as solicitors for a term of seven years, A. paying a premium of 800*l.* B., before entering into the partnership, knew that A. was inexperienced and incompetent in his profession, and assigned that reason for requiring the amount of premium which was paid. After the expiration of two years, B. complained that A.'s incompetence was injurious to the business, and called on him to dissolve the partnership; and A. thereupon filed a bill praying for a dissolution and for a return of a proportionate part of the premium:—Held, that he was entitled to the return of a part of the premium proportionate to the unexpired portion of the term. *Atwood* v. *Maude*, 3 L. R., Ch., 369; 16 W. R. 665.

6. Upon the dissolution of a partnership and a notice as provided in the partnership articles, if there has been no misconduct nor breach of the articles on the part of the partner so giving notice, the price originally paid by the continuing partner for his share in the goodwill will not be returned him, although the goodwill may have become valueless, and the business may have suffered by the retiring partner setting up a similar business in his own name, and on the adjoining premises. *Bond* v. *Milbourn*, 20 W. R. 197.

7. When a partnership is determined prematurely, if the incoming partner has paid a premium, he is in all cases entitled to have a proportionate part of the premium returned, except, first, where there has been actual or implied release or waiver of the right to it; or, secondly, where there has been actual or implied release of the right to be a partner, including such a deliberate and serious breach of the partnership contract as may be considered equivalent to a repudiation of it altogether. *Wilson* v. *Johnstone*, 16 L. R., Eq., 606; 29 L. T., N. S., 93; 42 L. J., Ch., 668.

In June 1869 A. entered into articles of partnership with B. for seven years, and paid a premium of 2,500*l.* The articles were strict in their provisions as to the conduct of the partners, and other matters. In November 1870 the term of the partnership was varied, and made to cease on 29th September 1875. In 1871 B. had reason to be dissatisfied with A., and, acting under a provision in the articles, called on him to sign (and in November 1871 he did sign) a notice of dissolution, which was duly gazetted. A correspondence ensued, and ultimately, B. refusing to return any part of the premium, A. filed a bill to recover it, and to have the partnership accounts taken in the usual way:—Held, that he was entitled to a return of a proportionate part of the premium, but on the footing of the partnership term being one of six years and a quarter, and not seven years. *Ib.*

Mere conduct entitling the other partner to a dissolution is not sufficient, inasmuch as the Court does not fine for immorality or even dishonesty in the abstract. *Ib.*

8. The plaintiff and defendant entered into partnership as solicitors for a term of twelve years, "the partnership to be determinable at the option of either partner" by giving three months' notice; and the plaintiff to have the

option of increasing his share in the profits of the business upon payment to the defendant of 600*l*. The plaintiff paid the premium of 600*l*. Afterwards the defendant dissolved the partnership by giving a notice as provided by the articles:—Held, that the plaintiff was entitled to the return of a proportionate part of the premium. *Rooke* v. *Nisbet*, or *Daw* v. *Rooke*, 50 L. J., Ch., 588; 29 W. R. 842.

1. When a partnership is dissolved before its natural expiration in consequence of the misconduct of a partner who has paid a premium, he is not entitled to a return of any part of the premium. And, in such a case, if the premium agreed upon has not been actually paid before the dissolution, the partner who has agreed to pay it will be ordered to pay the whole of it, notwithstanding the dissolution. *Bluck* v. *Capstick*, 12 L. R., Ch. D., 863; 48 L. J., Ch., 766; 41 L. T. 215; 28 W. R. 75.

2. Mere delay by one partner in furnishing further capital according to articles of partnership is not a ground for rescinding the partnership contract, or, in case of dissolution, for depriving the partner of the right to a return of the premium paid by him on entering into partnership. Where one partner, who has paid a premium on entering into partnership, commenced an action for dissolution, and the other partner immediately afterwards commenced a cross-action for dissolution, and the first partner then filed affidavits in his action containing imputations of misconduct against the other partner, which he did not sustain, and one decree for dissolution was made in both actions, which were practically one litigation:—Held, that the making of the imputations was not such misconduct as to disentitle the party making them to a return of his premium. Mere incompetence in a partner, however great, is not a bar to the return of any part of the premium paid by him, unless such incompetence has caused damage or injury, when it may be taken into account in determining how much of the premium shall be returned. *Brewer* v. *Yorke*, 46 L. T. 289.

Where a man with a business has taken a person into partnership with him, and has taken a less premium from him in the belief that he will be of material service in the partnership, and the new partner turns out utterly incompetent, such incompetence may possibly be a good reason for not allowing the return of the whole premium. Where an inquiry was directed to be made in chambers as to the amount of premium to be returned to one partner on a dissolution of partnership, and a certain amount was certified by the chief clerk, whose certificate was afterwards confirmed by the judge and the Court of Appeal, interest on the amount was directed to be paid from the date of the certificate. *Semble*. *Ib*.

3. In an action for dissolution of partnership on the ground of disputes between the partners, where there is no distinct breach of the partnership articles, the terms of dissolution as to return of premium and other matters are within the discretion of the judge, and his conclusions will not be interfered with by the Court of Appeal except on very sufficient grounds. *Lyon* v. *Tweddell*, 17 L. R., Ch. D., 529; 50 L. J., Ch., 571; 44 L. T. 785; 29 W. R. 689.

V. Capital and Profits.

See also VIII. IV.—XII. *post*.

I. *Proportions*, 5442.
II. *Contribution to Losses*, 5445.
III. *Interest on*, 5445.
IV. *Interest on Overdrafts*, 5447.

I. PROPORTIONS.

4. Partnership, without any stipulation as to the proportions; the partners entitled in equal moieties. *Peacock* v. *Peacock*, 16 Ves 49.

5. An equal partnership implies not only an equal participation *de facto* in profit and loss but a right in each partner to claim and insist on such participation. Thus, although in a case where parties had participated equally in profit and loss, the law would, in the absence of any contract, or any dealing from which a contract might be inferred, presume an equal partnership; yet this presumption would not arise if the books of the concern and the dealings of the parties showed that such could not have been the terms on which the business was carried on. *Stewart* v. *Forbes*, 1 Macn & G. 137; 13 Jur. 523. Affirming 16 Sim. 433

6. Two sets of parties having projected a railway on a similar line agreed to consolidate the project, and appointed, as solicitors of the proposed company, the plaintiff and defendant whom they had respectively consulted prior to the consolidation. The two solicitors accepted the appointment without making any definite arrangement as to the division of the business or of the emoluments of the office, and a much larger portion of the work was done by the defendant than by the plaintiff. In a conversation between them about six months after the appointment, and before the principal part of the business was transacted, the plaintiff stated, as the result of his inquiries into the practice in like cases, that the allowance for office expenses and personal trouble in such limited partnerships between solicitors was made by each party retaining, besides his expenses and disbursements, from 10 to 2 per cent. on the amount of the net charges for the business done, and which principle he considered satisfactory; and the defendant in reply, observed, that there could be no misunderstanding about it between honourable men. Upon a bill by the plaintiff, claiming an account and division of the profits of the business done by the company, upon the footing of an equal co-partnership, and offering to allow 25 per cent. upon the work done separately to the partner who did it, the Court, under the circumstances, made a decree accordingly. *Webster* v. *Bray*, 7 Hare 159.

7. A., being entitled under a parol partnership agreement with B. and C. to three-eighths of the capital and profits of the business became bankrupt; being at the time indebted to the partnership in respect of bills, in which the partnership name had been used for his personal accommodation. The assignee claimed a share of the profits made subsequently to the bankruptcy, while the continuing partners insisted, that the bankrupt's interest in the profits ceased at the time. In conse

quence of this difference, no settlement of accounts between the estate and the partnership took place, and the assignees filed their bill; but B. and C., and afterwards C. alone, pending the litigation with the assignees, carried on the business for many years with the stock and capital which existed at the time of the bankruptcy, and stock and capital substituted in the usual course of trade for such former stock and capital, aided by the expenditure of considerable sums by C.:—Held, that the assignees of A. were entitled to three-eighths of the profits which had been made, or should be made, until the concern was fully wound up, and to three-eighths of the money to be produced by the sale of what remained in specie of the capital and stock; that A.'s proportion of the profits was not to be lessened nor the proportion of C. to be increased in respect of the debt which A. owed to the partnership, or of the money which C. brought into the business beyond his share of the original capital. *Crawshay* v. *Collins*, 2 Russ. 325.

Upon an exception to a Master's report, stating the capital and stock in trade of a partnership to consist, at the time of the bankruptcy of one of the partners, of the estimated value of the dead stock employed in it, it was referred back to the Master, to state what was the amount of the capital, and also of the stock in trade at that time, in order to adjust the amount of subsequent profits to which the assignees of the bankrupt partner were entitled, as against the other partners who had continued to trade with the partnership property after the bankruptcy. S. C. 1 Jac. & Walk. 267.

1. As to the shares which partners take in the partnership property from implication arising from facts of this case. *Robley* v. *Blake*, and *Blake* v. *Brook*, 7 Bli. N. S. 90.

2. The adventure was for the supply of small-arms to a foreign government; and the arrangement to tender for the supply was verbally come to without any distinct agreement respecting the division of the profits. In the contracts for supply subsequently entered into with the representative of the foreign government, A. signed separately, and B. and C. were made parties by the name of their firm, and signed in that character:—Held, that the proper inference from the form and mode of execution of the contracts was that the adventure was undertaken by B. and C. as a firm, *i.e.*, as one person, conjointly with A. as another person, and, consequently, that the profits ought to be divided in moieties, one to A. and the other to B. and C., and it was decreed accordingly. *Warner* v. *Smith*, 32 L. J., Ch., 573; 11 W. R. 392; 8 L. T., N. S., 221; 1 De G. J. & S. 337; 1 N. R. 191. Affirming 7 L. T., N. S., 593.

3. In the absence of any evidence, the presumption is, that partners are equally entitled to the profits, and equally liable to bear the losses of the business. *Collins* v. *Jackson*, 31 Beav. 645.

4. A testator, after giving legacies to his daughters, bequeathed to his two sons C. and D. the remainder of his property, in equal proportions, of whatever kind it might consist at the time of his death. He directed the business of the mills of X. to be carried on, and a certain sum to be applied to that purpose, and the remainder of his capital to be invested in fee-simple estates, so that each of his sons should have his portion independent of the other; that they were not to be of age, for the purpose of his will, until they were twenty-five; and if one died without issue under that age, his property should go over to the other. The testator was entitled to 4,061*l.*, as a partner in the mills of Y. C. died under twenty-five:—Held, that the profits realized on the 4,061*l.* during C.'s life belonged to him, and were not capital to be invested in land. *Pilsworth* v. *Mouse*, 14 Ir. Ch. R. 163.

The testator's partner in the mills of Y., after his death, paid 5,421*l.*, which he appropriated to the payment, in the first instance, of the 4061*l.*, due at the testator's death, and the balance to subsequent profits:—Held, that the profits realized subsequently to C.'s death were divisible between his representative and D. *Ib.*

5. Partnership articles provided that the senior partner should receive a fixed annual sum out of the profits, and that the junior should receive the residue and bear all the losses. The senior partner was to be at liberty to retire on notice, when a deed of dissolution was to be executed containing all usual and proper provisions; and if he died without having retired, his death was to operate as a dissolution. If the junior partner died during the partnership, the senior was to pay the junior's representatives "his half-share of the stock;" but there was no corresponding provision for the event of the senior's death:—Held, on the death of the senior partner in the lifetime of the junior, that the estates of the deceased was entitled to a moiety of the stock in trade and credits of the partnership. *Nelson* v. *Bealby*, 4 De G. F. & J. 321; 30 Beav. 472; 5 L. T., N. S., 599; 8 Jur., N. S., 397.

"The business" held not to mean the capital or stock in trade. *Ib.*

6. Articles of partnership provided that the business should be carried on for the mutual and common benefit of the partners, and risk of profit and loss in equal shares; that A. should bring in 1,500*l.* capital, and B. 750*l.*, and that the capital in the business should carry interest: that if either partner brought in additional capital, interest should be paid upon it before any other payment of interest was made; that the partners should draw out of the partnership funds so much per year, and that the net profits in excess of the amount drawn out should remain in the business, upon which interest was to be allowed; that B. should give all his time to the business, and A. so much time as he should think proper; and that upon dissolution, after payment of debts, the remaining capital stock, moneys, and credits of the partnership should be divided between the partners according to their respective shares and interests. Upon dissolution, the capital of B. was found to have been increased to a small extent by the accumulation of profits; the capital of A. was considerably increased by accumulation of profits, and also by additional capital brought in. The assets proved insufficient to pay back the capital in full:—Held, that the assets ought to be

applied first in paying to A. the additional capital brought in by him, and the balance divided between the partners in proportion to their respective capitals. *Wood* v. *Scoles*, 1 L. R., Ch., 369; 12 Jur., N. S., 555; 35 L. J., Ch., 547; 14 W. R. 621.

1. A father took his sons into partnership under articles, providing that the capital then used by him in the business should be kept in it without allowing interest, and should remain the property of the father, the sons having during the partnership a certain share in the profits. The debts due to the business were estimated at 20*l.* per cent. below their nominal amount, but very nearly their full amount was realised. The father drew out of the business large sums, which appeared to have been wholly applied in payment of trade debts due when the partnership was formed. One of the sons brought fresh capital into the business:—Held, that, in the absence of contract, the sons could not claim to treat the difference between the estimated value of the debts due to the business and the amount actually realised as profit, but that the whole amount realised was to be treated as part of the father's capital. *Cooke* v. *Benbow*, 3 De G. J. & S. 1; 6 N. R. 135.

Held, also, that the contract was, not that the father should keep in the business the moneys employed there when the partnership commenced and pay *aliunde* the trade debts then owing, but that the business should be carried on as it stood for the benefit of himself and his sons, and that, therefore, the payment of the old trade debts was not an improper withdrawal of the capital. *Ib.*

Held, also, that if the father had withdrawn capital for unauthorized purposes he could not have been charged with interest unless such withdrawal had been fraudulent and grossly excessive. *Ib.*

Held, also, that in the absence of contract, the son could not claim interest on the capital brought in by him. *Ib.*

2. By articles of partnership between the plaintiff and the defendants, it was agreed that the plaintiff should reside and manage the business abroad, and that he might draw for his private use to the extent of 500*l.* until the yearly balance-sheet was made, and the amount of profit ascertained. After payment of specified expenses, the partners were declared entitled to the gains and profits of the business in the following proportions: K. to four-tenths, H. to two-tenths, and the plaintiff to four-tenths. In case the gains should be found insufficient to pay the expenses, the deficiency was to be borne in the same proportions; and, in consideration of the plaintiff devoting his whole time to the business, the defendants agreed to guarantee to him "that the four-tenths share in the profits to be received by him during the first two years should not be less than 500*l.* per annum; and that, if the net profits should at any time, upon the division thereof, exceed 1,500*l.* a year, he should receive an additional bonus of 10*l.* per cent. upon the gross earnings":—Held, that the true construction of the articles was, that if there should be a profit, and four-tenths of that profit should be less than 500*l.*, the plaintiff was to take 500*l.*, but if there should be no profit, then that the guarantee was not to emerge. *Croker* v. *Kreeft*, *Kreeft* v. *Croker* 13 L. T., N. S., 136.

Upon the dissolution of the partnership, the chief clerk found the plaintiff to be indebted to his co-partners in certain sums on the authority of partnership books kept by the defendants. The plaintiff having alleged that the books were erroneously and fraudulently compiled, and that the debts were not partnership debts, it was referred back to the chief clerk to ascertain and certify the amounts due from and to the plaintiff and the defendants respectively, with liberty to state special circumstances. *Ib.*

3. A solicitor who was acting for defendants in an action was instructed by his clients to associate with himself another person, A., as the solicitor to conduct the defence, and thereupon he proposed to A. to join with him in carrying on the business, to which A. assented, and nothing whatever was said as to any division of profits, or respecting remuneration:—Held, first, that this was a partnership for the particular business. Secondly, that the presumption of law was, that the profits were to be divided equally. Thirdly, that the party alleging, and on whom therefore rested the burden of proving, that the contract as to the profits was different, having failed to prove it, the profits must be equally divided. *Robinson* v. *Anderson*, 20 Beav. 98.

4. B., who was an architect, agreed with C. and K., who were wharf-building speculators and wharfingers, to render his financial and other assistance and supervision in the construction and completion of warehouses on two wharves, of which it was proposed to procure a lease; and, in consideration of such his assistance and supervision, to receive one equal fifth part or share of the profits of the speculation and undertaking. A lease of the X. property was procured, but the negotiations for the Y. property fell through at the time. B., it was originally intended, should be one of five, the other four to consist of C. and K., and two capitalist gentlemen, whom it was intended to secure. Eventually, B. and K., in lieu of procuring two capitalists to be admitted into the partnership, borrowed 18,000*l.* on mortgage of the premises by way of raising capital for the concern. No new agreement was entered into regarding the shares of the three parties to the original agreement:—Held, that B. was only entitled to one-fifth share as fixed in the agreement, but that such share should not be liable to the mortgage debt of 18,000*l.* *Bell* v. *Barnett*, 21 W. R. 119.

The Y. property became the subject of new negotiations on behalf of the partnership, but these latter negotiations also fell through. Some years after the date of the original agreement relating to the property, B. succeeded in obtaining a lease of the property, and claimed to retain it for his own benefit. B. had not previously declared in express terms that he considered the original agreement at an end:—Held, that the property still remained subject to the partnership agreement, and that B. was entitled to one-fifth share in that property also. *Ib.*

5. When a voluntary society has sold some of its real property, there being no rule of the society to the contrary, the members for the

time being are entitled to the proceeds of such sale in equal shares. *Brown* v. *Dale*, 27 W. R. 149; 9 L. R., Ch. D., 78.

1. S. and U. were solicitors and partners; S. was steward of a manor and receiver of rents. In the articles of partnership it was provided that steward's fees and receiver's salary of either partner should be deemed part of the profits of the partnership, but that the receipts and payments in respect thereof should be made by the partner conducting such business:—Held, that steward's fees and receiver's salary or commission are not profits on a trade or business in the ordinary sense of the term, and that, under the circumstances, balances due by S. as steward or receiver were not debts of the partnership. *Alston* v. *Sims*, 1 Jur., N. S., 438; 24 L. J., Ch., 553; 3 W. R. 431.

II. CONTRIBUTION TO LOSSES.

2. Though contribution among partners is now enforced at law, the jurisdiction of courts of equity is not ousted, and therefore though the bill was dismissed, the object having been obtained in an action directed, the Court would not dismiss it with costs. *Wright* v. *Hunter*, 5 Ves. 792.

3. In the absence of any evidence, the presumption is, that parties are equally liable to bear the losses of the business. *Collins* v. *Jackson*, 31 Beav. 645.

4. Bill for contribution by one of several partners against some of the other partners, stating that the partnership was wound up, and its debts paid, and that it only existed for the purposes of contribution; stating the number of shares which each of the partners had in the concern, and the sums subscribed by most of them, thereby showing that two of the defendants, and several of the absent parties, had paid up much more than the price of their shares; alleging that all the absent parties had either died insolvent (and that plaintiff was unable to procure administration to them), or were now wholly insolvent and out of the jurisdiction (not praying process against them); and stating a payment which plaintiff, as a partner, had been compelled to pay, and which was much more in proportion than what the defendants had paid; stating also that the defendants were the only persons who were at all capable of contributing towards payment to plaintiff of such excess; praying for such contribution, but not praying any partnership account. Demurrer for want of equity and want of parties overruled. *Jones* v. *Morgan*, 10 Jur. 238.

5. *Semble*, that there is no positive rule of law that losses are to be borne between partners in the same proportions in which they enjoy profits; but where partners have provided for the division of profits in certain proportions, and have made no provision as to losses, it is a fair inference that they intended to bear losses in the like proportion. *Re Albion Life Assurance Society*, 16 L. R., Ch. D., 83; 43 L. T. 524; 29 W. R. 109.

6. By the terms of the resolutions on the formation of a company, the object of which was to purchase land and found a colony, certain trustees had the control of an expedition to explore the district; and it was resolved that the expense of the expedition should not exceed a certain sum, and that the subscribers were not to be liable beyond a fixed amount. On the arrival in the country of the persons proceeding on the expedition, they were seized and thrown into prison, and owing to this the project failed, and the loss greatly exceeded the limit fixed by the resolutions:—Held, that the trustees could not call on the subscribers for contribution beyond the fixed amount. *Gillan* v. *Morrison*, 1 De G. & Sm. 421; 11 Jur. 861.

7. A. and B. went into partnership without written articles, the parol agreement between them being that profits should be shared and losses borne in equal shares. A. died, and on accounts of his estate being taken, it was found that he had advanced more capital than B., to the extent of 1,900*l.* The net assets of the partnership were only 1,400*l.*:—Held, that the deficiency of 500*l.* was a debt to which both estates were liable to contribute equally. *Nowell* v. *Nowell*, 7 L. R., Eq., 538.

8. A banker took three gentlemen into partnership without an inquiry being made into the accounts, and gave them a charge on all his estates by way of indemnity against all his liabilities at the time they entered into partnership:—Held, to be only an indemnity against what they should be called on to pay, on account of his liabilities, out of their private means, independent of the banking business. *Grylls* v. *Grylls*, *Mann* v. *Kendall*, 18 W. R. 85.

III. INTEREST ON.

9. A stipulation that interest should be allowed on the capital of partners presumed under the circumstances. In a partnership between A. and B., interest was allowed on the capitals; C., who was a clerk and relative, was cognisant of the terms on which this partnership was carried on; B. retired, and A. and C. continued the business; the whole capital embarked therein belonged to A.; there was an absence of all proof of any agreement between A. and C. in respect of interest on capital; D. and E. were afterwards admitted into the business, and an interest on account of capital was then resumed:—Held, under these circumstances, and from the knowledge that C. had of the terms on which the last partnership had been carried on, that it must be assumed that interest on capital was to be allowed in the second partnership. *Millar* v. *Craig*, 6 Beav. 433.

10. In a long unsettled partnership account, rendered intricate by the neglect of a party, he shall have no interest on the balance when settled. *Boddam* v. *Ryley*, 1 Bro. C. C. 239; 2 Bro. C. C. 2.

11. On a bill filed for an account on foot of the partnership transactions, one of the partners (a defendant) was, under the circumstances, decreed to pay interest upon the amount of the plaintiff's share until paid, at the rate of 5*l.* per cent. *Hutcheson* v. *Smith*, 5 Ir. Eq. R. 117.

12. In taking the accounts of all partnership dealings and transactions between A. and B., the chief clerk certified that B. had advanced all the sums required in the erection of certain

houses, and that he was entitled to be allowed interest on such sums from the dates when advanced, down to the date of the certificate, and that he ought to be charged with interest on the rents received by him. But the certificate was varied by striking out the sums allowed for interest. *Stevens* v. *Cook*, 5 Jur., N. S., 1415.

1. A claim by one partner for interest on capital in the partnership business disallowed under the circumstances of the case. *Hill* v. *King*, 3 De G. J. & S. 418 ; 1 N. R. 161.

A verbal agreement for a partnership, by which it was stipulated that the capital should be advanced in equal shares, but nothing was said about interest. One of the partners advanced his share of the capital, but the other did not:—Held, that the partner who had made such advance was not entitled to interest. S. C. 9 Jur., N. S., 527; 8 L. T., N. S., 220. And see 33 L. J., Ch., 136.

2. Under the common decree in a partnership suit interest is payable on the balance found to be due from one partner to another from the date of the certificate. *Bonville* v. *Bonville*, 35 Beav. 129.

3. Upon a decree for the dissolution of a partnership, with the usual directions, the accounts are taken up to the date of the decree, upon the footing of the existing articles, but from that date they are taken in the ordinary way, simple interest being allowed on the capital of the respective partners and the profits divided in equal shares. *Watney* v. *Wells*, 9 Jur., N. S., 396; 32 L. J., Ch., 194; 11 W. R. 228.

By an agreement between two partners, each was to have interest at 5 per cent. on his share of the capital, and the profits were then to be equally divided between them. A decree was made for a dissolution and a sale of the partnership property; but the business was carried on for some time afterwards, until the property was finally sold:—Held, that after the dissolution, interest was no longer payable under the agreement; and that in the division of the proceeds of the sale each partner would take what was found to be his share of capital at the time of the dissolution, with the accumulations, and that the residue must be equally divided between them. S. C. 2 L. R., Ch., 250; 36 L. J., Ch., 861; 16 L. T., N. S., 248; 15 W. R. 621.

4. By articles of partnership it was provided that the partners shoud carry out certain contracts, and that the partnership should continue until the contracts were completed, but that if either of the partners should die, then that his executors should be bound by his obligations, and that there should be no division of the profits until the completion of the contracts. One of the partners died, and he bequeathed all his property upon trust, after conversion and investment, for his widow for life, with remainder over. The contracts were not completed until six years after his death, when his share of the partnership assets was paid to his trustees:—Held, that his widow was entitled to interest at 4*l.* per cent. from his death on the value of his share in the partnership assets. *Jackson* v. *Jackson*, 20 L. T., N. S., 354; 17 W. R. 547.

5. Where profits are left by a partner in a business, he will not, in the absence of a special agreement, be allowed interest on them. *Dixham* v. *Bradford*, 5 L. R., Ch., 519.

In ascertaining the profits of a business, the value of the partnership property is to be found, and the original capital with interest thereon (if necessary) is to be deducted; the residue will represent the profits. *Ib.*

6. By a clause in a partnership deed it was provided that on the death of a partner his share, as ascertained in manner specified, with interest thereon at the rate of 10 per cent. per annum, should be paid to his personal representatives by four annual consecutive legal instalments:—Held, that interest was payable at the rate of 10 per cent. for one year on the first instalment when the same should become due, for two years on the second when due, and so on. *Beater* v. *Murray*, 1 W. R. 92.

7. A father took his two sons into partnership under articles, by which it was agreed that the business should be carried on with the father's capital, which should remain his; that yearly stock-taking should be made, that the partners should share profits and losses equally in thirds, that each of the sons besides his own share of the profits should have 150*l.* a year out of the father's share, but repairs and other outgoings in respect of the business premises should be paid out of the profits; that before division of the profits, the father should have interest at 4*l.* per cent. on his capital, and that in estimating profits a certain discount should be taken off the mills and machinery. The partnership lasted ten years, during the whole of which time in the yearly stock-taking the mills and machinery were valued as they stood without any discount, as provided in the articles, and without distinguishing the increase of value arising from additions and improvements, and the expenses of additions and improvements were charged against the partnership; the 150*l.* a year to each son was charged against the business, not against the father's share of profits; each partner was credited with interest on the capital standing to his credit at the beginning of the year, and the profit was then divided into thirds, and the shares carried to the credit of the partners respectively:—Held, that this mode of keeping the accounts, and the division of profits according to it, evidenced a new agreement between the parties, and that the account must be taken on that footing, and not on the footing of the articles: and that whether the mills and machinery were, according to the articles the property of the father or of the partnership they must be treated as being under this agreement the property of the partnership. *Pilling* v. *Pilling*, 3 De G. J. & S. 162.

The bill made no reference to the account having been kept in a mode inconsistent with the articles, and the decree directed an account of all dealings between the parties as partners under the articles dated 30th December 185—Held, that this was not a direction to take the accounts according to the articles, and that they ought to be taken according to the book. *Ib.*

The partners being entitled by agreement to interest on their capitals:—Held, that such interest must run till the principal was paid, although the partnership had been dissolved for several years. *Ib.*

1. A father took his sons into partnership under articles, providing that the capital then used by him in the business should be kept in it without allowing interest, and should remain the property of the father, the sons having during the partnership a certain share in the profits. The debts due to the business were estimated at 20*l.* per cent. below their nominal amount, but very nearly their full amount was realised. The father drew out of the business large sums, which appeared to have been wholly applied in payment of trade debts due when the partnership was formed. One of the sons brought fresh capital into the business:—Held, that in the absence of contract, the son could not claim interest on the capital brought in by him. *Per* Turner, L. J. The withdrawal by a partner of capital, in order to pay his private debts, is so far for the benefit of the other partners, as preventing the mischief that would arise from an execution against the partnership property, that, in the absence of fraud, no interest is payable to the other partners on account of the capital so withdrawn: But *semble* (*per* Knight-Bruce, L. J.). Interest may, under some circumstances, be payable between partners on account of capital brought in or withdrawn, independently of express contract. *Cooke* v. *Benbow*, 3 De G. J. & S. 1; 6 N. R. 135.

2. A testator was in trade in partnership with other persons for a term of years, under articles, by which the share of any partner dying was to be left in the concern till the expiration of the term, and then to be paid off by instalments, with interest and share of profits in the meantime. By his will he bequeathed all the residue of his real and personal estate to trustees, to get in with all convenient speed, and invest the moneys, and pay the interest or dividends to the widow for life, remainder to his children. A subsequent proviso in the will empowered the trustees to postpone any sale, at their discretion, and directed the rents and produce of any unsold part to go as the interest of the sales-moneys would have gone if such part had been sold. The books were made up half-yearly. The trustees did not get in the share in the partnership:—Held, that the widow was entitled to 5*l.* per cent. interest on the amount at which the stock in trade had stood in the books of the concern on the periodical stock-taking next preceding his decease, from the day of his death up to the day of the periodical stock-taking next succeeding his death. *Johnstone* v. *Moore*, 4 Jur., N. S., 356.

3. In taking the accounts of a partnership, interest after the dissolution will not in general be allowed to the partners on their respective capitals, though interest during the partnership with annual rests is allowed; but this rule may be varied by the terms of the articles, as, for example, by a provision treating the capital left in by a partner as an interest bearing loan. *Barfield* v. *Loughborough*, 8 L. R., Ch., 1; 42 L. J., Ch., 179; 27 L. T., N. S., 499; 21 W. R. 86.

Any sums of money received after the dissolution and retained by either partner ought to be debited to him, and applied first in reduction of the interest due to him; and secondly, in reduction of his capital. *Ib.*

By articles of partnership between two solicitors, it was agreed that in case either of them should at any time or times, with the consent of the other of them, advance or lend to the co-partnership or leave therein at any annual settlement of accounts any sum or sums of money, the partners respectively should be considered as creditors of the partnership in respect of such capital and advances, and should be allowed interest for the same. Upon the special terms of this contract:—Held, that in taking the accounts after dissolution, interest must be allowed to each partner on his share of the capital from time to time remaining in the business, with annual rests up to the time of the dissolution, but without rests from that time. *Ib.*

4. When A. retired from a partnership, but left 60,000*l.* capital in the business ostensibly as part of the partnership capital of B., such sum to be repaid at the end of three years (being the agreed term of the new co-partnership), and when B. retained and employed in the business the said sum beyond the expiration of that period:—Held, that interest at 5 per cent. per annum was payable on the 60,000*l.* from the expiration of the three years, and also on the profits from the time of the realization of the different portions of the same. *Spartali* v. *Constantinidi*, 20 W. R. 823.

Afterwards an appeal against this decision was compromised. S. C. 21 W. R. 116.

Courts of equity are not limited by 3 & 4 Vict., c. 42, s. 28, as to the allowance of interest. *Ib.*

IV. INTEREST ON OVERDRAFTS.

5. Partnership articles provided that neither party should draw from the partnership more than his presumptive share of the profits, but no provision was made for payment of interest in case of either partner overdrawing. Upon decree for dissolution:—Held, that one of the partners having overdrawn he could not be charged with interest upon the sums overdrawn. *Meymott* v. *Meymott*, 9 Jur., N. S., 426; 32 L. J., Ch., 218; 31 Beav. 445.

6. A simple contract debt does not carry interest, unless by virtue of some contract express or implied, and, therefore, where one partner was indebted to another for money drawn out of the firm, and there was no evidence of any contract or custom of dealing:—Held, that he could not be charged with interest in a suit for the administration of the latter's estate. *Rhodes* v. *Rhodes*, 1 Johns. 653; 6 Jur., N. S., 600; 29 L. J., Ch., 418; 8 W. R. 204.

7. A father trading alone took his sons into partnership, and undertook to bring into the business "all his capital then or usually employed therein, without any allowance of interest." In estimating the father's capital, the book-debts due to him were, according to the custom of the trade, valued at 20*l.* per cent. below their nominal amount; but they actually realised more. The father withdrew large sums from the capital, to pay trade debts incurred before the partnership was entered into, and one of the sons substituted capital of his own. In the absence of express contract:—Held, that no interest was payable to the sons on account of capital withdrawn by the father

to pay trade debts due at the date of the partnership. *Cooke* v. *Benbow*, 6 N. R. 135; 3 De G. J. & S. 1.

VI. Property.

I. *In General*, 5448.
II. *Whether Joint or Separate Assets*, 5448.
See also III. 1 *infra*.
III. *Leases*, 5450.
IV. *Conversion*, 5453.

I. IN GENERAL.

1. Possession of some owners is possession of all. *Exp. Machell*, 2 Ves. & B. 216; 1 Rose 447.

2. Where articles stipulate for a division of the partnership property at the end of the partnership, a sale is intended. *Rigden* v. *Pierce*, 6 Madd. 353.

3. Partnership determined by death, the legal property survives, not the beneficial interest. Right of the executor to the value of the testator's interest, to be ascertained, not by calculation but by sale. *Crawshay* v. *Collins*, 15 Ves. 227.

4. The interest of partners as tenants in common, where the estate was purchased out of the joint property, and mortgaged by the firm for a joint debt, is a joint security. *Exp. Free*, 2 G. & J. 250.

5. Right of survivorship between two persons, builders, with a provision for a lease of the ground, but not general partners, not interfered with. *Reilly* v. *Walsh*, 11 Ir. Eq. R. 22.

6. A. enters into partnership in fifths with three owners, for twenty-one years, in digging for mines in A.'s lands, A. to have two-fifths, and in consideration of his ownership of the land to have a tenth out of the other partners; A. dies, and his widow sets up a voluntary settlement made after marriage:—The Court inclined to the opinion that the partners were as purchasers, and that the voluntary settlement should not stand against them. *Shaw* v. *Standish*, 2 Vern. 326.

7. A bequest to the representatives of the late mercantile house of A. and K., or to such person or persons as should be entitled at testator's decease to their personal property, in satisfaction of a debt due by the testator's father:—Held, claimable by the legal representative of the surviving partner as representing the firm of A. and K., and not by the persons beneficially entitled to the properties of A. and K. *Kerrison* v. *Reddington*, 11 Ir. Eq. R. 451.

8. Trade fixtures in leasehold premises, mortgaged by a firm of traders:—Held, not within their order and disposal, so as to pass to their assignees in bankruptcy; though the lease had run out, and, pending the negotiation with the landlord for a new lease, the firm had occupied the premises from year to year. *Fearenside* v. *Derham*, 13 L. J., N. S., Ch., 354; 8 Jur. 633.

9. When a partnership at will is formed, for the purpose of working an invention for which a patent has previously been taken ou by and registered in the name of one of th partners alone, the patent becomes an asse of the partnership, and each partner acquire a right to practise the invention; and thi right is not taken away by the registere owners assigning the patent to third partie who have notice of the existence of th partnership. *Kenny's Patent Button-holin Co.* v. *Somerrell and Lutwyche*, 38 L. T., N. S 878; 26 W. R. 786.

K., who had invented an improved kin of buttonhole for boots and shoes, and machine for making it, obtained a loan fro L. to enable him to meet the expense taking out a patent for the invention; and th patent having been obtained by K. in h name alone, he and L. for more than fou years worked the invention in partnershi together. After the partnership had existe for some years, K. agreed with the trustee a projected company to assign the patent t it, and, the company having been formed, th assignment was duly made and registere At the time of the agreement and assignmer respectively the trustee and directors of th company respectively knew that L. and K had been working the invention togethe Notice of the assignment was given to L., an he was warned not to infringe the patent; bu he continued to work the invention, and th company then sought to restrain him fro so doing:—Held, that by the partnership L had obtained a licence to work the invention that at the time of the assignment of th patent the company had notice of the existenc of his right; and that they could not revok the licence. *Ib.*

10. Where a personal office or employment purchased with the partnership funds for th benefit of the partnership, the partner in whos name it is purchased is not necessarily trustee of the profits of the office for the oth partners, after the term of the partnership ha expired. *Clarke* v. *Richards*, 1 Y. & Coll. 35 4 L. J., N. S., Exch. Eq., 49.

II. WHETHER JOINT OR SEPARATE ASSETS.

11. A house, of which part was used as a office for the purposes of the business (r rent being charged to the partnership for it but of which the rents and profits were alwa carried to the separate account of one partn (who was the father of the other), and it wa always treated between the two as his separa property:—Held, to belong to his separa estate. *Exp. Murton*, 1 M. D. & De G. 25 4 Jur. 894.

12. H. takes a lease in his own name, an puts his own furniture therein, for the use the firm of H. & J.; the rent and oth expenses are paid by the partnership, th apprentices are boarded and lodged there, an the house is occupied entirely for the purpos of the trade, J. living in the house, and L himself residing elsewhere:—Held, that th furniture must be considered as in the reput partnership of H. and J., and as forming pa of the joint capital and stock of the partne ship. *Exp. Hare*, 1 Dea. 16; 2 Mont. & A. 47

13. Two American citizens and a Frenc

subject being in partnership, the owners of certain ships captured by British cruisers, and the commissioners under the treaty of commerce in 1794, between this country and America, for awarding compensations to American subjects who had suffered losses by capture, for which they could obtain no redress in the ordinary tribunals, having awarded in compensation of the ship of the partnership captured certain sums to the two Americans, with express exclusion of the French citizen, as an alien enemy:—Held, the sums so awarded are not partnership property, and the creditors of the partnership have no claim on them, as against the separate creditors of the Americans. *Campbell* v. *Mullett*, 2 Swan. 551.

1. A. and B. partners; A. dies, there being then joint property in hands of A. and B.'s bankers; towards execution of a previous arrangement, B., for partnership purposes, draws on bank, and hands money to trustees, and on agreement that if object of trust failed, money should be returned; it fails, and B. becomes bankrupt, money remaining in trustees' hands:—Held, that the money is the joint property of A. and B., applicable to their joint debts, and not the property of B. alone, as surviving partner. *Exp. Leaf, Re Simpson*, Mont. & Ch. 662; 4 Dea. 287; 9 L. J., N. S., Bky., 9.

2. A. and B. agree to dissolve partnership, and publish a notice in the Gazette to that effect, and also stating, that the debts due to and by the old firm would be received and paid by A.; no assignment is executed of the partnership effects to A., who continues to carry on the business on his own account, but under the partnership firm:—Held, upon a joint fiat issued against A. and B., that the partnership property belonged to the joint estate, and not to the separate estate of A. *Exp. Cooper, Re Johnston*, 1 M. D. & De G. 358; 10 L. J., N. S., Bky., 11; 5 Jur. 10.

3. Partners of a flour-mill and corn-mill supplied with water by the same mill-pond, entered into an agreement for a partition, the water to be a joint right between the two establishments, which were to be determined by lot between the parties, the party to whom the flour-mill might fall to have the right, at all times, to enter the establishment of the other, for the purpose of more effectually scouring the water-course; and either party, finding it necessary to make any proper outlay for such purpose, might claim and recover half the amount from the other; and should the water at any time prove insufficient for the working of both mills together, it was agreed that each concern should have the entire right of water during each alternate twelve hours:—Held, that the parties were entitled to a joint and equal right to the entire water, although at the date of the agreement the supply to the mills was unequal. *Hamilton* v. *Fawcett*, 9 Ir. Ch. R. 397.

4. Ships purchased by one partner, held separate property as between creditors after his bankruptcy and death of the other, upon circumstances; particularly the registry being made in the name of one partner only, and being afterwards continued for a fraudulent purpose. *Curtis* v. *Perry*, 6 Ves. 739.

5. A ship was purchased by a partner for himself, but was paid for out of the partnership assets. The firm became bankrupt:—Held, that the firm had no interest in the ship, or any lien on it for the amount of the purchase money. *Walton* v. *Butler*, 29 Beav. 428.

6. M. and W. were in partnership as solicitors. A benefit society had been formed at Worksop, where the partners resided, to last for ten years. On the formation of the society W. entered the name of M. as a subscriber for eight shares in the company, he himself having also eight shares. M. never executed the deed of the company. The subscriptions in respect of M.'s shares were always paid by W. At the termination of the ten years the affairs of the company were wound up, and W. claimed to participate in the proceeds of the company in respect of the eight shares subscribed in the name of M. as well as his own. The company had never been enrolled or registered under the 7 & 8 Vict., c. 110. M. claimed the proceeds in respect of his eight shares so standing in his name; W. resisted this, on the ground of the illegality of the company:—Held, nevertheless, on a bill by M. for the proceeds of the eight shares, that, as they had been separated and ear-marked, and were standing in the name of M., he was entitled to the benefit of these eight shares. *Mason* v. *Watkins*, 10 L. T., N. S., 453.

7. Refusal under the circumstances to interfere by injunction on behalf of partnership creditor to restrain the payment of trust moneys lent to the partnership, the firm having become bankrupt. *May* v. *Crosswell*, 7 Jur. 841.

8. Two partners had carried on business and dissolved partnership. They gave notice of the dissolution in the Gazette, and, by circular to the debtors, required the debts to be paid to one of the firm; and by the deed of dissolution the plant, etc., was assigned to the same partner, and it was stipulated that he should pay the partnership debts, and pay to the other the value of his share of the plant, etc., to be ascertained by arbitration. The partner who was thus declared entitled to the debts became bankrupt, and he had not paid the price of the other's share of the plant, etc.:—Held, that the debts remained the property of the firm, notwithstanding the agreement that they should belong to one. *Exp. Brewster's Assignees*, 22 L. J., Bky., 62.

9. A partnership firm of W. & G. being in insolvent circumstances, a deed of dissolution was executed, whereby G. assigned to W. all his interest in the partnership assets, and W. covenanted to pay the partnership debts and indemnify G. from the liabilities of the partnership. Fourteen days afterwards W. & G. were adjudicated bankrupts:—Held, that the deed of dissolution was fraudulent and void as against the joint creditors, and that the whole of the partnership property as it existed at the date of the deed continued to be joint property. *Exp. Mayou, Re Edwards-Wood and Greenwood*, 11 Jur., N. S., 433; 34 L. J., Bky., 25; 13 W. R. 629; 12 L. T., N. S., 254; 4 De G. J. & S. 664; 6 N. R. 8.

10. An agreement for the dissolution of a partnership of two persons provided that the outgoing partner should assign his share in the partnership property to the continuing

partner, and that out of the share a sum which had been withdrawn from the capital by the outgoing partner should be replaced, and that the assets should be realized for the benefit of both the partners according to their respective interests. An assignment was afterwards executed whereby the outgoing partner assigned his share of all the partnership property to the continuing partner, and in less than two months afterwards both became bankrupts:—Held, that the assignment was a complete and effectual conversion of the joint into separate assets as against the joint creditors. *Exp. Walker*, 4 De G. F. & J. 509.

1. On the formation of a partnership it was agreed that the business should be carried on at a mill belonging to one of the partners; and he was credited in the books of the partnership with the value of the mill. From time to time sums were expended in making additions to and improvements in the mill; and in the yearly balance-sheets the mill was entered at the original value, increased by the amount so expended, but less a certain amount for depreciation, and the partners were allowed interest on the sums from time to time standing to their capital accounts:—Held, that in the absence of any special agreement the mill was an asset of the partnership, and that on a sale of the business, under which the purchase money of the mill was largely in excess of its value in the books, the difference was profit divisible in the proportions in which the profits of the business were divisible at the time of the sale. *Robinson* v. *Ashton*, *Ashton* v. *Robinson*, 20 L. R., Eq., 25; 44 L. J., Ch., 542; 33 L. T., N. S., 88; 23 W. R. 674.

2. Three brothers, tenants in common of a farm and lands in Wales, carried on farming together. One brother died, having devised his one-third share to a nephew, and he and the two surviving brothers, B. and W., continued to carry on the farming. The nephew sold his one-third share of the farm and lands to his uncles, B. and W., the conveyance being to them as joint tenants, and they continued to carry on the farming. B. died, having given all his property to his wife. The farm and lands were subsequently sold. W. claimed, as surviving joint tenant, the proceeds of sale, representing the one-third share purchased from the nephew:—Held, that the one-third share became involved in partnership dealings, and must be regarded as partnership property, and that W. was entitled to only a moiety of the proceeds of sale. *Davies* v. *Games*, 12 L. R., Ch. D., 813; 28 W. R. 16.

3. By a decree made in a suit the partnership between the plaintiff and defendant was dissolved, and a sale of the partnership property ordered. In 1869 an order was made for the sale of the partnership property to the plaintiff for a certain sum, the plaintiff to be entitled to possession, and to pay interest on his purchase money from the date of the order. The plaintiff entered into possession under this order, but never paid the purchase money, nor took any assignment of the partnership property. The plaintiff afterwards became bankrupt, the property was again sold, and part of the purchase money had been paid into court:—Held, that, as under the order of 1869 the plaintiff was in possession as sole owner at the time of his bankruptcy, the fund in court belonged to his trustee in bankruptcy, and did not form part of the partnership assets. *Graham* v. *McCulloch*, 32 L. T., N. S., 748; 23 W. R. 786; 20 L. R., Eq., 397.

4. K., a partner in the firm of K. & Co., being entitled by the articles of partnership and desiring to withdraw 4,000*l.* from the capital of the firm, which was in a state of insolvency, bills of exchange to that amount, in three sets, were bought by and made payable to the order of the firm, and the first set of bills was indorsed by K. & Co. and delivered to K. K. died without receiving payment of the bills, and the first set was lost. The surviving partners executed a creditors' deed, and the second set of bills not having been indorsed was claimed by the trustees of the deed as partnership assets, and by K.'s executors as his separate estate. By arrangement the bills were indorsed to stakeholders, and the money was paid into court:—Held, that K. was not entitled to withdraw the 4,000*l.* when the firm was insolvent, and that as the money had not actually reached his hands it belonged to the joint creditors. *Re Kemptner*, 8 L. R., Eq., 286; 17 W. R. 818; 21 L. T., N. S., 223.

5. D. carried on business in partnership with W. and T., under a deed which provided that D. should be a partner in the profits, but not in the capital of the business, and should not be required to bring in any capital. The deed provided that if D. died during the continuance of the partnership his share in the profits should revert to the other partners, and his representatives should receive nothing more than a proportionate part of his share of the profits of the current half-year, up to the day of his death. D. died, leaving W. and T. him surviving. Afterwards W. died, and then the business was carried on for some months by T. alone, who ultimately filed a liquidation petition. At the date of the petition there were assets existing in specie which belonged to the firm before D.'s death:—Held, that the provisions of the deed did not take away the right of D.'s executors to be indemnified out of the assets of the firm existing at D.'s death and that, therefore, the assets remaining in specie were primarily applicable to the payment of the joint debts of the three partners and that the joint creditors could not prove against the separate trade assets of W. or of T., till their separate creditors had been paid in full. *Exp. Dear, Re White*, 34 L. T., N. S. 631; 1 L. R., Ch. D., 514; 45 L. J., Bky., 22 24 W. R. 525.

See also III. 1 *infra*.

III. LEASES.

1. *Whether Joint or Separate Assets*, 5450.
2. *Renewal of*, 5451.

1. Whether Joint or Separate Assets.

6. By agreement, dated the 29th March 1855, A., who had for some time prior to that period carried on business on his own account as a salt manufacturer at certain saltworks was entitled to have a lease thereof granted t

him for twenty-one years from the 25th March 1855, at an annual rent of 1,800*l.* per annum. By deed of arrangement, dated the 29th May 1856, it was agreed that A. should admit B. into partnership, in consideration of C., B.'s brother, advancing such sums, not exceeding 7,000*l.*, as should be necessary for the purposes of the partnership; and, by way of security for the repayment of the advances to be made by C., A. by deed of even date with the deed of arrangement gave to C. an underlease of the saltworks. The deed of arrangement declared the trusts of the underlease, and provided that on repayment by A. and B. of the sums to be advanced by C., C. should assign the saltworks to A. and B., their executors, administrators, and assigns. The deed also contained a power of sale, and it was thereby declared that C. should stand possessed of the surplus moneys arising from the sale "in trust for A. and B., their executors, administrators, and assigns." The deed of arrangement also provided that the partnership between A. and B. should continue during the term of the underlease to C., if A. and B. should so long live. By an agreement, dated the 25th February 1858, and made between A., B., C., and D., after reciting that C. had agreed to purchase the fee-simple of the saltworks, and that D. had agreed to take a lease thereof from C., it was agreed, that in consideration of A. waiving his claim to a lease as above mentioned, and A. and B. giving up possession of the saltworks to D., D. should pay to A. 10,000*l.*, with interest, as therein mentioned, and that D. should also pay to A. an annuity of 750*l.* for twenty-one years from the 25th December 1857. A dispute having arisen at the sale of the lease, whether this lease did not continue the separate property of A., subject to the use of the firm while the partnership lasted: — Held, that it was a partnership asset, and for the following circumstances—viz., that the lease had been at a rack rent; the firm was to have the benefit of it, and the firm was to last during the currency of the lease; there was a provision as to what was to be done with the lease in the contingency of a dissolution; on the mortgage being paid off, the equity of redemption was to be conveyed to the firm; and on a sale of the lease at the dissolution, the surplus was to be paid over to A., and he was to repurchase B.'s interest. *Hills* v. *Parker*, 7 Jur., N. S., 833; 4 L. T., N. S., 746. Reversing S. C. *sub nom.* *Parker* v. *Hills*, 5 Jur., N. S., 809; 33 L. T. 46.

1. A lease acquired for the purposes of a partnership, whether in the name of one or all of the partners, and dedicated to the partnership purposes, forms part of the partnership assets; but where an owner of a lease admits another to be his partner in the use of a part only of the demised property, and afterwards dissolves the partnership, the partner has no longer any interest in the lease. But the expelled partner is entitled to an allowance in respect of any benefit that had accrued to the lessee in respect of the expenditure of partnership capital. *Burdon* v. *Barkus*, 3 Giff. 412; 8 Jur., N. S. 130; 5 L. T., N. S., 573. Affirmed 8 Jur., N. S., 656; 31 L. J., Ch., 521; 7 L. T., N. S., 116.

Where there is no agreement between partners for the stock and plant of the concern to be taken by either party at a valuation on the determination of the partnership, one partner cannot either be compelled to take, or compel his co-partner to take, the stock and plant at a valuation, but each partner is entitled to have the value of the stock and plant ascertained by sale. *Ib.*

The partner who had expended certain moneys upon the partnership concern, on the faith of the partnership being co-extensive with the lease:—Held, entitled to an inquiry whether he ought to be recouped such money out of the partnership assets. *Ib.*

2. A partnership deed of a mine provided, that in the event of the bankruptcy of any partner, an account was to be taken of his share and interest in the mine (other than his share in the lease of the mine, which was not to be valued), and the amount of such account paid to the parties entitled. A partner became bankrupt:—Held, that the clause was void as against his assignees, who were entitled to his share in the lease. *Whitmore* v. *Mason*, 2 Johns. & H. 204; 8 Jur., N. S., 278; 31 L. J., Ch., 433; 10 W. R. 168; 5 L. T., N. S., 631.

3. Articles made between three partners directed that the real and leasehold estate of the partnership should be treated as partnership stock, and that, before any division of profits, the rates, repairs, etc., should be paid, and 5*l.* per cent. interest set apart on the capital, and be paid to the partners in the proportions in which they had advanced it. They afterwards purchased other estates, the purchase money of which was, by the conveyances, expressed to be paid by the three partners in equal proportions. The partners subsequently executed a deed, reciting the fact, that the purchase money had been wholly paid by two of the partners, and declaring that, until the third partner should pay into the partnership capital a sum equal to that paid by each of the other partners, he should stand possessed of the undivided third part of the estates in trust for them (the other two partners). Upon the dissolution of the partnership, the third partner not having paid any portion of his capital, the Court held, that the real and leasehold estate was nevertheless part of the partnership capital, and that the effect of the declaratory deed was to charge the legal interest of the third partner by way of mortgage with the proportionate share of the capital which he ought to have advanced:—Held, also, that in the interim, after a dissolution, and whilst the affairs of the partnership were being wound up, the third partner had ceased to be entitled to the benefit of a provision in the articles, allowing him a salary and the occupation of a house belonging to the partnership as managing partner, and that a receiver must be appointed. *Tibbits* v. *Phillips*, 10 Hare 355.

2. Renewal of.

4. A deceased partner, having contracted in his own name for a lease of premises to be employed in the partnership trade, the Court refused to restrain the landlord from granting a lease to his representatives, but restrained the representatives from disposing of the lease when granted, except for partnership purposes,

and with the assent of the surviving partner. *Alder* v. *Fouracre*, 3 Swan. 489.

1. A number of persons were partners in working a mine held under a lease for years, which expired on the 29th September 1846. The concern was managed exclusively by some of the partners, and the partnership was at will. In July 1846 the managing partners gave notice of dissolution to the others, and in August agreed with the landlord for a new lease to themselves. In September 1846 they gave the other partners notice of their intention to sell the stock-in-trade, and to apply to the landlord for a new lease to themselves exclusively. On the 11th December 1846, a new lease, in pursuance of the agreement entered into in August, was granted to the managing partners, who thenceforth carried on the concern at their own risk, and made large profits, without having any occasion to bring in fresh capital. The partners who were excluded never in any way assented to these proceedings, but, on the contrary, continually insisted on their right to a share in the benefits of the new lease; they, however, took no legal proceedings to enforce their right till 1855, when a bill was filed:—Held, that the plaintiffs, having, with the full knowledge of their rights, which were founded solely on constructive and not on express trust, allowed the managing partners to carry on a mining concern at their own risk so long without taking any steps to assert those rights by legal proceedings, could not be permitted effectually to assert them now. *Clegg* v. *Edmondson*, 3 Jur., N. S., 299; 26 L. J., Ch., 273; 8 De G. M. & G. 787.

Held, also, that the continual assertion by the plaintiffs of their rights, without taking any steps to enforce them, had no effect in removing the bar arising from lapse of time. *Ib.*

Held, also, that the fact that the mine had been uniformly profitable did not alter the case, for that this could not be known beforehand; and the plaintiffs, having abstained so long from making themselves liable to the risks, could not now claim to share the profits. *Ib.*

The circumstance that the partnership was dissoluble at will would not alone have disentitled the plaintiffs to relief, for that the principle on which the Court holds each partner entitled to the benefit of a renewal effected by one is the confidential relation which exists between partners, and which exists whatever be the duration of the partnership. *Semble. Ib.*

It is difficult, though perhaps not impossible, for a managing partner to contract, during the continuance of the partnership, for a new lease of the partnership property, and to secure for himself the exclusive benefit of such renewed lease. To give validity to such a transaction, the partners must all be placed upon an equal footing; and a mere notice by the managing partner to the others of his intention to apply for a new lease for his own benefit is not enough. *Semble. Ib.*

2. A. and B. were partners in lead mines held under a lease, which expired in 1845; after that time they continued to work the mines as tenants from year to year, until the death of A. in 1847, when B. worked them so far only as was necessary to keep the mines in operation, until 1850. In that year he received notice to quit, but before the expiration of such notice he obtained an agreement for a new lease, on the understanding that he would employ a larger amount of capital in working the mines. He continued to work the mines under the new lease until 1853, when he died intestate. On a bill filed by the assignee of C., who was entitled under the will of A. to an annuity charged on the testator's interest in the mines, against D., the legal personal representative of both A. and B., claiming that the estate of the testator had an interest in the mines after his death:—Held (reversing 24 Beav. 333), that the testator's interest did not cease on his death, but continued in the partnership for the benefit of his estate. *Clements* v. *Hall*, 2 De G. & J. 173; 4 Jur., N. S., 494; 27 L. J., Ch., 349; 6 W. R. 358.

If partnership property consists in part of leaseholds, the representative of a deceased partner may treat the surviving partner as trustee, and if the latter renews the lease, he is considered to do so for the benefit of the estate of the partner; but where the trade is one of a speculative character, requiring outlay, with an uncertain return, then, if the surviving partner continues the trade in his own name and renews the lease, the Court will not consider that the representative of the deceased partner has any interest unless he contributes a due proportion of capital *Ib.*

3. In 1853, articles of partnership were entered into between the plaintiff and J. H. whereby, after reciting the partnership previously existing, and that the effects consisted of a leasehold dwelling-house, workshop, and land at N., and that the plaintiff and J. H were jointly entitled to another dwelling-house at M. A., it was agreed that J. H. should stand possessed of the property at N., as to the dwelling-house and one-half of the land, for his own absolute use and benefit, and as to the workshop and other part of the land, in trust to assign the same to the plaintiff; that the property at M. A. should be assigned to the plaintiff, and that when and so soon as the plaintiff and J. H. should erect a dwelling-house at M. A of equal value with the dwelling-house at N the same should be assigned to the plaintiff who should thereupon re-assign the workshop to J. H. It was also agreed that an equal division should be made of the partnership effects, and that neither of the partners should apply any part of the co-partnership money or effects for his own private use until such division as aforesaid. A renewed lease of the property at N. was afterwards obtained from the lessor by J. H. to himself alone The partnership continued for some time, but no assignment was made, nor was any dwelling-house built, as contemplated by the agreement of 1853. J. H. afterwards assigned to G. M. the dwelling-house and half of the land at N., of which the plaintiff was then in possession, and G. M. commenced proceedings by ejectment in the county court against the plaintiff, in order to obtain possession of the premises. On a bill filed by the plaintiff against J. H. and G. M., praying for a partnership account, and for an injunction against G. M.:—Held, that, from the circumstances which had arisen, J. H. was not entitled

hold the dwelling-house and half of the land at N. in severalty, but that the plaintiff had sufficient interest in the property to maintain his right to an injunction against G. M., as J. H.'s assignee, from bringing ejectment; and an injunction was granted accordingly. *Hawkins* v. *Hawkins*, 4 Jur., N. S., 1044.

1. In a partnership at will there is no implied authority at law giving to one partner, without the consent of his co-partner, power, on the expiration of the lease of the premises where the partnership business is being carried on, to take a renewed lease of the same premises, or a lease of any other premises for the purpose of carrying on the partnership business or any portion of it. *Clements* v. *Norris*, 47 L. J., Ch., 546; 8 L. R., Ch. D., 129; 38 L. T., N. S., 591.

The same rule, in the absence of stipulations to the contrary, applies to partnerships created by deed. *Ib.*

Semble, that the rule would equally apply where partnership premises are burnt down or otherwise destroyed, or are taken by a railway or any other corporation under the powers of their special Act. *Ib.*

C. and N. entered into partnership for twenty-one years as ironmongers, under articles which provided that the business should be carried on at the Great Russell Street premises, or "in such other place or places as the partners may agree upon." Afterwards the partners agreed to add to their business that of ironfounders, and took for that purpose the Great Queen Street works. The lease of these works expired during the partnership, and C. declined to concur in a renewed lease. N. thereupon took a renewed lease of them in his own name, and insisted on his right to continue to carry on the ironfounding business there on account of the partnership:—Held, that as the partnership business could only be carried on in such place as the partners agreed upon, if they did not agree upon a place it could not be carried on at all, and that one partner, in the absence of express powers for that purpose, could not, without the consent of the other, although the partnership was to continue for a definite term, renew on account of the partnership a lease of the property on which the business had been carried on. *Ib.*

Held, therefore, that C. was entitled to an injunction to restrain N. from employing the assets or pledging the credit of the partnership in carrying on business at the Great Queen Street works. *Ib.*

IV. CONVERSION.

1. *In General*, 5453.
2. *Realty purchased out of Capital*, 5454.

1. In General.

2. Real estates used for purposes of a partnership trade, shall go to the heir, not the executor; though a co-partnership agreement may alter the nature of real estate, yet it must be expressed so to do. *Thornton* v. *Dixon*, 3 Bro. C. C. 199

3. Five persons purchased from the Commissioners of Sewers, and the purchase was to them as joint tenants in fee, but they contributed ratably to the purchase, which was with intent to drain a level, after which several of them died:—Held, to be tenants in common in equity, and though one of these five undertakers deserted the partnership for thirty years, yet he was let in afterwards, but on terms. *Lake* v. *Craddock*, 3 P. W. 158.

4. Two persons occupy and stock a farm jointly. There shall be no survivorship. But if two take a lease jointly of a farm, the lease shall survive. *Jeffreys* v. *Small*, 1 Vern. 217.

Not necessary, in articles of co-partnership, to provide against survivorship. *Ib.*

Where two are jointly interested by way of gifts, survivorship takes place; otherwise in a joint undertaking in the way of trade. *Ib.*

5. Upon construction of deed for the purpose of a partnership, real estate held to be converted out and out into personal. *Ripley* v. *Waterworth*, 7 Ves. 425.

6. Partnership property of different natures, partly real, partly personal; the difficulty of disentangling and arranging it is no objection against the heir. *Stuart* v. *Bute* (*Marquis*), 11 Ves. 666.

7. Real property held for the purposes of a trading company is, in equity, to be deemed in the nature of personal estate, although the company is a corporation, and the shares are assignable, and one shareholder is not answerable for the acts of another in relation to the partnership concern. *Bligh* v. *Brent*, 2 Y. & Coll. 268; 6 L. J., N. S., Exch. Eq., 58.

8. The share of a deceased partner in the freehold and copyhold estates of the partnership is not personal estate for the purpose of being included in the value or amount in respect of which probate duty is payable. *Custance* v. *Bradshaw*, 4 Hare 315; 14 L. J., N. S., Ch., 358; 9 Jur. 486.

9. A., being seised in fee of warehouses and land on which he carried on his trade, upon taking his son into partnership for twenty-four years, conveyed to him in fee certain shares in the houses and land; and, by the articles of partnership, it was stipulated that the shares in the land given to the son, as also those reserved by the father, should be taken as part of the joint-stock in the trade, and in the event of either party dying before the expiration of the twenty-four years without disposing of his shares, the same were to be sold, a right of pre-emption being reserved to the survivor. Both parties outlive the twenty-four years, and continue after that to carry on business, but without renewing the articles, when A. dies.—Held, that as between his real and personal representatives his shares in the land were not converted into personalty. *Cookson* v. *Cookson*, 8 Sim. 529; 6 L. J., N. S., Ch., 337; 1 Jur. 621.

10. Declaration that real estate, held for partnership purposes, is in the nature of personal estate. *Morris* v. *Kearsley*, 2 Y. & Coll. 139.

11. A stuff manufacturer, innkeeper, butcher, and farmer, devised his real estate, which he had employed in his several occupations, and his personal estate, to his wife for life, and then to his three sons as tenants in common. After his death the widow and sons carried on the several businesses in partnership down to the death of the widow, when the sons continued only the business of stuff manufacturers,

and employed the moneys arising from the sale of one part, and the mortgage of another part of the real estate, in that business. On the death of one son intestate:—Held, that his one-third of the devised lands had been converted. *Re Cooper, Cooper* v. *Cooper*, 26 W. R. 785.

1. Three brothers, tenants in common of a farm and lands in Wales, carried on farming together. One brother died, having devised his one-third share to a nephew, and he and the two surviving brothers, B. and W., continued to carry on the farming. The nephew sold his one-third share of the farm and lands to his uncles, B. and W., the conveyance being to them as joint tenants, and they continued to carry on the farming. B. died, having given all his property to his wife. The farm and lands were subsequently sold. W. claimed, as surviving joint-tenant, the proceeds of sale, representing the one-third share purchased from the nephew:—Held, that the one-third share became involved in partnership dealings, and must be regarded as partnership property, and that W. was entitled to only a moiety of the proceeds of sale. *Davies* v. *Games*, 12 L. R., Ch. D., 813; 28 W. R. 16.

2. A testator devised and bequeathed his moiety in a partnership business (as well as other property) to trustees on trust for sale, and directed that all his trust property should form an aggregate fund, and should be held (after payment of certain legacies and annuities) upon trust for certain charitable purposes. The partnership property consisted partly of real estate:—Held, that the residuary trust in favour of charities was void, as contrary to the Mortmain Act, so far as it comprised moneys arising from the sale of the testator's moiety of the real estate belonging to the partnership. *Ashworth* v. *Munn*, 15 L. R., Ch. D., 363; 50 L. J., Ch., 107; 43 L. T. 553; 28 W. R. 965.

2. Realty purchased out of Capital.

3. If joint tenants of leasehold or freehold lay out money jointly upon it in the way of trade, there is no survivorship. *Lyster* v. *Dolland*, 1 Ves. J. 435.

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5. Whether freehold estates purchased by a commercial partnership as an article of stock devolve on the death of a partner as real, or as personal estate, *quære*. *Crawshay* v. *Maule*, 1 Swan. 521; 1 Wils. 181.

6. Real estate purchased with partnership capital for the purposes of the joint trade is personal estate, and in respect of the share of a deceased partner, retains that character as between his real and personal representatives. *Phillips* v. *Phillips*, 1 Myl. & K. 649; 1 L. J., N. S., Ch., 214.

7. Two brothers, A. and B., entered into co-partnership without articles, and purchased lands for the purposes of their trade with money borrowed from C., and had the land conveyed to themselves in moieties to uses to bar dower. Shortly afterwards they mortgaged the land to C. in fee, to secure the money borrowed. A. died intestate, leaving B. his heir; B. then took D. into partnership. Each of the firm erected trade buildings on the land, and paid for them, and for the insurance on them, and also paid the interest on the mortgage-money out of their partnership funds. Ultimately B. and D. paid off the mortgage out of their partnership property and took a reconveyance of the land to themselves as joint tenants in fee. Previous to this the property had been in a family arrangement, to which B. was a party, treated as personalty:—Held, as against the heir of B., that it was personalty, as part of the partnership assets. *Houghton* v. *Houghton*, 1 Sim. 491; 10 L. J., N. S., Ch., 310; 5 Jur 528.

8. Devise of the residue of realty and personalty to testator's two sons as joint tenants. They for twenty years after the father's death carried on the business of farmers with such estates, and kept the moneys arising therefrom in one common stock, and with part of such moneys purchased other estates in the name of one of them, but never in any manner entered into any agreement respecting such farming business, or ever accounted with each other:—Held, that as to the leasehold and personal estate, which passed by the will of the father, the two sons remained joint tenants; but that as to all the after-purchased estates, they were tenants in common. *Morris* v. *Barrett*, Y. & J. 384.

9. Where two partners purchased out of the partnership effects real estate, to be used for partnership purposes, and which was in equity deemed personal estate; upon a new partner being introduced, the former partners stipulated that a rent should be payable for the premises by the firm; upon the death of one of the original partners:—Held, that the premises were to be considered part of his real estate. *Rowley* v. *Adams*, 7 Beav. 548; 8 Jur. 994.

10. A. and B., tenants in common of an estate, agreed to carry on the farming business in co-partnership, and afterwards entered in co-partnership as maltsters and biscuit bakers from time to time they made purchases of lands with the partnership moneys. Some of the lands so purchased were not conveyed to them, but others were conveyed to them, as to one moiety to A., who was a bachelor, in fee, and as to the other moiety to B., who was married, and a trustee to bar dower. The lands were used solely for farming and agricultural purposes, but all the receipts and payments in respect of them were entered into the partnership books, and carried to the account of the partnership. The farming business was continued until A.'s death, when the malting and biscuit baking had ceased several years before:—Held, that the lands were not converted into personalty. *Randall* v. *Randall*, 7 Sim. 271; 4 L. J., N. S., Ch., 187.

11. When land is purchased by partners out of the partnership assets, and used for the purposes of the business, it is to be considered as personalty both as between the partners themselves and as between the heir and personal representatives of a deceased partner. *Holroyd* v. *Holroyd*, 28 L. J., Ch., 902; 7 W. R. 426.

hold the dwelling-house and half of the land at N. in severalty, but that the plaintiff had sufficient interest in the property to maintain his right to an injunction against G. M., as J. H.'s assignee, from bringing ejectment; and an injunction was granted accordingly. *Hawkins* v. *Hawkins*, 4 Jur., N. S., 1044.

1. In a partnership at will there is no implied authority at law giving to one partner, without the consent of his co-partner, power, on the expiration of the lease of the premises where the partnership business is being carried on, to take a renewed lease of the same premises, or a lease of any other premises for the purpose of carrying on the partnership business or any portion of it. *Clements* v. *Norris*, 47 L. J., Ch., 546; 8 L. R., Ch. D., 129; 38 L. T., N. S., 591.

The same rule, in the absence of stipulations to the contrary, applies to partnerships created by deed. *Ib.*

Semble, that the rule would equally apply where partnership premises are burnt down or otherwise destroyed, or are taken by a railway or any other corporation under the powers of their special Act. *Ib.*

C. and N. entered into partnership for twenty-one years as ironmongers, under articles which provided that the business should be carried on at the Great Russell Street premises, or "in such other place or places as the partners may agree upon." Afterwards the partners agreed to add to their business that of ironfounders, and took for that purpose the Great Queen Street works. The lease of these works expired during the partnership, and C. declined to concur in a renewed lease. N. thereupon took a renewed lease of them in his own name, and insisted on his right to continue to carry on the ironfounding business there on account of the partnership:—Held, that as the partnership business could only be carried on in such place as the partners agreed upon, if they did not agree upon a place it could not be carried on at all, and that one partner, in the absence of express powers for that purpose, could not, without the consent of the other, although the partnership was to continue for a definite term, renew on account of the partnership a lease of the property on which the business had been carried on. *Ib.*

Held, therefore, that C. was entitled to an injunction to restrain N. from employing the assets or pledging the credit of the partnership in carrying on business at the Great Queen Street works. *Ib.*

IV. CONVERSION.

1. *In General*, 5453.
2. *Realty purchased out of Capital*, 5454.

1. In General.

2. Real estates used for purposes of a partnership trade, shall go to the heir, not the executor; though a co-partnership agreement may alter the nature of real estate, yet it must be expressed so to do. *Thornton* v. *Dixon*, 3 Bro. C. C. 199

3. Five persons purchased from the Commissioners of Sewers, and the purchase was to them as joint tenants in fee, but they contributed ratably to the purchase, which was with intent to drain a level, after which several of them died:—Held, to be tenants in common in equity, and though one of these five undertakers deserted the partnership for thirty years, yet he was let in afterwards, but on terms. *Lake* v. *Craddock*, 3 P. W. 158.

4. Two persons occupy and stock a farm jointly. There shall be no survivorship. But if two take a lease jointly of a farm, the lease shall survive. *Jeffreys* v. *Small*, 1 Vern. 217.

Not necessary, in articles of co-partnership, to provide against survivorship. *Ib.*

Where two are jointly interested by way of gifts, survivorship takes place; otherwise in a joint undertaking in the way of trade. *Ib.*

5. Upon construction of deed for the purpose of a partnership, real estate held to be converted out and out into personal. *Ripley* v. *Waterworth*, 7 Ves. 425.

6. Partnership property of different natures, partly real, partly personal; the difficulty of disentangling and arranging it is no objection against the heir. *Stuart* v. *Bute* (*Marquis*), 11 Ves. 666.

7. Real property held for the purposes of a trading company is, in equity, to be deemed in the nature of personal estate, although the company is a corporation, and the shares are assignable, and one shareholder is not answerable for the acts of another in relation to the partnership concern. *Bligh* v. *Brent*, 2 Y. & Coll. 268; 6 L. J., N. S., Exch. Eq., 58.

8. The share of a deceased partner in the freehold and copyhold estates of the partnership is not personal estate for the purpose of being included in the value or amount in respect of which probate duty is payable. *Custance* v. *Bradshaw*, 4 Hare 315; 14 L. J., N. S., Ch., 358; 9 Jur. 486.

9. A., being seised in fee of warehouses and land on which he carried on his trade, upon taking his son into partnership for twenty-four years, conveyed to him in fee certain shares in the houses and land; and, by the articles of partnership, it was stipulated that the shares in the land given to the son, as also those reserved by the father, should be taken as part of the joint-stock in the trade, and in the event of either party dying before the expiration of the twenty-four years without disposing of his shares, the same were to be sold, a right of pre-emption being reserved to the survivor. Both parties outlive the twenty-four years, and continue after that to carry on business, but without renewing the articles, when A. dies.—Held, that as between his real and personal representatives his shares in the land were not converted into personalty. *Cookson* v. *Cookson*, 8 Sim. 529; 6 L. J., N. S., Ch., 337; 1 Jur. 621.

10. Declaration that real estate, held for partnership purposes, is in the nature of personal estate. *Morris* v. *Kearsley*, 2 Y. & Coll. 139.

11. A stuff manufacturer, innkeeper, butcher, and farmer, devised his real estate, which he had employed in his several occupations, and his personal estate, to his wife for life, and then to his three sons as tenants in common. After his death the widow and sons carried on the several businesses in partnership down to the death of the widow, when the sons continued only the business of stuff manufacturers,

and employed the moneys arising from the sale of one part, and the mortgage of another part of the real estate, in that business. On the death of one son intestate:—Held, that his one-third of the devised lands had been converted. *Re Cooper*, *Cooper* v. *Cooper*, 26 W. R. 785.

1. Three brothers, tenants in common of a farm and lands in Wales, carried on farming together. One brother died, having devised his one-third share to a nephew, and he and the two surviving brothers, B. and W., continued to carry on the farming. The nephew sold his one-third share of the farm and lands to his uncles, B. and W., the conveyance being to them as joint tenants, and they continued to carry on the farming. B. died, having given all his property to his wife. The farm and lands were subsequently sold. W. claimed, as surviving joint-tenant, the proceeds of sale, representing the one-third share purchased from the nephew:—Held, that the one-third share became involved in partnership dealings, and must be regarded as partnership property, and that W. was entitled to only a moiety of the proceeds of sale. *Davies* v. *Games*, 12 L. R., Ch. D., 813; 28 W. R. 16.

2. A testator devised and bequeathed his moiety in a partnership business (as well as other property) to trustees on trust for sale, and directed that all his trust property should form an aggregate fund, and should be held (after payment of certain legacies and annuities) upon trust for certain charitable purposes. The partnership property consisted partly of real estate:—Held, that the residuary trust in favour of charities was void, as contrary to the Mortmain Act, so far as it comprised moneys arising from the sale of the testator's moiety of the real estate belonging to the partnership. *Ashworth* v. *Munn*, 15 L. R., Ch. D., 363; 50 L. J., Ch., 107; 43 L. T. 553; 28 W. R. 965.

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8. Devise of the residue of realty and personalty to testator's two sons as joint tenants. They for twenty years after the father's death carried on the business of farmers with such estates, and kept the moneys arising therefrom in one common stock, and with part of such moneys purchased other estates in the name of one of them, but never in any manner entered into any agreement respecting such farming business, or ever accounted with each other:—Held, that as to the leasehold and personal estate, which passed by the will of the father, the two sons remained joint tenants; but that as to all the after-purchased estates, they were tenants in common. *Morris* v. *Barrett*, Y. & J. 384.

9. Where two partners purchased out of the partnership effects real estate, to be used for partnership purposes, and which was in equity deemed personal estate; upon a new partner being introduced, the former partners stipulated that a rent should be payable for the premises by the firm; upon the death of one of the original partners:—Held, that the premises were to be considered part of his real estate. *Rowley* v. *Adams*, 7 Beav. 548; 8 Jur. 994.

10. A. and B., tenants in common of a estate, agreed to carry on the farming business in co-partnership, and afterwards entered into co-partnership as maltsters and biscuit bakers from time to time they made purchases of lands with the partnership moneys. Some of the lands so purchased were not conveyed to them, but others were conveyed to them, as to one moiety to A., who was a bachelor, in fee and as to the other moiety to B., who was married, and a trustee to bar dower. The lands were used solely for farming and agricultural purposes, but all the receipts and payments in respect of them were entered into the partnership books, and carried to the account of the partnership. The farming business was continued until A.'s death, but the malting and biscuit baking had ceased several years before:—Held, that the lands were not converted into personalty. *Randall* v. *Randall*, 7 Sim. 271; 4 L. J., N. S., Ch. 187.

11. When land is purchased by partners out of the partnership assets, and used for the purposes of the business, it is to be considered as personalty both as between the partners themselves and as between the heir and personal representatives of a deceased partner. *Holroyd* v. *Holroyd*, 28 L. J., Ch., 902; 7 W. R. 426.

1. G. bought a share in a co-partnership business established by S., D., & L. in New South Wales. No regular deed of co-partnership was executed, but by an agreement between them it was stipulated that some interests (the nature and extent of which were not defined) in a piece of land, wharf, and premises, upon which the partnership business was carried on, should form part of the partnership property. This property was then held by S., D., and L., under a lease, and was also subject to a mortgage. During the negotiation of the partnership, S., D., and L. paid off the mortgage, and acquired by purchase the fee of the property, and upon failure of the partnership concern sold the same, receiving the consideration money, which they refused to account for to G., or to treat as partnership assets, on the ground that the property had been acquired by them on their separate account, and not purchased with the partnership assets:—Held, first, that S., D., and L. having purchased the fee in the property during the negotiation for the partnership, and the consideration money paid by G. for his share in such partnership being based upon the fact of the property being freehold, the purchase must be treated as being for the benefit of the partnership concern, and that G. was entitled to participate and share with S., D., and L. in the freehold interest so acquired, G. contributing in the sum paid by S., D., and L. for the purchase thereof, and to the extent of his share in the partnership. *Gordon* v. *Scott*, 12 Moo. P. C. 1.

Held, secondly, that S., D., and L. were chargeable with interest from the date of the receipt by them of the purchase money, at the rate of 8 per cent., being the rate of interest allowed in the colony in the absence of a special contract. *Ib.*

2. There is no rule, that where lands are bought by partners in trade, and are paid for out of the partnership assets, they of necessity become part of the joint estate; nor, on the other hand, that if they are not bought for the purpose of the partnership business, they are not joint estate; nor does the form of the conveyance settle the question, which must be determined with reference to all the circumstances of the case. *Exp. M'Kenna, Re England (Bank of)*, 3 De G. F. & J. 645; 30 L. J., Bky., 25.

One of two partners, carrying on the business of leather factor, bought lands for the purpose of erecting a residence on part of it, and selling the remainder to a railway company. He offered a share to his partner, who was also desirous of building a house out of town for his residence. The offer was accepted, and the purchase money paid out of the partnership assets, but the conveyance was to the partners in separate moieties, each of which was conveyed to the usual uses to bar dower. The partners, at their individual expense, built houses upon portions of the land set apart for the purpose; but the other expenses relating to the land were paid out of the partnership assets:—Held, that the whole of the land constituted joint estate. *Ib.*

L. and M., partners in trade, purchased an estate T., and paid for it with money borrowed from the partnership. The purchase money and other moneys incidental to the purchase, were entered in the ledger of the firm to an account intitled "the T. estate account." The estate was conveyed to L. and M. in undivided moieties, to uses in bar of dower. L. and M. then, each of them, built a house for himself on the estate, and laid out his own private money upon it:—Held, that the T. estate, and the houses on it, were partnership property. S. C. *nom. Re Streatfield*, 7 Jur., N. S., 715; 30 L. J., Bky., 25; 9 W. R. 892; 4 L. T., N. S., 601.

3. Two persons seised of freeholds agreed to carry on business in partnership upon the premises for fourteen years, and that if either died during that term, the survivor should purchase the freeholds at the stated price. The fourteen years having expired, they, by parol agreement, continued the partnership "on the old terms." One afterwards died intestate:—Held, that the stipulation as to purchase was binding, and that the freeholds were converted into personal estate, and did not pass to the heir. *Essex* v. *Essex*, 20 Beav. 442.

Held, also, that the Statute of Frauds did not apply, for that a partnership, the terms of which had been settled by parol, was as good as one the terms of which had been settled by writing. *Ib.*

4. Two brothers entered into a joint speculation to purchase land, with a view to reselling it in small parcels at a profit. Two freehold estates were bought and conveyed to the brothers as tenants in common. A copyhold estate was surrendered to them as joint tenants, and two other estates remained still in contract when one brother died intestate. The purchase money for these estates was paid by means of a joint credit with a banking company. Some of the land had been re-sold by the brothers:—Held, that the share of the deceased brother in these estates was, as between his real and personal representatives, to be regarded as personalty. *Darby* v. *Darby*, 3 Drew. 495; 2 Jur., N. S., 271; 25 L. J., Ch., 371; 4 W. R. 413.

Semble, a partnership involves a contract, and partnership property of whatever denomination is assets on a dissolution. *Ib.*

5. Co-owners of lands, partly customary freehold and partly leasehold, worked a quarry on part of them, and let the rest to agricultural tenants. Part of the undivided profits was from time to time laid out in purchases of other lands for purposes of the quarry, the lands so purchased being, in most cases, conveyed to trustees on trust for the persons expressly by name who were interested in the undivided profits constituting the purchase-moneys, their heirs and assigns, and being in other cases conveyed to trustees without any express declaration of trust. One of the co-owners (a woman) married, and on her marriage a settlement of her shares and interest in the lands and quarry, plant and machinery, was executed, by which her shares and interest in the customary freeholds were treated as real estate, and her shares and interest in the entire property, both real and personal, were settled on herself for life for her separate use without power of anticipation, with remainder to her husband for life, with remainder, in default of issue, in trust for her

her heirs, executors, administrators, and assigns. Further purchases of customary freehold land were, after her marriage, made from time to time out of the undivided profits of the quarry, the land so purchased being conveyed to trustees, but without any trusts being declared except in one instance, that of a purchase made in 1849, in which case trusts were expressed on the instrument of conveyance, and were for the benefit of the co-owners, by name, in undivided shares, their heirs and assigns. In the books of account kept by the manager of the business these purchases were treated as if they had been purchases of stock in trade. These accounts were from time to time submitted to the parties interested, and in particular to the husband of the married woman. She having died without issue:—Held, that her share in the purchases of land so made after her marriage devolved as real estate, and not as personalty, and having been made with savings of income, were not comprised in the settlement, but passed at once on her death to her heir-at-law and customary heir. *Steward* v. *Blakeway*, 4 L. R., Ch., 603. Affirming 6 L. R., Eq., 479; 16 W. R. 1104.

1. A. and B. carried on business in partnership from 1850 to the death of B. in 1860. In 1855 they purchased house property in the Incumbered Estates Court, which purchase was made out of the partnership funds. The conveyance from the Court was made to A. and B. and their heirs for ever. B. died in 1860, leaving two children. A. continued to carry on the business in the name of the old firm until his bankruptcy, which took place in 1868. In 1867 A. mortgaged the premises purchased to D., a creditor, who from time to time had made advances of cash and goods to him. A. also deposited with D., by way of equitable mortgage, the title-deed of other premises, which had been held, up to 1867, in the name of the mother of A. and B., and in which the partnership business had been carried on up to the bankruptcy of A. The mother of A. and B. in 1867 made an assignment of the latter premises to A., who deposed that 4,000*l.* belonging to the partnership had been expended on the premises in permanent improvements during the life of B. D. filed a charge as mortgagee, in which he sought to make both sets of premises liable for A.'s debt to him. This charge was discharged by a next friend of the minor children of B., who claimed to be entitled in right of the deceased partner to a moiety of each of the premises:—Held, that the dischargeants were entitled to a moiety of the premises purchased in the Incumbered Estates Court out of the partnership funds. *Re Ryan*, 3 Ir. R., Eq., 222.

Held, also, that the dischargeants had failed to establish their claim to the second set of premises, which were assigned absolutely to A. after the death of B., as it was not clearly shown that the mortgagee had distinct notice that those premises were partnership property. *Ib.*

2. A nurseryman devised his real estate, on part of which he had carried on his business, and his residuary personal estate, to his three sons, F., M., and J., as tenants in common. After his death they carried on the business in partnership, and out of moneys belonging to the estate completed a contract for the purchase of more land which was inchoate at the death, and employed such land in the business. Subsequently, F. and J. purchased M.'s third share in the land and business, and paid for it partly out of the estate and partly out of moneys borrowed on the land. F. and J. then continued the business on the land. F. subsequently died intestate:—Held, that both the devised and the purchased lands employed in the business were converted. *Waterer* v. *Waterer*, 15 L. R., Eq., 402; 21 W. R. 508.

3. The share of a deceased partner in lands purchased by the members of a trading co-partnership, with money belonging to the partnership, and held as part of the stock of the firm, is to be deemed as converted into personal assets, and as such passes to his personal representative. The firm of co-partners, constituted by the deed of 29th October 1862, stated in *Cuffe* v. *Murtagh* (7 L. R., Ir., 411), and which was formed to carry on the business of corn factors, flour merchants, and otherwise as the majority of the firm should agree to trade or deal in, acquired two denominations of freehold land, A. and B., purchased out of partnership assets. One of the partners farmed B., and resided there, and the accounts of the farming were entered in the profit and loss of the firm. The lands of A. were occupied by tenants, but the rents were also brought into the profit and loss account, and money was raised on the security of the lands for the purposes of the firm, on the death of one of the partners, whose share was not taken by the survivors:—Held, that the share of the deceased in the lands was personal property, which passed to his personal representative, not to his heir. *Waterer* v. *Waterer* (15 L. R., Eq. 402), observed on and distinguished. *Murtagh* v. *Costello*, 7 L. R., Ir., 428.

In such a case the dissolution will not be made retrospective, but will be ordered from the date of the judgment. *Besch* v. *Frolich* (1 Ph. 172) followed. *Ib.*

VII. Duration.

See also IX. *post.*

4. Articles of partnership between two partners as brewers, maltsters, etc., covenantin with each other that they and their respectiv executors and administrators would continu partners for twenty-one years, determinabl upon the death of both partners, unless the respective representatives should agree to con tinue the business for the residue of the tern and empowering either partner to sell his shar in the partnership property (offering it first t the other partner), so that the purchaser shoul not be entitled to the possession of the partne ship property until the expiration of the par nership without the consent of the othe partner; empowering also each partner, eith in his lifetime or under his will, to introduc one or more relations, being sons, brothers, nephews, into the partnership, to take all or portion of his share during the continuance the partnership; and providing that, in ca of the death of either or both partners durir

the term, after having introduced such relation, the person so introduced should be considered as the original partner; providing, also, that in case of the death of either partner during the term, without having introduced such relation, the business should be carried on by the surviving partner and the executors, administrators, or trustees of the deceased partners, but making no provision for the case (which happened) of the death of one partner during the term, and his executors or administrators refusing to be concerned in the business with the surviving partner, and calling for an immediate dissolution and a sale and distribution of the partnership property, the surviving partner not consenting to such dissolution or sale:—Held, in a suit by the executors of the deceased partner against the survivor for a dissolution, that the provisions in the articles for the continuance of the partnership during the term of twenty-one years could not be enforced in equity, by way of specific performance of the partnership contract, against the representatives of a deceased partner, either by way of relief in a suit in which such surviving partner was plaintiff, or by way of protection in a suit in which he was defendant; and inasmuch as the articles could not be so enforced, the plaintiffs, the executors of the deceased partner, repudiating the partnership, were entitled to a decree for a dissolution, but that such relief would be given to them in equity, subject to any legal right which the surviving partner had to recover damages against the executors of the deceased partner for a breach of the covenants contained in the articles, and that the amount of any damages which might be recovered in such an action must be added to the credit side of the account of the surviving partner, to be taken under the decree. *Downs* v. *Collins*, 6 Hare 418.

1. No general rule that partners purchasing leasehold interest must be understood as entering into a partnership commensurate with the duration of lease. In this case it was held not so to be. *Crawshay* v. *Maule*, 1 Swan. 495; 1 Wils. 181.

2. The plaintiff and defendant held some powder mills on a lease, which would expire in 1831. The plaintiff filed his bill for the dissolution of the partnership; it was objected by the defendant that the partnership must last during the lease, but the Court held the partnership dissolved from the time stated in a notice given by the plaintiff to the defendant. *Alcock* v. *Taylor*, Taml. 506.

3. A partnership in trade is continued for some purposes after a dissolution. *Beak* v. *Beak*, 3 Swan 627.

4. Articles of partnership for a term were entered into between an active and a sleeping partner under the name of the former, who continued to carry on the business after the expiration of the term in the same name, but without paying off the capital of the sleeping partner:—Held, that the partnership continued, and that the sleeping partner was entitled to a share of the profits after the end of the term. *Parsons* v. *Hayward*, 4 De G. F. & J. 474.

5. Partnership after the determination of it by the contract of the partners, may continue for the purpose of winding up engagements with third persons. *Crawshay* v. *Collins*, 15 Ves. 226.

Partnership determined by death, the legal property survives, not the beneficial interest. Right of the executor to the value of the testator's interest, to be ascertained not by calculation, but by sale. *Ib.*

6. Where one of several partners agrees with a stranger for a sub-partnership, it is not to be implied, in the absence of any agreement, that the duration of the sub-partnership is to be co-extensive with the original partnership. *Frost* v. *Moulton*, 21 Beav. 596.

A. and B. were partners for four years of the Kingston Mill, and A. and C. were sub-partners at will. A. put an end to his sub-partnership with C. They afterwards met, and A. drew up this document: "C. to receive three-sixteenths of the Kingston Mill during the present partnership of A. and B.; if C. enters into any other business before, to renounce his interest above-mentioned, and to receive 500*l.* as a quit claim." It was taken to a solicitor to draw a formal agreement, who said it was too vague to act upon, and both parties differed as to its construction:—Held, that it was not a final concluded agreement, which could be enforced. *Ib.*

7. B., as principal, gave to his partner, C., a bond, which was executed by L. as surety, indemnifying him from all loss from the partnership business, it being stipulated by the articles of partnership that the business should continue for five years; that in case either partner should retire, and the other be desirous of continuing the business, the continuing partner might take the retiring partner's share of the partnership assets at a valuation; and that if at the expiration of the partnership term either of the partners should be desirous of carrying on the business, and should neglect or refuse to purchase his partner's share in the assets at a valuation as above mentioned, then the assets should be realized, the partnership debts paid out of the proceeds, and the surplus proceeds divided between the partners according to their interests. At the expiration of the partnership term neither of the partners retired from the business, but, without consulting L., continued to carry it on for about twenty months longer, at the end of which time C. retired, leaving the whole partnership assets in the hands of B., by whom the business was continued till B.'s bankruptcy, about three months afterwards. B. then absconded, leaving the concern insolvent, and C. was compelled to liquidate the liabilities of the partnership:—Held, that inasmuch as by the articles of partnership the partnership ought to have been wound up at the expiration of the term limited by the articles, it was not competent to C. to agree to its continuance without the consent of L., and yet to hold L. liable as surety upon the bond; and that C., therefore, was not entitled to put the bond in force against L. *Small* v. *Currie*, 18 Jur. 731; 23 L. J., Ch., 746.

8. A. was lessee of seams of coal for a term of years, and had abandoned the working of the upper seams as unprofitable. In 1845 he entered into partnership for working the upper seams with B., his colliery manager. In 1857, the upper seams having been worked as far as could be done from the existing pits, he, with

the privity and approbation of A., sank a new pit at considerable expense, which was defrayed out of the partnership moneys. In 1858, differences having arisen, A. gave B. notice to dissolve the partnership, which notice he refused to receive, insisting that the understanding had been that the partnership should continue for the whole duration of the lease. The new pit was only just finished. No express agreement as to the duration of the partnership was proved:—Held, that the burden of establishing that there was more than a partnership at will lay upon B., and that in the absence of such proof A. was entitled to dissolve the partnership at his pleasure, and B. could not claim any interest in the seams of coal. *Burdon* v. *Barkus*, 4 De G. F. & J. 42.

Held, also, that an inquiry had rightly been directed whether any and what sum ought to be allowed to B. in respect of the expenditure on the new pit. *Ib.*

1. Where a partnership, originally carried on under articles for a fixed term of years, is continued after the expiration of the term without new articles being entered into, it becomes a partnership at will. *Clark* v. *Leach*, 32 Beav. 14; 9 Jur., N. S., 165; 11 W. R. 227. Affirmed 9 Jur., N. S., 610; 32 L. J., Ch., 290; 11 W. R. 351; 8 L. T., N. S., 40; 1 De G. J. & S. 409; 1 N. R. 155.

2. A., in June 1869, borrowed 250*l.* from B., and, at the time, signed a paper in the following words: "In consideration of 250*l.* this day paid to me, I hereby undertake to execute a deed of co-partnership to you for one-eighth share in the profits of the Oxford Music Hall and Tavern, to be drawn up under the Limited Partnership Act of the 28 & 29 Vict., c. 86, called an 'Act to amend the Law of Partnership'":—Held, that this paper (which contained no provision as to the date or duration of the partnership) constituted a partnership at will; and that it was not put an end to by a letter, dated in August 1872, in which A. promised to repay B. on the 1st of September 1872 the principal, together with interest thereon (treating it only as a loan) such as should, as on a calculation of one-eighth of the profits, be found to be due to B. on that day. This letter was followed by a tender, which was not accepted. *Syers* v. *Syers*, 1 L. R., App. Cas., 174; 24 W. R. 970; 35 L. T., N. S., 101.

VIII. Death of Partner.

See also IX. *post.*

I. *Surviving Partners, Rights of*, 5458.
II. *Liability of Deceased Partner to Creditors*, 5459.
III. *Administration*, 5461.
IV. *Accounts*, 5464.

I. SURVIVING PARTNER, RIGHTS OF.

3. There is no such principle in equity that surviving partners cannot become purchasers from the representatives of the share of a deceased partner. *Chambers* v. *Howell*, 11 Beav. 6; 12 Jur. 905.

4. Injunction to restrain a surviving partner from disposing of the joint stock and receiving the outstanding debts. *Hartz* v. *Schrader*, 8 Ves. 317.

5. Injunction against a surviving partner proceeding by ejectment to obtain possession of a farm, of which a joint lease had been made to himself and his deceased partner. *Elliot* v. *Brown*, 3 Swan. 489

6. Injunction to restrain surviving partners from using the name of a deceased partner in the firm of the trade refused. *Webster* v. *Webb*, 3 Swan. 490.

7. A surviving partner being the executor of his deceased partner, is not entitled to an allowance for carrying on the business after his partner's decease, for the benefit of the estate; nor is an executor and legatee of such surviving partner. *Stocken* v. *Dawson*, 6 Beav. 371. Affirming 17 L. J., N. S., Ch., 282.

8. Acts done by one of the surviving partners, who was executor of the deceased partner, and which the surviving partners were in that character bound to do, cannot *primâ facie* be considered to have been done in the character of the executor. *Way* v. *Bassett*, 5 Hare 55; 15 L. J., N. S., Ch., 1; 10 Jur. 89.

9. One who was a member of a partnership firm appointed one of his surviving co-partners and another person his executors:—Held, that the surviving partner was not deprived of his right to retain assets in his hands in satisfaction of the liability of the testator to the firm, by the fact that the amount of the liability had not been ascertained, no accounts of the partnership having been taken. *Re Morris*, *Morris* v. *Morris*, 10 L. R., Ch., 68; 44 L. J., Ch., 178.

10. A surviving partner, whether to be considered as a trustee for a moiety of the profits for the representative of the deceased partner. *Marjoram* v. *Saundeford*, Romilly's Notes of Cases 110.

11. Surviving partner, trading on his own account with the debtors to the partnership, ordered that an attorney be appointed to sue for the debts, unless the surviving partner would give security to answer a moiety of the debts to the administratrix of the deceased partner. *Estwick* v. *Conningsby*, 1 Vern. 118.

12. Two partners, on the termination of their partnership, came to an arrangement for mutual convenience that a third person should collect the outstanding assets; it was acted upon for some time, and then one of the partners died:—Held, that the surviving partner could not repudiate the agreement and alone collect the debts, but that the executors of the deceased partner had a right to have a receiver appointed. *Davis* v. *Amer*, 3 Drew. 65.

13. The right of a surviving partner to the partnership assets is absolute. There is no fiduciary relation between him and the representatives of his deceased partner, but he is liable to account for the partnership assets, and, in taking such account, the Statute of Limitations is applicable. *Taylor* v. *Taylor*, 28 L. T., N. S., 188.

14. E. and H. carried on business as co-partners. The partnership articles provided *inter alia*, that on the death of either partner, his

personal representative might, within three months, elect to take to the deceased partner's share; if he should elect not to do so, the business, etc., to be valued, and the surviving partner to take the whole, giving security for the value of the deceased partner's share. E. died, and left a widow his executrix. E.'s widow not having elected to decline to carry on the business, H. was restrained by injunction from carrying on the business during the three months from E.'s death, except under the old name and style. *Evans* v. *Hughes*, 18 Jur. 691.

1. Where an executor and surviving partner of a testator demanded an allowance from the legatees, for his professional services as an accountant, and said that he would not prove the will until the allowance was made to him, such a bargain will find no favour with the Court, and the amount of the allowance will be ordered to depend strictly upon the services rendered. *McDonald* v. *Richardson*, *Richardson* v. *Marten*, 10 L. T., N. S., 166; 1 Giff. 81; 5 Jur., N. S., 9.

2. Where partner dies, leaving partnership accounts unsettled, Ecclesiastical Court will grant administration of his effects to surviving partner, or any person claiming, if his next of kin decline it. *Cawthorn* v. *Chalie*, 2 Sim. & S. 127; 3 L. J., Ch., 125.

II. LIABILITY OF DECEASED PARTNER TO CREDITORS.

3. A. partnership composed of three persons, A., B., and C., gave a joint and several bond to a bank, to cover advances to be made to them by the bank on a cash credit; and in that bond, two estates held by A. were specially named as part securities for these advances. A. died:—Held, that by his death the partnership was dissolved, and the security, so far as his estates were concerned, was no further continued; no arrangement between the surviving partners, or between them and the bank, for the purpose of settling the general accounts, being capable of affecting that security. *Scotland* (*Bank of*) v. *Christie*, 8 Cl. & F. 214.

After the death of A. the bank continued as before its dealings with the partnership, then constituted by B. and C.; and at a certain period, payments made to the bank entirely balanced the debt due to it at the time of A.'s death:—Held, that the separate liability of A.'s estates was thereby discharged. *Ib.*

4. Where there was no evidence of an intention to abandon the claim against the estate of a deceased partner, and adopt the individual responsibility of the continuing partner, but a total absence of any consideration or object for so doing, and also conclusive evidence that the forbearance was not to press upon or injure the estate of the deceased, of whose will the creditor was himself executor and trustee, although he did not prove:—Held, that he did not lose the remedy in equity against the estate of the deceased. *Winter* v. *Innes*, 4 Myl. & C. 101.

The estate of one of two parties is not, after his death, discharged from a partnership debt by the circumstance that the creditor continues his transactions with the survivor, and forbears, for some years, at the survivor's request, to take any steps to enforce payment of his debt. S. C. 2 Jur. 981.

Secus, where the transactions show that the creditor has accepted the liability of the survivor in discharge of the liability of the partnership. *Ib.*

5. Where A. and B. were partners as navy agents, and A. becoming lunatic the partnership was dissolved, and the business was carried on upon the same terms by B. and C., and B. died, and the accounts of both partners were unsettled:—Held, that the account of A. and B. must be taken on the foundation of the rule in *Clayton's case* (1 Meriv. 572), although C., in order to establish an agreement to the contrary, set up certain affidavits made by B. in a suit brought against him by the committee of the lunatic, in which he alluded to an understanding between B. and C., which in some instances had been acted on, that the advances made to the customers of their firm should be repaid before any portion of the moneys paid in by those customers was applied in liquidation of their debts due to the original firm. *Toulmin* v. *Copland*, 3 Y. & Coll. 625. Affirmed *sub nom. Copland* v. *Toulmin*, West 164; 7 Cl. & F. 350.

Where a remaining or surviving partner, upon taking a new partner, agrees to bring a large amount of good debts into the firm, that is so advantageous a guarantee to the incoming partner as to afford a strong inference, even against evidence on the other side, that the remaining or surviving partner did not intend to waive the benefit of the rule in *Clayton's case* (1 Meriv. 572). *Ib.*

6. The claim of a creditor against the assets of a deceased partner, was held not to be barred, under the circumstances, by the Statute of Limitations. *Braithwaite* v. *Britain*, 1 Keen 206.

7. Joint creditor by simple contract may proceed against a clear residue of assets of deceased partner (the survivor being insolvent), and may set off against a debt to the deceased from the survivor and himself as his surety, a debt to the survivor from deceased which was agreed to be applied in liquidation of debt secured. *Cheetham* v. *Crook*, 1 M'Clel. & Y. 307.

8. Deposit of bills with a banking-house in D.'s lifetime, which were sold by the house, part in his lifetime, and part after his death; the estate of D. is not answerable in respect of the latter, though in this particular case, it appeared that the party who deposited them had no notice of the death of D. *Devaynes* v. *Noble*, *Clayton's case*, 1 Meriv. 616.

Deposit with the partnership of exchequer bills, which were sold in D.'s lifetime, and the produce applied to the use of the house. D.'s estate is responsible in respect of the breach of trust, and not discharged by subsequent acts, from which an inference might be drawn of the creditor's adopting the surviving partners as his debtors. *Id.* 575.

The amount of money received by the sale of the exchequer bills becomes a partnership debt, which accrued from the moment when they were sold without the consent of the creditor; and this, whether the individual partners were or were not privy to the sale; the sale of the exchequer bills amounts only to a breach of trust. *Ib.*

Creditors, who, after D.'s death, continued

to deal with the surviving partners, by drawing out and paying in; but, having drawn sums out before they paid any in, the balance varying from time to time, but being upon the whole increased by such subsequent payments by the surviving partners, must be taken in reduction of the balance due at D.'s death, and his estate held discharged *pro tanto*. *Id.* 585.

Creditors at the death of D., who continued to deal with the surviving partners, both by drawing out and paying in money, whereby their debts were increased, but never at any time reduced:—Held, no discharge of the deceased partner's estate. *Ib.*

Transfer of stock to the partnership, as a security for advances, under an agreement not to sell without notice. D.'s estate liable to the full extent of stock, sold contrary to such agreement, and not only to the extent of the stock sold beyond the amount of the debt due to the partnership in respect of advances made by them. *Id.* 624.

Notice to the surviving partners given by a creditor of the partnership, as solicitor for the representatives of the deceased partner, that the estate of the deceased will not be liable for their future dealings, does not operate as discharging the estate from a debt previously incurred to that creditor, of which he was at the time ignorant. Payments subsequently made in respect of cash balances not to be taken as operating in extinction of such a debt. *Id.* 579.

No difference in principle between the case of a banking house and any other partnership, as to the equity of the creditors against the deceased partner's estate. Money paid into a banker's constitutes a debt, not a deposit. A creditor leaving money in the hands of the surviving partners in a bank, does not constitute a new contract, nor operate as a relinquishment of the old security. *Id.* 568.

Interest upon the exchequer bills allowed, at 5*l.* per cent. from the time of the sale, upon the ground that the claimant had a right to consider it as a debt from that time, and had elected so to consider it. *Id.* 580.

Creditors, in respect of stock standing in the names of the partners, which was sold in breach of trust, and the proceeds applied to the use of the partnership, entitled as against the estate of the deceased partner, either to consider it as a debt, or to have the stock specifically replaced at their option. It makes no difference that the stock stood in the name of, and was sold by, one of the partners only, the proceeds having been applied to the partnership use. *Id.* 611.

The creditor of a partnership in which one of the partners dies, and the surviving partners afterwards become bankrupt, has a right to resort to the assets of the deceased partner for payment, without regard to the state of the account as between such deceased partner and the surviving partners. S. C. 2 Russ. & M. 495.

1. Bankers upon a deposit of money with them gave notes bearing interest; the partnership was dissolved; one of the partners soon afterwards died, and his creditors were called by advertisement, and the partnership was formed by the survivors and others, who re-issued notes of the former partnership, and paid the interest of the deposit notes for near two years, and then failed; the assets of the deceased partner are not discharged. *Daniel* v. *Cross*, 3 Ves. 277.

2. Judgment in action against a surviving partner is no extinguishment of the partnership debt in equity. *Jacomb* v. *Harwood*, 2 Ves. 265.

3. A creditor of a partnership against whose debt the estate of a deceased partner is in a suit directly instituted against that estate entitled to the protection of the Statute of Limitations, cannot (on a bill against the surviving partners and the representatives of the estate of the deceased partner, alleging that the surviving partners are indebted to the deceased partner) recover his debt against the separate estate of such deceased partner, on the ground of the equity of the partners amongst themselves to enforce an adjustment of the partnership transactions: for the creditor can at the utmost only stand in the place of the surviving partners as against the estate of the deceased partner, and in such a case the surviving partners have no claim on the estate of the deceased. *Way* v. *Bassett*, 5 Hare 55; 15 L. J., N. S., Ch., 1; 10 Jur. 89.

4. Where the deceased was, at the time of his death, liable under the 7 Geo. 4, c. 46 (Banking Act), to the debts of the bank, but no suit was commenced against his executors until more than seven years after his death:—Held, that creditors of the bank were excluded from coming in under the decree for administration and taking account of his debts, and the matter not within the scope of this decree, and that the proper course for bringing their claims before the Court was by petition, and not by exception. The remedies given by the Act against the partners of such bank are not cumulative, but substitutional, for the prior liabilities of the partners. *Barker* v. *Buttress*, 7 Beav. 134; 13 L. J., N. S., Ch., 58; 8 Jur. 89.

5. In a suit by a joint creditor against the representatives of a deceased partner and the surviving partner, the plaintiff was held to be entitled to satisfaction out of the assets of the deceased partner, though it was not proved that the surviving partner was insolvent. The surviving partner is properly joined as a defendant in such a suit, being interested to contest the demand of the plaintiff and of all joint creditors, but the remedy against him is altogether at law. *Wilkinson* v. *Henderson*, 1 Myl. & K. 582; 2 L. J., N. S., Ch., 191.

6. Premises were demised to A. and B., who were co-partners, upon which they carried on their partnership business. A. died during the lease, and after his death his executors carried on the business in co-partnership with B. on the premises:—Held, nevertheless, that the covenants in the lease, which were joint only, were not to be considered as several as well as joint, so as to make A.'s estate liable for breaches of the covenants which occurred after his death. *Clarke* v. *Bickers*, 14 Sim. 639; 9 Jur. 678.

7. A contract to discharge a retiring partner from a debt due from the firm may be proved either by an express agreement or by facts and conduct from which it may be fairly inferred. *Harris* v. *Farwell*, 15 Beav. 31; 15 L. J., Ch., 185.

Taking a new security is not of itself sufficient to discharge the retiring partner, but there must also be an agreement, either express or to be fairly inferred, to discharge the old firm. *Ib.*

A banking firm, consisting of A., B., and C., were indebted to the plaintiff. A. died:—Held, that the estate of A. was not released from the plaintiff's demand by his receipt of interest from the surviving and a new partner. *Ib.*

A. was co-partner with B., C., and D. as banker, and was partner in another banking firm with B. and C. A. died, and E. was admitted a partner in the first bank alone. The two firms became bankrupt, and under an order of the Court the estates of the two firms were consolidated. The plaintiff (a creditor of the first bank in A.'s life) received a dividend out of the consolidated estate:—Held, that A.'s estate was not thereby released. *Ib.*

1. Prior to April 1872 a firm of bankers, consisting of two partners, A. and B., received money on deposit at interest, for which they gave deposit notes in the usual form to the depositors, who, when the amount on deposit was increased or diminished, gave up their old notes and received fresh ones for the new amount. In April 1872 C. and D. were admitted into the partnership, and notice of the change in the firm was given to the depositors. A fortnight afterwards A. died, and the business was carried on under the same firm by B., C., and D. In 1874 B. died, and the business was carried on by C. and D., still under the same firm, until 1875, when the bank stopped payment, and went into liquidation. The depositors all knew of A.'s death, and none of them made any claim against his estate. Some of them had not altered the amount of their deposit, but retained the notes they had received in his lifetime. They had, however, received interest from C. and D. Others had increased and others had diminished the amount of their deposit after A.'s death, receiving in each case fresh deposit notes; and they had all proved in the bankruptcy of C. and D. for the amount due on their notes as money advanced and lent to the bankrupts:—Held, that in each case there had been a complete novation, and that none of the depositors were entitled to prove against the estate of A. *Bilborough* v. *Holmes*, 5 L. R., Ch. D., 255; 46 L. J., Ch., 446; 35 L. T. 75; 25 W. R. 297.

2. As to the equity of a creditor of a partnership to obtain payment out of the separate estate of a deceased partner. *Brown* v. *Gordon*, 16 Beav. 302; 22 L. J., Ch., 65.

A creditor of a banking firm held to have accepted the surviving partners as his debtors, and to have lost, by sixteen years' delay and his conduct, the benefit of a trust contained in the will of the deceased partner for payment of his debts out of his real estate. *Ib.*

Where a man fills two characters, he may do an act which may affect him in one but not in the other character. *Ib.*

Payment of interest on a debt by surviving partners, one of whom was the executor of a deceased partner, held to have no reference to the executorial character. *Ib.*

R. B. deposited 110*l.* with Messrs. H. B. L., C. F., E. L. & C. S. F., bankers, upon a deposit note payable twenty days after sight. In June 1833 H. B. L. died, having, by his will, devised his real and personal estate to trustees, one of whom was his son, H. L., upon trust to raise money to pay his debts, etc., and, subject thereto, upon trust for H. L., whom he appointed sole executor. H. L. was admitted a partner in the bank. In 1835 E. L. died, and in 1843 C. F. died. C. S. F. and H. L. continued the business, but became bankrupts in 1847. R. B., from the death of H. B. L., received interest at the bank upon his deposit note until the bankruptcy, when he proved his debt against the bankrupts' estate; and on a bill filed to make the real and personal estate of H. B. L. liable to the payment of the 110*l.*:—Held, that the interest was not paid by the continuing partners, as agents of H. B. L., the testator; that no agency could be implied; that the interest was paid on account of the firm; that all claim against the real and personal estate was barred by the Statute of Limitations in six years; that R. B. had accepted the surviving partners as his debtors, and the devise made by H. B. L. for payment of debts was satisfied, and the bill was dismissed, with costs. *Ib.*

3. A., B., and C. jointly incurred a debt. After the death of A., the account was continued by B. and C., and a further debt incurred. Leave having been given to prove the whole debt against each of the estates of B. and C., and the earlier debt against the estate of A., dividends were received from all three estates to an amount exceeding in the aggregate the debt proved against A.'s estate. No special appropriation was made on the receipt of those dividends:—Held, that A.'s estate had no right to have the dividends from the estates of B. and C., wholly or ratably, appropriated to the earlier debt, and that the creditors were at liberty to avail themselves of the proof against A.'s estate, until either the whole debt was paid, or A.'s estate had contributed the full amount of the proof against it. *Denison* v. *Arison*, 2 Hem. & M. 647; 12 L. T., N. S., 340.

See also IX. IV. 1 *post.*

III. ADMINISTRATION.

1. *Between Joint and Separate Estates and Creditors*, 5461.
2. *Between Deceased Partner and Firm*, 5462.

1. Between Joint and Separate Estates and Creditors.

4. A joint creditor by simple contract may go against the assets of a deceased partner, but cannot before the account retain separate property of that partner in his possession. *Stephenson* v. *Chiswell*, 3 Ves. 566.

5. Where a partnership debt is by the form of the obligation joint and several, the creditor is entitled to be paid out of the assets of the deceased partner *pari passu* with the separate creditors; joint creditors are entitled only out of the surplus after the separate creditors have been satisfied. *Lee* v. *Flood*, 2 W. R. 26.

6. A testator carried on the business of an ironmaster on the D. estate, in partnership,

until January 1851, after which time he became sole proprietor of the business and estate. During the co-partnership the partners were credited with their shares of profit and debited with their shares of loss in their private accounts with the firm; and a similar account was kept by the testator after becoming sole proprietor, as between himself and the business. This private account was debited with considerable losses at the time of the last balance before testator's death, and on carrying the account down to the death a further balance of loss appeared:—Held, as between the general personal estate and the D. estate and business, which were separately bequeathed, that the personal estate must pay both these balances to the D. estate. *Guest* v. *Schreiber*, 4 W. R. 766.

1. A. and B. were secret partners in underwriting, and their course of business was to sign policies in each of their names for separate sums. *Semble*, that such policies were not void as to the assured under 35 Geo. 3, c. 63, s. 11. A. died, and B. afterwards became bankrupt:—Held, that joint creditors of A. and B. were entitled to have an account of the joint estate in the hands of the executors of A. and the assignees of B. *Brett* v. *Beckwith*, 5 W. R. 112; 26 L. J., Ch., 130; 3 Jur., N. S., 31.

2. The distinction between joint and separate assets is not restricted to the cases of a distribution under a bankruptcy or insolvency; it applies equally to the case of the administration of assets of deceased partners. *Ridgway* v. *Clare*, 19 Beav. 111.

In the administration of the assets of a deceased partner, where both partners are solvent, there is no distinction made between joint and several creditors; they are all paid, and in taking the partnership accounts, the joint debts thus paid will be allowed in account by the surviving partner. *Ib.*

If the estate of the deceased partner be insolvent, and that of the surviving partner solvent, the joint creditors will naturally go against the surviving partner, who will then be a creditor against the separate estate of the insolvent partner for the amount paid by him to the joint creditors beyond his share. *Ib.*

If both the deceased and surviving partner are insolvent, then the joint creditors must resort, in the first instance, to the joint estate, and can only go against the separate estate of each partner after the claims of his separate creditors have been satisfied. *Ib.*

If both partners die before administration takes place, the rule is the same. *Ib.*

3. Where one of two partners has died, and after his death the surviving partner has become bankrupt, and the joint creditors have received a dividend under the bankruptcy out of the joint estate, but have not been paid in full, they will, in the administration in chancery of the estate of the deceased partner, be entitled to come against so much only of his estate as may remain after payment of his separate creditors. *Lodge* v. *Pritchard*, 32 L. J., Ch., 775; 1 De G. J. & S. 610; 9 L. T., N. S., 107; 2 N. R. 537. Affirming 1 N. R. 534.

4. Where in an administration of the separate assets of a deceased partner it appears that both his estate and the estate of his surviving partner are insolvent, the separate creditors of the deceased partner have a priority over the joint creditors. *Whittingstall* v. *Grover*, 10 W. R. 53.

The fact that the deceased partner has devised his estates, subject to the payment of all his debts in respect of the partnership concern, or otherwise, is not sufficient to place the two classes of creditors on an equal footing. *Ib.*

Interest upon those separate debts which of themselves carry interest constitutes a portion of the debts due, and must, with the principal, be paid in priority to the joint debts. *Ib.*

5. Four persons carried on a business in partnership under a deed which provided that the death of a partner should not dissolve the partnership, but that the business should be carried on by the survivors or survivor, and the share of the deceased partner ascertained at the next half-yearly stock-taking, and paid to his representatives by instalments. Two of the partners died, and afterwards the survivors became bankrupt. No steps had then been taken to ascertain the shares of the deceased partners:—Held, that the creditors of the four partners had no right to have the joint assets of the four which remained in specie applied first in payment of their debts. *Re Simpson*, 9 L. R., Ch., 572; 43 L. J., Bky., 147; 22 W. R. 697; 30 L. T., N. S., 448.

6. Business was carried on by W. and T., in partnership, under a partnership deed which provided that all the capital in the business should belong to W., and that in case of his death the share of T. in the profits should belong to W.'s representatives or nominees, and the business should thenceforth be carried on by his personal representatives or nominees, and that T. should continue in it for six months to assist such representatives or nominees. W. died, having appointed T. his executor. The business, which was greatly in debt at W.'s death, was continued by T. for fourteen months. T. then filed a petition for the liquidation of his affairs. The stock in trade at the time of the liquidation consisted partly of things which had belonged to W. and T. during their partnership and remained in specie, partly of things acquired by T. after W.'s death:—Held, that the partnership deed meant only that the capital, subject to the payment of the debts, should belong to W., and that the proceeds of such part of the stock in trade as had been in existence during the partnership, formed joint assets applicable to the payment of the joint debts of the partnership, and that so much of the stock in trade as had been acquired by T. since W.'s death, was separate assets of T. applicable to the payment of his separate debts. *Exp. Morley, Re White*, 43 L. J., Bky., 28; 29 L. T., N. S., 442. Affirmed 31 L. T., N. S., 491.

2. Between Deceased Partner and Firm.

7. Upon the decease of a partner in trade, the firm was indebted to him for money advanced; the business was continued by the surviving partner, who with the money of the firm made additions to the stock in trade:—Held, as the executors of the deceased partner had permitted the continuance of the business,

that they had no lien upon the subsequently acquired stock in trade for the money advanced to the firm by their testator. *Puyn* v. *Hornby*, 4 Jur., N. S., 446; 27 L. J., Ch., 689; 25 Beav. 280.

1. Upon the death of T. H., in partnership with A. H., the concern was found greatly embarrassed, if not in an insolvent state. An arrangement was made by A. H. and T. R., a new partner, with the creditors and the next of kin of T. H., who died intestate (the husband of the next of kin having claims on T. H., and whose only remaining property was a lease and an agreement for another lease of other premises), whereby the creditors were to be paid a composition, and D., the husband of a sister of the deceased, a stated sum in satisfaction of his claim. Both the creditors and next of kin renounced administration, which was taken by A. H., and the arrangements, although afterwards varied, were acted upon. A. H. raised sums on mortgage of the leaseholds to meet the compositions, and upon a dissolution of the partnership, T. R. afterwards purchased the fee simple, and subsequently also mortgaged it to secure the debts to D. and others, and eventually disposed of the whole interest therein, both A. H. and T. R. during a period of thirty-seven years having dealt with the leaseholds as their own property. Upon the death of A. H., a bill having been filed by the plaintiff, as *administrator de bonis non* of T. H., and also as administrator of the deceased next of kin:—Held, that after such dealing, with the acquiescence of the next of kin and their representatives, an agreement to give up all interest was established, and releases would, if necessary, be presumed, and the appeal was dismissed with costs. *Skeffington* v. *Budd*, 9 Cl. & F. 219; 6 Jur. 809. Affirming S. C. *sub nom. Skeffington* v. *Whitehurst*, 3 Y. & Coll. 1; 7 L. J., N. S., Exch. Eq., 65.

2. A. and B., who had been partners as solicitors, renewed the partnership for their joint lives, and in the agreement it was stipulated that upon the death of either, the survivor should, during his life and the life of the widow of the deceased partner, pay to the appointee of the deceased partner, either an annuity of 200*l.* or one-fourth of the profits of the business at the election of the surviving partner. A., by settlement on his marriage, appointed in favour of his intended wife, who became his widow. The partnership continued till the death of A. in 1851, and B. carried on the business till his bankruptcy in 1856. At the death of A. the firm was greatly in debt, and the debts B. paid off, but he did not pay the widow either the annuity on any share of the profits nor make any election. The widow claimed to prove under the bankruptcy, but her proof was rejected:—Held, on appeal, that the assignees had still the power of election, and they having elected to pay one-fourth of the profits, the debts of the old firm must be set off against the profits; and that, for the purposes of the proof, the business must, under the articles, be considered not a new but a continuing business, and its debts be discharged before any profits could be divided. *Exp. Harper*, 1 De G. & J. 180; 2 Jur., N. S., 724; 26 L. J., Bky., 74.

3. Two solicitors entered into articles of partnership, one clause of which provided that on the death of either partner his executors or administrators should be entitled to receive out of the net profits of the partnership business a certain annuity for a term of years, and that this annuity should be applied as the deceased partner should by deed or will direct, for the benefit of his widow and children, and in default of such direction should be paid to his widow if living. One of the partners died. By his will he appointed his widow sole executrix, and gave all his property to her absolutely. In an action instituted by creditors for the administration of the testator's estate, an application was made that the continuing partner should pay the annuity to the receiver appointed to get in the testator's estate:—Held, that the annuity came to the hands of the testator's legal personal representative, not as assets, but as property impressed with a trust which the Court would execute. The annuity was, therefore, ordered to be paid to the widow. *Re Flavell, Murray* v. *Flavell*, 32 W. R. 102; 25 L. R., Ch. D., 89; 53 L. J., Ch., 185; 49 L. T. 690.

4. Interest in partnership trade, under articles for widows of the partners for their respective lives, and after the decease of the widow to be equally divided among their respective children:—Held, not vested in children who died in life of mother, on account of nature of the subject, the primary object being to constitute a partnership, and ascertain the succession; and a provision for the family being only a secondary object through that medium. *Balmain* v. *Shore*, 9 Ves. 500.

5. Articles of partnership under seal containing the usual covenant by the partners to be true and just to each other in all their dealings, and by which each bound himself, his executors, etc., unto the other, his executors, etc., in the penal sum of 5,000*l.* for the due performance of the partnership articles; on the death of one partner, he was found indebted to the partnership in 11,064*l.*:—Held, that the debt was by specialty for 5,000*l.* only, there being no covenant or obligation in the deed for payment of the general balance on the settlement of the partnership accounts, but only for 5,000*l.*, the express contract for a definite sum excluding any implication for a larger sum as a specialty debt. *Powdrell* v. *Jones*, 2 Sm. & G. 305; 18 Jur. 1048; 23 L. J., Ch., 606.

Semble, an express contract as to the amount of debt under specialty, excludes any implication by which that amount may be enlarged. Unless a deed expressly binds a partner, who shall be a debtor to his co-partner, to payment, by containing an express obligation to pay, it does not constitute a debt. S. C. 2 W. R. 513; 2 Eq. Rep. 624.

6. An agreement between four partners recited that they had considerable sums employed in the business, which it might be impracticable or highly detrimental to repay from the business immediately after the retirement or death of either of them, and provided that in case of the retirement or death of either, the balance due to such retiring or deceased partner should be repaid out of the business by the continuing or surviving partners, by annual instalments of

2,000*l.* One partner died, and his share in the business was ascertained, in suits instituted for that purpose and for the administration of his estate, to be 64,000*l.*, and the instalments were directed to be paid by the surviving partners, and the survivors and survivor of them, until further order. After some years two of the surviving partners died, and then the third became insolvent:—Held, that the estates of the two were liable for the unpaid balance of the 64,000*l.* *Beresford* v. *Browning*, 45 L. J., Ch., 36; 1 L. R., Ch. D., 30; 24 W. R. 120; 33 L. T., N. S., 524. Affirming 20 L. R., Eq., 564; 33 L. T., N. S., 118.

IV. ACCOUNTS.

1. *Suits for. By whom*, 5464.
2. *How taken*, 5464.
3. *Profits on Capital retained*, 5467.
4. *Profits, whether Capital or Income*, 5469.
5. *Costs.* See XVI. v. *post.*

1. Suits for. By whom.

1. If one of two partners give, by will, a sum out of share of business, the surviving partner may settle the account without the legatee. *Langley* v. *Oxford (Earl)*, Ambl. 798.

2. Residuary legatees may sustain a bill for an account against the executor and the surviving partner of the testator, though collusion between the executor and the surviving partner is neither charged nor proved. *Bowsher* v. *Watkins*, 1 Russ. & M. 277.

3. A suit by parties beneficially interested in the estate of a deceased partner cannot be maintained against both his executors and surviving partners, in the absence of special circumstances; but collusion is not the only ground for such a suit; and it may be maintained where the relation between the executors and surviving partners is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate as against such partners. *Travis* v. *Milne*, 9 Hare 141; 20 L. J., N. S., Ch., 665.

4. By articles of partnership the survivor of two partners was to take the whole stock, upon payment to the representatives of the other of what was due to him according to the last half-yearly rest. On the death of one, his widow, who was also a legatee, entered into an arrangement with the survivor for a distribution of the partnership effects, which agreement she afterwards filed a bill to set aside for fraud, also praying for an account of the partnership dealings and profits since the death of the testator:—Held, that she was entitled to production of the accounts of the business, as carried on after the testator's death, with reference to the relief prayed, and to which at the hearing she might be entitled. *Hue* v. *Richards*, 2 Beav. 305.

5. The administratrix of a deceased partner in a colliery executed an assignment of all his shares in collieries, and other personal estate, which were divided among and accepted by his daughters in equal shares, as their portions of the estate under the Statute of Distributions. The partnership affairs had not been wound up:—Held, that as the administratrix was still subject to the partnership liabilities, she was entitled to institute a suit against the surviving partners for the purpose of taking the partnership accounts; and that notwithstanding her children were not parties to the suit. *Clegg* v. *Fishwick*, 1 H. & Tw. 390; 1 Macn. & G. 294; 19 L. J., N. S., Ch., 49; 12 Jur. 993.

6. In the absence of fraud or collusion, or some other circumstance creating a privity between the parties, the only person who can file a bill against a surviving partner for an account of the partnership assets is the legal personal representative of his deceased partner. *Taylor* v. *Taylor*, 28 L. T., N. S., 188.

7. Where one of two executors was a partner with the testator, the residuary legatees may sustain a bill for an account of the partnership transactions against the executor, though collusion between them is neither charged nor proved. *Cropper* v. *Knapman*, 2 Y. & Coll. 338; 6 L. J., N. S., Exch. Eq., 9.

8. A., B., and C. having been in partnership together, and A. and C. having died, a bill by the residuary legatees of A. against his executors, and against B. and the executors of C., for an account of the personal estate of A., was sustained under the special circumstances of the case, although collusion between the executors of A. and the other defendants was neither charged nor proved. The case of *Newland* v. *Champion* (1 Ves. 105) considered. *Law* v. *Law*, 2 Colly. 41; 14 L. J., N. S., Ch., 313; 9 Jur. 745. Affirmed 16 L. J., N. S., Ch., 375; 11 Jur. 463. S. P. *Newland* v. *Champion*, 2 Colly. 46. n.

9. Any creditor of a deceased partner, whether joint or separate, may institute a suit to have the partnership as well as the separate estate administered in a court of equity, and the assignees of a surviving partner, who has become a bankrupt, are proper parties to the suit. *Brett* v. *Beckwith*, 3 Jur., N. S., 31; 26 L. J., Ch., 130.

2. How taken.

10. Stipulations in articles of partnership for an annual settlement of accounts, and for payment to the representatives of a deceased partner of an allowance in lieu of profits since the last annual account, proportioned to the amount of his share of profits during two years preceding, are waived in equity by omission through several years to settle annual accounts, and by engaging in business to which the stipulations cannot be applied without injustice; and an injunction was granted to restrain the representatives of a deceased partner from proceeding on a bond given by the surviving partners, for repayment of his share according to the articles, before the settlement of accounts of transactions pending at his decease, on which a loss was subsequently sustained. *Jackson* v. *Sedgwick*, 1 Swan. 460; 1 Wils. 297.

Partnership articles, containing special clauses for taking the accounts on which the parties have not acted, read in equity as if those clauses were expunged. *Id.* 469.

11. Partners agree that settlement of ac-

counts should take place on the 25th March annually, and that if either should die he should not share profits accrued since the last preceding settlement day. By mutual consent settlement on 5th November is substituted for 25th March. The last settlement made was on the 5th November 1811. In February 1813 one partner dies:—Held, his representative entitled to share of profits up to November 1812, the time when last settlement ought to have been made. *Pettyt* v. *Jameson*, 6 Madd. 146.

1. Where the articles of partnership directed an account of the partnership effects and rest to be taken once a year, and, on the expiration of the partnership term, the property to be divided on the footing of the last annual rest, and, if any partner should die during the partnership term, his representatives should receive payment of his share of the capital and stock, as ascertained at the last annual rest, with interest thereon (in lieu of profits from that time), by instalments; and such representatives to have no right to look into the partnership books. The partnership continued for several years, but the partners did not make the annual account and rest as provided by the articles. One partner died:—Held, that the representatives of the deceased partner were not entitled to a sale of the partnership property, as upon a dissolution; that the rest, and not the day of the rest, was the essence of the partnership contract; and, therefore, that the representatives of the deceased partner were entitled to participate in the profits up to the time of his death; and, also, to have the account taken, by means of the partnership books, in the usual way. *Simmons* v. *Leonard*, 3 Hare 581.

2. Where A. and B. were partners as navy agents, and A. becoming lunatic, the partnership was dissolved, and the business was carried on upon the same terms by B. and C., and B. died, and the accounts of both partners were unsettled:—Held, that the account of A. and B. must be taken on the foundation of the rule in *Clayton's case* (1 Meriv. 572), although C., in order to establish an agreement to the contrary, set up certain affidavits made by B. in a suit brought against him by the committee of the lunatic, in which he alluded to an understanding between B. and C., which in some instances had been acted on, that the advances made to the customers of their firm should be repaid before any portion of the moneys paid in by those customers was applied in liquidation of their debts due to the original firm. *Toulmin* v. *Copland*, 3 Y. & Coll. 625. Affirmed *sub nom.* *Copland* v. *Toulmin*, West 164; 7 Cl. & F. 350.

3. Sale of a testator's share in a partnership trade, and the property belonging to it, by his executor to his partner, for the purpose of being resold to one of his executors, set aside, and his estate held entitled to his aliquot proportion of the subsequent profits as if the partnership had continued. Interest allowed at 5 per cent. on sums paid out to his estate. *Cook* v. *Collingridge*, 1 Jac. & Walk. 607; 1 L. J., Ch., 74.

4. Form of decree for an account of a deceased partner's interest in a mercantile firm, where, since his death, new partners have from time to time been admitted, and have retired, and have employed their services and capital therein. *Wedderburn* v. *Wedderburn*, 2 Keen 722; 4 Myl. & C. 41; 8 L. J., N. S., Ch., 177; 3 Jur. 596.

5. It is not to be assumed that the annual stock-taking by a partnership truly represents the interests of the several partners in the firm; but it may or may not do so, according to the purposes for which, and the mode in which, it is made up. *Travis* v. *Milne*, 9 Hare 153; 20 L. J., N. S., Ch., 665.

6. Under the usual decree for an account on a bill by creditors, the Master refused to proceed upon the claim of the surviving partners of the testator in respect of a debt alleged to be due to them on the balance of certain dealings between the partnership and the testator in his separate capacity; but on motion to be admitted to go in before the Master and prove this debt under the decree, it was referred to the Master to take the account. *Poynter* v. *Houston*, 3 Meriv. 297.

7. Where the accounts of a partnership between two had been carelessly kept, and, after the death of one, the other furnished to the executors of the deceased partner an account current of the partnership dealings, which afforded them the only evidence to charge the surviving partner:—Held, that they were entitled to use it for that purpose in a suit instituted by the surviving partner to have the accounts taken, without being bound by the entries on the credit side of the account current. *Morehouse* v. *Newton*, 3 De G. & Sm. 307; 13 Jur. 420.

8. A., having been in partnership with B., after B.'s death carried on the same business, and disposed of the stock and bought in new. Shortly after B.'s death a valuation was made, by which the property that had belonged to the partnership was estimated at a certain value. The business subsequently declined. On a bill filed by the representatives of B., A. was charged with the amount of the valuation and interest since B.'s death, though the bill only prayed a partnership account. *Booth* v. *Parkes*, Beat. 444.

9. A surviving partner, who had possession of the partnership books, wilfully and fraudulently refused to produce them, to have the accounts taken under a decree for that purpose. The Master, in the absence of other evidence, charged 10 per cent. per annum on the capital stock, as the net gains made during the partnership, and debited the surviving partner with a moiety thereof:—Held, he was justified in so doing; and the Court decreed accordingly. The Court must give credit to what the Master reports as occurring in his presence. *Walmsley* v. *Walmsley*, 3 J. & L. 556.

10. When articles of partnership are clear and distinct, then partners are bound by them; when they are ambiguous or silent, the course of dealing between the partners regulates the mode by which the Court must deal with them, and in some cases the Court has allowed the constant usage of partners to supersede the articles. *Coventry* v. *Barclay*, 33 Beav. 1.

By partnership articles of a brewery firm executed in 1831, it was provided that an annual account and valuation should be made and fully finished between the partners, and

should, when finished and signed by all the partners, be binding on them; and that, on the death of any partner, the value of his share in the capital and profits, as appearing from the last annual account, should be paid to his representatives, with interest from that time in lieu of the profits, whereupon his estate was to be indemnified against the debts. One of the partners died two months after the taking of the annual account, without having signed or expressly approved of it. Upon a bill by his executors, alleging that the last valuation was an arbitrary one, and had not been adopted by the testator, and claiming that a new valuation ought to be made:—Held, that the account was in conformity with the previous practice, and was as binding on the testator as if he had signed it, and was binding on his estate. S. C. on appeal, 12 W. R. 500; 3 De G. J. & S. 320; 9 Jur., N. S., 1331; 9 L. T., N. S., 406; 3 N. R. 224. Varying 2 N. R. 375.

Held, also, that the estate of the testator was entitled to share in the surplus of a fund set apart in the account to meet certain contingencies or unascertained liabilities. *Ib.*

1. As to the proper mode, in the absence of any agreement expressed or implied, of taking the partnership accounts of bankers, as between a surviving partner and the estate of the deceased partner. *Bate* v. *Robins*, 32 Beav. 73, and *Crosskell* v. *Bower*, 32 Beav. 86.

2. By a partnership deed, interest at 5*l.* per cent. was payable on the partner's capital, and it was provided, that on death or retirement of a partner, the clear balance ascertained at the last stock-taking should be repaid, with interest at 5*l.* per cent., by instalments; but upon the death of a partner the last stock-taking was to be conclusive "as to the share and amount of interest of the deceased partner in the business, and should be the sum to be paid to his executors," with interest from the last stock-taking in lieu of profits from that time:—Held, that the estate of the deceased partner was entitled not only to 5*l.* per cent. for interest, but to 5*l.* per cent. for profits. *Browning* v *Browning*, 31 Beav. 316.

By partnership articles, "the clear balance, as ascertained from the last stock-taking" of a deceased partner, together with any additional capital (if any), was to be paid to his executors by instalments, and the last stock-taking was to be "conclusive as to the share or amount of interest of the deceased partner in the business," and was to be the sum to be paid to his executors:—Held, that as additional capital was to be taken into account, so, impliedly, capital drawn out in the interval between the last stock-taking and the death of a partner must be deducted. *Ib.*

3. By articles of partnership it was agreed that the settlement of accounts should be made half-yearly, at Lady-day and Michaelmas, and that on the death of a partner his share of the assets should be taken at the amount settled by the last half-yearly account preceding his death. By a subsequent parol agreement it was arranged that the accounts should be settled once a year only, viz., at Michaelmas:—Held, that this variation in the partnership articles did not affect the money interests of the partners; and that upon the death of a partner in the month of May the accounts must be settled up to the previous 25th of March. *Lawes* v. *Lawes*, 9 L. R., Ch. D., 91; 38 L. T., N. S., 370; 27 W. R. 186.

4. A. and B. carried on the business of carrying mails under a contract entered into by the Postmaster-General with B. and not assignable. A. died, B. continued to carry on the business under the contract, and refused to account for the value of the contract to the executors of the deceased partner:—Held, that as the contract was not assignable and its value could not be ascertained in the usual way by sale, it must be referred to chambers to ascertain the value, and the surviving partner must pay the value to the executors of the deceased, with a share of the profits since his death, a fair sum being allowed to the surviving partner for his services in carrying on the business. *Ambler* v. *Bolton*, 41 L. J., Ch., 783; 14 L. R., Eq., 427; 20 W. R. 934.

5. Five contractors jointly contracted to build a harbour, the building of which would take at least five years. Soon afterwards one of the contractors died:—Held, that his estate was entitled to share in the profits of the contract; and that those profits were to be the actual profits ascertained when the contract was completed, and not by valuation or by sale of the contract. *M'Clean* v. *Kennard*, 9 L. R., Ch., 336; 43 L. J., Ch., 323; 22 W. R. 382; 30 L. T., N. S., 186.

The deceased contractor named in his will three executors. Before the will was proved, the four other contractors signed an agreement, in which they, and also the executors of the will, were the parties, a blank being left for the names of the executors. The will was afterwards proved by two only of the executors, and those two executors then signed the agreement:—Held, that, though signed by two only of the executors, it was binding on the other contractors. *Ib.*

Held, also, that no regard could be paid to evidence that the other contractors expected the concurrence of the third executor, and would not have entered into the agreement if they had been aware that he would renounce. *Ib.*

6. Partnership articles provided for a balance-sheet being made out up to the 31st of December in each year, which, after a certain time, was to be binding on the partners, except that manifest errors, when discovered, should be corrected. It was also provided that a like account should be made out on the 31st of December next after the death of a partner, and that his executors should be entitled to receive by six instalments from the surviving partners the value of his interest as appearing from such balance-sheet. The uniform practice of the firm in making out their balance-sheets was to treat the loss occasioned by any asset turning out bad as attributable to the year in which it was discovered to be bad. In 1864 one of the partners died; and, after the balance-sheet had been made out, various assets which had been treated as good were ascertained to be irrecoverable, owing to the failure since the 31st of December 1864 of debtors to the firm, and depreciation of consignments, which, when the balance sheet was made out, had not been realized:—Held, that the executors of the deceased partner were

entitled to receive the value of his share as appearing by the balance sheet without any deduction for the losses subsequently ascertained. *Exp. Barber*, 5 L. R., Ch., 687; 18 W. R. 940; 23 L. T., N. S., 230.

1. A partner died in 1857, at which time the partnership business was unsaleable. The surviving partner carried on the business, expended considerable sums on the premises, and improved the business, and in 1865 sold the goodwill for 1,700*l.*:—Held, in administering the estate of the deceased partner, that the surviving partner was chargeable only in respect of the value of the business at the date of the other partner's death. *Broughton* v. *Broughton*, 44 L. J., Ch., 526; 23 W. R. 770.

2. A deed of partnership provided that in the event of the death of any of the partners, and in the event of the surviving partners electing to continue the business, the amount at the credit of the deceased partner as at the last balance "shall be paid out to his representative by instalments of equal amount at six, twelve, etc., up to sixty months' date from the date of the surviving partners declaring their election, with interest thereon from the date of the balance." The chief partner, whose interest was about 394,340*l.* in the concern, died. The surviving partners having elected to continue the business, sought to pay his representative by ten equal instalments, with interest on the amount of each instalment from substantially the date of the death to the date of payment. In a claim by the deceased partner's representative that interest should be added to each instalment on the balance of the capital sum remaining unpaid at the date of the payment of each such instalment; thus reaping an advantage of about 2,365*l.* from the earlier payment of the larger sums of interest:—Held, that the interest to be paid with each instalment was interest calculated on the balance of principal unpaid at that date, and not interest upon the amount of each instalment. *Ewing* v. *Ewing*, or *Orr Ewing* v. *Orr Ewing*, 8 L. R., App. Cas., 822.

3. A surgeon sold one-fifth of his business, and entered into partnership with the purchaser for such term as they should mutually agree to continue. The articles provided that in the event of the death of a partner, the survivor might purchase his share and interest in the business; but if he should decline, it should be sold to any other person. The purchaser died at the end of fifteen months, and the surviving partner declined either to purchase or to admit a purchaser into the business. He was charged with the value of the deceased partner's share and interest. *Featherstonhaugh* v. *Turner*, 25 Beav. 382; 28 L. J., Ch., 812.

4. Where an allowance was made to one of two partners for his labour in making up the books of the partnership, and during the last eighteen months of his life he was incapacitated by illness from performing that duty, in an account between his executors and the surviving partner, the allowance during the last eighteen months was disallowed to the deceased partner's estate. *McDonald* v. *Richardson*, *Richardson* v. *Marten*, 10 L. T., N. S., 166; 1 Giff. 81; 5 Jur., N. S., 9.

3. Profits on Capital retained.

5. On the death of one partner, the survivor retaining his capital, and employing it in the trade, decreed to account for the profits derived from it, making him proper allowances for the management of the business. *Brown* v. *De Tastet*, 1 Jac. 284.

6. Where a surviving partner has carried on the partnership business without withdrawing from the concern the capital or share of a deceased partner, there is no absolute rule that, in taking the subsequent accounts of the partnership dealings, as between the surviving, and the estate of the deceased, partner, the division of the profits shall be determined by the aliquot shares of the several partners in the business, in their joint lifetime, or by the amount of the agreed capital which they were respectively to supply, or by the actual amount of the capital belonging to the surviving, and the estate of the deceased, partner respectively; but the principle of division may be affected by considerations of the source of the profit, the nature of the business, and the other circumstances of the case. *Willet* v. *Blanford*, 1 Hare 253; 11 L. J., N. S., Ch., 182; 6 Jur. 274.

7. A surviving partner, whether to be considered as a trustee for a moiety of the profits for the representative of the deceased partner. *Marjoram* v. *Saundeford*, Romilly's Notes of Cases 110.

8. A testator was in trade in partnership with other persons for a term of years, under articles, by which the share of any partner dying was to be left in the concern till the expiration of the term, and then to be paid off by instalments, with interest and share of profits in the meantime. By his will he bequeathed all the residue of his real and personal estate to trustees, to get in with all convenient speed, and invest the moneys, and pay the interest or dividends to the widow for life, remainder to his children. A subsequent proviso in the will empowered the trustees to postpone any sale, at their discretion, and directed the rents and produce of any unsold part to go as the interest of the sales-moneys would have gone if such part had been sold. The books were made up half-yearly. The trustees did not get in the share in the partnership:—Held, first, that the widow was entitled to 5*l.* per cent. interest on the amount at which the stock in trade had stood in the books of the concern on the periodical stock taking next preceding his decease, from the day of his death up to the day of the periodical stock-taking next succeeding his death. *Johnstone* v. *Moore*, 4 Jur., N. S., 356.

Held, secondly, that the widow was entitled to all the profits accruing on the testator's share from such next succeeding stock-taking up to the determination of the partnership, over and above interest. *Ib.*

9. Classification of the three cases in which the estate of a deceased partner is entitled to participate in the subsequent profits of a trade in which his capital has been employed. *Wedderburn* v. *Wedderburn*, 22 Beav. 84; 2 Jur., N. S., 674; 25 L. J., Ch., 710.

The estate of a deceased partner is entitled to participate in the goodwill of a business

which does not belong to the surviving partners except by express agreement. *Ib.*

By articles of partnerships, on the death of a partner the survivors were entitled to the goodwill. A., a partner, died in 1801, having appointed his co-partners executors. They continued the trade, having made out an account, from which it appeared that the assets (consisting nearly wholly of outstanding debts) were 496,000*l.*, the liabilities 410,000*l.*, and the surplus 85,9000*l.*, of which A.'s share was 55,000*l.* The survivors carried this to the credit of the deceased partner's account, and they paid the amount with interest to the *cestuis que trustent* as they came of age. In 1831 the children claimed to participate in the profits of the subsequent trading, which in the thirty years had amounted to 308,000*l.*, on the ground that their capital had been employed therein. At the hearing, inquiries were directed with a view to charge them; but, on the Master's report, the Court having come to the conclusion that at the testator's death the surplus was merely nominal, that the business, to wind up, was insolvent, and that the subsequent profits were attributable to goodwill and the personal exertions and capital of the surviving partners:—Held, that the plaintiffs were not entitled to participate in the profits, so far as those profits were attributable to the goodwill and connection in trade of the old firm, and that their share in that portion of which they would be entitled to participate could not be estimated higher than the interest already paid. *Ib.*

Difficulties of enforcing a *cestui que trust's* right (however clear) to participate in profits of trade carried on in part with trust fund. S. C. 4 Myl. & C. 41; 8 L. J., N. S., Ch., 177; 3 Jur. 596. Affirming 2 Keen 722.

1. A bill was filed by parties beneficially interested under the will of a partner, who had by his will made his co-partner his executor, who had, after his partner's death, improperly employed his assets in trade. Subsequently to the testator's death his executor took two persons into partnership with him. Those two partners were not made parties to the suit, but they appeared as witnesses to prove the amount of profits made by the executor in continuing the business after the death of the testator. A bill was also filed by the executor against the parties beneficially interested under the will, for the usual and other accounts:—Held, that the executor was accountable for the profits made out of the assets improperly employed, and directed him to account and pay over those profits, although the persons subsequently taken into partnership were not parties to the suit, and not before the Court in any other character than above mentioned. *M'Donald* v. *Richardson*, *Richardson* v. *Marten*, 1 Giff. 81; 5 Jur., N. S., 9; 10 L. T., N. S., 166.

2. Executors and trustees, surviving partners of a testator, directed by his will to invest an infant's legacy in Government or real securities, took a security for it in the form of a mortgage on the freehold and leasehold property and fixtures belonging to the partnership in which they were the testator's surviving partners:—Held, that they were bound to account for the profits made by so employing the legacy and interest in their trade. *Townend* v. *Townend*, 1 Giff. 201; 5 Jur., N. S., 506.

The will directed the interest to be accumulated from the testator's death, but by the partnership articles the principal not being payable, but only interest at 5 per cent. for five years after the testator's death:—Held, that the amount of interest on the legacy should be computed, with annual rests, up to the date of the security, which was dated and taken on the day when the amount of the testator's share was payable. *Ib.*

Held, that the entry by the executors in the partnership books of the amount of the legacy to the credit of the legatees was a sufficient admission of assets. *Ib.*

3. Surviving partners, and executors who are not partners, but have continued their testator's assets in the business, are liable to account for profits made in respect of the value of a deceased partner's share only where there is no absolute contract for vesting in the survivors the share of the deceased partner, or only an option to take to his share on certain conditions, and the surviving partners neglect to perform such conditions or to liquidate the affairs of the partnership. *Vyse* v. *Foster*, 44 L. J., Ch., 37; L. R., H. L., 318; 31 L. T., N. S., 177; 23 W. R. 355. Varying 42 L. J., Ch., 245; 26 L. T., N. S., 725; 20 W. R. 697.

A. was partner in a firm under articles, which provided that the surviving partners should purchase the share of a deceased partner at a valuation. There was nothing to show that time was of the essence of the contract. A. died, having by will given his real and personal estate to three executors in trust for his children on their attaining the age of twenty-five, and with trusts in the meantime for investing in real or Government securities. One of his executors was partner at the date of the testator's will, and at his death another of his executors became a partner; the third never was a partner. The value of the testator's share in the firm was ascertained in the mode prescribed, but the executors allowed it to remain in the firm until the children arrived at the prescribed age, and the children were credited in the books of the firm with the ascertained value of their father's share, with compound interest at 5 per cent. The arrangement was most beneficial to the firm, and it was very advantageous to the children:—Held, that the contract for sale and purchase of the deceased partner's share was not affected by the delay in actual payment; that the relation of debtor and creditor, purchaser and vendor, subsisted as well between the partners who were executors and their co-executors as between the other partners and the executors, and that the executors, who were or afterwards became partners, were not liable to account for the profits made by them individually or by their firm generally through the use of their testator's capital, nor were the executors who had assented to such employment under any such liability. *Ib.*

The articles provided that the price of a deceased partner's share should be secured by promissory notes, and also that the surviving partners should enter into a covenant to indemnify the estate of the deceased partner from all partnership liabilities, and the representatives of the deceased partners were to release their interest in the firm and its effects. The promissory notes were not given, nor were

deeds of indemnity or release executed:—Held, that the purchase was not by the articles made conditional upon the execution of the release or indemnity or upon the giving of the promissory notes, and that the non-payment of the sums *ad diem* did not put an end to the contract. *Ib.*

Held, also, that the surviving partners ought to be parties to a bill seeking such relief. *Ib.*

The executors invested 1,600*l.* in a substantial, but not expressly authorized, improvement of their testator's property:—Held, that this sum should not be wholly disallowed them, but they might, at the option of the *cestuis que trustent*, take to the improved property at its original value, repaying to the estate what they had spent on the improvement. *Ib.*

1. A. and B. having carried on business in partnership with unequal capitals for a term of years, under articles which provided for an equal division of profits after payment of interest upon their respective capitals, continued, after the expiration of the articles, to carry on business until A.'s death upon the footing of the articles. At A.'s death his capital was more than three times as large as that of B., and B., who claimed under the expired articles the right to purchase the business, continued, without the consent of A.'s representatives, to carry it on and to use A.'s capital therein. In 1873, A.'s representatives commenced this suit against B., and at the hearing in 1875, it was decided that B.'s option to purchase ceased when the articles expired. The business was then sold under the order of the Court, after having been thus carried on for about three years:—Held, on further consideration, that after making a proper allowance to B. for managing the business, the profits earned since A.'s death must be divided between A.'s representatives and B., according to the proportion in which the partners were entitled to the capital employed in the business. *Yates* v. *Finn*, 13 L. R., Ch. D., 839; 49 L. J., Ch., 188; 28 W. R. 387.

4. Profits, whether Capital or Income.

2. By a partnership agreement accounts were to be taken and profits divided annually. If a partner died during the partnership term, his share of profits and interest on his capital were to continue to be paid to his representatives until the expiration of the term. One of the partners died, having by his will directed that his widow should, during her widowhood, have the income of his property, howsoever constituted or invested. The term expired during her widowhood. She was held entitled to the whole of the profits accrued after the annual account immediately preceding her husband's death, but to interest on his capital only as from the date of his death, so much of such interest as accrued in his lifetime being *corpus*. *Ibbotson* v. *Elam*, 14 W. R. 241; 1 L. R., Eq., 188.

3. Partnership articles provided that meetings of the partners should be held, and the profits should be divided annually. The partners, when reduced to two—the testator being one of them—met and resolved that the accounts should be made up half-yearly, in March and September. The meetings of the partners were held very irregularly, but when they took place it was the practice of the partners to examine the accounts, and to pass a resolution disposing of the profits, and until the passing of such resolution the profits were not carried to the separate credits. The testator, who died in August 1869, by will declared that from the day of his decease the annual income arising from his residuary personal estate should belong, in effect, to A. for life, and that for that purpose the clear profits arising from his partnership should be considered as annual income, and be paid to A. for life. In December 1869, at a meeting of the surviving partner and an executor of the testator, they resolved that the profits for the year ending March 1869 should be divided; and the testator's share was carried to the credit of his account under date 30th of September 1869, and it was in December 1869 paid to his executors. At a meeting of the same two persons in March 1870 they ordered the profits for the half-year ending September 1869 to be divided, and the testator's share was paid to his executors. In taking the account a question arose whether these shares should be distinguished as capital or as income:—Held, that the profits for the year ending March 1869 were capital, and belonged to the testator's estate; and that the profits for the half-year ending September 1869 were income, and belonged to A. *Browne* v. *Collins*, 12 L. R., Eq., 586.

4. A colliery partnership was carried on by five persons, holding seven shares transmissible on death or by sale (subject to restrictions), the affairs of the partnership being, by the partnership articles, subject to the control of the majority in value of the partners in meeting assembled. The articles contained a provision that upon the yearly settlement of accounts the clear profits, or a portion, if the majority at the meeting should so direct, should be added to the joint stock, or the same should be divided between the partners in proportion to their shares, and paid to them or passed to their separate accounts in the books of the partnership. After the death of one of the partners his share was retained under the provisions of his will and large sums advanced for the working of the colliery, which was then unremunerative. At length profits were made. They were not divided, but were carried forward from year to year in the balance to the credit of the profit and loss account, and in some years losses were debited to the same account. The profits were, as a matter of fact, employed in working and extending the colliery, but no resolution was passed to add the amount to capital. Fourteen years after the first profits were made, dividends were declared, and two years later the tenant for life under the deceased partner's will died, there being then a large sum to the credit of the profit and loss account:—Held, that the accumulated profits had been added to the joint stock, and that the tenant for life's representatives had no claim in respect of them. *Straker* v. *Wilson*, 19 W. R. 761; 24 L. T., N. S., 763; 40 L. J., Ch., 630; 6 L. R., Ch., 503. Varying 39 L. J., Ch., 463; 18 W. R. 643.

5. Profits in a partnership business partly

earned in the testator's lifetime, but not ascertained until after his death, are not apportionable, but are income of the testator's estate. *Lambert* v. *Lambert*, 22 W. R. 359; 29 L. T., N. S., 878.

IX. Dissolution.

See also VIII. *ante*—XV. & XVI. *post*.

I. *Grounds*, 5470.
II. *Notice*, 5475.
III. *Advertisement in Gazette*, 5476.
IV. *Sale by Court*, 5476.
V. *Rights and Liabilities of Partners and Creditors*, 5477.

I. GROUNDS.

1. *Conduct and Breach of Articles*, 5470.
2. *Death*, 5472.
3. *Lunacy*, 5472.
4. *Other Cases*, 5474.

1. Conduct and Breach of Articles.

1. The transactions of partners with each other cannot be considered merely with respect to the express contract between them. The duties and obligations arising from the relation between the parties are regulated by the express contract between them so far as it extends and continues in force; but if it, or so much of it as continues in force, does not reach to all those duties and obligations, they are implied and enforced by law. And it is often matter to be collected and inferred from the conduct of the parties whether they have held themselves, and ought or not to be, bound by the particular provisions in the express agreement. Where it is insisted that the conduct of one partner entitles the other to a dissolution, the Court must consider, not merely the specific terms of the express contract, but also the duties and obligations which are implied in every partnership contract. *Smith* v. *Jeyes*, 4 Beav. 503.

2. Under a bill by some partners in a joint concern on behalf of themselves and the others, three hundred in number, for a dissolution, receiver, etc., and an account, alleging mismanagement by the managers, the Court refused to interfere by injunction, and the appointment of a receiver in the first instance, until they had tried the means of redress provided by the articles. *Carlen* v. *Drury*, 1 Ves. & B. 154.

3. Bill by a partner, under a parol agreement, charging misconduct in the other partner, and praying a dissolution, account, and injunction from executing securities in the name of the firm; demurrer to prayer for a dissolution, because there was no writing between them, overruled. *Master* v. *Kirton*, 3 Ves. 74.

4. The Court will dissolve a partnership where it appears that the business cannot be carried on according to the true intent and meaning of the articles of co-partnership, although one partner objects to the dissolution. *Baring* v. *Dix*, 1 Cox 213.

5. The Court will not decree a dissolution of partnership, unless it be shown that the defendant has substantially failed in the performance of his part of the partnership agreement. It is not the office of the Court to enter into consideration of mere partnership squabbles. *Wray* v. *Hutchinson*, 2 Myl. & K. 235; 3 L. J., N. S., Ch., 62.

6. Partnership in the Opera House dissolved by the conduct of the parties making it impossible to carry it on upon the terms stipulated. *Waters* v. *Taylor*, 2 Ves. & B. 299.

7. A. and B. and the son of B. entered into partnership as solicitors, and by articles agreed: (2) that the partners were diligently and faithfully to employ themselves in carrying on and managing all the professional business in which they or either of them might be employed or concerned; (5) that B. should use his best endeavours to obtain the appointment of the partnership firm to three offices or clerkships which were then held by B., and such offices should be partnership appointments; (6) that all other compatible offices should be obtained, if possible, in the name of the firm, and the emoluments treated as part of the profit of the partnership; (15) that if B. or his son should retire, or A. or B. or his son should die, the share of the deceased partner should accrue to the surviving partners; and if B. or his son retired they were to use their best endeavours to secure the practice to the continuing partners, and such retiring partner should not practise within thirteen miles; (16) that if either partner should not diligently and faithfully employ himself in carrying on the said partnership's practice, and should, on receiving moneys, bills, notes, etc., knowingly and wilfully omit immediately to make entries thereof; or if A. or the son of B. should absent himself more than two months in one year, the others or other of the partners, if they or he should think fit, should be at liberty to dissolve the partnership, by giving to the offending partner a notice to that effect; and the partnership should from that time, or the time specified in the notice, be dissolved, in the same manner and with the same consequence as if it had been determined by the voluntary retirement of the offending partner. B. and his son subsequently procured their own appointment or the appointment of one of them to the offices or clerkships, and did not endeavour to procure the appointment of A. It was afterwards discovered that B. was greatly involved in debt, and he absconded in January 1849, and did not return to the business. In May 1849 A. served a notice, in the manner pointed out by the articles, on B. and his son to have the dissolution declared by the Court an injunction to restrain them from practising within thirty miles, and a decree that they should resign the several offices or clerkships —Held, that the plaintiff was entitled to dissolve the partnership as to B., but not as against the other partner (the son of B.), and that he was not entitled to dissolve it by notice under the sixteenth clause, without the concurrence of his co-partner (the son); the B. not having procured or endeavoured to procure for the partnership firm the appointments to the several offices or clerkships, so

to give the plaintiff at the dissolution either a share of the profits of the offices or the chance of competing for them, but such appointments having been procured for B. and his son to the exclusion of the plaintiff, B. and his son were not to be allowed to retain the offices for their exclusive benefit; that inasmuch as from the nature of the offices they could not be sold, nor could any manager or receiver be appointed to carry them on, the defendants ought to be charged with the value of the offices in the partnership accounts; that the plaintiff having given a notice of dissolution (acting under the sixteenth clause), and his co-partner having adopted it, the partnership should be treated as dissolved from the time of the notice, although not with the consequences attaching to a dissolution under the fifteenth clause; that the consequences of a dissolution, under the fifteenth clause, not having attached, the plaintiff, therefore, was not entitled to the injunction to restrain the defendants from practising within thirty miles. *Smith* v. *Mules*, 9 Hare 556; 21 L. J., N. S., Ch., 803; 16 Jur. 261.

An agreement, that, if any of several partners should not diligently and faithfully employ himself in carrying on the partnership practice, the others might give notice of dissolution—construed to refer to the diligent and faithful discharge by each partner of the portion of business carried on by him. S. C. 9 Hare 569: 16 Jur. 261.

A designed or wilful omission to make proper entries in the partnership books must be shown, in order to establish a case of breach of the partnership articles on the ground of an omission to make such entries. *Ib.*

1. A court of equity will dissolve a partnership before the expiration of the term, where the circumstances have so changed and the conduct of the parties is such as to render it impossible to carry it on without injury to all the partners. *Harrison* v. *Tennant*, 21 Beav. 482.

The Court dissolved a partnership entered into for a term of years, when, without any breach of the partnership articles, circumstances had so altered, that it could not be carried on upon the footing originally contemplated, and the confidence mutually reposed having ceased, and given place to mistrust, so that it was apparent that the partnership could not go on without mutual injury. *Ib.*

Where A. and B., who had been partners for some time, entered into a new partnership with C., at the same time B. took all the assets of the old firm, and covenanted to indemnify A. from the liabilities:—Held, that the partnership between the three might be determined by the Court for due cause without setting aside the deed of indemnity, which might be the subject of another suit. *Ib.*

2. Partnership dissolved, on the ground that the ill feeling between the partners rendered it impracticable that business could be successfully or beneficially conducted. *Watney* v. *Wells*, 30 Beav. 56.

3. The Court will not dissolve a partnership on the ground of a small infraction of the articles of co-partnership. *Anderson* v. *Anderson*, 25 Beav. 190.

Articles of partnership provided that if either of the partners should give guarantees, without consent, the other might dissolve on giving notice; one of the partners, in the course of eight years, gave a guarantee for 25*l*., and the other gave notice to dissolve:—Held, that this alone was not, in equity, a sufficient ground for a dissolution. *Ib.*

4. The plaintiff and defendant carried on the business of surgeons as partners under articles of partnership which provided that "in case either of the partners should be desirous of retiring, and should give twelve calendar months' notice in writing of such his desire to the other partner, the continuing partner should have the option of becoming the purchaser of the share of the retiring partner, for a sum equal to two years' purchase of the shares of the retiring partner in the next annual profits of the business, provided such option were exercised within one calendar month from the receipt by him of such notice of retirement." And they also stipulated that "each of the partners should employ himself assiduously in the business and concerns of the partnership business, and use his utmost skill, care, and diligence to promote and increase the same; and that if either of the partners should commit any breach of any of the covenants and agreements therein contained, and on his part to be respectively observed and performed, then and in any of such cases the other, if he should think fit, should be at liberty to dissolve the partnership by giving the party offending notice in writing, declaring the partnership to be dissolved and determined." On the 15th of August 1856 the defendant served upon the plaintiff the proper notice, under the articles, of his intention to retire from the business. Disputes having then arisen as to the conduct of certain portions of the business, calculated greatly to reduce the value of the annual profits of the concern, the defendant, on the 13th day of September 1856, having previously received notice, through his solicitor, that the plaintiff intended to exercise the option given him to purchase the defendant's share of the business, under the articles, served upon the plaintiff notice of a dissolution of the partnership, on the ground of an alleged breach, by the plaintiff, of the stipulations of the articles. Later in the same day the plaintiff served notice, under the articles, of his intention to exercise his option of purchase, in accordance with the intimation he had previously given to the defendant's solicitor:—Held, the evidence failing to show an actual violation of any stipulation of the partnership articles by the plaintiff, that the defendant was not entitled to a dissolution under the articles, and that the partnership business must be continued to be carried on, at whatever inconvenience, till the expiration of the twelve months after service of the plaintiff's notice of purchase. *Warder* v. *Stilwell*, 3 Jur., N. S., 9; 26 L. J., Ch., 373.

5. If a partner has been guilty of embezzlement, or has committed a breach of trust, his co-partner may, by notice, dissolve the partnership from the date of the notice, notwithstanding the articles of partnership provide for its continuance for the joint lives of the partners. *Essell* v. *Hayward*, 6 Jur., N. S., 690; 29 L. J., Ch., 806; 8 W. R. 593; 30 Beav. 158.

1. Where partners, who are so under a contract for a period, there being no specific power by the contract to dissolve, so conduct themselves that mutual confidence is impossible, the Court will, of its own authority, dissolve the partnership, against the will of one of the partners. *Baxter* v. *West*, 1 Dr. & Sm. 173.

2. If a partner neglects a business which he covenanted to manage for a salary of 200*l.* a year out of the profits, and a suit is instituted for a dissolution of the partnership, a decree will be made, and the Court will not compel him to pay the costs up to the hearing; but any neglect or breach of covenant by such partner may be considered in taking the accounts. *Hawkins* v. *Parsons*, 8 Jur., N. S., 452; 31 L. J., Ch., 479; 10 W. R. 377.

3. By articles of partnership for a term between A. and B., all bills were to be signed by A. only. B. drew a bill on a customer for the amount of his bill:—Held, that this was not a substantial violation of the articles. *Cheesman* v. *Price*, 35 Beav. 142.

The failure of one partner to enter in his accounts partnership moneys received by him is, of itself, and independent of any provisions in the articles of partnership, a sufficient ground for the other partner dissolving. *Ib.*

By articles of a partnership for a term each partner was to keep proper books of account and to enter all his receipts, and in default the other might dissolve the partnership. One partner had made small omissions in seventeen instances, which, in the aggregate, amounted to 9*l.* 10*s.*:—Held, that this justified the other in dissolving the partnership. *Ib.*

4. Immoral conduct on the part of a partner in a firm of bankers is not a sufficient ground for a dissolution as to that partner, although the articles of partnership contained a clause for dissolution in case any of the partners should do any act to the discredit or injury of the co-partnership. *Snow* v. *Milford*, 18 L. T., N. S., 142; 16 W. R. 554.

5. Articles of partnership provided that each partner (with the exception of one of them) should devote his whole time and attention to the business, and not directly or indirectly engage in any other business; should be just and faithful in all transactions, and give full information respecting his transactions on account of the firm; and that if any partner should fail to observe or perform any of the articles or stipulations therein contained, it should be lawful for the other partners to expel such partner. C., one of the partners, entered into an agreement with Z., a musical instrument maker, whereby he agreed to advance moneys, the interest on which was to consist of half the profits of the business, or at least to amount to 10 per cent. In consequence of this the other partners gave notice to the plaintiff that he had ceased to be a partner, and circulated a letter among their customers to the same effect. By the articles, in case of such expulsion, the expelled partner lost his share in the goodwill. The bill prayed that the notice of expulsion was invalid on the ground of *mala fides*, and because C. had no opportunity of being heard in his defence, and that his arrangement with Z. was not a breach of the articles:—Held, that his transactions with Z., although not amounting to a partnership, were a breach of the articles: that no notice of intention to expel or opportunity of defence was necessary, and the expulsion was valid. *Cooper* v. *Page*, 34 L. T., N. S., 90.

6. By the partnership articles the partners were allowed to draw a fixed sum quarterly out of net profits, with a proviso that, if at the end of the year the net profits should not have amounted to the sum drawn, each of the partners should be debited in the partnership accounts with, and should at the end of the partnership repay to the co-partnership, the difference between the amount of the sums received in respect of such quarterly payment and the sum he would have been entitled to receive as his share of net profits. The partnership for the two first years proved a dead loss, and the drawings, consequently, came out of the capital. The plaintiff wished for an immediate dissolution, but the defendant wished to carry on the partnership a little longer. The plaintiff commenced an action for dissolution, and applied for an interim injunction to restrain the defendant from drawing out of the capital until the hearing:—Held, that the drawing out of capital was, notwithstanding the proviso for repayment at the end of the partnership, such misconduct within the meaning of the partnership articles as justified the Court in granting the injunction, but that the plaintiff also must undertake not to draw out of capital. *Lemann* v. *Berger*, 34 L. T., N. S., 235.

2. Death.

7. Death of one partner held a dissolution of partnership where there is no time of duration appointed. *Crawshay* v. *Maule*, 1 Swan. 509; 1 Wils. 181.

8. The death of a partner, of itself, works a dissolution of the partnership; and the mere want of notice does not, it seems, make the estate of the deceased partner liable to the continuing partners. *Secus*, if one of the partners is an executor of the deceased. *Vulliamy* v. *Noble*, 3 Mer. 614.

9. Partnership for term of years is dissolved by death of one before expiration of term *Gillespie* or *Cranford* v. *Hamilton*, 3 Madd 351.

10. A partnership was entered into between A. and B. for a term of years, subject to a power in A. to determine it by giving three months' notice; and it was provided, that in case of the death of A. before the partnership was fully wound up, his executors should settle its affairs. A. during the term gave notice to determine, and died before the expiration of the three months:—Held, that the partnership determined on the death of A. *Bell* v. *Nevin*, 12 Jur., N. S., 935; 15 W. R. 85.

3. Lunacy.

11. If a partner is so far disordered in his mind, as to be incapable of conducting the business according to the terms of the articles of co-partnership, a court of equity will dissolve the partnership. *Sayer* v. *Bennet*, Cox 107.

1. One partner, notwithstanding a temporary disorder, considered a partner. *Pearce* v. *Chamberlain*, 2 Ves. 35.

2. Lunacy is not a dissolution of partnership. *Wrexham* v. *Hudleston*, 1 Swan. 514. n.

3. The lunacy of a partner is not *ipso facto* a dissolution of the partnership, but is a ground for the dissolution, if the other partner or partners come to the Court for a decree of dissolution on the ground of such lunacy. One of two partners having continued the partnership business for some time after the lunacy of the other, and having then sold the business, the representative of the deceased lunatic partner was held to be entitled to his share of the partnership profits up to the period of sale. *Jones* v. *Noy*, 2 Myl. & K. 125.; 3 L. J., N. S., Ch., 114.

4. Upon the lunacy of one member of a partnership firm being found by commission, the Court will decree a dissolution as against him, and an account, with a reference to the Master as to the lunacy. *Milne* v. *Bartlet*, 8 L. J., N. S., Ch., 254; 3 Jur. 358.

5. During a partnership for twenty-one years, one of the parties became and was found a lunatic:—On a bill by the other partner to dissolve the partnership on account of the lunacy, to which the committee was made a party, and admitted the lunacy, a reference was made to the Master as to the competency of the partner to conduct the business according to the articles. *Patey* v. *Patey*, 5 L. J., N. S., Ch., 198.

6. Decree for a dissolution of partnership on the ground of insanity as from the date of the decree. *Sander* v. *Sander*, 2 Colly. 276.

7. On a bill to dissolve a partnership on the ground of the lunacy of a partner, the Court will not make its decree retrospective, even to the filing of the bill, still less to the time when the defendant first became incapable of attending to business. *Besch* v. *Frolich*, 1 Ph. 172; 12 L. J., N. S., Ch., 118; 7 Jur. 73.

8. The share of a deceased partner in lands purchased by the members of a trading co-partnership, with money belonging to the partnership, and held as part of the stock of the firm, is to be deemed as converted into personal assets, and as such passes to his personal representative. The firm of co-partners, constituted by the deed of 29th October 1862, stated in *Cuffe* v. *Murtagh* (7 L. R., Ir., 411), and which was formed to carry on the business of corn factors, flour merchants, and otherwise as the majority of the firm should agree to trade or deal in, acquired two denominations of freehold land, A. and B., purchased out of partnership assets. One of the partners farmed B., and resided there, and the accounts of the farming were entered in the profit and loss of the firm. The lands of A. were occupied by tenants, but the rents were also brought into the profit and loss account, and money was raised on the security of the lands for the purposes of the firm, on the death of one of the partners, whose share was not taken by the survivors:—Held, that the share of the deceased in the lands was personal property, which passed to his personal representative, not to his heir. *Waterer* v. *Waterer* (15 L. R., Eq., 402), observed on and distinguished. *Murtagh* v. *Costello*, 7 L. R., Ir., 428.

In such a case the dissolution will not be made retrospective, but will be ordered from the date of the judgment. *Besch* v. *Frolich* (1 Ph. 172) followed. *Ib.*

9. Confirmed and incurable insanity is a ground for dissolving a partnership; but a mere diminution of capacity in attending to it, is insufficient for that purpose. *Sadler* v. *Lee*, 6 Beav. 324; 12 L. J., N. S., Ch., 407; 7 Jur. 476.

Difficulty in holding a partner who ostensibly takes an active part in the conduct of the business free from responsibility, on the ground of insanity, in respect of the acts of the firm. *Ib.*

10. A., B., and C. were partners. A. died, having bequeathed his residuary property to G. S. and H. S. equally. H. S. thereupon assumed to act as partner in the place of A., and employed the assets in the business. A bill was filed by G. S. to administer A.'s estate, and for an account of the assets employed by H. S. in the business. The bill alleged that the partnership was now to be wound up, denied the right of H. S. to be a partner, and stated that B., another of the partners, had been since some time before A.'s death imbecile and incapable of transacting business. This last statement, and the interrogatories founded upon it, being excepted to:—Held, that B.'s state of mind during this time was a material fact in considering whether H. S. was properly a partner, and whether it was possible now to wind up the partnership business. The exceptions were overruled. *Simpson* v. *Chapman*, 15 Jur. 1052.

11. By articles of partnership it was stipulated that, in the event of such severe illness as should oblige the defendant to quit India for more than one year, the books should be made up to the end of the partnership year, and a valuation should be made of the stock. The defendant became an incurable lunatic on his way to India. He arrived there in 1841, and was sent back:—Held, that this article contemplated a dissolution; that, according to the fair meaning of the article, the event had happened, and that his partners were entitled to a dissolution as from the end of the partnership year 1842, and not, as contended by the defendants, from the decree. *Bagshaw* v. *Parker*, 10 Beav. 532.

12. The Court will entertain a bill for the dissolution of a partnership on the ground of insanity of a partner, and will refer it to the Master to inquire into the fact; but there must be strict evidence of insanity. *Kirby* v. *Carr*, 3 Y. & Coll. 184; 2 Jur. 741. S. C. *nom.* *Kirby* v. *Cox*, 8 L. J., N. S., Exch. Eq., 31.

13. Decree made for the dissolution of a partnership in consequence of the lunacy of one of the partners. *Leaf* v. *Coles*, 1 De G. M. & G. 171.

In a case where a dissolution of partnership had been decreed, in consequence of the lunacy of one of the partners, and large sums had been paid into court to the separate account of the lunatic in respect of his share of the capital and profits of the business; the Lord Chancellor, on being subsequently satisfied of the complete recovery of the lunatic, ordered the fund to be paid out to him. *Id.* 417.

Mode of proceeding in such cases. *Ib.*

14. A notice of dissolution given to a lunatic partner is sufficient to put an end to the part-

nership. *Mellersh* v. *Keen*, 27 Beav. 236; S. P. *Robertson* v. *Lockie*, 15 Sim. 285; 10 Jur. 533.

1. Where one of three partners in a mining concern had become lunatic, and committees of his estate had been appointed, the Court directed the partnership property to be sold as a going concern, with liberty to all parties to bid. *Rowlands* v. *Evans*, *Williams* v. *Rowlands*, 8 Jur., N. S., 88; 31 L. J., Ch., 265; 10 W. R. 186; 5 L. T., N. S., 628; 30 Beav. 302.

Where notice had been given to one of the partners to exercise his option of pre-emption, under the provisions of the partnership articles, and he afterwards became lunatic, without having exercised his option, such notice held to be binding upon the committee afterwards appointed, a sale having taken place in the meantime, and that the right of pre-emption was gone. *Ib.*

2. Motion for an interim injunction to restrain a partner who, six months previously, being temporarily of unsound mind, had attempted to commit suicide, from interfering in the partnership affairs, refused, the evidence not showing that, at the time of the motion, he was incompetent to conduct the business of the partnership according to the partnership articles. And a motion in a cross suit, to restrain the defendants in such cross suit from preventing the partner who had been insane from transacting the business of the partnership as a partner thereof, granted. *Anon.*, 2 Kay & J. 441.

The circumstances, that the conduct and state of mind of the partner in question were such as at once to destroy the confidence of the other partners, and to induce customers to withdraw their custom from the firm, and that the malady under which he laboured might as easily have led him to attempt the life of one of his partners, held not to furnish sufficient ground for granting the first motion. *Ib.*

Examination of the authorities on this subject. They establish these propositions: first, actual insanity of a partner is not in itself a dissolution of the partnership, but there must be a decree for dissolution. *Ib.*

Secondly, such a decree, notwithstanding actual insanity proved to have existed before the filing of the bill, will not be made in a disputed case without a further inquiry whether, at the time when the relief is sought, the party is in such a state of mind as to be able to conduct the business of the firm in partnership with the other members, according to the articles of partnership. *Ib.*

Semble, the affirmative of this issue would then lie with the party who had been of unsound mind. *Ib.*

And thirdly, insanity existing when the relief is sought, is good ground for a dissolution. *Ib.*

3. In the case of a bill for the dissolution of a partnership on account of the alleged insanity of one of the partners, there can be no dissolution without a decree of the Court, and such decree is not made without further inquiry as to the state of mind of the party at the time the case comes before the Court. An injunction to restrain such a partner from interfering with the partnership business refused, there being no evidence to satisfy the Court that he was at that time incompetent to transact business, although there had been undoubted insanity some months before. *Ogilvy* v. *Gregory*; *Gregory* v. *Ogilvy*, 4 W. R. 67; 25 L. J., Ch., 32.

4. A person who has become permanently insane, but has not been so found by inquisition, may maintain a suit by his next friend for the protection of property in which he is interested as partner. *Jones* v. *Lloyd*, 18 L. R., Eq., 265; 43 L. J., Ch., 826; 22 W. R. 785; 30 L. T., N. S., 487.

Permanent lunacy of a partner is a ground of dissolution at the instance of the lunatic as well as of the other partner. *Ib.*

A bill was filed by a next friend on behalf of a person of unsound mind not so found by inquisition, against his partner in business, alleging that he had for some time past been suffering from softening of the brain and was of unsound mind, and that it would be for his benefit that the partnership should be dissolved; and praying that the partnership might be dissolved and accounts taken, and his share in the assets secured for his benefit, and for a receiver:—Held, that the suit could be maintained. *Ib.*

Articles of partnership provided that either party should be at liberty to determine the partnership at the end of the first seven years of the term, on giving previous notice to the other partner of his intention to do so. One partner having become insane, the other served on him notice of his intention to determine the partnership at the end of the first seven years of the term:—Held, that the notice could not be withdrawn without the consent of the insane partner. *Ib.*

4. Other Cases.

5. A partnership for ten years dissolved by decree of the Court at the end of three years, the relations between the partners being such that it could not be continued with advantage to either party. *Leary* v. *Shout*, 33 Beav. 582.

6. The Court of Chancery has jurisdiction to dissolve a partnership of which the business cannot be carried on at a profit without further capital, each partner having contributed his share of capital, and it is not necessary to show that the concern is embarrassed. *Jennings* v. *Baddeley*, 3 Kay & J. 78; 3 Jur., N. S., 108.

Dissolution of a partnership decreed on that ground in a case involving other and special circumstances, on which, however, the Court did not rely as essential to the decree. *Ib.*

B., owner in fee of coal mines on which he had expended 3,000*l.*, applied to J. for further capital, and both parties equally conceiving that 3,000*l.* would be sufficient to bring the mines to working order, it was agreed that a lease should be made for fifty years from 1852, at a dead rent and a royalty reserved to B. and his assigns, and that J. and B. should be partners in equal shares in the mines, and in the business of working and selling the coal, during the lease. There was no provision for raising further capital. In 1856 J. had advanced not only his 3,000*l.*, but 25,000*l.*, and it appeared that it was impossible to work the mines at a profit, and that there was no chance of being able to do so. B. was unable, and J. unwilling, to advance any more capital. J. filed

a bill for a dissolution, which was ordered accordingly, on the ground that the objects of partnership had wholly failed. *Ib.*

1. A., B., and C. agreed to enter into a joint speculation in tea. One consignment only was made by A. to B., which was paid for by C. Disagreements arose respecting it, B. and C. insisting that it was a spurious article, and repudiating the consignment:—Held, that the partnership relations were not put an end to by the repudiation; that the rights, obligations, and liabilities of the parties could not be settled by any simple litigation at law between any two, and that the matter formed the proper subject of a suit in equity. A bill under the above circumstances, insisting on the repudiation, and in the alternative asking to have the accounts taken and the rights, etc., of the parties determined, held not demurrable on the ground of the inconsistency of the alternative relief. There are necessarily things to be done preparatory to the commencement of a partnership, and matters necessary to be done after its termination for the purpose of winding it up. These are not to be excluded in the consideration of the partnership dealings and transactions. *Cruikshank* v. *M'Vicar*, 8 Beav. 106; 14 L. J., N. S., Ch., 41.

2. Where a partner has a right to appoint a person to succeed upon his death to his share of the business, and the person so appointed refuses to accept that share, or to comply with the stipulation of the articles, the partnership is dissolved; but the dissolution is not a dissolution which is wrought by the exclusion of the appointee by the surviving partners. *Kershaw* v. *Matthews*, 2 Russ. 62.

3. A. having been rendered incapable of performing his partnership duties, his partner filed a bill against him for a dissolution. Afterwards and before the hearing, A.'s health improved:—Held, that there was not sufficient ground for dissolving the partnership, and all proceedings were stayed, with liberty to apply. *Whitwell* v. *Arthur*, 35 Beav. 140.

4. In February 1847 A. and B. entered into a joint contract with a company for making and for completing the works of a railway. In May 1848 execution was sued out against A. by a creditor, and the sheriff sold the moiety of his goods, etc., on the railway to B. B. then assigned his interest in the contract to the plaintiff by way of security. B. was allowed, with the knowledge of the company, to proceed with the execution of the works alone till the 25th August 1848, after which date the works were completed by the plaintiff, who gave notice of the assignment to him to the company. The company paid various sums in respect of the works to B. and the plaintiff; but on the plaintiff bringing an action, in February 1850, against the company in the names of A. and B., the company obtained a release from A.:—Held, that the partnership between A. and B. was dissolved by suing out the execution in May 1848; that the release obtained from A. was void as against B. and the plaintiff; that the assignment by B. was effectual to pass to the plaintiff all moneys payable to B. under the contract; and that B. and the plaintiff were alone entitled to payment for the works executed by them under the contract after the 10th May 1848. *Aspinall* v. *London & North Western Railway Co.*, 1 W. R. 518; 11 Hare 325. See *Perrens* v. *Johnson*, 3 Jur., N. S., 975; 3 Sm. & G. 419.

II. NOTICE.

5. Partnership without any provision as to its duration may be determined without previous notice, subject to the accounts to wind up the concern. *Peacock* v. *Peacock*, 16 Ves. 49.

6. Where the contract neither expressly nor by reference limits the duration, the partnership may be terminated at a moment's notice by either party. *Crawshay* v. *Maule*, 1 Swan. 506; 1 Wils. 181.

7. *Quære*, whether partnership for an indefinite time, without deed, can be dissolved on notice by either party. *Littlewood* v. *Caldwell*, 11 Price 98.

8. The general right which every member of a partnership has to dissolve the partnership, will not be controlled except by clear expressions: that right will not be controlled by the partners taking a lease for years of the premises where the trade is to be carried on; nor by provisions in the articles as to the amount of capital to be brought in by the several partners in successive years; nor by provision for the event, where the partners are in number more than two, of the exclusion of one of them by the others. *Barter* v. *Plenderleath*, 2 L. J., Ch., 119.

9. A partnership without articles, and for an indefinite period, may be dissolved by any partner at any time, without previous notice, subject to the engagements of the partnership; but the existence of engagements with third persons cannot prevent the right of dissolution as among themselves. The consequence of a dissolution, where there are articles prescribing the terms, is a general sale and account of the joint property: one or more partners therefore cannot insist on taking the share of another at a valuation, or that he shall remove his proportion from the premises, thereby securing the goodwill. Partner after the dissolution of the partnership, continuing to trade with the joint property, must account for the profits. *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298.

10. Determination of an agreement of the nature of a partnership at will, held to result from the animus of the parties towards each other, without any formal notice. *Pearce* v. *Lindsay*, 3 De G. J. & S. 139.

11. A person selling a share in his business, and becoming a partner with the purchaser for an indefinite period, will not in equity be permitted to dissolve the partnership immediately afterwards, and retain the premium. *Featherstonhaugh* v. *Turner*, 25 Beav. 382; 28 L. J., Ch., 812.

12. A notice of dissolution given to a lunatic partner is sufficient to put an end to the partnership. *Mellersh* v. *Keen*, 27 Beav. 236.

Notice by two partners to a third that "we shall dissolve the partnership on the 31st of December" operates as a dissolution on that day. *Ib.*

13. By articles of partnership between A. and B. the partnership was to be dissolved on either party giving the other six months' notice. A. gave the required notice:—Held, that it was effectual, notwithstanding B. was insane

when it was given. *Robertson* v. *Lockie*, 15 Sim. 285; 10 Jur. 533.

1. If a partnership is carried on beyond the term fixed for its duration, it can only be dissolved by special notice, and in its absence no notice to dissolve will be implied. *Parsons* v. *Haward*, 8 Jur., N. S., 474, 924; 31 L. J., Ch., 666; 10 W. R. 531, 654; 6 L. T., N. S., 523, 628; 31 Beav. 199; 4 De G. F. & J. 474.

2. A partnership at will held dissolved as from the date of the filing of a bill which prayed for its dissolution. *Shepherd* v. *Allen*, 33 Beav. 577.

3. Articles of partnership provided that either party should be at liberty to determine the partnership at the end of the first seven years of the term, on giving previous notice to the other partner of his intention to do so. One partner having become insane, the other served on him notice of his intention to determine the partnership at the end of the first seven years of the term:—Held, that the notice could not be withdrawn without the consent of the insane partner. *Jones* v. *Lloyd*, 18 L. R., Eq., 265; 43 L. J., Ch., 826; 30 L. T. 487; 22 W. R. 785.

4. W. and C. entered into co-partnership for a term of twenty-one years in the trade of mill-stone makers, C. being besides cashier of the firm. Disputes of old standing existed between the partners at the commencement of the co-partnership, and ill-temper was exhibited on frequent occasions between them and afterwards. C. ultimately, and within a year from the commencement of the partnership term, took proceedings to determine the co-partnership by notice under the expulsion clause, upon the ground of W.'s alleged violations of the partnership articles in six particular items, which were specified in a notice to him, dated in March 1871. W. filed a bill to restrain C. from proceeding further with that notice, and to have such notice declared void. C. afterwards took proceedings under the arbitration clause, and W. amended his bill for the purpose of restraining these latter proceedings also. The particular alleged violations were explained away upon the evidence as entire mistakes on C.'s part attributable to the previous state of feeling existing between the partners:—Held, that W. was entitled to have the notice of dissolution declared void, and all proceedings upon such notice restrained; also, that C. must be restrained from proceeding under the arbitration clause, and that he must pay to W. his costs of the litigation. *Witt* v. *Corcoran*, 21 W. R. 47.

5. By partnership articles, one of three partners might determine the co-partnership by giving six calendar months' notice; and in that case, immediately after the expiration of the six calendar months, the assets were to be valued, and after the valuation being made and the result communicated, the partnership "shall, in regard to all the said partners, cease and determine":—Held, that the partnership was dissolved at the expiration of the six months, and not from the completion of the valuation, though it continued after the six months, for the purpose of winding it up. *Griffiths* v. *Bracewell*, 35 Beav. 43.

6. The partnership articles between two surgeons, W. and S., provided that either might give the other twelve months' notice of an intention to retire, when the party receiving such notice should have one month wherein to exercise his option of becoming the purchaser of his retiring partner's share. It was also provided, that either partner might, under certain circumstances of misconduct, declare the partnership peremptorily at an end. S. having given notice to W. of his intention to retire, the latter, within the month, signified his intention of purchasing. S. then attempted to countermand his previous notice, and declare the partnership dissolved upon various allegations of misconduct:—Held, that he was bound by his notice; that W. had the option of purchasing; and that both parties must abide by the stipulations in their partnership deed, however inconvenient in the result. *Warder* v. *Stillwell*, 5 W. R. 174; 26 L. J., Ch., 373; 3 Jur., N. S., 9.

7. Three members of a company which was unlimited as to its duration, executed a deed dissolving the company, and left a notice of it at the company's office; they then filed a bill on behalf of themselves and all other members, except the defendants, against the officers of the company, alleging that the company consisted of upwards of 400 members, and that the plaintiffs were ignorant of, and had no means of learning, their names and residences, and praying that the company might be declared to be dissolved:—Held, that all the members ought to have been served with notice of the deed, and a demurrer to the bill for want of equity was allowed. *Wheeler* v. *Van Wart*, 9 Sim. 193; 2 Jur. 252.

III. ADVERTISEMENT IN GAZETTE.

8. Inasmuch as no advertisement of the dissolution of a partnership is inserted in the London *Gazette*, unless it is signed by both partners, the Court, in a suit for dissolution of partnership, will make an order declaring that the defendant be decreed to do all acts necessary for procuring a dissolution of the partnership to be inserted in the *Gazette*. *Troughton* v. *Hunter*, 18 Beav. 470.

IV. SALE BY COURT.

9. Articles of partnership providing that upon its expiration the stock in trade should be divided, received, and taken by the partners according to their respective interests:—Held, that they could not be carried into execution literally, and that therefore by the general law of partnership the settlement must be by a sale and division of the whole. *Cook* v. *Collingridge*, Jac. 617; 1 L. J., Ch., 74.

10. Decree for sale of partnership concern, restraining the managing partner from acting, with liberty to either party to lay proposals before the Master for management until the sale. *Waters* v. *Taylor*, 2 Ves. & B. 299.

11. In a suit instituted for the dissolution of a partnership, it being clear on the bill and answer that some party is entitled to a dissolution, a sale of the partnership property may be directed on motion. *Crawshay* v. *Maule*, 1 Swan. 506; 1 Wils. 181.

If a partnership is actually ended, no person can make any use of the property inconsistent

with the purpose of winding up the concern. *Ib.*

In the instance of a trading partnership actually dissolved, the Court orders a sale on motion. S. C. 1 Swan. 523. And see *Crawshay* v. *Collins*, 15 Ves. 227.

1. In a suit to wind up a partnership, the Court will not, on motion before decree, order a sale of the partnership effects, unless the partnership is actually and clearly dissolved. *Broadwood* v. *Goding*, 5 L. J., N. S., Ch., 96.

Two partners carried on business for nearly twenty-one years, on the terms of articles, which had been prepared, but not executed. In a suit to wind up the partnership, the Court refused, upon motion immediately before the expiration of the term, to order a sale of the effects. *Ib.*

2. The consequence of a dissolution where there are articles prescribing the terms, is a general sale and account of the joint property: one or more partners therefore cannot insist on taking the share of another at a valuation, or that he shall remove his proportion from the premises, thereby securing the goodwill. Partner after the dissolution of the partnership, continuing to trade with the joint property, must account for the profits. *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298.

3. Where there is no agreement between partners for the stock and plant of the concern to be taken by either party at a valuation on the determination of the partnership, one partner cannot either be compelled to take, or compel his co-partner to take, the stock and plant at a valuation, but each partner is entitled to have the value of the stock and plant ascertained by sale. *Burdon* v. *Barkus*, 3 Giff. 412; 8 Jur., N. S., 130; 5 L. T., N. S., 573. Affirmed 8 Jur., N. S., 656; 31 L. J., Ch., 521; 7 L. T., N. S., 116.

The partner who had expended certain moneys upon the partnership concern, on the faith of, the partnership being co-extensive with the lease:—Held, entitled to an inquiry whether he ought to be recouped such money out of the partnership assets. *Ib.*

4. *Quære*, whether, upon the dissolution of partnership not under articles, a partner has an inherent right in that character, without the assistance of a court of equity, to insist upon the sale of the partnership effects. *Cragg* v. *Ford*, 1 Y. & Coll. C. C. 280.

5. Several persons, who were jointly entitled to several leases of a colliery, worked it in co-partnership:—Held, on a dissolution, that one of the co-owners of the leases could not insist on a partition, though there might be no debts, but that the whole must be sold. *Wild* v. *Milne*, 26 Beav. 504.

6. Several persons, having obtained a mining lease for sixty years, entered into partnership in the business of iron ore workers for that period. The business consisted of winning and selling hematite iron in an unmanufactured state. One of them having become lunatic, the Court dissolved the partnership, and directed the concern to be sold by an indifferent person, with liberty to the parties to bid. *Rowlands* v. *Evans*, *Williams* v. *Rowlands*, 30 Beav. 302; 8 Jur., N. S., 88; 31 L. J., Ch., 265; 10 W. R. 186; 5 L. T., N. S., 628.

7. An order was made directing a reference to the chief clerk, whether it would be for the benefit of the estate of a deceased partner that the partnership property should be sold by public auction, or whether a valuation which had been made in a former suit should be adopted. A large portion of the capital of the deceased partner remained in the business. The estate of the deceased partner claimed to be entitled to profits made subsequent to the date of the valuation. The chief clerk refused to go into the question of subsequent profits, and reported in favour of the valuation in preference to a sale:—Held, that the chief clerk had acted within the scope of his authority, and had come to a reasonable conclusion. *Blyth* v. *Blyth*, 4 L. T., N. S., 536.

8. The executors of a deceased partner held entitled to have the partnership premises (the freehold of which belonged to the firm), and the business sold in the most advantageous manner, whether as a going concern, or otherwise. *Hall* v. *Barrows*, 1 N. R. 543.

9. Where the premises at which a partnership business was carried on belonged to one partner exclusively, the Court, in directing a sale of the business in an action between the partners for dissolution, ordered the sale to be conducted by an independent firm of solicitors, with liberty to either partner to bid. *Pawsey* v. *Armstrong*, 18 L. R., Ch. D., 698; 50 L. J., Ch., 683.

10. The partners in a mine being hopelessly embarrassed, and their position becoming more critical every day, the Court interfered against a dissentient partner on motion before the hearing, and ordered an immediate sale of the mine and partnership property. *Heath* v. *Fisher*, 38 L. J., Ch., 14; 19 L. T., N. S., 805; 17 W. R. 69.

Practice on Sales by the Court Generally.]
See VENDOR AND PURCHASER.

V. RIGHTS AND LIABILITIES OF PARTNERS AND CREDITORS.

1. *Of Creditors against Retired Partner*, 5477.
2. *Of Creditors of Old Firm against New Firm*, 5480.
3. *Payments after Dissolution*, 5481.
4. *Of Retired against Continuing Partner*, 5481.

1. Of Creditors against Retired Partner.

See also VIII. 11. *ante.*

11. A. and B., partners in a goldsmith's trade, are bound in a bond to J.; A. and B. break off the partnership and divide their stock; J., the obligee in the bond, knows this, and that A. took upon him to pay the debts, and after a great distance of time brings a bill against the executor of B., yet he (J.) shall recover. *Heath* v. *Percival*, 1 P. W. 683; 1 Stra. 403.

12. If a retiring partner assign all his share in the concern to two of the continuing partners upon trust to pay him an annuity for his life, subject to abatement or enlargement, with the fluctuation of the profits of trade, that will not, with reference to creditors, determine the partnership. *Exp. Wilson*, Buck. 48.

A retiring partner assigns all his share in the concern to two of the continuing partners upon trust for his infant children, in such shares as he should appoint, and in default of appointment, upon trust for the children, to be divided amongst them when the younger shall attain twenty-one:—Held, that the contingent interest the father had in the share so assigned, depending upon the death of any of the children under twenty-one, was such an interest reserved by him in the concern, as with reference to creditor prevented the determination of the partnership. *Ib.*

1. After a dissolution of partnership by death or otherwise, the surviving or continuing partners of the firm are (in a suit by persons claiming to be creditors of the partnership) entitled to the protection of the Statutes of Limitation, although as between themselves and retired partners, or the estates of deceased partners, the partnership accounts are never settled; and the retired partners, or the executors of a deceased partner, are in such a suit against them entitled to the like protection. *Way* v. *Bassett*, 5 Hare 68; 15 L. J., N. S., Ch., 1; 10 Jur. 89.

2. A. authorised the sale of his share in a brewery to B., his surviving partner, whom he appointed one of his executors. B., conceiving he had duly become the purchaser, carried on the business until his death, and it was subsequently carried on by C., his executor. Afterwards, upon a bill filed, the sale was set aside, and the estate of A. became entitled to share in the profits made subsequent to A.'s death. C. afterwards became bankrupt, having the whole trade property in his possession:—Held, that the trade creditors during the time the business was carried on by C. had no lien for their debts on A.'s share. *Stocken* v. *Dawson*, 9 Beav. 239. Affirmed 17 L. J., N. S., Ch., 282.

3. A debt due from a trading firm of four persons was, with their knowledge, assigned by the creditor to two of the partners, upon certain trusts. One of the partners (not a trustee) afterwards retired, leaving in the new firm sufficient assets to discharge all the liabilities of the old firm. The trustees, with the knowledge of the retiring partner, permitted the trust-fund to remain outstanding upon the security of the new firm. It was afterwards lost, in consequence of breaches of trust, of which the retiring partner was a consenting party:—Held, that he was answerable, *quâ* debtor, to the *cestui que trust* for the loss; but the Court would not give relief against him as a person who had concurred in the breach of trust, for the bill did not ask that relief against him. *Cummins* v. *Cummins*, 3 J. & L. 64; 8 Ir. Eq. R. 723.

4. Where to a bill for an account against a partnership, a retired partner averred by his answer that the plaintiff had adoped the successors as his exclusive debtors, but stated no facts in proof of such adoption, the account directed against him, but without prejudice to the question of his being discharged or not by the acts of the plaintiff. *Benson* v. *Hadfield*, 4 Hare 32.

5. A. and B., partners, were solicitors to the commission. More than six years back they received various sums of money on account of the estate, having a set-off in respect of their bill of costs, but which bill they did not deliver to the assignee within six years. Beyond the six years, A. and B. (upon an agreement that A. should pay all the debts) dissolved partnership, and the assignee, with knowledge of this fact, continued to employ A. alone as the solicitor to the commission, and no attempt was made to charge B. with the moneys received by A. and B. till very lately, viz., when an official assignee was appointed; nor had B. ever acknowledged any liability to account:—Held, first, that as between B. and the creditors, neither the Statute of Limitations, nor laches, nor other conduct of the assignee would operate as a bar, A. and B being solictors to the commission. But, secondly, that as the assignee was able to recoup the estate, he could not, under such circumstances of conduct on his part, call on B. to account. A. had become bankrupt. *Semble*, nevertheless, that he or his assignees were necessary parties. *Exp. Gould, Re Robertson*, 4 Dea. & Ch. 547; 2 Mont. & A. 48; 4 L. J., N. S., Bky., 7.

6. In 1780 A. and B. were partners as army agents, having been in the habit of receiving money from the government for the pay of certain regiments. In that year A. retires, and B. and C. carry on the business as before, but without coming to any account with the Crown, and without any account whatever being taken of the liability of the firm of A. and B., at the time of A.'s retiring. In 1783 B. and C. are required by the government to render the account of moneys issued for the several regiments during the period of the existence of the firm of A. and B., and of B. and C., which they do without any break appearing in them at 1780, when A. retired. But the accounts rendered do not state any debtor and creditor account as between the respective firms and the Crown, but show simply the sums issued in respect of each regiment, and how they have been applied. On the formation of the firm of B. and C., the old ledgers are used; there was no agreement to take to the liabilities of A. and B., and everything is carried on in the same manner as before, till 1783, when the 23 Geo. 3, c. 30 was passed, which directs that an estimate is to be thenceforth prepared of the amount which will be required for the purposes of the army; that the amount is to be paid from time to time into the Bank; that the paymaster of the forces is to communicate to the secretary at war the sums that will be required for the purposes of the different regiments; that the agents of the different regiments are to communicate to the secretary at war the sums that will be required for the different regiments, and an issue is then made to the agent for the particular purposes of those regiments, and annual accounts were required to be rendered by the several agents. Upon this footing matters are carried on till 1804, when B. and C. became bankrupts, and a balance of 150,000*l.* is found due to the Crown; and in 1820, and not before, it is found that 91,000*l.*, part of the 150,000*l.*, was due at the time of the retirement of A. *Semble*, under these circumstances, that B. and C. could not be presumed to have adopted the debt of A. and B., and that the government could not be presumed to have assented thereto had such adoption existed: and, consequently, that the government had

no right to prove the entire sum of 150,000*l.* against B. and C.'s estate. But it also appearing that the assignees had, by proceedings in the Court of Session in Scotland, treated the 91,000*l.* as due from their estate: and the government having, on the other hand, sued the representatives of A. in Scotland (subsequently to the discovery of the balance being due), so as to charge A. alone as the debtor, a claim was permitted to be entered, till the result of the Crown's proceedings, which were still pending against the representatives of A., was ascertained. *Exp. Sandham*, 4 Dea. & Ch. 818.

1. A general devisee in trust for the testator's widow and children, having received from the widow, who was executrix, on her going abroad to recover part of the property, bonds for a debt from him and his partners to the estate, in settling the affairs of the partnership on the retirement of one partner who had notice of the trust, delivered to him the bonds to be cancelled without the privity of the *cestui que trust*; continuing to make remittances on that account from the funds of the new partnership: the partner who retired is not discharged. *Dickenson* v. *Lockyer*, 4 Ves. 36.

2. A. and B., partners, were indebted to the plaintiff on a promissory note. A. retired from the partnership. At the time of his retirement a large sum was due to him from the concern; for securing the payment of which B. gave him his bond; and it was agreed between them that B. should take on himself all the liabilities of the firm. For some years plaintiff received interest from B., dealing wholly with him. A. died. B. became bankrupt, and plaintiff proved his debt under the bankruptcy, and filed his bill against A.'s executor for the difference. It did not clearly appear whether the plaintiff was privy to the agreement between A. and B., or whether A. left assets in B.'s hands sufficient to meet the partnership liabilities. An issue was directed to try whether A. was indebted to plaintiff at the time of filing the bill, upon an admission that he was living at that time. *Mills* v. *Boyd*, 6 Jur. 943.

The acceptance of the sole security of the continuing partner for a debt due from the firm may be a sufficient consideration for the discharge of a retiring partner, *semble*. *Ib.*

3. A partner who had joined a firm before 1810 and continued in it up to 1820, held liable in 1835 to a suit by the representative of a creditor, for money due to him by the firm in 1810, and interest on it up to the institution of the suit. *Fergusson* v. *Fyffe*, 8 Cl. & F. 121.

4. A contract to discharge a retiring partner from a debt due from the firm may be proved, either by an express agreement, or by facts and conduct from which it may be fairly inferred. *Harris* v. *Farwell*, 15 Beav. 31.

Taking a new security is not of itself sufficient to discharge the retiring partner, but there must also be an agreement, either express or to be fairly inferred, to discharge the old firm. *Ib.*

A bank, consisting of three members, was indebted to A. B. In 1837 one of the members died, and a new partner was admitted. A. B. received interest from the new firm until 1841, when they became bankrupt. A. B. went in and proved against the new firm, swearing that they were indebted to him for money received to his use:—Held, that the separate estate of the deceased partner had not been discharged. *Ib.*

5. Where a member of a firm which is under a continuing contract retires with an indemnity, the continuing partners are his agents for carrying on the contract; and although after notice of the retirement the retiring partner is in a sense a surety, that authority will not be extended so far as to discharge him from the contract by reason of acts of the continuing partners fairly within the scope of their authority in carrying out the contract. *Oakford* v. *European and American Shipping Co.*, 1 Hem. & M. 182; 9 L. T., N. S., 15; 2 N. R. 103.

Continuing partners under such a contract (which gave the firm the power of appointing an arbitrator in case of dispute) entered into an agreement by which they waived a very doubtful point of construction on the original contract, and referred differences to arbitrators, one of whom was selected by themselves, instead of by the firm, as constituted at the date of the contract:—Held, that this was not such a variation of the original contract as to discharge the retired partner. *Ib.*

6. Prior to April 1872, a firm of bankers, consisting of two partners, A. and B., received money on deposit at interest, for which they gave deposit notes in the usual form to the depositors, who, when the amount on deposit was increased or diminished, gave up their old notes and received fresh ones for the new amount. In April 1872 C. and D. were admitted into the partnership, and notice of the change in the firm was given to the depositors. A fortnight afterwards A. died, and the business was carried on under the same firm by B., C., and D. In 1874 B. died, and the business was carried on by C. and D., still under the same firm, until 1875, when the bank stopped payment, and went into liquidation. The depositors all knew of A.'s death, and none of them made any claim against his estate. Some of them had not altered the amount of their deposit, but retained the notes they had received in his lifetime. They had, however, received interest from C. and D. Others had increased and others had diminished the amount of their deposit after A.'s death, receiving in each case fresh deposit notes; and they had all proved in the bankruptcy of C. and D. for the amount due on their notes as money advanced and lent to the bankrupts:—Held, that in each case there had been a complete novation, and that none of the depositors were entitled to prove against the estate of A. *Bilborough* v. *Holmes*, 5 L. R., Ch. D., 255; 46 L. J., Ch., 446; 25 W. R. 297; 35 L. T., N. S., 75.

7. A firm of two partners dissolved; one retired and the other carried on the business with a new partner under the same style. A customer of the old firm sold and delivered goods to the new firm after the change but without notice of it. After receiving notice he sued the new firm for the price of the goods, and upon their bankruptcy proved against their estate; and afterwards brought an action for the price against the late

partner:—Held, that the liability of the late partner was a liability by estoppel only, and not jointly with the members of the new firm; that the customer might at his option have sued the late partner or the members of the new firm, but could not sue all three together; and that having elected to sue the new firm he could not afterwards sue the late partner. *Scarfe* v. *Jardine*, 7 L. R., App. Cas., 345; 51 L. J., Q. B., 612; 47 L. T. 258; 30 W. R. 893.

2. Of Creditors of Old Firm against New Firm.

1. When a trading partnership is formed, consisting of a large number of shareholders, and the shares are made transferable, the rule of ordinary partnerships, that a new partner is only liable *inter se* for subsequent debts, does not prevail. *Mayhew's case*, 1 Jur., N. S., 566; 24 L. J., Ch., 353.

2. A firm was newly constituted, but no alteration was made in the mode of carrying on the business; the accounts were continued in the old books as if no change had taken place; and the existing liabilities were discharged or diminished either from the assets of the old firm, or from the funds of the new firm indiscriminately:—Held, this was cogent evidence that the new firm had assumed the liability to pay the debts of the old firm. *Australasia (Bank of)* v. *Flower*, 1 L. R., P. C., 27; 12 Jur., N. S., 345; 35 L. J., P. C., 13; 14 W. R. 377; 14 L. T., N. S., 144.

Where creditors of the old firm know that the new firm has arranged to assume the debts of the old firm, and go on dealing and receive payment of part of the debt out of the blended assets of the old and new firms, such creditors thereby discharge the old firm, and accept the new firm as their debtor. *Ib.*

Whatever may have been the origin of the rule, it is well settled, that in administration under bankruptcy the joint and separate estates of partners are considered as distinct, and a joint creditor having a security on the separate estate is entitled to prove against the joint estate without giving up his security on the ground that it is a different estate. *Ib.*

3. A company, being at the time indebted to a bank, was amalgamated, by a deed to which the bank was not a party, with the Société de C. The société by the deed undertook the liabilities of the company. The société, the company, and the bank subsequently went into liquidation, and, upon a claim being put in by the bank against the société for the debt owing to it by the company at the date of the amalgamation, it was decided, in proceedings in France to which the company was a party, that the société was not liable, and the claim of the bank was rejected. The bank then claimed the amount of the debt in the liquidation of the company:—Held, that it was the duty of the company in the proceedings in France to see that the société was substituted in its place as debtor to the bank, and that the company, not having performed this duty, remained liable to the bank, and the claim was accordingly allowed. *Re St. Nazaire Co.*, 25 W. R. 424.

4. A company, with limited liability, was formed to carry on the business of a previously existing bank with limited liability, and the assets of the bank were handed over to the company, and the business was thenceforward carried on in the name of the company, which name differed but slightly from that of the bank. J. was a creditor of the bank in respect of a deposit at interest. No notice of the transfer of the business was sent to J., but the interest on his deposit was, in two successive half-years after the transfer, sent by the company to J.'s agents, and this payment was accepted by them. The company then stopped, and was ordered to be wound up. The letters in which the interest was sent to the agents were headed with the name of the company, and spoke of the deposit being with them. J. carried in a claim for his deposit against tht company, and his claim was admitted by the official liquidator, and included in the chief clerk's certificate of the debts, and a dividend of 10*s.* in the pound was paid upon it. H., a contributory of the company, afterwards moved to have J.'s claim expunged:—Held, that J. had never accepted the company as his debtors, and that his claim must be expunged. *Re Commercial Bank Corporation of India and the East*, 16 W. R. 958.

Held, also, that H. was not estopped, by reason of his knowledge of the objects for which the company was formed, and of the fact that the assets of the bank were handed over to the company, from disputing the claim of J. *Ib.*

5. When a new partner is introduced into an established firm, or a new firm is constituted in place of it, and a creditor, with knowledge of all the facts, continues his dealings with the firm, his assent to a substitution of the liability of the new firm for that of the old will be inferred upon slight circumstances; but slight circumstances will not lead to any such inference where the creditor has, four months after the substitution of the new firm, distinctly asserted that his dealings were with the old firm exclusively, and that he has no knowledge of the new firm in the transaction. *Re Smith, Knight, & Co., Exp. Gibson*, 20 L. T., N. S., 835; 4 L. R., Ch., 662; 17 W. R. 833.

A. lent to B. and C. divers sums of money to be expended in executing certain works for which B. and C. were contractors. B. and C., during the period in which these advances were being made, transferred all their contracts to a company, which undertook to indemnify them against all liabilities incurred by them in respect of the contracts. The money advanced by A. was actually expended by the company in the manner contemplated. A. refused to acknowledge the company as the borrowers of the money, and required the promissory notes which were given for repayment to be made by B. and C., which was accordingly done. About a year later, A. accepted from the company interest upon the loan up to date. Beyond a few letters relative to the amount of interest, no communication took place between A. and the company:—Held, that upon the company being wound up, A. could not claim to be a creditor of the company for the amount of the notes, as he had not accepted the company as his debtor. *Ib.*

6. Although slight evidence is sufficient in the case of ordinary firms to show that a creditor who continues his dealings with incoming partners accepts the new firm as his

debtors instead of the old firm, yet strict proof will be required before it is held that a creditor of a company, under a special contract, has accepted the liability of another company with which the first is amalgamated. *Re Family Endowment Society*, 5 L. R., Ch., 118; 21 L. T., N. S., 775.

3. Payments after Dissolution.

1. Payments by a debtor to a firm, made to the successors after all the original partners had ceased to be members, were held not to be in satisfaction of the debt due to those original partners in the absence of any proof of consent on the part of the survivor of them to the payments being so taken. *Jones* v. *Maund*, 3 Y. & Coll. 347.

2. On the death or retirement of a partner in a business in the nature of a banking business, the rule in *Clayton's case*, that moneys received by the new partnership must be applied in payment of the debts of the old partnership, will be held *primâ facie* to apply in taking the accounts as well between the partners themselves as between the partners and third persons, and there must be strong evidence to rebut the presumption as to that mode of taking the accounts. *Copland* v. *Toulmin*, West. 164; 7 Cl. & F. 349; 3 Y. & Coll. 625.

3. The account of a customer of a firm consisted of debits and credits arising from the purchase and sale of goods. The partnership was dissolved, the customer being then greatly indebted to it, but the account was continued in the same mode by the succeeding firm:—Held, that the doctrine of appropriation of payments applied to the debtor's account. *Laing* v. *Campbell*, 36 Beav. 3.

4. Money admitted by executor to be in hands of his partners is in his own hands sufficient for the purpose of being ordered into court. *Johnson* v. *Aston*, 1 Sim. & S. 73.

5. B. & T. being partners as sharebrokers, T. contracts for the purchase of shares, and enters into arrangements with a bank to advance money to pay for them. The partnership is dissolved and notice given to the bank, after which the bank, without the authority or knowledge of B., advances money to pay for the shares, which are thereupon deposited with it, and afterwards sells the shares:—Held, that B. is bound by the acts of T. *Butchart* v. *Dresser*, 1 W. R. 178; 10 Hare 453; 4 De G. M. & G. 452.

6. One of the two partners, after the dissolution of the partnership, received the rents of a debtor to the partnership, and retained out of them the amount of the debt, and he stated that he did this on an understanding that the debtor should have credit for the sum so retained, and that he considered the debt to have been satisfied by these moneys; but no account had been settled between him and the debtor:—Held, that, as against the other partner, the debt to the partnership was not to be considered as satisfied. *Pritchard* v. *Draper*, 1 Russ. & M. 191; Taml. 332.

Declarations of one partner as to the payment subsequently to a dissolution of a debt due to the partnership, are admissible against the other partner. *Ib.*

4. Of Retired against Continuing Partner.

7. Distinction between capital and stock in trade, with reference to the rights of retiring and continuing partners. *Crawshay* v. *Collins*, 1 Jac. & Walk. 278.

8. Where A. and B., two partners having one interest in the return proceeds of a foreign consignment, dissolve partnership, and agree that their interest shall be vested in B., and afterwards separate fiats being issued against each the assignee of A. assigned all his interest in the said proceeds to B., though no notice of the transfer had been given to the foreign consignees:—Held, that the proceeds belonged to the separate estate of B. *Exp. Birley, Re Krauss*, 2 M. D. & De G. 354. And see 1 M. D. & De G. 387.

9. A partner continuing the business took an assignment of all the stock, etc., and covenanted to indemnify the retiring partner from the debts then owing from the partnership. The continuing partner became bankrupt and obtained his certificate, and subsequently an action was commenced against the retiring partner upon an acceptance of the partnership; judgment was obtained against him, and he paid the debt and costs:—Held, that no action would lie against the bankrupt upon the covenant, since under 49 Geo. 3, c. 121, s. 8, the retiring partner might, on his liability, have resorted to and proved his debt under the commission, and was therefore barred by the certificate. *Wood* v. *Dodgson*, 2 Rose 47.

10. Retired partner, with covenant of indemnity against the debts, in consideration of assigning his share of the property, admitted under a commission against the remaining partner to prove a joint debt paid by him, indemnifying the joint estate against the joint debts. *Exp. Ogilby*, 3 Ves. & B. 133; 2 Rose 177.

11. Lien of a retiring partner under an agreement for dissolution; not against the creditor of the other, claiming either under a title given to him, or, in case of bankruptcy, property left in his order and disposition within statute 21 Jac. 1, c. 19, s. 11. *Exp. Rowlandson*, 2 Ves. & B. 173; 1 Rose 416.

Joint creditors have no lien on the partnership effects until execution, which may be joint or several; their equity, after dissolution, depends on the right of the partners. *Ib.*

12. A former partner, there being partnership debts unpaid, cannot petition to prove the balance of accounts; *à fortiori*, not to stay certificate. *Exp. Robinson, Re Case*, 4 Dea. & Ch. 499.

13. Where upon a dissolution of partnership one partner, who was the defendant, undertook for a salary the winding-up of the affairs:—Held, that he was not solely chargeable for loss arising from delaying the sale of the effects, the other partner not having exercised the right, which the Court held he still had, of compelling a sale at the proper time. *Cragg* v. *Ford*, 1 Y. & Coll. C. C. 280.

14. Upon the dissolution of a partnership, a deed was executed, whereby the retiring partner assigned the debts to the continuing partners, giving them an irrevocable power of attorney to receive them, and covenanting not to interfere in their collection. The surviving partners continued their dealings with one of

the debtors to the old firm, and, without the sanction of the retiring partner, took a security in their own name for the aggregate amount of the old and new debt:—Held, that they thereupon made themselves personally responsible to the retiring partner for his share of the debt; held, also, that they would have been equally liable as partners, independently of the deed. *Lees* v. *Laforest*, 14 Beav. 250.

1. If, upon dissolution of partnership, it is agreed that certain articles of partnership stock shall become exclusive property of one of the partners, and that a certain fund shall be applied in payment of debts, and that fund proves insufficient:—Held, that the other partner has no lien on those articles for the deficiency. *Lingen* v. *Simpson*, 1 Sim. & S. 600.

2. Deed by which A., B., and C., partners in trade, in consideration of 4,000*l.* paid to them by D., in augmentation of their capital, agree to admit him into partnership with them for a term; it was also agreed that A. should receive in lieu of profits a clear sum of 560*l.* per annum, and all the property of the concern was charged with the payment of this sum quarterly, and of the 4,000*l.* at the determination of the partnership; A., B., and C. were to pay rent, taxes, wages, and the other outgoings of the trade, which was to be carried on by them, and in their names only, and D. was not to be required to attend to it; D. was at liberty to retire on giving twelve months' notice, and on his retiring, or at the end of the term, the 4,000*l.* and the arrears (if any) of the 560*l.* per annum were to be paid to him by A., B., and C., by instalments to be secured by their bonds, and they were to indemnify him from the debts of the partnership:—Held, that this deed was not usurious. *Fereday* v. *Hordern*, Jac. 144.

3. Agreement, on dissolution of partnership, that the continuing partner shall, in consideration of an assignment to him of the partnership property, including a lease of the premises on which the business was carried on, secure to the retiring partner the payment of an annuity, by bond conditioned to be void on payment of the annuity, or in case he should at any time after the expiration of the then existing lease be dispossessed of and compelled to quit the premises, without any collusion, contrivance, act, or default of his own. The continuing partner obtains a renewal of the lease, and afterwards becomes a bankrupt, and the renewed lease passes under an assignment of his estate. This is not such an eviction or dispossession as was contemplated by the agreement, in the event of which the annuity was to cease. *Holyland* v. *De Mendez*, 3 Meriv. 184.

4. Plaintiff and defendant (partners) agreed to dissolve, and that the defendant, on payment of half value of effects, should take the whole; the defendant took possession, but failed to make payment, and had begun to pull down buildings. Injunction to restrain him refused. *Cofton* v. *Horner*, 5 Price 537.

5. A partner having retired under an agreement of indemnity against partnership claims was allowed a sum of money recovered by the sentence of a foreign court for customs, without examination of the merits. *Kennedy* v. *Cassillis*, 2 Swan. 325.

6. Under covenant to a retiring partner as soon as conveniently could be to pay the debts and indemnify him against them, broken by death of covenantor, leaving debts undischarged; those debts being paid by covenantee, become a specialty debt against the administrator. *Musson* v. *May*, 3 Ves. & B. 194.

7. Pinkus having claimed to be a co-proprietor with Paynter in gasworks, which the latter had erected and was about to sell to the East London Gas Light Company, then about to be formed, it was agreed between them, for the purpose of ending their disputes respecting the ownership of the gasworks, that Paynter should be at liberty to sell the works at such price as he pleased, upon accounting to Pinkus for the value of the works, at a certain rate, and that Paynter should hold shares for Pinkus in the company, to the value of 2,000*l.*, and retain them in his own name for two years. The East London Gas Light Company was formed, and purchased the gasworks from Paynter. Pinkus filed a bill against Paynter, and obtained a decree for specific performance of their agreement, which Paynter had resisted. In the meantime, before the decree was made, the East London Gas Light Company was regularly dissolved, and the gasworks were sold to the Radcliffe Gas Light and Coke Company. Pinkus then filed a supplemental bill against the Radcliffe Company, the former directors of the East London Gas Light Company, and the assignees of Paynter, he having become bankrupt, to establish a lien upon the gasworks for what should be found due to him under the former decree, as well as to carry out the former decree against all these parties. The bill was dismissed, with costs, against all the parties, except the assignees of Paynter. *Pinkus* v. *Ratcliffe Gas Light & Coke Co.*, 13 L. J., N. S., Ch., 244; 1 H. L. Ca. 309.

8. The partnership between A. and B. was dissolved, and A. retired. A., by deed, agreed to execute an assignment to B. of the partnership assets (part of which consisted of a policy, of which the partners were assignees), and B. was to covenant to pay the debts and indemnify A. against them. No further deed was executed. A. died, and B. afterwards assigned the policy to a purchaser who had notice of the deed. A.'s executors were afterwards compelled to pay partnership debts which ought to have been discharged by B. The policy being adversely claimed by the purchaser and by A.'s executors:—Held, that though A. and his executors were entitled to pursue any portion of the partnership property in the hands of B., and have it applied in payment of the partnership debts, yet that they had no such right as against the purchaser from B., though with notice, for he was not bound to see to the application of the purchase money. *Re Langmead*, 20 Beav. 20; 24 L. J., Ch., 237; 1 Jur., N. S., 198. Affirmed 7 De G. M. & G. 353; 2 Jur., N. S., 1058; 24 L. J., Ch., 589; 3 W. R. 602.

Held also that the deed of dissolution created no charge upon the policy in favour of the retiring partner. *Semble*, if a charge had been created, the continuing partner could have given a good discharge to the purchaser, the debts not being scheduled in the deed. S. C. 3 W. R. 260.

1. As to the equity of set-off for partnership debts paid by a continuing partner, against a legal debt due from him to a retired partner, upon a bond for a private loan. *Lee* v. *Flood*, 2 Sm. & G. 250; 2 W. R. 348.

One of two partners as bankers lent to his partner a sum of money on the joint and several bond and covenant of the borrower and another person in 1821, and died in 1833; the obligor continued to pay interest till 1843, when he died, and his executor paid interest up to 1847. On the death of the obligee in 1833, some settlement of the banking affairs was come to between his executor and the surviving partner and another subsequently admitted, which the executor alleged was final, but which was disputed. The executor of the obligee then became a partner, and other changes subsequently took place in the firm, each new firm taking on itself all the former liabilities and assets. In 1847 the firm in which the executor had continued a partner became bankrupt. In a suit for the administration of the estate of the obligor, certain creditors of the firm, on promissory notes given prior to 1833, whose debts had been adopted by the successive firms, were admitted as separate creditors of the estate. The executor of the obligee was admitted as a creditor for the loan, and no equitable set-off for contribution was allowed, none having been established in respect of the said estate of the obligee being separately liable to the creditors, although it was probable that in winding up the partnership affairs, some claim by the obligor's estate against the estate of the obligee might be established. *Ib.*

2. The payment of the expenses of advertisements out of partnership funds is not necessarily a ground for giving to each partner, at the expiration of the partnership, a continuing share in the advantages of publicity produced by the advertisement; the partnership having had, during its continuance, the benefit of the expenditure. *Morison* v. *Moat*, 9 Hare 266; 15 Jur. 787; 20 L. J., Ch., 513. See 16 Jur. 321.

3. In 1856 A., B., and C. were partners. B. retired in 1860, when a deed of arrangement was executed. C. retired in 1862, when another similar deed was executed. In 1863 A. filed a bill against B. and C., charging misrepresentation and fraud, and seeking to have the partnership dissolved in 1860 or in 1862, or that it might be wound up under the direction of the Court; and for other relief:—A demurrer by B. to the bill for want of equity was overruled; but one by him for multifariousness was allowed, with leave to amend. *Matthews* v. *Reeves*, 11 W. R. 528; 8 L. T., N. S., 298.

4. Upon the dissolution of a partnership between G. and one B., a deed was entered into to settle the rights of the parties. It contained a clause to the effect that, should the respondent succeed in obtaining from the Government a remission, in whole or in part, of an amount due from the firm for "timber dues," secured by a bond, he should account for, and pay to G., one-half of the amount so remitted. The Government, upon the application of B., subsequently remitted upon the bond an excess of rents paid by the firm:—Held, that the assignee of G. was entitled under the agreement to have the benefit of this remission. *Burstall* v. *Baptist*, 21 W. R. 485.

5. Where a partnership at will had been dissolved by one partner by notice, the Court restrained that partner from excluding the other partner from the partnership premises pending the winding-up of the concern, and from taking any advantage of his position with respect to the joint clients of the firm. *Roberts* v. *Everhardt*, 2 W. R. 125; 1 Kay 148; 23 L. J., Ch., 201; 2 Eq. Rep. 780.

6. The trade duly continued by surviving partner, to wind up the concern, is not the partnership trade, but in the nature of a trust, and, if carried on otherwise as a continuing trade, it is at the risk of the surviving partner, liable to the option of the representative of the deceased partner. *Booth* v. *Parks*, 1 Moll. 465.

X. Rights, Duties, and Liabilities.

I. *Powers of Majority*, 5483.
II. *Expulsion of Partner*, 5484.
III. *Introduction of New Partner*, 5485.
See also IV. *infra.*
IV. *Transmission of Shares*, 5485.
V. *Dormant Partner*, 5491.
VI. *Firms with Common Members*, 5492.
VII. *Managing Partner*, 5492.
VIII. *Authority of Partner. Liability of Firm*, 5494.
IX. *Liability when Joint and Several*, 5501.
See also BOND, III.
X. *Of Partner against his Co-partner*, 5502.
See also XIV. *post.*
XI. *Of Firm against Partner*, 5503.
XII. *Of Creditors of Firm against Partner*, 5505.
XIII. *Of Creditors of Partner against Firm*, 5506.
XIV. *Mortgages by and to Partners*, 5507.

I. POWERS OF MAJORITY.

7. The majority of partners never represent the whole body, except where there has been a voice called for from the minority. The Court will generally take the opinion of the minority to have been fairly overruled. *Const* v. *Harris*, T. & R. 527.

A partner complaining that the other partners do not do their duty towards him must be ready to do his duty towards them. *Id.* 524.

The act of a majority of partners is the act of all, provided all are consulted, and the majority are acting *bonâ fide*. Partners must act upon the joint opinion of all, and cannot exclude the judgment of any one. *Id.* 525.

A party taking the share of a partner in a concern cannot be let loose from the obligations that partner is under to the concern. *Id.* 521.

8. Partnership amongst a number of persons to be arranged by a committee of five, and by general meetings of which the vote of a majority was to be binding, with a provision that any one wishing to retire should first offer his share

to the committee at a certain price, and, if they declined to buy, might sell it to any other person:—Held, that the majority were not able to sell the whole concern without the consent of all. *Chapple* v. *Cadell*, Jac. 537.

1. If six persons join in a partnership of life assurance, it seems clear that neither the majority, nor any select part of them, nor five out of the six, can engage that partnership in marine insurances, unless the contract of partnership expressly or impliedly gives that power. *Natusch* v. *Irving*, 2 Coop. C. C. 358.

But *quære*, if a part of the six openly and publicly profess their intention to engage the partnership in another concern, and clearly and distinctly bring this to the knowledge of one or more of the other partners, and such one or more of the other partners can be clearly shown to have acquiesced in such intention, and to have permitted the other partners to enter upon and engage themselves and the body in such new projects. *Ib.*

The principles which a Court would act upon in the case of a partnership of six must, as far as the nature of things will admit, be applied to a partnership of 600. *Ib.*

They who seek to embark a partner in a business not originally part of the partnership concern must make out clearly that he did expressly or tacitly acquiesce. *Ib.*

II. EXPULSION OF PARTNER.

2. It is not competent to any number of persons in a partnership (unless they show a contract rendering it competent to them) formed for specified purposes, if they propose to form a partnership for very different purposes, to effect that formation by calling upon some of their partners to receive their subscribed capital and interest, and quit the concern; and in effect, by compelling them merely to retire upon such terms, so to form a new company. *Natusch* v. *Irving*, 2 Coop. C. C. 358.

The right of a partner is to hold his partners to the specified purposes whilst the partnership continues, and not to rest upon indemnities with respect to what he has not contracted to engage in. *Ib.*

That a dissatisfied partner may sell his shares for double what he originally gave for them, is no reason for compelling him to part with them. *Ib.*

3. Articles of partnership provided that it should be lawful for the holders of two-thirds or more of the partnership shares for the time being to expel any partner, by giving him notice thereof under their hands in the form thereby prescribed; and that immediately after giving such notice, a notice of the dissolution as to the expelled partner should be signed by the partners, and published, with power to any other of the expelling partners to sign the name of the expelled partner; and it was provided, that if a partner became bankrupt, insolvent, or was expelled, his interest should cease, as to profit and loss, as if he had died on the day of such bankruptcy, insolvency, or expulsion; and that the amount of his share should be ascertained, and payment secured, by the same arrangement as would have been applicable in case of his decease; and it was also provided, that the shares of retired, deceased, bankrupt, insolvent, or expelled partners should be disposed of in such way, either to or between some or all of the continuing partners, or by the admission of a new partner or partners, as the holders of a majority of shares should determine. The articles provided, that, in the case of making certain arrangements, there should previously be a meeting of the partners in committee, but did not express that any such meeting should be necessary previous to the exercise of the power to expel. The article also provided for the adjustment of the partner's accounts within sixty days after the 30th of June in each year, when an inventory of all the stock, debts, etc., should be made, with proper allowances, so as to ascertain the partnership property, profit and loss, and the shares of the respective partners, which shares were to be carried to their respective accounts; and it was provided, that the share of any partner who might wish to retire, if his retirement were consented to by the majority of the others, was to be taken by the continuing partners at the amount at which the same stood at the time for making the yearly rest or settlement next preceding, and that the surviving partners were also to take the shares of a deceased partner at the amount at which the same stood at such next preceding yearly rest or settlement:—Held, that the power of expulsion of a partner might be exercised by two-thirds of the partners, without any previous meeting of the partners in committee upon the question, and without any cause being assigned for such expulsion; but that the power must be exercised with good faith, and not against the truth and honour of the contract. That such a power must be understood to exist, not for the benefit of any particular parties holding two-thirds or more of the shares, but for the benefit of the whole society or partnership. That it could not be exercised merely to enable the continuing partners to appropriate to themselves the share of the expelled partner at a fixed value less than the true value. That the power was not properly exercised at the exclusive instance of one partner, and, in consequence of his representation to the other partners, made without the knowledge and behind the back of the partner who was to be expelled, and without giving to such partner the opportunity of stating his case, and of removing any misunderstanding on the part of his co-partners. *Blisset* v. *Daniel*, 10 Hare 493; 18 Jur. 122; 1 W. R. 529; 1 Eq. Rep. 484.

4. Partnership articles, executed in 1864, gave power to the majority, upon not less than six months' notice, to enforce the retirement of any partner if they should be so desirous, and also power to the others to expel any partner immediately on his committing certain specified offences, and also provided for partial dissolution on retirement or death of any partner, and for total dissolution, and for the taking and settlement of annual accounts by the partners, and for the ascertainment, under the provisions for taking the annual accounts, of the sum standing to the credit of any partner going out on any partial dissolution. Accounts were taken annually, but not in accordance with the articles. In 1873 a six months' notice of enforced retirement

which in fact was informal, was given to the plaintiff, who accepted an offer contained therein to become a partner again in the firm subject to a change in his position, and to certain restrictions, and to the cesser of his interest in the event of proceedings on his part similar to those which led to the notice, the existing articles to be "taken as the guide of a partnership so formed." No new articles were drawn up:—Held, that the power of enforced retirement at the desire of the majority was retained in the new partnership. *Steuart* v. *Gladstone*, 47 L. J., Ch., 423; 38 L. T. 557; 26 W. R. 657. Affirmed 10 L. R., Ch. D., 626; 40 L. T. 145; 27 W. R. 512.

Held, also, that the notice being valid when given could not be invalidated by an error in accounts to be taken subsequently, and that the accounts must be taken by the Court. *Ib.*

III. INTRODUCTION OF NEW PARTNER.

See also IV. *infra.*

1. By articles of partnership it was agreed that, except as thereinafter provided, none of the partners should hire any clerk or servant in the business, but T., one of the partners, might introduce two of his sons as pupils or clerks, at a salary, such sons to have an option of becoming partners. T. introduced two sons, the second of whom died without becoming a partner:—Held, that T. could not introduce or employ a third son as pupil or clerk. *Watney* v. *Trist*, 45 L. J., Ch., 412.

Held, also, that an action to restrain the breach of a partnership covenant would lie, though the plaintiff did not pray for a dissolution. *Ib.*

2. A. assigned his business to three of his clerks, reserving a share of the profits for the benefit of a son, to be nominated by him, and who, on attaining twenty-one, was to have the option of being admitted a partner. The articles of partnership, to which A. was a party, gave power to the partners to dissolve with mutual consent, and also a power to any partner to withdraw, so long as stated intervals were left between the retirement of the partners. The two existing partners (one of whom had come in under a subsequent deed), just before the son came of age, announced a dissolution of the partnership, and recommenced the same description of business under another name:—Held, that without the consent of A. the attempted dissolution was not effectual, as it was contrary to the intention of the original articles, and subversive of the rights of A. *Allhusen* v. *Borries*, 15 W. R. 739.

3. If two partners take a third partner, without specifying the terms on which he becomes such partner, he has the same rights, and is subject to the same liabilities as the two original partners; the terms and conditions of the partnership which bind them, bind him, unless a new contract be made between them, and so also, if the conditions of his becoming partner are partially set forth, then to the extent that they are not specified and involved by necessary reference therein, he will be bound by the terms of the partnership contract affecting the two original partners with whom he associates himself. *Austen* v. *Boys*, 24 Beav. 598; 3 Jur., N. S., 1285; 27 L. J., Ch., 243. Affirmed 4 Jur., N. S., 719; 27 L. J., Ch., 714; 2 De G. & J. 626.

By partnership articles entered into in 1838 between A., B., and C., it was stipulated that A. should be at liberty at any future time to introduce D. into the partnership business. The articles contained no provision for the case of a retiring partner. In 1839 A. retired from the firm without being paid anything for the goodwill of the business, and in September 1846 B. and C. entered into new articles of partnership for a period of seven years from the 1st September 1846. The eleventh clause of the articles provided that if any partner or partners retired, the continuing partner or partners was or were to pay such retiring partner or partners for his or their interest and share and goodwill in the business, the fair marketable value thereof. In 1849 A. exercised the power of introducing D. into the partnership, at which time a memorandum was drawn up the effect that from the 1st September 1850 to the 1st September 1853 D. was to take one-fifth of the profit and loss of the business, from which latter date he was to share equally with the other partners; and that in case of the death or retirement of either of the two senior partners before the 1st September 1853, his share was to be divided into thirds, the surviving senior partner to take two-thirds and D. one-third. This memorandum was signed by B. and D. simpliciter, but C. added the qualification, that so far as the memorandum fixed D.'s share and position he agreed thereto, but that as between himself and B. the memorandum was not to annul or prejudice the existing articles of July 1846, the stipulations of which, as between himself and B. were to remain in force. At the time of signing this memorandum D. was not aware of the stipulation in the articles of 1846 as to retiring partners. On the 29th August 1853, two days before the partnership would have expired by effluxion of time under the articles of September 1846, C. gave notice to dissolve the partnership on the following day, and the dissolution took place accordingly on the 30th August 1853. He filed a bill against B. and D. to take the partnership accounts, and claimed to be entitled, under the eleventh article of September 1846, to be paid for his share of the goodwill of the business:—Held, that D. was not bound by the eleventh clause of the articles of 1846. *Ib.*

Held, also, that as between C. and B., the articles of July 1846 remained in force; that the clause for retirement did not have any operation after the 1st September 1853; and therefore that C. was entitled to be paid for the goodwill of the business only in respect of the time which elapsed between the dissolution of the partnership and the 1st September 1853. *Ib.*

IV. TRANSMISSION OF SHARES.

1. *By Will*, 5486.
2. *By Sale to Firm or Third Parties*, 5488.
3. *By Mortgage*, 5490.

1. By Will.

1. Partnership stipulation that a son of one partner, or, in case of his minority, the executor, should, on the death of such partner, succeed to his share. The Court, on the terms of the partnership deed, considered it an option, and not an obligation. *Madgwick* v. *Wimble*, 6 Beav. 495; 14 L. J., N. S., Ch., 387; 7 Jur. 661.

2. Articles of partnership do not survive for the benefit of executors, etc., without an express provision for such purpose. *Pearce* v. *Chamberlain*, 2 Ves. 33.

3. Where there is a stipulation that partnership should exist for nineteen years, and in case of death of either partner, his widow, etc., should become partner, etc.:—Held, that it is not imperative on widow, etc., to be a partner, but optional with her, etc., and that she, etc., was entitled to reasonable time to look into concern, so as to elect, but not to have an account taken. *Pigott* v. *Bayley*, M'Clel. & Y. 569.

4. The option reserved to the executors of a deceased partner to enter into a partnership with a surviving partner must be accompanied by the obligation on the part of the surviving partner to admit them; and, unless the option is confined to the representatives of the partner who shall die first, the surviving partner must have the option of entering into the partnership with the representatives of the deceased partner, with the same accompanying obligation on their part to admit him. *Downs* v. *Collins*, 6 Hare 436.

5. A., B., and C., carrying on business in co-partnership for a term which would expire on the 19th February 1807, under articles which empowered A., in case of his death during the term, to bequeath his share of the trade in favour of his wife or children. A. died, having bequeathed his share of the concern to his executors, in trust for his children. The business continued to be carried on under the same firm as before, and his executors interfered in the management and shared in the profits:—Held, that the partnership which carried on the business after the death of A. was a new partnership. *Pemberton* v. *Oakes*, 4 Russ. 154; 6 L. J., Ch., 35.

6. Testator, after giving life interests in stock to each of his daughters, afterwards the principal among his grandchildren in pursuance of a power in articles of partnership, appointed his executors to carry on the trade in his room, with power to dissolve or nominate any other person; and gave them his share of the capital and all freehold and leasehold in trust to carry on the trade as long as they should think fit, and after expiration of partnership, to sell the estates, and with the produce and profits of trade and all the rest of his estate to form a fund to accumulate twelve years; then among the grandchildren living. By codicil he substituted his partner, who was his son-in-law, in the room of one executor removed, and desired that if his executors should continue trade, and his grandsons T. and J. should attain twenty-one, his executors would nominate each a partner for a quarter, when executor should think fit, with legacies at the same time to sink into the estate, if they should decline the partnership or die before twenty-one; executors to advance any further sum they might want to carry on trade; the rest of the property among all the grandchildren, except T. and J. By another codicil he left it entirely to executors to appoint J. or not; if not appointed his legacy to be void:—Held, that T. and J. were both entitled to be partners and to legacies at twenty-one, one executor (their father) being for admitting them, the other two against it; but if all had without fraud united in declaring J. unfit, they might have excluded him; in which case he could have taken nothing under this devise. *Wainwright* v. *Waterman*, 1 Ves. J. 311.

7. In 1829 A. entered into partnership with three other parties. All the capital was found by A., and he was to have eleven-twentieths of the profits, and the other parties were to take the remainder. The partnership was to continue till 1845; and, if A. died before that time, he was authorised to name one of his sons to succeed him, as to five-twentieths, and A. was to leave in the concern, or his son was to bring into it, a capital not exceeding 30,000*l.*, and the surviving partners were to give security on the property of the partnership, for such part of A.'s interest as should not be given to his son; and the amount was to be paid off by instalments. In 1832 it was agreed that A. should have only five-twentieths in the concern. A., by his will, after referring to his power of naming a son to succeed him, disposed of his interest to such one or two of his sons as his wife should appoint; and directed that part of the profits should be applied in the support of his sons during their minority, and the remainder be accumulated as part of his personal estate, and he appointed his wife and two of his partners executors. During A.'s life, the partnership borrowed money from their bankers, and deposited with them the title-deeds of the real estate belonging to the partnership; and a large amount was due to them at A.'s death. A.'s sons were minors, and the banking account was continued without any alteration. A.'s capital was continued in the concern, and a separate account was opened in the books of the firm with A.'s executors. In 1839 the firm became bankrupt, being largely indebted to the bank, but the amount which had been paid by them to the bank since A.'s death was greater than the sum due from A. and his partners at that time. Held, that, the executors were justified in continuing the testator's capital in the concern and that the lien of the bank being discharged by the payments made subsequently to A.'s death, A.'s representatives were entitled to a lien on the estate of the firm to the amount of the value of A.'s capital above 30,000*l.* *Fearnside* v. *Derham*, 13 L. J., N. S., Ch., 354; 7 Jur. 633.

8. A tradesman bequeathed his residuary estate, including his stock in trade, to trustees with a direction to convert into money all such parts as should not consist of leaseholds or money in the funds; and to invest the same and pay the annual income to Sarah, his wife, and, after her decease, to Mary, his wife's sister, and after the decease of the survivor of Sarah and Mary, he gave his residuary estate to another person absolutely. After the date of the will Mary married, and her husband and the testator entered into partnership, under

articles, which contained a proviso, that if the testator should die during the partnership, leaving a widow surviving, such widow might, if she should think fit, continue to carry on the partnership business with the surviving partner, and should be entitled to the testator's share in the profits and excess of capital; and if the testator should leave no widow, or his widow should not desire to enter the business, or if the other partner should die during the partnership, the surviving partner to take upon himself the partnership business and property, accounting and paying for the same as therein directed. The testator died, leaving his widow, who, under this provision, claimed his interest in the partnership:—Held, that the provision in the articles took the testator's share of the business wholly out of the provisions of the will, and that the widow became entitled under the partnership articles to such share. *Page* v. *Cox*, 10 Hare 163.

A trust may well be created in the absence of any expression importing confidence, and the obligation on the surviving partner created by the partnership articles, with reference to the legal interest in the partnership, did not in substance differ from a trust, and therefore the articles of partnership created a trust in favour of the wife, to arise on the death of the testator, leaving a widow surviving, which would attach on the property as it should then exist. *Ib.*

1. A testator was a member of a partnership at will in a bank, without any provision entitling the executor of a deceased partner to an interest in the goodwill of the concern. The credit in which the bank was rendered capital unnecessary, and at the testator's death the property of the concern exceeded its liabilities by a very small amount, the testator's share in which was far exceeded by the balance due from him to the bank on his private account as a customer. After his death the surviving partners admitted into the firm his son, who was his executor, but who was not admitted into the firm in that character, and the business continued to be carried on without any separation or appropriation of the partnership assets as they existed at the testator's death. In a suit against the executor for the administration of the testator's estate:—Held, that he was not accountable to the testator's estate for the profits which he had received as a partner in the bank. *Simpson* v. *Chapman*, 4 De G. M. & G. 154.

2. E. and H. were partners under articles. One of the terms was, that on the decease of either partner, his personal representative should have the power, within three months, of electing to continue the share of the deceased partner, and if he declined, then the business, stock in trade, etc., were to be valued, and the surviving partner was to take to the whole, giving security for the moiety late belonging to the deceased partner. E. died:—Held, that during the three months, or until E.'s personal representative should elect, the survivor, H., was to be prevented by injunction from carrying on the business in any other firm than what had been used in the life of E. *Evans* v. *Hughes*, 18 Jur. 691.

3. A partner destined his two sons to be taken into the partnership business, but one of them only availed himself of the intention, and entered into the partnership. There was an understanding that on the death of a partner the interest should be continued in his family. The son who had entered the concern having died, leaving several sons, and leaving his brother executor and trustee under his will, the brother nominated his own son to the business, to the exclusion of his nephews. On a bill by the widow of the deceased partner praying that the brother might be ordered to account for the benefit accrued to his son, which ought to have been enjoyed by the son of the deceased partner:—Held, that the widow, not having claimed the benefit of the nomination, and having acquiesced in the appointment made, could have no claim in equity. *Vansittart* v. *Osborne*, 20 W. R. 195.

4. By deed of the 29th October 1862, six persons, of whom the testator was one, formed a partnership by deed for seven years from the date of the deed, with a money capital of 30,900*l.*, to be contributed in equal shares. The deed provided that each partner should employ himself in or about the business, and carry on and manage the same to the greatest advantage; and that in case any of the partners should die before the expiration of the term of seven years, or in case at the expiration or other sooner determination of the partnership any of the partners should retire, and the others should be desirous of carrying on the business, the share of any partner so dying or retiring might, at the option of the others, be taken by them at a valuation, on giving a written notice of election within six months after such death or retirement; and that in case no such notice should be given, it should be deemed that the other partners had elected not to take the share of such deceased or retiring partner. Two of the partners died—one in 1865, and the other in 1867—and no notice of election to purchase either share was served by the surviving partners, but the business was continued by the survivors. By a deed of the 15th October 1869, made between the four surviving partners, one of whom was the testator, reciting the deed of 1862, the term of the partnership thereby created, and the deaths of the two deceased partners, and that the said partnership was still subsisting and consisted of the four surviving members of the firm, who were entitled to the stock in trade, etc., as expressed in the deed of 1862, it was agreed and declared that it should be competent to each of them, at any time during the continuance of the partnership, by deed or will, to nominate and appoint any male person, at his decease, to take his share in the said partnership and future profits thereof, with such amount of his capital therein as each of them respectively should think fit, such nomination to be valid though made during the minority of any such nominee, but not to take effect until he should have attained the age of twenty-one years; and that every such person should become and be accepted as a partner in the room and in respect of the share, etc., of the deceased whom he should so represent; and it was thereby also provided that, upon the expiration of the term of seven years, and upon the commencement of any new partnership between the parties, similar clauses and provisions should be inserted in the deed of partnership. The testator made his will, and thereby, having

recited that under the deed of the 15th October 1869 he was entitled to nominate a successor, he appointed, in the event (which happened) of his not having male issue, his nephew, E. H., to be his successor in the firm, to the extent of 5,150*l.*, the testator's original capital in the firm; and in case the said E. H. should die, the testator, by his said will, appointed his nephew, M. H., as such successor. The testator died, leaving both his nephews him surviving, but no male issue. E. H. died during his minority. M. H. was still a minor. The partnership was wound up, and the testator's share in the partnership assets was transferred into court in the present action:—Held, (1) that though the term of seven years, created by the deed of October 1862, had expired before the testator's death, the right of nomination created by the deed of 1869 still existed, being imported into the terms of the partnership at will springing out of the former one; (2) that E. H., having died under twenty-one, did not take any vested interest in the partnership, or its capital or property; (3) that the testator had the power of appointing a substitute for E. H.; (4) that by the words "in case the said E. H. should die" the testator referred to death under twenty-one, and that on the death of E. H. under twenty-one M. H. became substituted for him, and that upon M. H.'s attaining that age he would become entitled to the sum in court, representing the amount of the testator's capital in the firm. *Cuffe* v. *Murtagh*, 7 L. R., Ir., 411.

2. By Sale to Firm or Third Parties.

1. Partnership amongst a number of persons to be arranged by a committee of five, and by general meetings of which the vote of the majority was to be binding, with a provision that anyone wishing to retire should first offer his share to the committee at a certain price, and, if they declined to buy, might sell it to any other person:—Held, that the majority were not able to sell the whole concern without the consent of all; but that if all but two were desirous of retiring, they might sell their own shares without making an offer of them to the committee. *Chapple* v. *Cadell*, Jac. 537.

2. A deed of partnership (in the *Morning Herald* newspaper) contained a clause that no proprietor should dispose of his share, without first offering the same for sale, by notice, in a writing under his hand, to the other proprietors, at a certain monthly meeting. It had been usual to enter at such meeting a notice of this offer in a book, open to the inspection of all the proprietors both present and absent, but not to serve any notice personally:—Held, whether regard were had to the words of the deed, or to the mode of acting, that such entry was a sufficient notice. *Glassington* v. *Thwaites*, Coop. *temp.* Brougham, 115.

3. A partner may give a third person an interest in his share, but cannot make him a partner. *Bray* v. *Fromont*, 6 Madd. 5.

4. By an agreement between some of the partners in a colliery, reciting that it was apprehended it would be competent for one partner to determine the joint interest, and bring the partnership property to sale, and that the death of any partner would have that effect, and that they were desirous that their interest should be so far several that the share of any partner should be transmissible to his representatives, and that the partnership interests should not be determined, and the entire property sold, without the consent of the majority in value, but each should be competent to sell his own share only; it was agreed that each of them should hold to himself, transmissible to his own representatives or assigns, an aliquot share of certain of the partnership property, and that their joint holding should not be subject to the ordinary terms applying to partnership property, so as to entitle any one of them to a sale, without the concurrence of such majority, or to dissolve the partnership, or so as to cause a total dissolution of partnership by the death of any one of them:—Held, that this was not an agreement by the parties, that the representatives of a partner after his death should continue partners with the survivors, and contribute to the working of the colliery on their joint account; but was only an agreement that none of the partners, or their representatives, should be entitled to a sale of more than his own share of the partnership property. *Tatam* v. *Williams*, 3 Hare 347.

5. *Semble*, that where partnership articles provide that a partner may transfer his shares, they mean that he may so transfer them as to put the transferee in his place, as to antecedent liability. *Mayhew's case*, 5 De G. M. & G. 837.

6. Partnership articles provided that no partner should sell his shares except as follows:—That the partner desirous of selling should offer the shares to his co-partners collectively; if they should decline, then to the partners desirous of collectively purchasing; and if none such, then to the partners individually; after which he might sell to a stranger. One of four partners offered his shares to the other three collectively (one of whom to his knowledge would not purchase). The remaining two declared their willingness to accept, and were told that no offer was made to them:—Held, that the offer to the three enured for the benefit of the two, and specific performance decreed accordingly. *Homfray* v. *Fothergill*, 1 L. R., Eq., 567; 14 L. T., N. S., 49.

7. By partnership articles between A., B., and C., it was agreed, that, upon the sale by a partner of his share in a mining concern, his co-partners should have a right of pre-emption. A. gave to B. notice of his intention to sell, after which B. became a lunatic, and the option not having been exercised for some time, A. sold to C.:—Held, that B.'s right of pre-emption was lost. *Rowlands* v. *Evans*, *Williams* v. *Rowlands*, 30 Beav. 302; 8 Jur., N. S., 88; 31 L. J., Ch., 265; 10 W. R. 186; 5 L. T., N. S., 628.

8. Two partners in a brewery, part of the property of which consisted of freehold and copyhold estates, covenanted that the survivor should have the option of purchasing the share of the deceased partner in the property of the partnership, at a valuation; and the survivor accordingly exercised such option, and paid to the executors of the deceased partner the amount at which his share was valued. The

share of the deceased partner and his legal estate in part of the freehold and copyhold estates of the partnership descended or became vested in his infant heir; but the Court refused, upon petition or motion under the Trustee Act 1850, without suit, to declare the infant heir a trustee for the surviving partner. *Re Burt*, 9 Hare 289.

1. P., H., and J., for working a colliery, entered into a partnership, and by the articles it was stipulated, that if either should suffer his share to be taken in execution, and the others or other should thereupon give notice of their or his desire that the partnership should cease, then at the expiration of a month from the time of such notice the partnership should cease. The working of the colliery was commenced, but before the coal was reached a creditor of J. brought an action, and issued execution against him to recover 283*l.*, and his share or interest in the colliery was taken in execution under a *fi. fa.* Notice of dissolution of partnership was given by P. and H. J.'s share or interest was put up by the sheriff and sold by auction. At the sale P. and H. became the purchasers of J.'s share or interest for 500*l.* Of this, a balance of 164*l.*, after paying the execution creditor's claim and expenses, was received by J. The sheriff subsequently, as far as he lawfully might or could, assigned to P. and H. all the estate, share, and interest of J. A bill was filed by P. and H., praying for a declaration that the partnership was dissolved, or if it appeared that the sale did not operate as an effectual transfer, for an account of the partnership dealings. J. filed a cross bill, praying that the sale might be set aside:—Held, that the coal being nearly reached when the sale took place, some suspicion of misconduct and concealment attached to P. and H., and that the sale must be declared void. *Perrens* v. *Johnson*, *Johnson* v. *Perrens*, 3 Jur., N. S., 975. See *Aspinall* v. *London & North-Western Railway Co.*, 11 Hare 325.

Semble, that in a case of this kind it is of the utmost importance to show that no suspicion or trace of misconduct can attach to the partners who have become purchasers of the share or interest of their partner. *Ib.*

In order to sustain the purchase by the solvent partners of their partner's share under a compulsory sale, their conduct must be free from all suspicion of unfairness. S. C. 3 Sm. & Giff. 419.

2. A prosperous company came to consist of three partners, A., B., and C., having equal shares. The contract of co-partnership contained, *inter alia*, a clause that it should not be in the power of any of the partners to assign all or any part of their shares or interest in the capital, stock, or profits of the concern to any person or persons, or give them a right to inspect the company's books, or to interfere in any way with the business; and should any such assignment be made the same was declared of no effect so far as regards the company. There was also a clause that on the retirement of a partner the remaining partners should have power to buy his interest at the amount standing to his credit at the last balance. A. entered into an agreement by which he sold to B. his whole interest. A.'s name remained on the books, and he signed all deeds relating to the business till his death seven years after. C. was not till then informed of the agreement. He then claimed to participate on the grounds of (1), an alleged mandate to B. to purchase for the company A.'s interest; (2), that the agreement could only be legally made under the contract of co-partnership with his consent; and (3), that B. had secretly acquired a benefit for himself within the scope of the partnership business:—Held, that in point of fact no agreement had been made between B. and C. to the effect that B. was to buy A.'s interest for the partnership. And in respect to the articles of co-partnership, they did not prevent the agreement being made, and otherwise it was perfectly legal. Therefore C. was not entitled to any benefit under it. *Cassels* v. *Stewart*, 6 L. R., App. Cas. (Sc.), 64; 29 W. R. 636.

3. One partner may agree with retiring partner to give him a sum for concern, though they know it to be insolvent, no fraud being intended. *Exp. Peake*, 1 Madd. 346.

4. Articles of partnership having provided that on dissolution by death, notice, or misconduct of a partner, the remaining partner should have the option of taking his share at a valuation, payable by yearly instalments in the course of seven years; and that on the bankruptcy or insolvency of a partner, the partnership should be immediately void as to him; by a deed, four years subsequent, the partners declared (after a recital that such was their intention in the articles) that in the event of bankruptcy or insolvency, the same arrangement should be practised as on dissolution by death, notice, or misconduct: one of the partners having become bankrupt within a few months after the execution of the latter deed, his assignees are not bound by it. Whether a provision in articles of partnership, that on the bankruptcy of a partner his share shall be taken by the solvent partners, at a sum to be fixed by valuation, and payable by instalments in a course of years, is not void by the statutes concerning bankrupts, *quære*. *Wilson* v. *Greenwood*, 1 Swan. 471; 1 Wils. 223.

5. A partnership deed of a mine provided, that in the event of the bankruptcy of any partner, an account was to be taken of his share and interest in the mine (other than his share in the lease of the mine, which was not to be valued), and the amount of such account paid to the parties entitled. A partner became bankrupt:—Held, that the clause was void as against his assignees, who were entitled to his share in the lease. *Whitmore* v. *Mason*, 2 John. & H. 204; 8 Jur., N. S., 278; 31 L. J., Ch., 433; 10 W. R. 168; 5 L. T., N. S., 631.

6. The vendor of a share in a partnership business filed a bill against the purchaser, who had taken possession, charging that he had grossly mismanaged the property, and destroyed its value, and praying that he might be declared to have accepted the title, and might be decreed to perform the contract specifically. The Court was of opinion that the title had not been accepted, and as a good title was not shown, a specific performance could not be decreed:—Held, that upon a record so framed, no accounts of enquiries could be directed as to the defendant's possession and management of the property, with

a view to ascertain whether any and what sum ought to be paid, or compensation made by him to the plaintiff. *Stevens* v. *Guppy*, 3 Russ. 171; 6 L. J., Ch., 164.

1. A. and B., being in partnership as distillers, came to an agreement whereby R. was to buy out A., and it was agreed that if B. should, during A.'s life, be desirous of retiring, he should give notice, and A. should then have an option of re-purchase, on the terms that within six months after notice by A. the premises, goodwill, stock in trade, and all such of the subsisting contracts as A. should be willing to take, should be valued in "the usual way" by two valuers, one to be named by A., the other by B., or by the umpire of the two valuers. B. gave notice of his intention to retire, whereupon A. gave notice of his intention to re-purchase, and two valuers were appointed; but after the appointment B. refused to allow his valuer to proceed with the valuation:—Held, on the authority of *Milnes* v. *Gery* (14 Ves. 400), and *Wilks* v. *Davis* (3 Meriv. 507), that there was no contract between the parties which the Court could specifically enforce. *Vickers* v. *Vickers*, 4 L. R., Eq., 529; 36 L. J., Ch., 946.

2. A. being as a partner entitled to a share of extensive iron works, and of the lands and premises on which they were carried on, agreed for valuable consideration to assign to B. his interest in the property and business: B. interfered and acted as a partner, but afterwards he assigned his share and gave notice to the other partners that he had withdrawn from the business, and when called on to complete his purchase, resisted the performance of the contract successfully, on the ground that a good title could not be shown:—Held, that B., as between him and his other partners, was to be treated as a partner, and was to contribute to the partnership losses, until the time when he gave notice of his withdrawal from the concern, and assigned his share; that his liability ceased upon his assigning his share and giving notice to the other partners of his withdrawal from the concern; that the assignment of his share, though made to an insolvent person, was not for that reason the less effectual in putting an end to his liability; that the assignee not having been acknowledged a partner or permitted to act as such did not, by his acceptance of the assignment, incur any liability as between himself and the co-partners. *Jefferys* v. *Smith*, 3 Russ. 158.

3. By Mortgage.

3. A coal mine was worked by several persons under a lease, the articles of partnership giving each a power of pre-emption in case any partner wished to dispose of his share. A partner deposited an attested copy of a lease, in order to give an equitable mortgage on his share to a stranger.—Held, the Court could not make the usual order for sale, etc., as the partnership accounts must first be taken, which this Court has no jurisdiction to do, and the case was not free from doubt. *Exp. Broadbent, Re Borron*, 1 Mont. & A. 635; 4 Dea. & Ch. 3; 3 L. J., N. S., Bky., 95.

4. *Semble*, a proprietor of a theatre having demised his share without the consent of his co-proprietor may obtain an injunction to restrain his lessees from doing any act prejudicial to such co-proprietor. *Const* v. *Harris*, T. & R. 529.

5. A partnership for a term of years having expired, L., one of the retiring partners, having occasion to borrow 20,000*l.* of the plaintiffs, wrote to them a letter, the substance being, that the amount of his capital in the late partnership, clear of claims, might be taken roughly at 25,000*l.*; and that he had been informed that a portion of the balance at credit with C. & Co. (in which firm L. was a partner), on account of the late firm, would be appropriated towards the payment of the same. By the same letter L. authorized B., one of his late partners, acting for the firm, to pay to the plaintiffs the amount of his capital, and bound himself to give the plaintiffs a full and perfect lien thereon, such as they might think necessary to secure to them an exclusive title to the balance. B. wrote to the plaintiffs, through L., stating that, in compliance with L.'s letter, he had instructed C. & Co. to transfer to the plaintiffs, from the surplus partnership assets to B. & Co. in their hands, 5,000*l.*, and he engaged to pay to the plaintiffs the remaining balance of L.'s capital with them. Shortly afterwards L. gave the plaintiffs his promissory note for 20,000*l.*, and sent B.'s letter as a collateral security. C. & Co. afterwards became bankrupt, and the promissory note of L. was afterwards dishonoured. The plaintiffs then applied to the continuing partners of the late firm of B. & Co. for payment, and they claimed to be allowed, accounting for L.'s share, to deduct the 5,000*l.* which he had authorized B. to direct C. & Co. to pay to the plaintiffs. The plaintiffs, on the other hand, alleged that there never was a sum of 5,000*l.* with C. & Co. on account of the surplus assets of B. & Co., and claimed the whole of L.'s share of the assets of B. & Co., without deducting the 5,000*l.*:—Held, that they were entitled to recover the whole amount of L.'s share to the extent of 25,000*l.*, without deducting the 5,000*l.* *Glyn* v. *Hood*, 5 Jur., N. S., 1117. Affirmed 6 Jur., N. S., 153; 29 L. J., Ch., 204; 8 W. R. 248.

The bill was filed in 1855, after the deaths of L. and B.:—Held, that there were no laches. *Ib.*

6. A mortgagee of shares in a partnership is entitled to the usual foreclosure decree in respect of them. The mortgaged shares will only be affected by such liabilities as are thrown upon them by reason of some agreement in force at the time of the execution of the mortgage. *Redmayne* v. *Foster*, 2 L. R., Eq., 467; 35 L. J., Ch., 847; 14 W. R. 825.

Where a partnership deed gave to the several partners a right of pre-emption of any shares which might be sold, the Court, on a bill by the mortgagee of certain shares, made the usual foreclosure decree against one of the partners, but in the event of his being absolutely foreclosed, gave leave to any of the other partners to redeem the plaintiff before a given day. *Ib.*

Each partner being at liberty to buy the mortgaged shares is properly made a party to such a suit, on the ground that he is entitled to see that the accounts affecting the mortgaged shares are properly taken. *Ib.*

7. A bankrupt, while in partnership with K., deposits a lease with a creditor, and the

share of the deceased partner and his legal estate in part of the freehold and copyhold estates of the partnership descended or became vested in his infant heir; but the Court refused, upon petition or motion under the Trustee Act 1850, without suit, to declare the infant heir a trustee for the surviving partner. *Re Burt*, 9 Hare 289.

1. P., H., and J., for working a colliery, entered into a partnership, and by the articles it was stipulated, that if either should suffer his share to be taken in execution, and the others or other should thereupon give notice of their or his desire that the partnership should cease, then at the expiration of a month from the time of such notice the partnership should cease. The working of the colliery was commenced, but before the coal was reached a creditor of J. brought an action, and issued execution against him to recover 283*l.*, and his share or interest in the colliery was taken in execution under a *fi. fa.* Notice of dissolution of partnership was given by P. and H. J.'s share or interest was put up by the sheriff and sold by auction. At the sale P. and H. became the purchasers of J.'s share or interest for 500*l.* Of this, a balance of 164*l.*, after paying the execution creditor's claim and expenses, was received by J. The sheriff subsequently, as far as he lawfully might or could, assigned to P. and H. all the estate, share, and interest of J. A bill was filed by P. and H., praying for a declaration that the partnership was dissolved, or if it appeared that the sale did not operate as an effectual transfer, for an account of the partnership dealings. J. filed a cross bill, praying that the sale might be set aside:—Held, that the coal being nearly reached when the sale took place, some suspicion of misconduct and concealment attached to P. and H., and that the sale must be declared void. *Perrens* v. *Johnson*, *Johnson* v. *Perrens*, 3 Jur., N. S., 975. See *Aspinall* v. *London & North-Western Railway Co.*, 11 Hare 325.

Semble, that in a case of this kind it is of the utmost importance to show that no suspicion or trace of misconduct can attach to the partners who have become purchasers of the share or interest of their partner. *Ib.*

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acceptor was a member of the firm of the drawers. *Exp. Liddel*, 2 Rose 34.

1. In May 1839 A., a creditor of the firm of B. and S., proposed to become a partner with them, the terms of the intended partnership being, that A. should bring in 1,000*l.* in money and 1,000*l.* in goods, and should be entitled to one-third of the profits, and be a dormant partner; the name of the firm was to be changed to B., S., & Co., and the partnership was to date from the 1st April 1839, but A. reserved to himself the option of determining, at any period within twelve months from that day, whether he would become a partner. The name of the firm was altered accordingly, and a new banking account was opened in the name of B., S., & Co.; and A. advanced the 2,000*l.* to the firm; but within twelve months he declared his determination not to enter into the partnership:—Held, that A. was not liable for goods supplied to the firm after May 1839, for that he never became a complete partner. *Gabriel* v. *Evill*, 9 M. & W. 297; Car. & M. 358. S. P. *Exp. Turquand*, 2 M. D. & D. 339.

See also BANKRUPTCY, XIX. xviii. 1.

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3. B. is a partner with A. as nail manufacturers, and with C. as grocers. The firm of B. and C. advance moneys to the firm of A. and B.:—Held, that as B. and C. were not liable for the debts of A. and B., B. and C. could prove under a fiat issued against A. and B. *Exp. Thompson, Re Ecroyd*, 3 Dea. & Ch. 612; 1 Mont. & A. 312, 324.

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5. Mere temptation to abuse partnership effects is not sufficient to induce Court to grant injunction. *Glassington* v. *Thwaites*, 1 Sim. & S. 124; 1 L. J., Ch., 113.

All the proprietors of the M. paper being also, with the exception of one, proprietors in the E. paper, an injunction to restrain using effects of former partnership to assist latter, in consideration of an annual sum, was refused where there had been an agreement permitting use on those terms which had been long acted under. *Ib.*

But injunction granted to restrain using effects not included in agreement. *Ib.*

6. To bill (also praying discovery) stating that partnership subsisted between plaintiff in equity and deceased partner of a banking firm in another concern, in which plaintiff had chief management, and that cheques were drawn under special circumstances, founded on mutual understanding, etc.; answer denying privity of defendants, or that they were in any way engaged in concern as partners or otherwise, is sufficient to prevent injunction to stay defendant's proceedings at law to recover amount of cheques paid by them on account of plaintiff in equity. *Askam* v. *Thompson*, 4 Price 330.

7. P., a partner in two houses of trade originating in the West Indies, where his partners continue to carry on the business, but being himself resident in London, receiving and disposing of consignments from and shipping cargoes to his partners abroad, becomes bankrupt. On bill by his assignees against a creditor of the two firms, having attached in the West Indies property belonging to both, for account of what he had received by means of his attachments:—Held, that the defendant was entitled to retain what he had received, to the extent of satisfying his joint debts, and to account only for the overplus. *Brickwood* v. *Miller*, 3 Meriv. 279.

8. A common member of two firms, one of which had dealings with the other as agents of a third firm, represented to the third that there was a debt due from one of the two to the third:—Held, that it was not competent to the two firms to avail themselves as against the third of the ordinary rule respecting the appropriation of payments to the reduction from time to time of the earlier portion of the account, and thus to arrange the accounts between them in such manner as to result in the liquidation of the debt represented to be due as before mentioned. One of two partners died; after his death the affairs were wound up under deed of inspection, which provided that the firm should be deemed to have committed an act of bankruptcy on a certain day, which was about three months after the partner's death:—Held, that the partnership property continued to be joint estate, and was not in the order and disposition of the surviving partner. Where there are two firms, and one of them contains one partner who is a member of the other firm, there may be double proof in bankruptcy upon the estates of both firms. *Wickham* v. *Wickham*, 2 Kay & J. 478.

See also BANKRUPTCY, XXIV. iv. 23 (c) - XXIV. xxviii. 6 (c) & 9.

VII. MANAGING PARTNER.

See also SHIPPING—COMPANY.

1. *Compensation for Services*, 5495
2. *Personal Liability*, 5493.

1. Compensation for Services.

1. On the death of one partner, the survivor retaining his capital, and employing it in the trade, decreed to account for profits derived from it, making him proper allowances for the management of the business. *Brown* v *De Tastet*, 1 Jac. 284.

2. Two sets of parties having projected a railway on a similar line agreed to consolidate the project, and appointed, as solicitors of the proposed company, the plaintiff and defendant, whom they had respectively consulted prior to the consolidation. The two solicitors accepted the appointment, without making any definite arrangement as to the division of the business, or of the emoluments of the office, and a much larger portion of the work was done by the defendant than by the plaintiff. In a conversation between them about six months after the appointment, and before the principal part of the business was transacted, the plaintiff stated, as the result of his inquiries into the practice in like cases, that the allowance for office expenses and personal trouble in such limited partnerships between solicitors was made by each party retaining, besides his expenses and disbursements, from 10 to 25 per cent. on the amount of the net charges for the business done, and which principle he considered satisfactory; and the defendant, in reply, observed that there could be no misunderstanding about it between honourable men. Upon a bill by the plaintiff, claiming an account and division of the profits of the business done by the company, upon the footing of an equal co-partnership, and offering to allow 25 per cent. upon the work done separately to the partner who did it,—the Court, in the circumstances, made a decree accordingly. *Webster* v. *Bray*, 7 Hare 159.

3. The managing partner of a concern is not entitled to an allowance for carrying on the partnership trade, where there is neither contract between the partners nor a custom of the trade to authorize such allowance. *Hutcheson* v. *Smith*, 5 Ir. Eq. R. 117. And see *Tibbits* v. *Phillips*, 10 Hare 355.

4. Partners having stipulated to devote their whole time to the business, and one having discontinued his services, an inquiry was, upon a dissolution, directed as to what was proper to be allowed to the other partner in respect of the business having been exclusively conducted by him. *Airey* v. *Borham*, 29 Beav. 620.

5. In taking accounts between three partnerships with common members, one firm cannot charge commission for collecting the debts of the other two firms. *Whittle* v. *M'Farlane*, 1 Knapp 311. But see *Robinson* v. *Anderson*, 20 Beav. 98.

6. Where an allowance was made to one partner for his labour in making up the books, and during the last eighteen months of his life he was incapacitated by illness, the allowance was disallowed on taking the account between his executor and the surviving partner. *McDonald* v. *Richardson*, *Richardson* v. *Marten*, 1 Giff. 81; 10 L. T., N. S., 166; 5 Jur., N. S., 9.

7. A surviving partner being the executor of his deceased partner is not entitled to an allowance for carrying on the business after his partner's decease for the benefit of the estate; nor is an executor and legatee of such surviving partner. *Stocken* v. *Dawson*, 6 Beav. 371. Affirming 17 L. J., N. S., Ch., 282.

8. Where A. and B., partners, assigned all their stock in trade to C., in trust to secure a sum of money advanced by C., and upon further trusts that C. might manage the business until he and other creditors were repaid sums due to them:—Held, on a bill for an account by the surviving partner, that C. was not entitled to credit himself with any sums as bonuses, notwithstanding that his management of the concern had been such as to pay all creditors, and largely to diminish his own debt, and that the partners had repeatedly acquiesced in such charges. *Barrett* v. *Hartley*, 14 W. R. 684.

9. At the commencement of a partnership, the partners both living in the same house, entertained their customers jointly; one removing, the whole expense of entertainment (which was necessary in the trade) fell upon the other. They ought to have agreed for an allowance; the Court can make none. The accounts having been annually balanced without such allowance, is conclusive. *Thornton* v. *Proctor*, 1 Anstr. 94.

2. Personal Liability.

10. Where a lease of mines is taken by six persons, for the purpose of working them in partnership, and the managing partner becomes in the course of such management indebted to the concern, his interest in the partnership is in the first place applicable to satisfy his debt to the concern. *Fereday* v. *Wightwick*, 1 Russ. & M. 45; Taml. 250.

11. The managing partner of a colliery worked beyond the boundaries of the colliery without proper inquiry as to such boundaries, and, after notice from the adjoining owner that he was committing a trespass, recklessly continued such workings without consulting his co-partners, under the *bonâ fide* belief that the adjoining owner had no title to the disputed area. An action against him for trespass and damages by the adjoining owner was referred to arbitration. The co-partners had no knowledge of the action until after the reference had been agreed to. They attended the reference, however, and did not object to it. The arbitrator found that a trespass had been committed, and assessed the damages at 6,000*l*. The co-partners refusing to contribute, the managing partner brought an action against them claiming a declaration that the 6,000*l*. damages was a partnership debt, and that defendants were bound to contribute ratably to it:—Held, that, inasmuch as the managing partner had acted with culpable negligence in continuing to work in the disputed area after notice from the adjoining proprietor, and without consulting his co-partners, he alone was liable for the damages. *Thomas* v. *Atherton*, 10 L. R., Ch. D., 185; 48 L. J., Ch., 370; 40 L. T. 77.

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6. To bill (also praying discovery) stating that partnership subsisted between plaintiff in equity and deceased partner of a banking firm in another concern, in which plaintiff had chief management, and that cheques were drawn under special circumstances, founded on mutual understanding, etc.; answer denying privity of defendants, or that they were in any way engaged in concern as partners or otherwise, is sufficient to prevent injunction to stay defendant's proceedings at law to recover amount of cheques paid by them on account of plaintiff in equity. *Askam* v. *Thompson*, 4 Price 330.

7. P., a partner in two houses of trade originating in the West Indies, where his partners continue to carry on the business, but being himself resident in London, receiving and disposing of consignments from and shipping cargoes to his partners abroad, becomes bankrupt. On bill by his assignees against a creditor of the two firms, having attached in the West Indies property belonging to both, for account of what he had received by means of his attachments:—Held, that the defendant was entitled to retain what he had received, to the extent of satisfying his joint debts, and to account only for the overplus. *Brickwood* v. *Miller*, 3 Meriv. 279.

8. A common member of two firms, one of which had dealings with the other as agents of a third firm, represented to the third that there was a debt due from one of the two to the third:—Held, that it was not competent to the two firms to avail themselves as against the third of the ordinary rule respecting the appropriation of payments to the reduction from time to time of the earlier portion of the account, and thus to arrange the accounts between them in such manner as to result in the liquidation of the debt represented to be due as before mentioned. One of two partners died; after his death the affairs were wound up under deed of inspection, which provided that the firm should be deemed to have committed an act of bankruptcy on a certain day, which was about three months after the partner's death:—Held, that the partnership property continued to be joint estate, and was not in the order and disposition of the surviving partner. Where there are two firms, and one of them contains one partner who is a member of the other firm, there may be double proof in bankruptcy upon the estates of both firms. *Wickham* v. *Wickham*, 2 Kay & J. 478.

See also Bankruptcy, XXIV. iv. 23 (c) - XXIV. xxviii. 6 (c) & 9.

VII. MANAGING PARTNER.

See also Shipping—Company.

1. *Compensation for Services*, 5495
2. *Personal Liability*, 5493.

1. Compensation for Services.

1. On the death of one partner, the survivor retaining his capital, and employing it in the trade, decreed to account for profits derived from it, making him proper allowances for the management of the business. *Brown* v *De Tastet*, 1 Jac. 284.

2. Two sets of parties having projected a railway on a similar line agreed to consolidate the project, and appointed, as solicitors of the proposed company, the plaintiff and defendant, whom they had respectively consulted prior to the consolidation. The two solicitors accepted the appointment, without making any definite arrangement as to the division of the business, or of the emoluments of the office, and a much larger portion of the work was done by the defendant than by the plaintiff. In a conversation between them about six months after the appointment, and before the principal part of the business was transacted, the plaintiff stated, as the result of his inquiries into the practice in like cases, that the allowance for office expenses and personal trouble in such limited partnerships between solicitors was made by each party retaining, besides his expenses and disbursements, from 10 to 25 per cent. on the amount of the net charges for the business done, and which principle he considered satisfactory; and the defendant, in reply, observed that there could be no misunderstanding about it between honourable men. Upon a bill by the plaintiff, claiming an account and division of the profits of the business done by the company, upon the footing of an equal co-partnership, and offering to allow 25 per cent. upon the work done separately to the partner who did it,—the Court, in the circumstances, made a decree accordingly. *Webster* v. *Bray*, 7 Hare 159.

3. The managing partner of a concern is not entitled to an allowance for carrying on the partnership trade, where there is neither contract between the partners nor a custom of the trade to authorize such allowance. *Hutcheson* v. *Smith*, 5 Ir. Eq. R. 117. And see *Tibbits* v. *Phillips*, 10 Hare 355.

4. Partners having stipulated to devote their whole time to the business, and one having discontinued his services, an inquiry was, upon a dissolution, directed as to what was proper to be allowed to the other partner in respect of the business having been exclusively conducted by him. *Airey* v. *Borham*, 29 Beav. 620.

5. In taking accounts between three partnerships with common members, one firm cannot charge commission for collecting the debts of the other two firms. *Whittle* v. *M'Farlane*, 1 Knapp 311. But see *Robinson* v. *Anderson*, 20 Beav. 98.

6. Where an allowance was made to one partner for his labour in making up the books, and during the last eighteen months of his life he was incapacitated by illness, the allowance was disallowed on taking the account between his executor and the surviving partner. *McDonald* v. *Richardson*, *Richardson* v. *Marten*, 1 Giff. 81; 10 L. T., N. S., 166; 5 Jur., N. S., 9.

7. A surviving partner being the executor of his deceased partner is not entitled to an allowance for carrying on the business after his partner's decease for the benefit of the estate; nor is an executor and legatee of such surviving partner. *Stocken* v. *Dawson*, 6 Beav. 371. Affirming 17 L. J., N. S., Ch., 282.

8. Where A. and B., partners, assigned all their stock in trade to C., in trust to secure a sum of money advanced by C., and upon further trusts that C. might manage the business until he and other creditors were repaid sums due to them:—Held, on a bill for an account by the surviving partner, that C. was not entitled to credit himself with any sums as bonuses, notwithstanding that his management of the concern had been such as to pay all creditors, and largely to diminish his own debt, and that the partners had repeatedly acquiesced in such charges. *Barrett* v. *Hartley*, 14 W. R. 684.

9. At the commencement of a partnership, the partners both living in the same house, entertained their customers jointly; one removing, the whole expense of entertainment (which was necessary in the trade) fell upon the other. They ought to have agreed for an allowance; the Court can make none. The accounts having been annually balanced without such allowance, is conclusive. *Thornton* v. *Proctor*, 1 Anstr. 94.

2. Personal Liability.

10. Where a lease of mines is taken by six persons, for the purpose of working them in partnership, and the managing partner becomes in the course of such management indebted to the concern, his interest in the partnership is in the first place applicable to satisfy his debt to the concern. *Fereday* v. *Wightwick*, 1 Russ. & M. 45; Taml. 250.

11. The managing partner of a colliery worked beyond the boundaries of the colliery without proper inquiry as to such boundaries, and, after notice from the adjoining owner that he was committing a trespass, recklessly continued such workings without consulting his co-partners, under the *bonâ fide* belief that the adjoining owner had no title to the disputed area. An action against him for trespass and damages by the adjoining owner was referred to arbitration. The co-partners had no knowledge of the action until after the reference had been agreed to. They attended the reference, however, and did not object to it. The arbitrator found that a trespass had been committed, and assessed the damages at 6,000*l*. The co-partners refusing to contribute, the managing partner brought an action against them claiming a declaration that the 6,000*l*. damages was a partnership debt, and that defendants were bound to contribute ratably to it:—Held, that, inasmuch as the managing partner had acted with culpable negligence in continuing to work in the disputed area after notice from the adjoining proprietor, and without consulting his co-partners, he alone was liable for the damages. *Thomas* v. *Atherton*, 10 L. R., Ch. D., 185; 48 L. J., Ch., 370; 40 L. T. 77.

VIII. AUTHORITY OF PARTNER. LIABILITY OF FIRM.

1. *In General*, 5494.
2. *Bills of Exchange*, 5494.
3. *Documents executed by One Partner*, 5496.
4. *Fraud and Misappropriation*, 5496.
5. *Loans and Pledges*, 5498.
6. *Payments and Receipts*, 5501.

1. In General.

1. To make partnership liable to demand in respect of separate transaction, an agreement must appear. *Exp. Peele*, 6 Ves. 602.

2. Power of a partner to bind the partnership, unless from the nature of the transaction it can be inferred to be separate, in which case previous authority, or subsequent approbation, must be shown. *Exp. Bonbonus*, 8 Ves. 546.

3. A general dissolution of partnership does not operate to discharge the members of it from the subsequent acts of one of them in respect of the engagements of the partnership, with third persons, entered into prior to the dissolution. *Ault* v. *Goodrich*, 4 Russ. 430.

Sub-partners are liable to the partners for the acts of each other. Thus, if a firm consisting of A. and B. engage in a speculation with C., A. is answerable to C. for the acts of B. *Ib.*

4. Where one of three partners in a banking concern, who resided at the place where the banking-house was, and was the only partner who transacted the business, the other two residing at a distance from it, absented himself from the banking-house, shut it up, and stopped payment:—Held, that this was not evidence of a joint act of bankruptcy by all three. *Mills* v. *Bennett*, 2 M. & S. 556.

5. A partner may give a guarantee where the obligation has reference to business connected with the partnership, and where the guarantee is notified to the firm, and they do not dissent from it. *Exp. Nolte*, 2 G. & J. 295.

6. Where two of three partners entered into engagements in breach of the articles, which the other partner disapproved of, and prohibited for the future, without expressly repudiating what had been done, or objecting to the entries connected with it:—Held, that the partnership assets were liable in respect of what had been done. *Cragg* v. *Ford*, 1 Y. & Coll. C. C. 285.

7. *Semble*, an authority to a member of a dissolved partnership to wind up the concern, close the books, and collect the debts, authorizes the party to state and settle an account. *Luckie* v. *Forsyth*, 3 J. & L. 388.

8. L., a partner in a firm at Grenada, employs a firm at St. Thomas to supply articles to fulfil a contract, which the St. Thomas firm do, believing the contract to have been entered into on behalf of the Grenada firm. The other partners in the Grenada firm write to the St. Thomas firm to disclaim the contract:—Held, that the Grenada firm were liable for all advances in respect of the contract made by the St. Thomas firm, previously to the day of their receipt of the disclaimer, or subsequently to it, in consequence of liabilities which they had previously incurred, and that the Grenada firm were entitled to credit for all payments made in respect of the contract prior to that day, or subsequently to it, if specifically made in respect of the account then due and for the balance of all payments made generally in respect of the contract subsequently to that day, after satisfying the amount due to the St. Thomas house by L. alone. An account current kept by the St. Thomas house of all their transactions with the Grenada house, both prior to and after the disclaimer of the contract, held not to be evidence of specific appropriation by them of the sums they had received. *Smith* v. *Ure*, 2 Knapp 188.

9. A., on behalf of himself and partners, entered into contract with B. for certain commodity, but the name of A. is only used in contract. Other partners having paid part of deposit, were held liable to the contract. *Browne* v. *Gibbins*, 5 Bro. P. C. 491.

10. One of several partners, who is treasurer of the whole, enters into contract with A., and afterwards failing, his estate is vested in trustees. Though contract with A. concerns the partnership business, yet he is not entitled to any satisfaction out of treasurer's share of partnership effects, but must come in equally with the other creditors; the money due to A. not being for wages. *Ball* v. *Lanesborough*, 5 Bro. P. C. 480.

2. Bills of Exchange.

11. L., a partner in a firm carrying on the business of solicitors, gave, without the knowledge of his partners, a promissory note in the joint name of the firm, as security for a sum of money advanced to him by C., and applied the money to his own private use. The partners filed their bill against C. and L. for the delivery up of the note, and, on L. becoming bankrupt, brought his assignees before the Court by supplemental bill. The assignees, by their answer, submitted their interest in the suit to the judgment of the Court:—Held, first, that, under the circumstances of the case, the note was not binding on the partners, either as between them and L., or as between them and C.; secondly, that it was a case in which L.'s assignees ought neither to pay nor to receive costs. *Smith* v. *Coleman*, 7 Jur. 1053.

12. A., the partner of B., carrying on business at a different place, draws bills of exchange, sometimes in the name of the firm, and sometimes in his own name, on the clerk of the partnership managing the business in London, and discounts them with bankers in the country; on an application by them that the bills drawn in the separate name of A. might be considered as a partnership debt, as having been applied to partnership purposes, the Lord Chancellor, expressing an opinion against the claim, directed dividends to be reserved till after an action at law. *Exp. Emly*, 1 Rose 61. See 15 East 7.

13. Bills drawn by one partner, for a separate debt, in the partnership name, cannot be recovered on as against the firm, unless the plaintiff can prove either a direct assent from the other partners, or circumstances from

which such an assent can reasonably be presumed. *Frankland* v. *M'Gusty*, 1 Knapp 274.

1. Where one partner gives the acceptance of the firm for his separate debt, without authority from his co-partner, such acceptance does not bind the firm. *Exp. Goulding*, 2 G. & J. 118. Affirmed 8 L. J., Ch., 19.

2. If A. and B. are partners in a trade carried on in the name of A. only, and A. draws bills in his own name, payable to his order, which he indorses, and afterwards B. also indorses, and procures them to be discounted, there is no legal contract for a holder to maintain an action against A. and B. upon the bills, unless it appear that A. drew and indorsed the bills in the character of and as representing A. and B. *Exp. Bolitho*, Buck 100.

A person discounting the bills may have a right of action against A. and B. jointly for money had and received, if he can show that they received the money by means of the bills for partnership purposes. *Ib.*

3. Order for goods by two partners, afterwards partnership dissolved; a bill drawn on the two partners, but accepted only by one who carried on a separate trade, and the goods delivered to him, no claim can be made on the other partner. *Exp. Harris*, 1 Madd. 583.

4. A partner, after the partnership ceased, gave a joint note. Bill filed to strike out the plaintiff's (the former partner's) name, have the bill retained for a year, and the trial had; when the plaintiff at law could not prove the partnership, and was non-suited; yet Lord Chancellor (on equity reserved) refused to decree the name to be erased. *Ryan* v. *Mackmath*, 3 Bro. C. C. 15.

5. Injunction granted *ex parte* to restrain the negotiation of a bill of exchange by a holder, who had given valuable consideration for it, but who had notice that it had been improperly accepted by a partner of the plaintiffs in the partnership name. *Hood* v. *Aston*, 1 Russ. 412.

6. Generally speaking, a partner has full authority to deal with the partnership property for partnership purposes. If the business of the partnership is such as ordinarily requires bills of exchange, then, unless restrained by agreement, any one partner may draw, accept, and indorse bills of exchange in the name of the partnership for partnership purposes. All persons may give credit to his acts and his authority unless they have notice or reason to believe that the thing done in the partnership name is done for the private purposes or on the separate account of the partner doing it. In that case, authority by virtue of the partnership contract ceases, and the person dealing with the individual partner is bound to inquire and ascertain the extent of his authority. If he does not so act he must depend upon the right of the partner, or on circumstances sufficient to repel the assumption of fraud. *Exp. Darlington District Joint Stock Banking Co., Re Riches*, 4 De G. J. & S. 581; 11 Jur., N. S., 122; 34 L. J., Bky., 10; 13 W. R. 353; 11 L. T., N. S., 651; 5 N. R. 287.

The unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove by showing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so. *Ib.*

A bill drawn by a partner in the name of his firm, indorsed by him also in such name to himself, and discounted at his private bankers', for his own account, cannot be proved against the joint estate of the firm, unless he had authority from partners to act as he did, with regard to the bill, or unless the proceeds have actually been applied to partnership purposes, and the firm is indebted to his private account to an amount to cover the amount of the bill. *Ib.*

Where a partner drew bills in the name of a partnership firm, and obtained acceptances to them from various persons by fraudulent misrepresentation of what it was that was being signed, and then indorsed the bills, so accepted, with the name of the firm, and again indorsed them over to himself:—Held, that the partner's private bankers, who had discounted the bills, having full notice that their customer was using partnership property for his private purposes, and seeing that all the signatures, except the acceptances, were in his handwriting, were guilty of gross negligence, and could not be allowed to prove in bankruptcy for the loss they had sustained on the fraudulent acceptances against the estate of the surviving partners. *Ib.*

7. S. & S., trading in that name, becoming embarrassed, executed a deed, to which they were parties of the first part; certain of the creditors, as trustees, of the second part, and the general scheduled creditors (among whom the trustees were named) of the third part. The deed assigned their property to the trustees, and empowered the trustees to carry on the business, under the name of the Stanton Iron Company, to execute all contracts and instruments necessary to carry it on, to divide the net income to be taken among the creditors, in ratable proportions (such income to be deemed the property of S. & S.), with power to the majority of the creditors, assembled at a meeting, to make rules for conducting the business, or to put an end to it altogether; and after the debts had been discharged, the property was to be re-transferred by the trustees to S. & S. Two of the creditors, C. and W., were named among the trustees; C. never acted; W. acted for six weeks, and then resigned. Some time afterwards the other trustees, who continued to carry on the business, became indebted to H., and gave him bills, accepted by themselves "per proc. the Stanton Iron Company":—Held, that there was no partnership created by the deed, and that, consequently, C. and W. could not be sued on the bills as partners in the company. *Cox* v. *Hickman*, 8 H. L. Ca. 268; 7 Jur., N. S., 165; 30 L. J., C. P., 125; 9 C. B., N. S., 847.

Held, also, that they could not be sued for goods sold and delivered, there being no distinction upon the question of liability between the bills and the consideration for which they were given. *Ib.*

8. A. and B. partners, A. receives money in the shop, and gives his noté for it. Though

no proof that this money was brought into stock, or used in trade, yet this note being given in the shop by one of the partners, it shall bind both, and though this note at law binds only the executor of the surviving partner, yet in equity the creditor may follow the estate of the other. *Lane* v. *Williams*, 2 Vern. 277, 292.

1. Four firms, F. & Co., M. & Co., M. & L., and A. & Co., associated themselves in a trading adventure, under an agreement which provided "that the finance of the business be carried on by acceptances of the several parties interested as may from time to time be arranged." The association was not registered, nor was its existence made known to the world, though it was known as the Adansonia Fibre Company among its members. The adventure had, before the association was formed, been carried on by F. & Co., in whose name it continued to be carried on. An order having been made for winding up the association, an application was made to prove on ten bills of exchange, drawn by M. & Co., for the purposes of the adventure, and accepted some by F. & Co., some by M. & L., and some by A. & Co.:—Held, that the proof could not be admitted, for that the bills bound only the individual firms by which they were drawn and accepted. *Re Adansonia Fibre Co., Miles' claim*, 9 L. R., Ch., 635; 31 L. T., N. S., 9.

2. In an action against partners, on a bill accepted by one of them in the name of the firm, the admissions in his answer to a bill in equity against him are not admissible against the rest. *Booth* v. *Quin*, 7 Price 193.

3. Documents executed by One Partner.

3. Partnership bound by the signature of one partner. *Exp. Gardom*, 15 Ves. 28.

4. Partners bound by an instrument executed by one in the presence of the others. *Burn* v. *Burn*, 3 Ves. 578.

5. Demurrer to a bill by a surety, stating that two partners having agreed to execute a release to the principal, in consideration of an assignment of his effects, one alone executed the release, overruled. Whether a release so executed binds all the partners, *quære*. *Hawksham* v. *Parkins*, 2 Swan. 539.

6. One partner can, though the partnership be dissolved, sign the bankrupt's certificate for a joint debt proved under the commission by himself and his co-partner. *Exp. Hall*, 1 Rose 2; 17 Ves. 62.

7. One partner may act for all, almost universally in bankruptcy, proving debts, voting for assignees, and signing certificates. *Exp. Hodgkinson*, 19 Ves. 293. *Exp. Mitchell*, 14 Ves. 597.

Joint commission of bankruptcy on affidavit of debt, and bond sworn and executed by one partner on behalf of all. *Ib.*

8. B. was chief partner in a partnership of three persons. He examined a draft contract, and wrote "approved" at the end, and also signed his name. This was treated as an assent binding on all the partners (whose names were mentioned in the paper), although the several forms of signature of the partnership was that of "B. & Sons." *Brogden* v. *Metropolitan Railway Co.*, 2 L. R., App. Cas., 666.

9. *Semble*, in a partnership which is not for a fixed period, one partner has no implied authority to enter into a contract for a lease for twenty-one years of premises to be used for partnership purposes, so as to bind the other partners. *Sharp* v. *Milligan*, 22 Beav. 606.

Three partners agreed, by parol, for a lease of some premises. They entered and paid the rent. A., one of the partners, two years afterwards signed a contract for a lease on behalf of the firm. Possession was continued, and rent paid until a dissolution. The Court, under the circumstances, inferred that A. had authority to sign the contract, though it was denied by the other partners, and made a decree for specific performance against them. *Ib.*

10. A. and B. were partners, and A., on the faith of representations made to him by the secretary of a company, informed B. that the liabilities were limited, and thereupon B. consented to shares being taken in the company. A. executed the company's deed alone, in the name of the firm. Two calls were paid by the firm, and dividends were received by the firm as part of the partnership assets. The firm dissolved partnership, and all the assets and liabilities (the shares being particularly specified) were transferred from A. to B. The company failed, and was wound up. It then appeared that the liabilities of the company were not limited, and B. alleged that A. alone was liable as a contributory:—Held, the misrepresentation as to the limited liabilities not being wilful, and the company assenting, that B. was primarily liable, and A. secondarily liable, as contributories. *Exp. Betts*, 26 L. J., Ch., 455.

4. Fraud and Misappropriation.

11. A., B., and C. executed to a banking firm, consisting of E., F., and G., a power of attorney, empowering them "jointly and severally" to receive the dividends, and to sell out the stock itself. The power was sent by the bankers to their broker, who deposited it with the Bank of England. F. alone clandestinely sold out the stock, but the firm had credit for the proceeds. The sale was concealed, and the amount of dividends for some time accounted for:—Held, that E. was liable for the sale though it had taken place after the death of C. and G.; and that he would have been equally liable, though the proceeds had not been placed to the credit of the firm. *Sadler* v. *Lee*, 6 Beav. 324; 12 L. J., N. S., Ch., 407; 7 Jur. 476.

12. A., B., and C. agreed for the purchase of certain mines for 10,000*l.* and to form a joint stock company for working them, and that the mines should be sold to the company for 25,000*l.*, of which 10,000*l.* should be paid to F., the proprietor, and the remainder divided amongst themselves and certain of their friends whom they nominated to be directors and officers of the company. At a meeting of the persons so nominated, at which A., B., and C. were present, but before the company was established, it was resolved that the company should purchase the mines for 25,000*l.*, to be paid to F., and a conveyance was afterwards taken from F. to the trustees of the company, and the 25,000*l.* was paid out of the funds of

the company, and distributed in the manner agreed upon. A suit having been instituted by some of the shareholders, on behalf of themselves and the others, against the persons who had participated in the 15,000*l.*, the latter were decreed to refund what they had received; and one of the defendants having become bankrupt after he had paid what he had received into court, under an order upon motion:—Held, that the plaintiffs were entitled to receive that sum, and were not to be put to prove their demand under the commission. *Hichens* v. *Congreve*, 4 Sim. 420.

1. A tenant for life of settled estates obtained an Act of Parliament for selling the estates, and investing the proceeds, under the direction of the Court, in the purchase of other lands to be settled to the same uses; after the estates had been sold, and the money paid into Court, the tenant for life fraudulently obtained an order, under which part of the money was paid out to him. Messrs. B., G., and C., solicitors and co-partners, acted as the solicitors of the tenant for life in obtaining the order, and in every other proceeding under the Act; B. was aware of the fraud, but G. and C. were wholly ignorant of it:—Held, nevertheless, in a suit instituted by the remainder-man after the death of the tenant for life, that G. and C., as well as B., and the estate of the tenant for life, and all the other parties to the transaction, were jointly and severally liable to make good the money. *Brydges* v. *Branfill*, 12 Sim. 369; 11 L. J., N. S., Ch., 249; 6 Jur. 310.

2. Joint owners of a patent are considered as partners, and where a party had been induced by the fraud of one of such joint owners to purchase from him, by an agreement to which all were parties, the use of a patent right, which turned out to be of no value:—Held, that each of the parties to the contract, one of whom had no interest in the patent at the time of the contract, was liable to refund the whole of the purchase money fraudulently obtained. *Lovell* v. *Hicks*, 2 Y. & Coll. 481; 6 L. J., N. S., Exch. Eq., 85. See S. C. 2 Y. & Coll. 46; 5 L. J., N. S., Exch. Eq., 101.

Quære, as to effect on right of plaintiff to recover the whole from each, had it been proved that he knew that three of the parties to the contract were, by special agreement, entitled in severalty to different proportions of the profits of the patent, and that one of them had no interest in it whatever. *Ib.*

Semble, that joint owners of a patent are answerable for losses occasioned by their co-adventurers only to the extent of their respective shares. S. C. 2 Y. & Coll. 46; 5 L. J., N. S., Exch. Eq., 101.

3. A., a partner in a house of agency in India, died, having, by his will, directed his estate to be called in and invested on certain trusts, and appointed two of his co-partners his executors. They, however, suffered his share of the partnership to remain in the house. After A.'s death, B. and C. were admitted as partners, and they knew that A.'s share was in the house, and that it was subject to the trusts of his will. They afterwards retired, and other partners were admitted. The house ultimately failed:—Held, that B. and C. were not responsible for the breach of trust committed by their co-partners the executors. *Twyford* v. *Trail*, 7 Sim. 92

4. A partner in a banking house transferred bank stock belonging to a customer by a forged power of attorney. The proceeds were paid to the account of the partnership, and afterwards appropriated by F., who was subsequently executed for other forgeries, and a commission issued against the other partners, who were ignorant of the transaction, but with common diligence would have known of it. *Quære*, whether the customer can prove for the value under the commission. An action ordered to try whether the parties were indebted to the customer. *Exp. Bolland, Re Marsh*, 1 Mont. & A. 570.

5. An action brought as ordered in *Exp. Bolland, Re Marsh*, 1 Mont. & A. 570:—Held, the customer could maintain an action against the partners for money had and received. *Keating* v. *Marsh*, 1 Mont. & A. 582; 2 Cl. & F. 250. Affirmed *id.* 592.

6. Several persons entered into partnership as manufacturers in December 1806, on the terms (*inter alia*) that one partner should have the management of the business and accounts, and that three of the partners should have no votes or voices in the general affairs, but should be bound by the acts of the majority of the other partners. One of those other partners was also partner in a bank with which the firm kept an account. On the dissolution of the first firm, in 1820, a bill was filed against the partners, or their representatives, by the bankers for an account, and payment for a large balance claimed to be due to them, charging several stated accounts alleged to have been delivered and approved of. One of the defendants (being one of the partners excluded from the management), by his answer, disputed the account, and, by a cross bill, alleged that the superintending partners had, by misconduct and neglect, suffered the acting partner to embezzle the partnership property; that, if any balance were due to the bankers, it had arisen through such misconduct, and that the superintending partners, including the partner in the bank, ought to bear the loss. By the decree dismissing the cross bill, it was referred to the Master to take the account, with liberty to state special circumstances. The Master declined, under this direction, to take the account on the footing of a stated account, and the defendant insisted on the account being taken and vouched item by item; on which the plaintiffs presented their petition for a re-hearing, which was refused, the petition not having been presented within six months after the decree pronounced, the Court, however, expressing a strong opinion that no other decree could, according to the pleadings, have been made. *Milford* v. *Milford*, M'Clel. & Y. 150.

7. A case may happen in which the governing body of a joint stock company or the partners of a firm may so unite with a stranger in practising frauds against the company for whom thay act as to entitle the company to repudiate such acts, and to be relieved against them. *Vigers* v. *Pike*, 8 Cl. & F. 562.

In a case depending on alleged misrepresentations of value there cannot be a more effectual bar to the plaintiff than by showing that he was from the beginning cognizant of all the matters complained of, or after full

information of them continued to deal with them. *Ib.*

A. having granted a lease of certain mines to P. as a trustee for the West Cork Mining Co., and having in his lifetime received certain sums in part payment of the consideration money of the lease; P., who was his executor, filed his bill against V., the managing director of the company, for an account of the sum due on foot of the purchase money, and for payment thereof. V. filed a cross bill on behalf of the company, and thereby, after setting forth various facts and matters as evidencing fraudulent conduct against the shareholders on the part of A. and his executor P., impeached the lease as fraudulent, and the consideration thereof as exorbitant and extravagant:—Held, under the circumstances, that the plaintiff in the original cause was entitled to the relief as prayed for by his bill, and that the cross bill should be dismissed without costs. S. C. 2 Dr. & Wal. 1. Affirmed 8 Cl. & F. 562.

1. A., a partner in a house of agency in India, died, having by his will directed his estate to be called in, and invested on certain trusts, and appointed two of his co-partners his executors. They, however, suffered his share of the partnership to remain in the house. After A.'s death B. and C. were admitted as partners, and they knew that A.'s share was in the house, and that it was subject to the trusts of his will. They afterwards retired and other partners were admitted. The house ultimately failed:—Held, that B. and C. were not responsible for the breach of trust committed by their co-partners, the executors. *Twyford* v. *Trail*, 7 Sim. 92.

2. A., a partner in a banking firm, advised B., a female customer of the bank, to sell out some Dutch Stock, telling her the firm could procure for her better security, and that he had one in view; he said the money was, in fact, wanted by his own son, who was in trade. B. sold out the stock, and paid the money into the bank; she then gave A. a cheque to draw it out and invest it. He drew it out, and misapplied it and absconded, the interest having been regularly carried to her account in the meantime in the books of the bank, but by whom did not clearly appear. All these transactions took place at the banking house, and B. had no acquaintance or dealings with A., except as banker and a member of the firm. The other partners did not appear to have known of them at the time they took place, but they did before A. absconded:—Held, that they were not liable. *Bishop* v. *Jersey* (*Countess of*), 2 Drew. 143; 18 Jur. 765; 23 L. J., Ch., 483; 2 W. R. 247; 2 Eq. Rep. 545.

3. A firm of stockbrokers purchasing, on behalf of a customer, foreign securities, passing by delivery, which in their usual course of dealing they retained in their own custody, are jointly and severally liable to make good the same if lost or misapplied. *De Ribeyre* (*Marchioness*) v. *Barclay*, 23 Beav. 107; 26 L. J., Ch., 747.

Where, therefore, one of the partners, who was a trustee of a marriage settlement, under instructions to the firm, not only bought the foreign securities, but also individually transacted all the business of the customer with the firm, and finally applied them for his own purposes, not wholly unconnected with the firm:—Held, that the securities were in the custody of the firm and not of the trustee; that the firm was responsible for them, whether lost or misapplied; and the trustee having absconded and become bankrupt, that the remaining partners must replace the securities. *Ib.*

4. When one partner in a firm has received a sum of money in the ordinary course of the partnership business, and misappropriated it, all the partners are jointly and severally liable to make good the amount; and, therefore, one or more of them may be made defendants to a suit for that purpose, without suing all. *Plumer* v. *Gregory*, 31 L. T., N. S., 17.

See also SOLICITOR, X. v.

5. Loans and Pledges.

5. Held, that a ship, the property of a partnership, might, under the Ship Registry Act, the 3 & 4 Will. 4, c. 55, s. 32, be mortgaged by one partner without the concurrence of the others. *Exp. Howden, Re Litherland*, 2 M. D. & De G. 574.

6. A bankrupt, while in partnership with K., deposits a lease with a creditor; and the partnership is afterwards dissolved, when certain arrangements are made between the bankrupt and the solvent partner:—Held, that no subsequent arrangements of this kind will affect the rights of the creditor under the original deposit, and that he is entitled to the usual order for the sale of the property. *Exp. Booth*, 2 Dea. & Ch. 59; 1 L. J., N. S., Bky., 81.

7. The implied authority of a partner to bind his co-partners for the repayment of money borrowed for partnership purposes does not necessarily extend to raising money for the purposes of increasing the fixed capital of the firm; and, therefore, a party advancing money to one partner, knowing that it was for this purpose, cannot as a matter of course charge the other partners with the loan, unless the transaction took place with their express or actual authority. *Fisher* v. *Tayler*, 2 Hare 218.

Two partners in a firm advertised their intention of adding 16,000*l.* to their capital by admitting one or more additional partners. W. entered into a negotiation with one of the partners, then acting on behalf of both, on the subject of the announcement, but afterwards declining to enter into the firm, advanced a sum of 4,000*l.* to that partner by way of loan, on the security of the bills of the firm, and also of the separate estate of each partner:—Held, that W. had, so far as this evidence went, notice that the loan of 4,000*l.* was an advance, not within the implied authority of the partner obtaining it, the other partner having authorised the capital to be raised in a different mode; but, inasmuch as the original partnership was then existing, and the advance might have been within the scope of the partnership authority, without reference to the proposed increase of capital, liberty was given to W., for the purpose of trying that question, to bring an action on the bill against the executors of the other partner. *Ib.*

1. If a partner borrows a sum of money, and gives his own security only for it, it does not become a partnership debt by being applied for partnership purposes with the knowledge of the other partner. *Bevan* v. *Lewis*, 1 Sim. 376.

2. A. and B. partners, A. receives money in the shop, and gives his note for it. Though no proof that this money was brought into stock, or used in trade, yet this note being given in the shop by one of the partners, it shall bind both, and though this note at law binds only the executor of the surviving partner, yet in equity the creditor may follow the estate of the other. *Lane* v. *Williams*, 2 Vern. 277, 292.

3. A. and B., who were partners in the business of sharebrokers, and also bought and sold shares on their own account, dissolved their partnership, and after the dissolution A. deposited with the bankers of the firm shares which the firm had contracted to buy, but had not paid for, and obtained advances to pay for such shares upon the security created by the deposit, and signed an authority to the bankers, in the name of the firm, to sell the shares, if the moneys advanced were not repaid in a certain time. In a suit brought by B. against A. and the bankers, repudiating the authority of A. to make the deposit, obtain the advances, or authorise the sale:—Held, that under the circumstances A. had power, notwithstanding the dissolution, to raise money for the purpose of completing the purchase of the shares by means of the deposit, and to give the bankers authority to sell the shares in default of repayment. *Butchart* v. *Dresser*, 10 Hare 453; 4 De G. M. & G. 452; 1 W. R. 178.

4. Partnership property cannot, as against the partners, be pledged as a security for the private debts of a member of the firm. *Wilkinson* v. *Eykyn*, 14 W. R. 470; 14 L. T., N. S., 158.

5. Partners cannot effectually pledge partnership property, so as to make it available for their own private debts. To do so when the partnership is insolvent is to commit an act of bankruptcy. *Exp. Snowball, Re Douglas*, 41 L. J., Bky., 49; 7 L. R., Ch., 534; 26 L. T., N. S., 894; 20 W. R. 786.

A partnership, consisting of A. and B., were in insolvent circumstances, the separate estates of the partners being also insolvent. On the 14th of September B. executed a power of attorney to C., authorising him in general terms to deal with his property. The power contained no reference to the partnership. It contained express powers as to a ship which was in reality partnership property; though the fact did not appear in the power. On the same day B. left England, under circumstances which constituted his departure an act of bankruptcy. In November A. and C. (as B.'s attorney) executed a mortgage of all the partnership property to S., a creditor of the partnership, and also a separate creditor of both parties, to secure all the past debts and such future advances as might be made. At the same time a bill of sale of the ship was executed by A. and C. (as attorney), in consideration of a sum of money paid by S. on account of the partnership. In April A. and B. were both adjudicated bankrupts. S., at the date of the deeds, knew the circumstances under which B. had left England, but he declared in his evidence that he did not infer that B. had any intent to delay or defeat his creditors, and therefore did not know that he had committed an act of bankruptcy:—Held, first, that the execution of the mortgage by C., as B.'s attorney, was void, as not being within the scope of the power of attorney. *Ib.*

Held, secondly, that the execution of the mortgage was an act of bankruptcy, on the ground of its being a mortgage of partnership assets to secure separate debts at a time when the partnership was insolvent. *Ib.*

Held, thirdly, that S. must be held affected with notice that B. had committed an act of bankruptcy by leaving England. *Ib.*

Held, fourthly, as a consequence of the above holding, that both mortgage and bill of sale were void as against the trustee of the joint estate. *Ib.*

6. M. and L., a partnership firm, had a joint account with a bank, with whom M. had also a separate account. M. having railway shares, which the bank knew to be his separate property, deposited them with the bank, accompanied with a written memorandum that they were to be held as a collateral security for a promissory note of his own which had been discounted by the bank, or for any other sums in which he was or might become indebted to them. M. and L. subsequently became bankrupt, being indebted to the bank on their joint account in a sum which was unsecured. Before the bankruptcy the shares had become the property of the firm:—Held, that the bank was not entitled to hold the shares as a security for the debt due to them from the firm. *Exp. M'Kenna*, 7 Jur., N. S., 588; 30 L. J., Bky., 20; 3 De G. F. & J. 629; 9 W. R. 490; 4 L. T., N. S., 164.

7. A firm of solicitors received money from R., a client, for the purpose of investment. No investment was made at the time, and the money was applied by them for their own use. After the death of one of the partners his executors commenced a partnership action, in which H., the surviving partner, was appointed one of two receivers. H., without communicating with his co-receiver or with R., put certain deeds forming part of the partnership property into a box with R.'s name outside. R. subsequently obtained possession of these deeds, and claimed to retain them as security for the money owing to her by the firm. The articles of partnership contained a clause providing that, on the death of either partner, the surviving partner should, within six months of the next general annual account, pay to the representatives of the deceased partner his share of the profits of the year, and should execute a bond for payment within two years to them of the share of the capital of the deceased partner:—Held, that H. had no power of giving R. a security upon these deeds, which formed part of the partnership property, and that R. must deliver them up to the receivers in the partnership action. *Hills* v. *Reeves*, 30 W. R. 439. Affirmed 31 W. R. 209.

8. By a deed of settlement, a joint stock banking company, called "The Bank of Australia," was established as a bank of issue and deposit at Sydney, in New South Wales. The deed contained clauses conferring powers upon

the directors "for the better management of the concerns of the said company, etc.," whereby it was declared that they shall have, and be expressly invested with, "full power and authority to superintend, order, conduct, regulate, and manage all and singular the affairs and business of the said company, to the best of their discretion and judgment, under and subject to the provisions thereinafter contained." Such board of directors were further empowered to "devise and make such provisions, rules, orders, and regulations touching the government, carrying on, and management of the affairs of the said company, the same not being repugnant to the general rules and regulations therein contained, as they should think expedient." In the year 1843 the Bank of Australia became involved in pecuniary difficulties, whereupon the directors at Sydney applied to the Bank of Australasia for a loan, and borrowed from that bank at various times the sum of 154,000*l.*, for which the directors gave their promissory note. Upon the negotiation of this loan, the directors of the Bank of Australia entered into an agreement with the Bank of Australasia, whereby they stipulated that the Bank of Australia should cease to be a bank of issue, deposit, and discount, and should become a loan company, and that no transfer of shares or stock should be made without the consent of the Bank of Australasia; they also agreed to wind up and get in their capital as a loan company. Payment of the note for 154,000*l.* was refused by the shareholders of the Bank of Australia on the ground that the stipulations contained in the agreement were *ultra vires* the directors. On an action brought by the Bank of Australasia on the promissory note against the chairman of the Bank of Australia, the Supreme Court at New South Wales, at a trial at bar, found for the defendant. Upon appeal:—Held, by the Judicial Committee (reversing the verdict and judgment of the Supreme Court), first, that the directors of the Bank of Australia had the powers of managing partners in an ordinary banking partnership, and that amongst these was the power of borrowing money for the purpose of discharging the existing liabilities of the bank till the assets should be realised, and of discontinuing the bank if they thought such conduct essential to the interests of the shareholders. *Australasia (Bank of)* v. *Breillat*, 6 Moo. P. C. 152; 12 Jur. 189.

Held, secondly, that the circumstances of the engagements of the directors to repay the loan being accompanied by other stipulations, some of which were *ultra vires*, did not discharge the bank from liability to repay the loan, as the only effect of those stipulations was that they could not be enforced. *Ib.*

1. One of two partners procured the discount of a promissory note of the firm on an agreement for a mortgage of shares belonging to the firm in certain ships and their freight, and of the policies of insurance effected by the firm on the shares. A mortgage deed was prepared, purporting to be made by both partners, but was only executed by the one. At the time of the execution of the deed one of the ships was lost, but this fact was not then known to the parties:—Held, that the security was binding on the firm, notwithstanding the execution of the deed by one partner only, and passed the insurance money, although the deed was not registered according to the Shipping Acts. *Exp. Bosanquet*, 1 De G. 432.

2. By the deed of settlement of an unregistered company, dated in August 1840, it was provided, "that the trade or business of the company should be that of bankers, or of banking, including the issuing of bank notes and bills payable on demand, after sight, after date, or otherwise, and the making of loans, and advances to customers and other persons on real or personal security . . . on sheep, cattle, and live stock, on wool, farm stock, and produce, and on all and every other kind and description of property whatsoever, including the discounting of bills of exchange, etc. . . . the borrowing or taking up money at interest on inland or foreign bills of exchange or promissory notes, bonds, debentures, deposit receipts, or other obligations, as should from time to time be deemed expedient." Large discretionary powers were given to the directors to invest, convert, re-invest, and vary the property, stocks, funds, securities, and moneys of the company; and they had power also to act as agents for other companies, and for private persons at home or abroad, and to do any business or acts of agency which the court of directors might direct or approve of. The capital of the company was to consist of 1,000,000*l.*, and to be raised by 20,000 shares of 50*l.* each. A large proportion of the shares allotted were taken by the directors themselves, but of the calls made upon these shares little or nothing was ever paid by the directors. In addition to the funds raised by the allotment of shares to other persons, the directors borrowed large sums of money upon debentures, or notes in the following form, payable at long intervals of time:—"We, directors of the royal bank of A., for ourselves and the other shareholders of the said company, jointly and severally promise to pay to G. H. W., or bearer, etc., at the union bank of L., the sum of, etc., for value received on account of the company." These instruments were signed by the chairman and two other directors, and by the secretary, and they had coupons attached for the payment of interest half-yearly. The moneys thus raised were partly taken out by, and partly sent out, to B. B., one of the directors, who, having obtained powers of attorney and commission from his co-directors, went to Australia, and there entered into very large agricultural and other speculations, instead of employing them in the ordinary business of banking. The first general meeting of the proprietors was held in July 1845. Others were held in 1846 and 1847. At all of these meetings reports were presented to and adopted by the shareholders. The company suspended payment in 1848. In winding up its affairs, the Master allowed, as debts against the company, certain claims by the holders of these instruments or debentures. On motion to discharge or vary his certificate;—Held, that the Master's decision was right: that the powers given by the deed were large enough to authorise the directors to borrow money on such instruments; and that the notes were so framed as to form a contract binding on the company. Held, also, that the charge against the directors of concealment and misstatement failed. *Galloway's case*, 18 Jur. 885.

6. Payments and Receipts.

1. Where a sum of money, payable at a future time, was assigned to two persons who were partners as a security for money to be advanced by them, or either of them:—Held, that the survivor of such two persons could give a discharge for the whole amount due on the security. *Brasier* v. *Hudson*, 9 Sim. 1.

2. Bill by assignees of a bankrupt, claiming a debt, which had been paid to his partner, as paid after notice of dissolution of the partnership, that partner retiring and the bankrupt continuing, dismissed; the terms of the alleged arrangement not being made out, so as to establish the right in equity of the bankrupt against the legal right of the other partner. The other questions therefore were not determined: 1st. Whether a demand, the result of an over-payment in advance upon a single transaction of sale between merchants, or merchant and factor, was within the exception as to merchants' accounts in the Statute of Limitations; 2ndly. As to the effect of that exception; whether including merchants' accounts generally, or those only with items continuing within the six years; 3rdly, upon the objection of laches, independent of the statute. *Duff* v. *East India Co.*, 15 Ves. 198.

3. One of the two partners, after the dissolution of the partnership, received the rents of a debtor to the partnership, and retained out of them the amount of the debt; and he stated, that he did this on an understanding that the debtor should have credit for the sum so retained, and that he considered the debt to have been satisfied by these moneys; but no account had been settled between him and the debtor:—Held, that as against the other partner, the debt to the partnership was not to be considered as satisfied. *Pritchard* v. *Draper*, 1 Russ. & M. 191; Taml. 332.

4. A. and B. were partners in a firm. A. allowed a debtor to the partnership to set off a separate debt of his own against money due to the firm, the debtor knowing the interest which B. had in the debt. B. filed a bill against the debtor and against A., to have it declared that the debtor had no right to retain his share in the debt towards payment of the separate debt of A.:—Held, that, although one partner could bind another in the receipt and payment of partnership debts, he could not set off his separate debts against the debts due to the firm; and the debtor's knowledge of the co-partner's interest rendered the bill sustainable as against him. *Piercy* v. *Fynney*, 12 L. R., Eq., 69; 40 L. J., Ch., 404; 19 W. R. 710.

Held, also, that this was a proper subject for a suit in equity, since one partner must sue in an action in the name of himself and his co-partner. *Ib.*

IX. LIABILITY WHEN JOINT AND SEVERAL.

5. A firm of three dissolved partnership, one of them retiring; and by the deed of dissolution, the two continuing partners covenanted for themselves, their heirs, executors, and administrators, that they, or one of them, would pay to the out-going partner certain specified sums:—Held, that this only constituted a joint liability at law, and could not be otherwise construed in equity. *Wilmer* v. *Currey*, 2 De G. & Sm. 347; 12 Jur. 847.

A., B., and C., being partners, by deed dissolved partnership as to C. A. and B. jointly covenanted with C. to pay all the debts of the partnership to which C., with them, was liable, and to pay C. a certain sum, by three instalments. The debts were not paid, and B. died before the second instalment was due, leaving all his property to his wife, whom he made his executrix. C. filed his bill against A. and the executrix of B. for the administration of the estate of B., and payment of the two instalments, and of the debts of B., and of the debts of the partnership still unpaid. A. and the executrix of B. each demurred for want of equity, and for that the other defendant was not interested in the several and distinct matters for which the bill was filed, and the demurrers were allowed. *Ib.*

6. A. and B. being partners, and C., as their surety, give a joint and several promissory note to D., by which they "jointly and severally promise to pay" to D. the amount of a partnership debt due from A. & B. The note is signed by A. & B., not as individuals, but in their partnership firm, and by C. the surety:—Held, that this note could not be treated as the several note of each one of the three, but as the several note only of the surety, and the joint note of A. and B. *Exp. Wilson, Re Manley*, 3 M. D. & De G. 57.

7. By an agreement between A., B., C., and D., four partners in a mercantile business, after reciting that all the partners had considerable sums of money employed in the business as floating capital, which it might be impracticable or highly detrimental for the others of them to repay or to advance from the business immediately after the retirement or death of either of them, it was agreed between and by them, that in case of either of them retiring from the co-partnership business, or departing this life during its continuance, then and in such case the continuing or surviving partners or partner should not be compelled by such retiring partner, or by the executors or administrators of such deceased partner, to repay to him or them his or their share in the co-partnership business immediately; but the clear balance, as ascertained from the last stock-taking, due to such retiring or deceased partner, together with any additional capital (if any), should be repaid out of the business by the continuing or surviving partners by instalments, as therein mentioned, until the whole amount should be fully paid or discharged, unless the surviving or continuing partners should wish to pay such share or balance at an earlier period, which they were to be at liberty to do:—Held, that the agreement was merely an arrangement as to the mode of discharging a pre-existing joint and several liability, and was not intended to alter the nature of the liability. *Beresford* v. *Browning*, *Browning* v. *Beresford*, 20 L. R., Eq., 564; 33 L. T., N. S., 118. Affirmed 24 W. R. 120; 33 L. T., N. S., 524; 1 L. R., Ch. D., 30; 45 L. J., Ch., 36.

Held, also, that if the agreement did create a new liability, such new liability arising out

of a contract by a mercantile partnership was in equity several, and not joint merely. *Ib.*

1. There is no settled rule of equity that a contract which is in terms joint, and would be so construed at law, is to be treated in equity as joint and several. *Kendall* v. *Hamilton*, 4 L. R., App. Cas., 504; 48 L. J., C. P., 705; 41 L. T. 418; 28 W. R. 97. Affirming 3 L. R., C. P. D., 403; 47 L. J., C. P., 665; 39 L. T. 250; 27 W. R. 121.

An action, and a judgment against two persons who had borrowed money from the plaintiffs (though the judgment is unsatisfied), constitute a bar to another action brought by the same plaintiffs against a third person, who is afterwards discovered to have been really interested, as a partner, with the two debtors in the business for the purposes of which the money had been borrowed. *King* v. *Hoare* (13 M. & W. 494) adopted. *Ib.*

K. had, under a written arrangement between himself and W. & M., made large advances to them in respect of certain speculations in iron. W. & M. fell into difficulties. K. brought an action against them to recover the debt, and obtained judgment. This judgment remained unsatisfied. W. & M., who resided in Scotland, became bankrupt there, and K. put in his claim under the Scotch sequestration, and recovered a small dividend. K. then discovered that H. had been associated as a partner in the speculations in iron, and brought an action against him as having been jointly liable with W. & M. in respect of the advances:—Held, that the action against H. was not maintainable, the contract having passed into a judgment. Diss. Lord Penzance, on the ground that the objection to K.'s title to recover was merely one of technical procedure at law, and that since the Judicature Act 1873 the rule of equity had, as to such a matter, superseded the rule of law, and the rule in equity admitted of this proceeding against H. the newly-discovered partner. *Ib.*

The expression that partnership debts were treated in equity as joint and several explained. *Ib.*

2. A bill drawn upon, and addressed to, the Milford Spinning Company as the drawee was accepted by F. Malcolmson, one of the partners, "for the Milford Spinning Company and self": —Held, that the acceptance did not entitle the drawer to be paid out of the separate estate of F. Malcolmson in a suit for administration of his assets. *Malcolmson* v. *Malcolmson*, 1 Ir. L. R., Ch. D., 228.

X. OF PARTNER AGAINST HIS CO-PARTNER.

3. One of two partners may have a demand against the other for compensation, in the nature of unliquidated damages, and enforcable in equity only. *Bury* v. *Allen*, 1 Colly. 589.

4. One partner may agree with other retiring partner to give him a sum for concern, though they know partnership to be insolvent, no fraud being intended. *Exp. Peake*, 1 Madd. 346.

5. The partner of the bankrupt ordered to attend before the commissioners to be examined, and to produce the partnership books and papers, there being no suggestion of his being indebted to the bankrupt, or having property of the bankrupt in his possession. *Exp. Levett*, 1 G. & J. 185.

6. Under a separate commission of bankruptcy, proof admitted by solvent partners having paid the joint debts since the bankruptcy, on account of a misapplication by the bankrupt to his own use, not by contract, but by fraud, exceeding his authority, and without the privity of his partners. *Exp. Yonge*, 3 Ves. & B. 31; 2 Rose 40.

It is obligatory on a partner to apply property as received to partnership purposes, or to charge himself, as debtor, in the partnership books. *Ib.*

7. Money paid by one partner in a joint concern, being his liquidated share of the joint debts, to another partner, as agent for settling the debts, if not applied accordingly, may be proved as a debt upon the bankruptcy of the latter; and therefore, a payment by the other on the same account, after the bankruptcy, cannot be recovered from the bankrupt who had obtained his certificate; but in respect of another payment, also after the bankruptcy, in consequence of the failure of the bankrupt and other partners in paying their shares, a right to contribution arose, and the whole was recovered in an action against the bankrupt, who had obtained his certificate, the defendant not having pleaded in abatement. *Wright* v. *Hunter*, 5 Ves. 792.

8. B. and C. having refused to pay A. his share of the profits, unless he would sign a receipt, containing a protest by B. against A.'s claim to any right of pre-emption, A. is entitled to file a bill for payment of his share of the profits, and for a declaration of the Court with respect to his rights of pre-emption. *Stewart* v. *Stuart*, 1 L. J., Ch., 61.

9. On the formation of a partnership between A. and B., A. lends to B. B.'s proportion of the capital, and A. is to receive it again, and interest thereon, out of B.'s share of the profits. B. assigns property to C., in trust to secure to A. the money lent by him, and pay C. the amount. After an act of bankruptcy by B., known to A., A. files a bill for a dissolution and account of partnership, and for payment of the debt:—Held, that A. and C. could not, after such election, sue out a fiat against B., founded on that debt, A. having elected his remedy, and treated the debt as mixed up with the partnership accounts. *Exp. Gray*, 4 Dea. & Ch. 778; 2 Mont. & A. 283; 4 L. J., N. S., Bky., 70.

10. Construction of deeds; first, that a provision for payment of the "just proportion or share" of all debts owing from one partner jointly and as a partner, referred not to the contribution as among the partners, but to what, with reference to the state of the partnership funds, and the ability of the other partners, he may eventually be called on to contribute to the joint debts, so as they may be fully paid; secondly, that under a provision for debts of various descriptions, no preference was intended, which must be clearly shown, otherwise the Court favours equal payment; thirdly, a reference to a deed of a specified date, there being two of the same date, one executed at that time, the other subsequently, was in the absence of positive

evidence, and aided by circumstances, applied to the former. *Wadeson* v. *Richardson*, 1 Ves. & B. 103.

1. A. lends B. money to enable him to commence a trade at 5 per cent. interest; after the loan B. agrees to give A. one-eighth of the annual profits by monthly payments, which offer A. accepts, and B. accordingly makes several monthly payments, for which A. gives B. receipts on account:—Held, that the balance of the principal and interest due from B. to A. was a good petitioning creditor's debt, not arising out of a partnership nor affected by usury. *Exp. Briggs*, 3 Dea. & Ch. 367; 1 Mont. & A. 46.

2. Where partner withdrawing money from partnership by entries in books, disguises transaction, or wholly omits or conceals it, it is a fraud, and will entitle others to sue his separate estate; otherwise, if done openly. *Exp. Smith*, 6 Madd. 2; 1 G. & J. 74.

3. The bankrupt, who was in partnership with W. P., borrowed various sums of him, by way of personal loan, and upon the dissolution of the partnership, purchased the stock in trade for a stipulated sum. W. P. made out an account entitled "Mr. H. P. (the bankrupt) in account with H. and W. P.":—Held, that W. P. had a good petitioning creditor's debt, notwithstanding this mode of entitling the account. *Exp. Richardson*, 3 Dea. & Ch. 244.

4. A., B., C., and D. being partners in a particular venture, and money on the partnership account being in the hands of B., and D. being indebted to A., A. is not entitled, in the account between him and B., to have credit for D.'s share of the money in B.'s hands. *Bodin* v. *Farquhar*, 1 L. J., Ch., 21.

5. A commission issued by one partner against another, not for the purpose of distributing the bankrupt's effects among his creditors, but for the sole purpose of dissolving the partnership, is supersedable. *Exp. Christie*, 2 Dea. & Ch. 465; Mont. & Bli. 314. Affirmed *id.* 488; Mont. & Bli. 329; 2 L. J., N. S., Bky., 87.

6. A., being a dormant partner with B., dissolves partnership, and B. is declared indebted to A. on balance; A. sues B. for balance, and receives cognovit for debt and costs; B. becomes bankrupt:—Held, A. is entitled to prove his debt against the estate, although some partnership debts are unpaid. *Exp. Grazebrook*, 2 Dea. & Ch. 186.

7. Equitable right of partners, subject to the joint debts; depending upon the result of the account between them. Therefore, under a joint commission of bankruptcy, the separate estate of one has a lien on the other's share of a surplus of the joint estate in respect of a debt, proved under bills drawn in the name of the firm for a separate debt; and may come in with the other separate creditors for the deficiency. *Exp. King*, 17 Ves. 115; 1 Rose 212.

8. Assignees under separate commission against A. cannot come upon joint estate for a sum brought into the partnership beyond his share: for creditors rely on the ostensible state of the fund. *Exp. Lodge*, 1 Ves. J. 167.

9. A. and B., partners in trade, executed a deed to wind up the partnership, containing a mutual release. B. had, unknown to A., previously withdrawn a sum of money from the concern:—Held, that A.'s equity was not to have the money repaid, but to have the transaction set aside. *Skilbeck* v. *Hilton*, 14 W. R. 1017.

A. continued to act upon the deed for a year after he knew that B. had withdrawn the money:—Held, that he could not then have the transaction set aside. *Ib.*

10. A partner who has received his share of the assets has no equity to insist that the share belonging to his co-partner shall be impounded to answer outstanding demands against the firm, unless he brings his own share into Court for the same purpose. *Hutcheson* v. *Smith*, 5 Ir. Eq. R. 117.

11. Where a partner, who owned eleven-twentieths of the capital of the firm, and was entitled under the articles to the profits in the same proportion, and to have a security for the value of his share of the capital at the end of the partnership, varied the arrangements by agreeing to take five-twentieths of the profits:—Held, that the right to a security for his share of the capital was not thereby affected. *Fearenside* v. *Derham*, 13 L. J., N. S., Ch., 354; 8 Jur. 633.

A partner, having a power to nominate by will his sons to succeed him in the business, on continuing or bringing in a specified and large share of the capital, directed his executors to appropriate to such of his sons as should well conduct themselves in business such interest therein as the executors might think fit:—Held, though not strictly within the power, that the surviving partners, having acquiesced in those arrangements, and received the benefit of the testator's capital, which he directed to remain in the business, were bound by it. *Ib.*

12. H. and D. consign indigo to Messrs. G. for sale, with a letter of instructions, to which H. adds a postscript stating that T. is to share his moiety with him, and directing Messrs. G. to carry the balance, after certain payments thereout, to the separate accounts of the three—H., D., and T. Messrs. G. act on these instructions. T. deals with his share through their means, and H. then revokes his directions to carry to T.'s separate account, in consequence of T.'s default in meeting a bill, of which he was joint acceptor with H. H. files a bill for a decree that he has a lien on T.'s share in the hands of Messrs. G., and for an account and lien on the balance. Bill dismissed with costs. *Holroyd* v. *Griffiths*, 4 W. R. 225; 3 Drew. 428.

13. A. and B. were joint owners of a house, and A. had laid out on it moneys he had obtained from B.:—Held, that B. had no lien on the house for the amount. *Kay* v. *Johnston*, 21 Beav. 536.

XI. OF FIRM AGAINST PARTNER.

1. *In General*, 5503.
2. *Profits on Separate Business*, 5505.

1. In General.

14. No partner who owes a duty towards another can place himself in a situation which

gives him a bias against the discharge of that duty. *Burton* v. *Wookey*, 6 Madd. 367.

1. Where a lease of mines is taken by six persons, for the purpose of working them in partnership, and the managing partner becomes in the course of such management indebted to the concern, his interest in the partnership is in the first place applicable to satisfy his debt to the concern. *Fereday* v. *Wightwick*, 1 Russ. & M. 45; Taml. 250.

2. A person employed on behalf of himself and his co-partners, in negotiating the term of a lease, is not entitled to stipulate clandestinely with the lessors for any private advantage to himself. Where, therefore, a sum of 12,000*l.* was paid in pursuance of such a stipulation, the party receiving it was declared to hold it in trust for the partnership. Before the transaction was discovered, one of the partners withdrew, and subsequently another partner assigned a share in the stock, and in his proportion of this claim, to persons then admitted into the concern:—Held, that the retired, the continuing, and the new partners were properly joined as co-plaintiffs in a suit to have the trust declared. *Fawcett* v. *Whitehouse*, 1 Russ. & M. 132; 4 L. J., Ch., 64; 8 L. J., Ch., 50.

3. Trust funds were invested in the purchase of transferable shares in a banking company, in the name of one of the trustees, who executed a declaration of the trusts thereof, the rules of the company not allowing shares to stand in the name of joint-owners or *cestuis que trustent*. The trustee was also a proprietor of shares in his own right in the same company, and made various sales and purchases of shares therein. There was nothing to distinguish which were the individual shares held by the different proprietors, the same being in the nature of capital, expressed by quantity. The trustee contracted to assign a certain number of shares to the banking company as a security for advances which they made to him. He afterwards became bankrupt:—Held, that having regard to the deed of association, the banking company had no lien, founded on the general relation of partnership, on the shares of a proprietor, in respect of a debt owing by the proprietor to the company. *Pinkett* v. *Wright*, 2 Hare 120; 12 L. J., N. S., Ch., 119; 6 Jur. 1102.

4. By a clause in the deed of settlement of a banking company, it was stipulated that the company should have a lien on the shares of such proprietors as were customers and indebted to the bank, and that no share should be transferred without the consent of the directors; and an abstract of these provisions was indorsed on the certificate of the share held by each proprietor. The bankrupt, at the time of his bankruptcy, was the owner of thirty of these shares, and had in his possession the certificates of ownership thus indorsed, being then largely indebted to the bank for advances:—Held, that these shares did not pass to his assignee under the clause of reputed ownership in the Bankrupt Act so as to defeat the lien of the bank, which had been provided for in the deed. *Exp. Plant*, 4 Dea. & Ch. 160.

5. In a suit in which a decree for a dissolution and an account of an unsuccessful partnership was made, the chief clerk certified that one of the partners, an infant, was entitled to a salary under the partnership agreement; but that his share of the partnership capital, which was unpaid, was irrecoverable. Subsequently the infant, who, previously to the date of the certificate, had attained his majority, moved to stay all further proceedings in the cause as against him, on his disaffirming the agreement for the partnership, and disclaiming all interest under it. That motion was refused; but on the cause coming on for further consideration, on a question affecting the proportion which each of the partners was to contribute towards the partnership losses:—Held, that the share of the infant partner was irrecoverable as an asset of the partnership; that the debts and liabilities (with the exception of the infant's salary) must be paid out of the certified assets; that the infant disclaiming his salary it was not to be paid to him. *Wright* v. *Tanner*, 20 L. T., N. S., 427.

6. A ship was purchased by a partner for himself, but was paid for out of the partnership assets. The firm became bankrupt:—Held, that the firm had no interest in the ship, or any lien on it for the amount of the purchase money. *Walton* v. *Butler*, 29 Beav. 428.

7. M. and L., a partnership firm, had a joint account with a bank, with whom M. had also a separate account. M. having railway shares, which the bank knew to be his separate property, deposited them with the bank, accompanied with a written memorandum that they were to be held as a collateral security for a promissory note of his own which had been discounted by the bank, or for any other sums in which he was or might become indebted to them. M. and L. subsequently became bankrupt, being indebted to the bank on their joint account in a sum which was unsecured. Before the bankruptcy the shares had become the property of the firm:—Held, that the bank was not entitled to hold the shares as a security for the debt due to them from the firm. *Exp. M'Kenna, Re Mortimore*, 7 Jur., N. S., 588; 30 L. J., Bky., 20; 9 W. R. 490; 4 L. T., N. S., 164.

8. Where there is a bankruptcy of a firm and a bankruptcy of an individual member of the firm, the general rule is that the joint estate of the firm and the separate estate of the partner are kept distinct, so that neither estate is allowed to prove in competition with the other, but this rule does not apply where there has been a fraudulent conversion by a partner to his own purposes of the property of the firm. *Read* v. *Bailey*, 47 L. J., Ch., 161; 3 L. R., App. Cas., 94; 26 W. R. 223; 37 L. T., N. S., 510. Affirming 4 L. R., Ch. D., 537.

H., a banker, took into partnership K., who was unacquainted with banking, and took no part in the business of the firm. H., who managed the business, from time to time took large sums out of the bank, concealing the over-drawings by means of fictitious entries in the books of the bank. On his death it was discovered that by reason of the over-drawings and the employment of the moneys abstracted in losing speculations on the Stock Exchange, the bank was utterly insolvent, and K. was adjudicated bankrupt. An action was instituted for the administration of the separate estate of H., in which the trustee in bankruptcy of the firm claimed to prove in respect of the

funds fraudulently drawn out by H.:—Held, that the trustee was entitled to prove. *Ib.*

2. Profits on Separate Business.

1. When one partner entered into a contract which turned out profitable, and which arose out of business originally partnership business, and did not communicate to his partner what he was engaged in:—Held, that the profits must be treated as attributable to the partnership. *Hancock* v. *Heaton*, 22 W. R. 680; 30 L. T., N. S., 592. Affirmed 22 W. R. 784.

2. The master and part owner of a ship purchased goods during the voyage, which his answer stated were purchased out of private property, and the profits of private trade during the voyage; but the Court, considering there were strong grounds for thinking that the goods were purchased with partnership property, or with money for which the defendant was accountable to the partnership, and that they belonged to the partnership, restrained him from receiving the goods. *Gardner* v. *M'Cutcheon*, 4 Beav. 534.

3. One of several partners was employed to purchase goods for the firm. He, unknown to his co-partners, purchased goods of his own, at the market price, but he made a considerable profit thereby:—Held, that the transaction could not be sustained, and that he was accountable to the firm for the profit thus made. *Bentley* v. *Craven*, 18 Beav. 75.

4. The common clause in partnership deeds that "neither partner shall engage in any other business, except on account of and for the benefit of the partnership," being merely a negative covenant, the only remedy for a breach is an action for an injunction to restrain the continuance of the breach, or for a dissolution of the partnership, or for damages. *Dean* v. *M'Dowell*, 47 L. J., Ch., 537; 8 L. R., Ch. D., 345; 26 W. R. 486; 38 L. T., N. S., 862.

Where, therefore, partnership articles contained such a clause, and one of the partners clandestinely purchased a share in another business, not in rivalry with the partnership, and from which no damage or loss whatever resulted to the partnership:—Held, that the other partners had no equity against the defaulting partner for an account of the share and profits made by him in the other business. *Ib.*

In such a case the damages would be merely nominal. *Ib.*

Semble, that in order to sustain an action for an account of profits in such a case, the clause should provide that, in case of any breach, the other partners shall have the option either of taking to the share and profits of the defaulting partner in the other business, or of leaving him alone to bear the loss, if any, resulting therefrom. *Ib.*

If profits have been made in any other business by a partner in violation of a covenant not to engage in any other business, the profits will not be decreed to belong to the partnership unless they have arisen from employment of the partnership property, or from transactions in rivalry with the firm, or from some advantage obtained by the partner by virtue of his being a member of the firm. *Ib.*

XII. OF CREDITORS OF FIRM AGAINST PARTNER.

5. Commission may issue against one of several partners for a joint debt. *Exp. Crisp*, 1 Atk. 133.

6. Under a joint commission, each of the persons included in it must be found bankrupt, and a joint commission void as to one is so as to both. If one partner be dead at the time it is taken out, it abates and is absolutely void. *Beasley* v. *Beasley*, 1 Atk. 97.

7. Creditors of a partnership which failed in two years allowed to come upon the separate estate of one partner, in respect of effects taken out of the partnership by him, without the privity of the other. *Exp. Lodge*, 1 Ves. J. 166.

8. A. and B., partners, gave a joint and several bond to C., who afterwards becomes indebted to A. B. becomes bankrupt; C. proves the bond under the commission, and then brings a joint action against A. and B., to which B. pleads his certificate. A. being, by this form of action, precluded from setting off his separate debt, applies for and obtains injunction against C.'s proceeding in the joint action. *Bradley* v. *Millar*, 1 Rose 273.

9. Separate commissions of bankruptcy against partners taken out by a joint creditor on the same debt, and on the same day, immediately after dissolution of the partnership, and no separate creditor appearing. *Exp. Gardner*, 1 Ves. & B. 74.

10. Upon a separate commission of bankruptcy, the benefit of an insurance effected by the bankrupt upon his own account on a ship, of which he was joint owner, is not liable to the joint creditors. *Exp. Parry*, 5 Ves. 575.

11. Two partners, by a deed of trust, provided for the payment of their joint creditors on a given day, and to pay the surplus of the fund to their separate creditors. The distribution of the fund was delayed by difficulties with reference to the separate creditors. Interest was given to the joint creditors from the fixed day at 4*l.* per cent., though their debts did not carry interest before any sum was paid to the separate creditors. *Pearce* v. *Slocombe*, 3 Y. & Coll. 84.

12. J. C. S. and W. S., carrying on business as brewers, in co-partnership, admitted W. W. as a dormant partner. It was stipulated by deed that the stock and effects of the old firm, including the plant, etc., and book debts, should form part of the capital stock of the new co-partnership; that W. W. should be paid 10 per cent. on the capital advanced by him, and should not otherwise interfere. The business was carried on as before, in the names of J. C. S. and W. S. only, until the new firm became bankrupt. Upon petition of several creditors of the old firm, some of whom had notice of the dormant partner, it was held, that all the personal chattels of the new firm were within the order and disposition of J. C. S. and W. S., and ought to be administered in the bankruptcy as the separate estate of the two. *Exp. Jennings, Re Starkey*, Mont. 45.

Where A. and B., partners, assigned all their stock in trade to C., in trust to secure a sum of money advanced by C., and upon further trusts that C. might manage the business until he and other creditors were repaid sums due

to them:—Held, on a bill for an account by the surviving partner, that C. was not entitled to credit himself with any sums as bonuses, notwithstanding that his management of the concern had been such as to pay all creditors, and largely to diminish his own debt, and that the partners had repeatedly acquiesced in such charges. *Barrett* v. *Hartley*, 14 W. R. 684.

XIII. OF CREDITORS OF PARTNER AGAINST FIRM.

1. *In General*, 5506.
2. *Executions*, 5506.

1. In General.

1. Assignment by one partner of joint property to secure his separate debt must be subject to the joint debts. *Young* v. *Keighly*, 15 Ves. 557.

2. Partnership effects first applied to pay partnership debts. *West* v. *Skip*, 1 Ves. 456.

3. On separate commission against one partner, the assignees took possession of partnership property, and were about to sell it. Injunction granted on filing bill and affidavit to restrain the sale. *Allen* v. *Kilbre*, 4 Madd. 464.

4. One of several partners previous to his marriage agreed with his intended wife's trustees that he would assign to them a portion of his capital in the business, to secure them certain periodical payments of 500*l*., on the trusts of his marriage settlement. In pursuance of this agreement, the partnership open an account in their books with the trustees, in which they place to the credit of the trustees the sum of 3,000*l*., and debit their partner with the same sum, giving the trustees notice that they have transferred this sum from their partner's private account. Defaults having been made in the payments of 500*l*., and the firm having become bankrupt:—Held, that this was an acknowledgment of a present debt from the firm to the trustees, the consideration for which was the intended marriage. *Exp. Hill*, 1 Dea. 123.

5. A bill, filed by a creditor of a testator against the executor and certain persons who were in partnership with the executor, alleged that the partnership claimed to be entitled to retain assets which were in their hands, in satisfaction of a debt which they pretended was due to them from the testator, but it did not charge in express terms that the executor was colluding with his co-partners:—The creditor was held to have, under such circumstances, a right to sue all the partners; and a demurrer by the partners, other than the executor, was overruled. *Gedge* v. *Traill*, 1 Russ. & M. 281. n.

6. S. and U. were solicitors and partners. S. was steward of a manor and receiver of rents. In the articles of partnership it was provided that steward's fees and receiver's salaries of either partner should be deemed part of the profits of the partnership, but that the receipts and payments in respect thereof should be made by the partner conducting such business:—Held, that steward's fees and receiver's salary or commission are not profits on a trade or business in the ordinary sense of the term, and that, under the circumstances, balances due by S. as steward or receiver were not debts of the partnership. *Alston* v. *Sims*, 1 Jur., N. S., 438; 24 L. J., Ch., 553; 3 Eq. Rep. 334.

7. In 1851 A., B., and C. agreed to be partners for five years. Six months afterwards, A. being in difficulties, it was agreed between A., his creditors, and B. and C., that A. should retire and B. carry on the business for his own behoof and that of A.'s creditors for the period of five years, as agreed on by the articles, and that A. should assign to trustees his separate estate for the benefit of his creditors, and B. agreed to appropriate to the trustees the share of profits in his business that would have accrued to A. in the event of the partnership having been continued, less 400*l*. a year, to be appropriated to A.'s maintenance. A. died two months after:—Held, that the right of his creditors to a share in the profits thereupon ceased. *Crosbie* v. *Guion*, 23 Beav. 518; 6 W. R. 50.

2. Executions.

8. Execution by a separate creditor against joint property, subject to account ascertaining the specific interest of the partner in the joint effects, allowed. *Exp. Hamper*, 17 Ves. 407.

9. Right of the separate creditor of one partner against the partnership property. *Skipp* v. *Harwood*, 2 Swan. 586.

10. The interest of each partner in his share of the surplus, subject to all the partnership accounts, and that interest only, is liable to the execution of a creditor by the bankruptcy of one; his interest is divested, and vests in his assignees by relation to the act of bankruptcy. *Dutton* v. *Morrison*, 17 Ves. 193; 1 Rose 213.

11. A separate creditor of a partner has no right against the joint property farther than the separate interest of partner, viz., his share upon the division of the surplus, subject to the account of the partnership; therefore, joint property of an insolvent partner taken in execution for a separate debt cannot be held against the joint creditor. *Taylor* v. *Fields*, 4 Ves. 396.

Assignee, executor, or separate creditor, coming in the right of one partner against the joint property, comes into nothing more than an interest subject to an account between the partnership and the partner, and therefore to the joint debts: assignee under a separate commission of bankruptcy has only the same right to stand in the place of the bankrupt by the common law, not under the bankrupt laws. *Ib.*

12. Injunction granted to restrain the goods of a partnership from being taken in execution for a debt due from one of the partners, who died before the writ was delivered to the sheriff. *Newell* v. *Townsend*, 6 Sim. 419.

13. The power of a solvent partner, upon the bankruptcy of his co-partner, to sell the partnership property, is given him in his personal capacity, to enable him to wind up the affairs of the partnership, and cannot be transferred by him to another, either by assignment of all his share and interest in the partnership, or by exposing himself, although *bonâ fide*, to a judg-

ment under which all such share and interest are taken in execution. *Fraser* v. *Kershaw*, 2 Kay & J. 496; 2 Jur., N. S., 880; 24 L. J., Ch., 445.

A sale of partnership assets by an execution creditor of a solvent partner claiming the sole property is a tortious conversion such as ought to be restrained. *Ib.*

1. Two persons contracted with a railway company to execute certain works, and, after some progress had been made with the works, a judgment creditor of one of the contractors took in execution his share of the plant and effects, which the sheriff sold and assigned to the other contractor. The other contractor assigned the interest of the firm in the contract, and all the effects and moneys due or to become due in respect of the same, to a third person, by way of security, with power to such assignee to enter on the works and take possession, and execute the contract. The assignee afterwards took possession of the works, and proceeded to complete them. The company had notice of the execution and sale by the sheriff of the property of one contractor, and of its assignment to the other, and of the subsequent assignment by the other to the assignee; and they allowed the works to be continued by the two latter persons respectively, and made payments to them on account. The assignee having (after the insolvency of his assignor) filed a bill against the company for an account of what was due from the company in respect of the contract, and for a declaration that a release executed to the company by the contractor, whose share had been taken and assigned by the sheriff, was fraudulent:—Held, that the seizure in execution of one partner's share of the plant and effects operated as a dissolution of the partnership. *Aspinall* v. *London & North-Western Railway Co.*, 11 Hare 325.

Held, also, that the subsequent prosecution of the works by the other contractor or his assignee did not necessarily involve any new contract with the company, but was consistent with that theretofore made; and that the contractor or his assignee, who, without objection from the company, prosecuted the works, could sustain a suit against the company for payment of what had become due from them in respect of the works done under the contract. *Ib.*

Held, also, that a release executed by the partner and contractor, whose share of the partnership effects had been taken in execution, was void as against the other contractor and his assignee. *Ib.*

2. P., H., and J. entered into a partnership for working a colliery, and by the articles it was stipulated, that if either should suffer his share to be taken in execution, and the others or other should thereupon give notice of their or his desire that the partnership should cease, then at the expiration of a month from the time of such notice the partnership should cease. The working of the colliery was commenced, but before the coal was reached a creditor of J. brought an action, and issued execution against him to recover 283*l.*, and his share or interest in the colliery was taken in execution under a fi. fa. Notice of dissolution of partnership was given by P. and H. J.'s share or interest was put up by the sheriff and sold by auction. At the sale P. and H. became the purchasers of J.'s share or interest for 500*l.* Of this, a balance of 164*l.*, after paying the execution creditor's claim and expenses, was received by J. The sheriff subsequently, as far as he lawfully might or could, assigned to P. and H. all the estate, share, and interest of J. A bill was filed by P. and H., praying for a declaration that the partnership was dissolved, or if it appeared that the sale did not operate as an effectual transfer, for an account of the partnership dealings. J. filed a cross bill, praying that the sale might be set aside:—Held, that the coal being nearly reached when the sale took place, some suspicion of misconduct and concealment attached to P. and H., and that the sale must be declared void. *Perrens* v. *Johnson*, *Johnson* v. *Perrens*, 3 Jur., N. S., 975.

Semble, that in a case of this kind it is of the utmost importance to show that no suspicion or trace of misconduct can attach to the partners who have become purchasers of the share or interest of their partner. *Ib.*

XIV. MORTGAGES BY AND TO PARTNERS.

3. A security to a firm continued after an alteration in the members of it, upon the construction of a letter, raising an agreement to that effect. *Exp. Marsh*, 2 Rose 239.

4. An agreement by way of deposit of title deeds, with a firm of five, one of whom was a nominal partner only, extended by subsequent agreement to the actual partnership of four. *Exp. Alexander*, 1 G. & J. 409. And see S. C. 2 G. & J. 275.

Deeds are deposited with a firm of five partners, one of whom was a nominal partner, as a collateral security for advances by the firm, which are secured by bond; the nominal partner being dead, it is agreed that the four surviving partners shall hold the deeds as a collateral security for sums secured by a second bond in addition to the former bond:—Held, that under this agreement the partnership of four has an equitable lien on the estates comprised in the deeds, to the extent of the sums due on both bonds. S. C. *nom. Exp. Alexander, Re Tills*, 2 L. J., Ch., 159.

5. Where title deeds are deposited by way of security with a firm, upon a verbal agreement, the deposit may be extended by a subsequent verbal agreement for the security of a new sum upon a change of partners. *Exp. Lloyd*, 1 G. & J. 389; 2 L. J., Ch., 162.

6. A., as creditor of a firm, held securities from one of its members, for moneys advanced by him, at different times, to the firm, but claimed a balance beyond what those securities would cover. All the creditors of the firm agreed to accept a composition "of 7*s.* for every 20*s.* due to the said creditors respectively." A. was the first to sign this deed; but added to his signature the words, "without prejudice to any securities whatever that I hold." The other creditors signed in their respective order, under A.'s signature:—Held, that such a composition, thus accepted, did

not affect the rights of A. upon his previous securities, but only related to the balance beyond the sum they would cover, and that he might afterwards enforce those securities in equity. *Duffy* v. *Orr*, 1 Cl. & F. 253; 5 Bli. N. S. 620.

1. Where the bankrupt deposited title deeds with his bankers to secure future advances, and after a change in the partnership continued for six years the same mode of dealing with them, and the same running account:—Held, that this was a tacit recognition of the deposit of the deeds with the new firm upon the same terms as with the old. *Exp. Oakes, Re Worters*, 2 M. D. & De G. 234; 10 L. J., N. S., Bky., 69; 5 Jur. 757.

2. The title deeds of property belonging to one of two partners in trade are deposited with a banking firm to secure the balance on the account current between the banking firm and the partnership. On a particular advance being afterwards made by the former to the latter, the partner to whom the deeds belong writes a letter to the effect that the object of the deposit is to secure that "as well as any future advances." An alteration takes place in the members of the banking firm, but the new firm retain the deeds and continue to advance money to the partnership:—Held, that the existing banking firm were entitled to the benefit of the security. *Exp. Smith, Re Gye*, 2 M. D. & De G. 314.

3. A security for a separate demand does not extend to a joint demand. *Exp. Freen*, 2 G. & J. 246.

The interest of partners as tenants in common, where the estate was purchased out of the joint property and mortgaged by the firm for a joint debt, is a joint security. *Id.* 250.

4. Securities to a banking firm for a certain balance cease on the change of the firm by the admission of a new partner; and if the account be carried on by the new firm, subsequent payments by the debtor will be applied in the first instance exclusively in satisfaction of the balance due at the date of the admission of the new partner. *Eyton* v. *Knight*, 2 Jur. 8.

5. When a mortgage in the ordinary form is made to partners in trade to secure a partnership debt, one of such partners takes no authority to bind the others or the mortgagor by a sale under the power in the mortgage; and if a person to whom he has contracted to sell the property expends money in repairs on the faith of such contract, the money so expended cannot be recovered from the firm. *Warr* v. *Jones*, 24 W. R. 695.

See also Bankruptcy, XXVII. v. 7.

Mortgage of Share in Partnership.] See IV. 3 *supra*.

XI. Books.

6. A solvent partner is entitled to retain the partnership books, when the other becomes bankrupt. *Exp. Finch, Re Coverdale*, 1 Dea. & Ch. 274. And see *Exp. Trueman, id.* 464.

7. Where a partnership has expired by efflux of time, and in a suit for an account, etc., a receiver has been appointed before decree, the Court will not compel defendant (the former managing partner) to deliver up to receiver, for the purpose of making out bills of costs, partnership books and accounts, which have remained in his hands, and title-deeds belonging to a third person, which came into the possession of the co-partners as solicitors, such defendant offering the receiver free access thereto, and to assist in making out such bills. *Dacie* v. *John*, M'Clel. 206; 13 Price 446.

8. Specific performance of agreement made at dissolution of partners, that particular book used in trade should be considered exclusive property of one of partners, and that copy of it should be given to other, will be decreed. *Lingen* v. *Simpson*, 1 Sim. & S. 600.

9. Injunction granted to restrain the defendant, who had removed the partnership books from the place of business, from keeping them at any other place. *Greatrex* v. *Greatrex*, 1 De G. & Sm. 692; 11 Jur. 1052.

10. Where defendant denies charges in bill, of fraud and misconduct of partnership, and explains others away, and alleges his inability to put in a full answer by reason that plaintiff withheld improperly the partnership books, the Court refused (but without prejudice to future application) the injunction prayed by the bill. *Littlewood* v. *Caldwell*, 11 Price 97.

11. A creditor who has proved against the joint estate is not entitled to inspect the separate books. *Re Prichard*, 1 F. N. R. 17.

12. It is not sufficient excuse for a member of a partnership not giving a discovery, which he is bound to give if he can, and which is to be obtained from inspection of the partnership books, to allege generally that his partners or, as in this case, his co-directors in a joint-stock company refuse him access to the books. *Taylor* v. *Rundell*, 1 Y. & Coll. C. C. 128; 5 Jur. 1129.

13. If a partnership is admitted, the books are admissible, in taking the account of the partnership transactions, but the books of A. are not admissible against B. to prove a partnership, if it be denied. *Sim* v. *Sim*, 11 Ir. Ch. R. 310.

14. *Semble*, that by the ordinary rules of the Court partnership books are admissible in evidence for and against all the partners and their estates. *Lodge* v. *Pritchard*, 3 De G. M. & G. 906.

15. Partnership accounts having been directed to be taken by the Master in a case in which some of the books had been lost, the Court directed the Master, if it should appear in taking the account that any necessary books, etc., should be wanting, to report the same specially, and whether in consequence of the want of such books he was unable to proceed satisfactorily in taking the account. *Millar* v. *Craig*, 6 Beav. 433.

See also Practice (Discovery, Production, and Inspection).

XII. Account.

See also VIII. IV. *ante.*

I. *Right to*, 5509.
II. *How taken*, 5510.
III. *Statute of Limitations and Lapse of Time*, 5511.
IV. *Settled and Re-opening*, 5514.
V. *Parties*, 5516.
VI. *Pleading*, 5517.
VII. *Practice*, 5518.
VIII. *Costs.*

See XVI. V. *post.*

I. RIGHT TO.

1. Profit of partnership in underwriting was illegal by 6 Geo. 1, c. 18, s. 12, and could not be subject of account in equity; but that part of statute is repealed by 5 Geo. 4, c. 114. *Knowles* v. *Houghton*, 11 Ves. 168. See *Watts* v. *Brooks*, 3 Ves. 612; *Ottley* v. *Brown*, 1 Ball & B. 360.

2. Bill by a partner under a parol agreement, charging misconduct in the other partner, and praying a dissolution, account, and injunction against executing securities in the name of the firm; demurrer to the prayer for a dissolution, because there was no writing between them, overruled. *Master* v. *Kirton*, 3 Ves. 74.

3. The firm of S. & Co. advanced money for the purpose of a joint speculation with the firm of B. & Co.; after that was terminated, one of the partners of B. disclaimed all interest in the speculation, and in any balance due from B. & Co. in favour of his co-partner, and then the partnership of S. & Co. was dissolved: demurrer, for want of equity, to a bill for an account filed against B. & Co. by the party in whose favour the disclaimer was made, overruled. *Kinder* v. *Ashburton (Lord)*, 2 Jur. 1002.

4. On an execution against the share of one in the partnership stock, under circumstances amounting to a dissolution, the Court held the plaintiff, as an insolvent partner, to be entitled as against the other defendant partner, who had been the assignee of the sheriff, to an inquiry and account as to the debts and receipts, and how applied. *Habershon* v. *Blurton*, 1 De G. & Sm. 121.

5. P. and D., in the year 1814, commenced a partnership as solicitors. W. was a client of the firm, and employed D. as his private agent to receive his rents. The partnership was dissolved in 1817, when W. was indebted to the firm for a bill of costs in a sum of 867*l.*, and D., upon a settlement of the partnership between him and P., was found indebted to P. in a sum of 750*l.*, for which he gave security, and agreed to assign to P. the outstanding partnership debts. Of this settlement, debt, and agreement, notice was given to W. in 1821. During the partnership and afterwards D. had received moneys on account of W. beyond the amount of the bill of costs; there was no evidence of any direction given by W. to D. to apply the moneys received by D. on his account to the payment of the bill of costs, nor of any settlement of accounts between W. and D.; but it was in evidence, that upon one occasion W. said to D., that he had better keep some money of W.'s which he had in his hands, as he might want it. A bill in equity, filed by P., stating these facts, and that D. had possession of the partnership books, to which P. had not access; that D. had refused to concur with him in suing W. at law, or to permit the use of his name for that purpose; and that, by collusion between W. and D., the moneys of W. received by D. had, as they pretended, been applied to payment of the partnership debt, and praying an account and payment of the debt, was dismissed by the Master of the Rolls; but on appeal to the Lord Chancellor this order was reversed, and a decree for account and payment made against the executors of W., and this decree was affirmed on appeal. *Nottidge* v. *Pritchard*, 8 Bli., N. S., 493; 2 Cl. & F. 379.

6. On a general reference, by three partners, of all matters in difference to arbitration, the arbitrators found the partnership capital on the day of the dissolution to be, in merchandise and good debts, of a given amount, including a debt due from A., one of the partners, and that there were some dubious debts. They then ascertained the amount of the debts due from the partnership, and found the gross value of the stock, which, including the debt due from A., they awarded to be divisible between the other partners B. and C. They next found the dubious debts to be divisible, as received, between the three partners; and they awarded that A. should give security for the payment of his debt by instalments, and directed B. to receive the outstanding debts and effects, and to pay all the debts owing by the partnership, of which accounts were to be stated periodically, and of the balance of receipts; special credit was to be given for A.'s share against his debt, and the remainder was to be divided between B. and C., and any balance of payments was to be borne in the same proportions. The award was acted upon by all parties, but B. subsequently received some debts which were omitted in the accounts laid before the arbitrators, and on which their award proceeded, and he also received good debts to a larger amount than had been estimated by the arbitrators. On a bill by A. against his co-partners:—Held, that he was entitled, notwithstanding the reference was of all matters in difference, to an account of the good debts received beyond the amount estimated by the arbitrators, and to an account of the receipts in respect of dubious debts, and that any over receipt in respect of good debts ought to follow the directions of the award with respect to the dubious debts. *Spencer* v. *Spencer*, 2 Y. & J. 249.

7. A. conveys lands to trustees on trust to sell if the unsatisfied debts of a partnership, in which he had been concerned, should at a given time exceed 40,000*l.* The trustees sell and convey to the purchaser by a deed, which recites that the debts of the partnership exceeded the specified amount, and that A. had died intestate as to his real estates; and the heir-at-law of A. joins in that deed, and enters into a covenant for the title of the trustees, a covenant against all acts done by him or his father, and a covenant of the further assurance; it afterwards appears to be uncertain whether A. had not devised his

real estate, and the purchaser files a bill to have protection against or remedy of the alleged defect in his title which this discovery created:—Held, that the purchaser is not entitled to have an account of the debts of the partnership, in order to establish the fact of their having at the specified time exceeded the specified amount. *Hallett* v. *Middleton*, 1 Russ. 243.

1. Two captains of ships of war enter into an agreement that all prizes taken by either of them, whether in the ships they then had, or in any other ships which they might thereafter command, should be equally divided between them. One of them changed his ship, which meeting with an accident, was ordered to be laid up, and it was some time before he got another: the other captain continued cruising all the time, but objected to account for the prizes which he took during the interval of his partner being unemployed: but held that he was accountable for all the prizes taken from the date of the agreement. *Ogle* v. *Sansom*, 1 Bro. P. C. 149.

2. A suit against the managing committee of a provisionally registered joint stock company was compromised, the defendants agreeing to pay a certain sum of money. One of them paid more than his proportion of that sum and filed his bill for an account and contribution: —Held, that he was entitled to an inquiry as to the particulars of the compromise, and an account on the footing of it, and that the defendants could not without a cross bill insist on the whole affairs of the partnership being wound up, and the rights and liabilities of all parties being ascertained, before making good the amount of their contribution. *Prole* v. *Masterman*, 21 Beav. 61.

3. A., a resident in England, and the sole member of a Liverpool firm, entered into a partnership with B. and C., residents in Hayti, in a business to be carried on at Hayti. The Liverpool firm acted as the agents of the Haytian firm. B. was admitted as a partner in the Liverpool firm. C. died, and the winding-up of the Haytian firm was committed by agreement to A. and B. A. died, leaving B. sole survivor in each firm. B. and the Haytian legal representatives of C. engaged in cross suits in Hayti, in which certain settled accounts were established. The representative of A., whose assets were all in England, was not a party to the Haytian suit:—Held, on a bill filed by the administrator of C. in England, that there was jurisdiction in the Court of Chancery to wind up the partnership in Hayti, and to take the accounts of that firm and of the agency of the Liverpool firm; and decree accordingly. *Maunder* v. *Lloyd*, 2 John. & H. 718; 1 N. R. 123.

Held, also, that the law of Hayti was to regulate the transactions of the Haytian firm. *Ib.*

4. An adventurer in a mining company, the rules of which did not contain any provision for the forfeiture of shares on non-payment of calls, received notice from his co-adventurers and co-lessees of the mines, that unless his arrears of calls were paid up, his shares would be forfeited on a specified day. He replied by denying the right to forfeit his shares. A resolution extending the time for payment was then communicated to him, to which he replied by denying the right to deprive him of his share in the lease. Some months after the extended time had expired, he received from the co-adventurers another application for payment of his arrears, of which he took no notice until more than six months had elapsed, when he claimed to be still a partner. Two years afterwards he filed a bill for an account:—Held, that he was entitled to be still considered a partner. *Hart* v. *Clarke*, 6 De G. M. & G. 232; 24 L. J., Ch., 137. Affirmed *sub nom. Clarke* v. *Hart*, 6 H. L. Cs. 633.

5. K. advanced money to G. on the faith of a letter which he insisted constituted a contract of partnership in the profits of the business of the Italian Opera at Covent Garden. G. insisted that it amounted to nothing but an agreement to pay the amount of the loan and the interest on it out of the profits (if any should arise), but that the concern remained his alone. The letters which passed between the parties were held to bear this construction, and, therefore, an account as of the profits of a partnership was refused. *Knox* v. *Gye*, 5 L. R., H. L., 656; 42 L. J., Ch., 234.

The advance was made with reference to the business of the Italian Opera at Covent Garden, the lease of which theatre was in the name of G. alone. That theatre was burned down in 1856, and G. hired another theatre (the Lyceum), and carried on the business of the Italian Opera there, and in two years' time returned to a new theatre at Covent Garden, which had been built in the interval, and of which the lease, as in the former case, had been granted in his name alone:—Held, that the true construction of the letters between the parties showed that the agreement between them was confined to the old Covent Garden Theatre alone, and, therefore, an account of profits alleged to have arisen at the Lyceum and the new Covent Garden Theatres was refused. *Ib.*

6. The rule that a court of equity will not assist persons who stand aloof from a joint undertaking in a time of adversity, and then claim a share in it, when it has been rendered prosperous by the exertions of others, does not apply when the others have set apart a sum to answer the share of the person so standing aloof. *Exp. Dibbens, Re Shadwell Waterworks Co.*, 18 W. R. 160.

II. HOW TAKEN.

7. Where partnerships have commenced at different times upon bankruptcy of all, the Court will separate accounts, and each estate shall first bear its own debts. *Exp. Martin*, 2 Bro. C. C. 15.

8. In taking the accounts between three partnerships, the first, of A. and B., the second, of A., B., and C., the third, of B. and C., the partnership of B. and C. cannot charge commission for collecting the debts of the other two partnerships. *Whittle* v. *M'Farlane*, 1 Knapp 311.

9. A. usually employed B. as his agent to buy hops of the several planters in and about Canterbury, but having, in a particular season, omitted to give him any orders at the usual time, B. enters into a partnership with three

others for purchasing hops of that year for their mutual benefit. The hops are accordingly purchased, but A. having intelligence of this transaction before they were delivered, prevails upon B. to declare to the planters that he bought them as A.'s agent, and by that means A. got the hops delivered to him:—Held, that this was a fraud upon the partners of B., and that A. should account for the value of the hops according to the highest price for which he sold them. *Hunter* v. *Sheppard*, 4 Bro. P. C. 210.

1. A. and B. entered into an agreement for a partnership, B. to pay A. a consideration of 2,500*l.*, of which a moiety was paid down, but no deed ever actually executed. Personal quarrels having ensued within a few months from the commencement of the partnership, A. unjustifiably excluded B. from entering upon the premises, or taking any part in the concern; and upon a bill filed for a dissolution and account, and a return of part of the premium, in consequence of which the notice of dissolution was gazetted, but before any further step taken A. became bankrupt:—Held, that in taking the accounts with the assignees, B. was to be credited with the entire premium, but debited with the moiety unpaid, and a proportional part of the whole premium, calculated upon the actual duration of the partnership. *Bury* v. *Allen*, 1 Colly. 589.

2. A surviving partner who had possession of the partnership books, wilfully and fraudulently refused to produce them to have the accounts taken under a decree for that purpose. The Master, in the absence of other evidence, charged 10 per cent. per annum on the capital stock as the net gains made during the partnership, and debited the surviving partner with amount thereof:—Held, he was justified in so doing, and the Court decreed accordingly. The Court must give credit to what the Master reports as occurring in his presence. *Walmsley* v. *Walmsley*, 3. J & L. 556.

3. So long as the partnership accounts are unsettled, moneys advanced by one partner to the firm, or drawn out by another, are merely items of account and not debts; and even if it was considered as a debt, the Court will not order it to be paid in, in a suit for taking the partnership accounts, to answer an alleged but unascertained deficiency of the partnership assets. *Richardson* v. *England* (*Bank of*), 4 Myl. & C. 165; 8 L. J., N. S., Ch., 1; 2 Jur. 911.

4. A. was lessee of seams of coal for a term of years, and had abandoned the working of the upper seams as unprofitable. In 1845 he entered into partnership for working the upper seams with B., his colliery manager. In 1857, the upper seams having been worked as far as could be done from the existing pits, he, with the privity and approbation of A., sank a new pit at considerable expense, which was defrayed out of the partnership moneys. In 1858, differences having arisen, A. gave B. notice to dissolve the partnership, which notice he refused to receive, insisting that the understanding had been that the partnership should continue for the whole duration of the lease. The new pit was only just finished. No express agreement as to the duration of the partnership was proved:—Held, that an inquiry had rightly been directed whether any and what sum ought to be allowed to B. in respect of the expenditure on the new pit. *Burdon* v. *Barkus*, 4 De G. F. & J. 42.

5. Two sets of parties having projected a railway on a similar line agreed to consolidate the project, and appointed, as solicitors of the proposed company, the plaintiff and defendant, whom they had respectively consulted prior to the consolidation. The two solicitors accepted the appointment without making any definite arrangement as to the division of the business, or of the emoluments of the office, and a much larger portion of the work was done by the defendant than by the plaintiff. In a conversation between them about six months after the appointment, and before the principal part of the business was transacted, the plaintiff stated, as the result of his inquiries into the practice in like cases, that the allowance for office expenses and personal trouble in such limited partnerships between solicitors was made by each party retaining, besides his expenses and disbursements, from 10 to 25 per cent. on the amount of the net charges for the business done, and which principle he considered satisfactory: and the defendant, in reply, observed, that there could be no misunderstanding about it between honourable men. Upon a bill by the plaintiff, claiming an account and division of the profits of the business done by the company, upon the footing of an equal co-partnership, and offering to allow 25 per cent. upon the work done separately to the partner who did it, the Court, under the circumstances, made a decree accordingly. *Webster* v. *Bray*, 7 Hare 159.

6. The common account of the dealings and transactions of co-partners, is to be taken according to the articles or usage of the partnership, although no special directions to that effect are inserted in the decree. *Watney* v. *Wells*, 1 N. R. 82.

III. STATUTE OF LIMITATIONS AND LAPSE OF TIME.

1. *Claims by Partners inter se*, 5511.
2. *Claims by Creditors*, 5513.

1. Claims by Partners inter se.

7. Bill by a merchant against his partner for an account: Plea, twenty years' acquiescence without suit, and also the Statute of Limitations. Plea allowed as a good bar in equity, though between merchants. *Brydges* v. *Mitchell*, Gilb. Eq. Rep. 224.

Note, the distinction is, that if open accounts are continued by subsequent acts, they are not barred by length of time. *Aliter*, if deserted; for then a settled balance will be presumed. *Ib.*

8. An account of a partnership estate, and of moneys paid to one of the partners during the partnership, and after the dissolution of it, directed at a distance of four years after such dissolution, under circumstances showing that the partner retired, from a conviction that the partnership was insolvent. *Anderson* v. *Maltby*, 4 Bro. C. C. 423; 2 Ves. J. 244.

9. In 1800 A., B., and C. entered into partnership as attorneys, upon certain terms ex-

pressed in a memorandum. In 1808 A. died, leaving B. his executor and residuary legatee, and then B. and C. formed a partnership, and agreed to share the profits equally. In December 1825 their partnership was dissolved by consent. During the former partnership, A. and B. had made advances both jointly and severally for C.'s private use; during the latter partnership B. made similar advances. In 1827 B. became bankrupt, no settlement of accounts having taken place between any of the parties. In July 1831 B.'s assignees filed a bill against B. (as A.'s executor) and C., for an account of the dealings of both partnerships, and of all the advances made by A. and B. C. pleaded the Statutes of Limitations (21 Jac. 1, and 9 Geo. 4) to so much of the bill as related to such advances:—Held, that as the plea extended to the joint advances of A. and B., during the first partnership, it covered too much, and was, therefore, bad. *Robinson* v. *Field*, 5 Sim. 14.

1. Bill by surviving partners against the executors of a partner, who had died thirteen years before the institution of the suit, for an account of the partnership dealings and transactions, charging that the deceased partner was indebted to the firm at the time of his death, dismissed with costs, on the ground of lapse of time, no new liabilities of the former partnership appearing to have arisen or become known after the death of the deceased partner. *Tatam* v. *Williams*, 3 Hare 347.

2. Upon the death of one of three partners, his executors carry on the business with the two surviving ones for a twelvemonth longer, and then dissolve the partnership; upon which occasion the two continuing partners give the executors a bond to secure the balance due to them, and more than six years afterwards the two become bankrupt:—Held, that the executors had a right to prove the amount of the bond against the joint estate of the two continuing partners. *Exp. Hall*, 3 Dea. 125.

3. Bill by assignees of a bankrupt, claiming a debt, which had been paid to his partner, as paid after notice of dissolution of the partnership, that partner retiring and the bankrupt continuing, dismissed; the terms of the alleged arrangement not being made out, so as to establish the right in equity of the bankrupt against the legal right of the other partner. The other questions therefore were not determined: 1st, Whether a demand, the result of an over-payment in advance upon a single transaction of sale between merchants, or merchant and factor, was within the exception as to merchants' accounts in the Statute of Limitations; 2ndly, As to the effect of that exception; whether including merchants' accounts generally, or those only with items continuing within the six years; 3rdly, upon the objection of laches, independent of the statute. *Duff* v. *East India Co.*, 15 Ves. 198.

4. The right of a surviving partner to the partnership assets is absolute. There is no fiduciary relation between him and the representatives of his deceased partner, but he is liable to account for the partnership assets, and, in taking such account, the Statute of Limitations is applicable. *Taylor* v. *Taylor*, 28 L. T., N. S., 188.

5. A., B., and C. carried on business as copartners under articles containing a covenant by which the partnership effects were made a security for the repayment of the sum in which the concern might be indebted to any partner; and the other partners covenanted to make up the deficiency, according to their equitable liability. After the death of A. and B. their respective personal representatives filed a bill against C. to take the account of the partnership, and a receiver was appointed, who got in the assets, and without the sanction of the Court, but with the approbation of the parties, paid them to the executors of A., to whom the partnership was largely indebted, and the suit was not further prosecuted. These payments were insufficient to discharge the debt due to A.'s estate, and the estate of B. remained liable to the estate of A. to a considerable amount in respect of that debt:—Held (affirming 25 Beav. 421), that it not being proved that the receiver made the payments with the sanction of the personal representative of B. for the purpose of discharging the liability of C.'s estate, those payments did not take the demand against B.'s estate out of the Statute of Limitations. *Whitley* v. *Lowe*, 2 De G. & J. 704; 4 Jur., N. S., 815.

6. When a partnership is dissolved by the death of one of the parties the Statute of Limitations will not, in general, run against the representatives of the deceased partner or against the surviving partner, so long as there are any outstanding assets to be got in, or liabilities to be discharged. *Millington* v. *Holland*, 18 W. R. 184.

7. On a bill to dissolve a partnership and take the usual accounts, although the partnership had been discontinued more than six years before the filing of the bill, the Court directed the accounts to be taken, notwithstanding that the defendant insisted on the Statute of Limitations as a bar. *Miller* v. *Miller*, 8 L. R., Eq., 499.

8. After a dissolution of partnership, by which the continuing partner covenanted to pay the debts and to pay the retiring partner a sum equal to half the next half-year's profits:—Held, that non-payment of a debt by the continuing partner during the half year could not be set up against the retiring partner as an answer to the Statute of Limitations. *Watson* v. *Woodman*, 20 L. R., Eq., 721; 24 W. R. 47.

Held, also, that though the debt was from solicitors to a client in respect of moneys received, there was no express trust to exclude the operation of the statutes. *Ib.*

9. In 1858 the plaintiff and defendant entered into partnership transactions which came to a final termination in 1861, when the defendant admitted that 787*l.* was due to the plaintiff, but he never subsequently made any admission of the debt, or promise to pay. The plaintiff brought an action for an account of the partnership dealings:—Held, that the Statute of Limitations could be set up on demurrer; and was a good defence to a claim for partnership accounts. *Noyes* v. *Crawley*, 10 L. R., Ch. D., 31; 48 L. J., Ch., 112; 39 L. T. 267; 27 W. R. 109.

10. T. advanced 12,000*l.* to G. on the terms of partnership. T. made a will, leaving this money equally between K. and G. T. died in December 1854, before old Covent Garden Theatre was burnt, which event took place in March 1856. There had been, before Decem-

ber 1854, negotiations between G. and one H. to allow G. the use of Her Majesty's Theatre, but though a sum of 5,000*l.* (part of T.'s 12,000*l.*) had been paid to H. under these negotiations, he had never performed his contract. G. finally brought an action against H., and recovered judgment for 5,000*l.*, but ultimately (after the death of T., yet within six years of the date of a bill filed by K. for an account) consented to accept 2,500*l.* as a compromise. K. in December 1864 filed a bill against G. for an account of profits in the partnership with T., and of what was due to K. in respect thereof under T.'s will:—Held, that the right of K. under T.'s will began in December 1854, and was barred in equity by analogy to the Statute of Limitations, the bill not having been filed till 1864. *Knox* v. *Gye*, 5 L. R., H. L., 656; 42 L. J., Ch., 234.

Held, also, that the surviving partner being a trustee for the executors of his deceased partner, the payment of the 2,500*l.* from H. within six years from the filing of the bill did not take the case out of the Statute of Limitations. *Ib.*

1. The doctrine of *Prendergast* v. *Turton* (1 Y. & C. C. C. 98; 13 L. J., Ch., 268) does not apply where a surviving partner has refused to give the representatives of a deceased partner all the information as to the state of the concern which is necessary to enable them to exercise a sound discretion as to whether they should claim an interest in, and take a share of, the risks of the concern. *Clements* v. *Hall*, 2 De G. & J. 173. And see *Clarke* v. *Hart*, 6 H. L. Ca. 633. Affirming S. C. *sub. nom. Hart* v. *Clarke*, 6 De G. M. & G. 232.

. Claims by Creditors.

2. The claim of a creditor against the assets of a deceased partner was held not to be barred under the circumstances by the Statute of Limitations. *Braithwaite* v. *Britain*, 1 Keen 206.

Semble, that the equity of a creditor for an account against the deceased partner's estate continues, notwithstanding the Statute of Limitations, as long as the surviving partner continues liable, and the equity of the surviving partner for contribution against the estate of the deceased partner is subsisting. *Winter* v. *Innes*, 4 Myl. & C. 101; 2 Jur. 981.

After the death of one of two partners, the survivor cannot set up the Statute of Limitations as a bar to a demand against the assets of the deceased. Whether the deceased's representatives can set up the statute, so long as the survivor continues liable to the payment of the debt, and the deceased's estate is consequently liable to be called upon by the survivor for contribution, *quære*. *Ib.*

3. After a dissolution of partnership by death or otherwise, the surviving or continuing partners of the firm are (in a suit by persons claiming to be creditors of the partnership) entitled to the protection of the Statute of Limitations, although as between themselves and retired partners, or the estates of deceased partners, the partnership accounts are never settled; and the retired partners, or the executors of a deceased partner, are in such a suit against them entitled to the like protection. *Way* v. *Bassett*, 5 Hare 68; 15 L. J., N. S., Ch., 1; 10 Jur. 89.

A. deposited money with B., C., and D., who were bankers in partnership, and received from them notes, in which they promised to pay him the amount three months after sight, with interest. B. died in March 1837, having appointed C. and another his executors: C. and D. continued the banking business in the same name until 1842, and interest was regularly paid on the notes by the firm until that time; the payment being indorsed upon the notes and signed by one of the partners or their clerk. In December 1843 the executors of A. filed their bill against the executors of B., and the devisees under his will, for payment of the amount of the notes out of the personal or real estate of B.:—Held, that the acts of the surviving partners of B. had not the effect of taking the debt upon the notes out of the operation of the Statute of Limitations as against the real or personal estate of the deceased partner. *Ib.*

4. In 1811 A. and B. entered into a partnership, which continued till 1818, when it was dissolved, and the affairs wound up, except as to some outstanding debt. In 1820 a deed of release was executed, from which these debts were excluded. Partnership books relating generally to these and other debts were all along suffered to remain in A.'s hands. All the outstanding debts were subsequently settled. In 1830 B. was declared bankrupt, till which time the books were never called for by B.:—Held, that A. and B. nevertheless continued tenants in common in respect of them, and that the length of time did not affect that relationship; and therefore, although there was no charge of fraud in the settled account, yet the commissioner had jurisdiction to call A. before him, and examine him and the books, relative to the former dealings of the bankrupt. *Exp. Trueman, Re Martindale*, 1 Dea. & Ch. 464.

5. A. and B., partners, were solicitors to the commission. More than six years back they received various sums of money on account of the estate, having a set-off in respect of their bill of costs, but which bill they did not deliver to the assignee within six years. Beyond the six years, A. and B. (upon an agreement that A. should pay all the debts) dissolved partnership, and the assignee, with knowledge of this fact, continued to employ A. alone as the solicitor to the commission, and no attempt was made to charge B. with the moneys received by A. and B. till very lately, viz., when an official assignee was appointed; nor had B. ever acknowledged any liability to account:—Held, first, that as between B. and the creditors, neither the Statute of Limitations, nor laches, nor other conduct of the assignee would operate as a bar, A. and B. being solicitors to the commission. But, secondly, that as the assignee was able to recoup the estate, he could not, under such circumstances of conduct on his part, call on B. to account. A. had become bankrupt. *Semble*, nevertheless, that he or his assignees were necessary parties. *Exp. Gould, Re Robertson*, 4 Dea. & Ch. 547; 2 Mont. & A. 48; 4 L. J., N. S., Bky., 7.

6. The remedy of a creditor against the estate of a deceased partner:—Held, under

the circumstances, to be barred by lapse of time. *Brown* v. *Gordon*, 1 W. R. 2; 22 L. J., Ch., 65.

As to the equity of a creditor of a partnership to obtain payment out of the separate estate of a deceased partner. S. C. 16 Beav. 302.

A creditor of a banking firm held to have accepted the surviving partners as his debtors, and to have lost, by sixteen years' delay and his conduct, the benefit of a trust contained in the will of the deceased partner for payment of his debts out of his real estate. *Ib.*

R. B. deposited 110*l.* with Messrs. H. B. L., C. F., E. L. & C. S. F., bankers, upon a deposit note payable twenty days after sight. In June 1833 H. B. L. died, having, by his will, devised his real and personal estate to trustees, one of whom was his son, H. L., upon trust to raise money to pay his debts, etc., and, subject thereto, upon trust for H. L., whom he appointed sole executor. H. L. was admitted a partner in the bank. In 1835 E. L. died, and in 1843 C. F. died. C. S. F. and A. L. continued the business, but became bankrupts in 1847. R. B., from the death of H. B. L., received interest at the bank upon his deposit note until the bankruptcy, when he proved his debt against the bankrupts' estate; and on a bill filed to make the real and personal estate of H. B. L. liable to the payment of the 110*l.*:—Held, that the interest was not paid by the continuing partners, as agents of H. B. L., the testator; that no agency could be implied; that the interest was paid on account of the firm; that all claim against the real and personal estate was barred by the Statute of Limitations in six years; that R. B. had accepted the surviving partners as his debtors, and the devise made by H. B. L. for payment of debts was satisfied, and the bill was dismissed with costs. S. C. 22 L. J., Ch., 65.

IV. SETTLED AND RE-OPENING.

1. By articles of partnership, it was agreed, that just and true accounts should be made out, half-yearly, and signed by the partners, and that such accounts should not afterwards be called in question, except for errors discovered in the lifetime of all the partners. The accounts were made out by one of the partners; and after the death of two of the other partners, it was discovered that the accounts were fraudulent:—Held, that the fourth partner was entitled to have the accounts of the partnership taken from the date of the articles. *Oldaker* v. *Lavender*, 6 Sim. 239.

2. Although the correct and accurate value of a share of one of the partners in a joint concern cannot be ascertained without converting the property of the concern into money, ascertaining the surplus (if any), after satisfying all demands of other persons, and after taking the account between the concern and each partner, and finding the balance due to or from each partner severally; yet it is lawful for partners to deal with each other in quite a different way. If they think proper, they may lawfully rely on the stock-takings, valuations, and accounts which appear by the books, and the accounts kept in the manner known to or acquiesced in by the partners; and the subsequent discovery of unintentional inaccuracy will not be ground to set such a transaction aside. And where the partnership business was carried on in Van Diemen's Land, and none of the partners could have personal knowledge of the transactions, but they were obliged to rely on the reports of agents, it was held that they might fairly and honestly deal with each other with respect to their shares, notwithstanding the ignorance in which they all were as to their exact value. *Knight* v. *Marjoribanks*, 11 Beav. 322; 13 Jur. 136. Affirmed 2 Macn. & G. 10; 2 H. & Tw. 308.

The question of value in such cases is comparatively immaterial, if there was no deception, misrepresentation, fraud, or unfair concealment. *Ib.*

3. At the commencement of a partnership, the partners both living in the same house entertained their customers jointly; one removing, the whole expense of entertainment (which was necessary in the trade) fell upon the other. They ought to have agreed for an allowance, the Court can make none. The accounts having been annually balanced without such allowance, is conclusive. *Thornton* v. *Proctor*, 1 Anstr. 94.

4. In 1811 A. and B. entered into a partnership, which continued till 1818, when it was dissolved, and the affairs wound up, except as to some outstanding debts. In 1820 a deed of release was executed, from which these debts were excluded. Partnership books relating generally to these and other debts were all along suffered to remain in the hands of A. All the outstanding debts were subsequently settled. In 1830 B. was declared bankrupt, till which time the books were never called for by B.:—Held, that A. and B. nevertheless continued tenants in common in respect of them, and that the length of time did not affect that relationship, and, therefore, although there was no charge of fraud in the settled account, yet the commissioner had jurisdiction to call A. before him, and examine him and the books relative to the former dealings of the bankrupt. *Exp. Trueman, Re Martindale*, 1 Dea. & Ch. 464.

5. No precise form is necessary to constitute a stated and settled partnership account. *Sim* v. *Sim*, 11 Ir. Ch. R. 310.

An account drawn up in the handwriting of one partner, A., eight years after the dissolution of the partnership, stated the assets of the firm at the time of the dissolution taking the excess of the assets over the original capital as representing the balance of profit over loss on the several transactions, and stated the amount drawn out by each partner, and the amount coming to each. In this account A., after giving credit for various payments made to him by his co-partner, B., after the dissolution, struck a balance against himself, and the account was assented to by B.:—Held, a stated and settled account, though some debts due to the partnership were omitted as uncertain. *Ib.*

6. Principles which regulate a court of equity in opening stated and settled accounts. *M'Kellar* v. *Wallace*, 5 Moo. Ind. App. 372; 8 Moo. P. C. 378.

Accounts of long standing and great complication of a mercantile firm at Calcutta, one of the partners of whom afterwards acted as

agent in England, involving charges for agency and partnership transactions, were mutually agreed to be investigated and closed. After long negotiations and discussion respecting some of the charges, an agreement was come to, the parties agreeing to strike the general balance at a given sum, reserving one item of the account, amounting to a considerable sum, for future investigation. This reserved item was subsequently settled by the acceptance of a bill of exchange for a lesser amount, as such reserved item, if opened, would have disarranged the settled general account. The bill of exchange was dishonoured, and an action brought to recover the amount. A bill was then filed for an injunction, for the cancellation of the bill of exchange, and that the accounts so settled might be opened. The Supreme Court of Calcutta held, that the reserved item being left open was evidence that the account was not finally closed, and decreed the accounts to be opened, referring the cause to the Master. Upon appeal:—Held, by the Judicial Committee (reversing such decree and dismissing the bill with costs), that the transaction amounted to an adjustment of the general accounts between the parties, subject to the reserved item which was ultimately settled, and that the accounts so settled and closed could not in the absence of fraud be reopened. *Ib.*

1. A party who, upon a compromise, had executed a general release, claimed relief on the ground of a large item, in which he was interested, having by mistake been omitted in the account:—Held, that he was entitled to relief, but that to obtain it the release must be wholly set aside. A. B., the representative of a deceased partner, having filed his bill against C. D., the surviving partner, for an account, A. B., in consideration of 500*l.*, released C. D. from all claims, and the bill was dismissed. By mutual error a debt of 2,000*l.*, owing to the partnership, but which was not then known to exist, was omitted in the consideration by both parties. C. D. afterwards received it:—Held, that A. B., notwithstanding the release, was entitled to his share of the debt, but that to obtain it the whole account must be reopened. *Pritt* v. *Clay*, 6 Beav. 503.

2. Upon the dissolution of a partnership, and the settlement of all accounts between the partners, the continuing partner took some of the debts as good debts. One turned out to be bad, the securities for it having been fraudulently abstracted by a clerk:—Held, that he could not sustain a bill to rectify or set aside the settlement of accounts. *Laing* v. *Campbell*, 36 Beav. 3.

3. When three brothers entered into a partnership for seven years, "or for such further time as the partners might agree upon," and at the end of the seven years a general account was taken, but nothing was mentioned about continuing the partnership, and the general account did not include the plaintiff's share of the goodwill:—Held, that although he had signed the account he was not bound by it, as it was not according to the terms of the articles, and no mention of the goodwill was made in the account. *Barrow* v. *Barrow*, 27 L. T., N. S., 431.

Right of a partner under the above circumstances to subsequent profits (*i.e.*, profits made since the dissolution). *Ib.*

4. An account was settled and releases executed between residuary legatees of a partner and the representatives of the surviving partner; numerous and important errors in the account having been proved, the release was set aside; but having regard to the lapse of time and the loss of books and documents, the Court declined opening the accounts altogether, but gave leave only to surcharge and falsify. *Millar* v. *Craig*, 6 Beav. 433.

5. In a partnership action, where one error of 950*l.* was established in an account long settled:—Held, that in taking the accounts the plaintiff should be at liberty to surcharge and falsify, and that such liberty should not be limited to errors appearing from the books. *Gething* v. *Keighley*, 9 L. R., Ch. D., 547.

6. A suit was instituted by one of two partners against the other, praying for a dissolution of the partnership, and for the partnership accounts. The bill set out the partnership deed, which stated that 6,000*l.* had been brought into the business by the defendant, and alleged that the statement to that effect was erroneous; but there was no prayer that the account as to the 6,000*l.* should be opened or the deed set aside. The defendant by his answer stated that the account as regarded that sum was treated as a settled account at the date of the partnership deed, and he declined to set out the items of which it was composed, and claimed the benefit of his defence as if he had pleaded or demurred:—Held, that the discovery sought as to how the sum of 6,000*l.* was made up was not relevant to the relief prayed, and that the defendant was not bound to answer the whole bill, but might refuse to give the discovery without being required to plead to the bill. *Wier* v. *Tucker*, 14 L. R., Eq., 25; 26 L. T., N. S., 719; 41 L. J., Ch., 471.

7. Accounts certified to be correct by a member of one of two firms after its dissolution in the usual course of dealings between them, held under the circumstances to be binding upon the executors of a deceased partner, as stated and settled accounts. *Luckie* v. *Forsyth*, 3 J. & L. 388.

8. In order to entitle a party to open a settled account, it is not sufficient merely to prove the existence in the account of errors which a court of equity might consider improper charges or omissions, without reference to what may have been the conduct of the party in agreeing to such account; because, in the absence of fraud or pressure, every item in an account, of which, at the time of settlement, the parties are fully cognisant, may be considered as the subject of special agreement between them, which neither party is at liberty to repudiate. *Maund* v. *Allies*, 5 Jur. 860.

A., B., and C. were interested in equal shares in certain coal mines, as co-partners in trade together; and, after the decease of B., D. having purchased B.'s share from his representatives, was, but not till after the death of A., admitted a partner in the concern, and, together with C. and the representatives of A., signed a settlement of the partnership accounts up to a certain period. D. then purchased A.'s share from his representatives. A., during his lifetime, was the sole manager of the concern; and before his death several settlements of accounts took place between the partners. D. having filed a bill against C.

and the representatives of A. and B., alleging errors in the settled accounts, and that they were fraudulently drawn out by A., and praying an account of all the partnership dealings and transactions, and that D. might be at liberty to surcharge and falsify the accounts, and that what should be found due from A. might be paid by his representatives:—Held, that if any one of such errors could be established, the result would be only a right in the other partners to have the amount of such error deducted from the share of A. coming to D., as the assignee of that share. *Ib.*

1. M. was a partner with E. in the trade of a wool-broker, but, becoming embarrassed through private speculations in the purchase of Australian shares, withdrew all his capital from the firm on the eve of his bankruptcy. M. died before passing his final examination in the bankruptcy, and his widow became his personal representative, being also residuary legatee of his estate. The bankruptcy was superseded, and accounts were rendered between the widow and E., which accounts she examined by means of skilled referees of her own choosing, and with the aid of an experienced solicitor, and also approved the same, receiving the balance and giving a formal receipt for the same. Fourteen years after the date of this receipt, she filed a bill to have the accounts retaken, alleging a fraudulent concealment from her by her referees, with the knowledge of E., of the fact of the destruction of all vouchers for the particulars of the account some time previously to the investigation of the accounts which was made by them on her behalf, and specifying two erroneous items in the accounts. The evidence of error in these items was defective:—Held, that neither the alleged errors in the account, nor the alleged fraudulent concealment being clearly made out, the Court would not suffer the settled accounts to be reopened at this distance of time. *Cuthbert* v. *Edinborough*, 21 W. R. 98.

2. It is not to be assumed that the annual stocktaking by a partnership truly represents the interests of the several partners in the firm; but it may or may not do so, according to the purposes for which, and the mode in which, it is made up. *Travis* v. *Milne*, 9 Hare 153; 20 L. J., N. S., Ch., 665.

3. Partnership articles provided that once a year an account should be taken, and a rest made of the joint stock and the value thereof, and that every such rest or account should be signed by all the partners, and when finished and so signed should be conclusive. Accounts were annually signed by all the partners, including a valuation, which, however, was arrived at by the partners themselves, without a regular appraisement by any skilled surveyors. One of the partners died during the partnership, without having signed or being present at the last preceding rest, but having seen and retained the balance sheet which was sent to him and having made no objection to the valuation contained in it:—Held, that the mode of valuation adopted was not a deviation from the articles, and that if it had been, the course of usage had rendered it binding on all the partners, and that the last rest bound the executors of the deceased partner, although he had not signed it or concurred in making the valuation. *Coventry* v. *Barclay*, 3 De G. J. & S. 320; 33 Beav. 1; 12 W. R. 500; 9 Jur., N. S., 1331; 9 L. T., N. S., 496.

V. PARTIES.

4. Part of the proprietors of an undertaking may have an account against others without making all the members parties, especially if they sue on behalf of themselves and others. *Chancey* v. *May* or *Anon.*, Pre. Ch. 592.

5. A., B., and C. partners together; A. agrees with D. to give him a moiety of his share in the concern. An account may be decreed between A. and D., without making B. and C. parties. *Brown* v. *De Tastet*, Jac. 284. See *Bodin* v. *Farquhar*, 1 L. J., Ch., 21.

6. Society for relief in sickness, etc., by means of a fund raised by subscription of the members, considered merely as a partnership, having no corporate character. In a suit, therefore, against the trustees by some members for account, alleging a dissolution contrary to articles, all other members must be parties. *Beaumont* v. *Meredith*, 3 Ves. & B. 180.

7. Part of a ship's crew appointed two to be agents. On bill for account by such agents in their own names, and not "on behalf of themselves and the rest," a demurrer was allowed for not having made the whole parties. *Leigh* v. *Thomas*, 2 Ves. 312.

A few creditors may sue for themselves and rest, and the suit abates not by death of one. *Id.* 313.

8. Bill by one of the officers and crew of a privateer against the owner, for an account of captures, according to the articles. Leave given to amend, by stating that the bill was on behalf of the plaintiff and all others; and upon that amendment the account was decreed. *Good* v. *Blewitt*, 13 Ves. 397.

9. In a suit between a part owner and managing owner of a ship and the mortgagees of the shares of other part owners, to determine the question of right to the freight and earnings of the ship, the same being claimed by the plaintiff towards the expenses of repairs and outfit preparatory to the voyage, and by the mortgagees as applicable, in the first instance, to the payment of their debt, the assignees of the mortgagors, the other part owners, were held to be necessary parties, and not to be entitled to their costs. *Green* v. *Briggs*, 6 Hare 632.

10. One of thirty-eight proprietors of a newspaper was appointed book-keeper, and received the moneys of the concern; a bill being filed against him for an account, etc., by twelve of the proprietors on behalf, etc.:—Held, that the remaining twenty-five were necessary parties. *Bainbridge* v. *Burton*, 2 Beav. 539.

11. A defendant to a suit for winding up a partnership has a right to insist that the suit shall be so constituted as that the decree may be binding on all the parties to the partnership contract; and, therefore, a bill by one against another of five partners in a joint speculation, for an account and payment of the defendant's contributory share of an alleged loss on the winding up of the concern, was held to be defective as to parties, although it was alleged and proved that the plaintiff had, as managing partner, made all the advances

himself, and that he had settled with and released the other co-partners; and it was held, that an undertaking by the plaintiff to bear any liability, which on taking the accounts might appear to subsist against the absent partners in favour of the defendant, would not cure the defect. *Hills* v. *Nash*, 1 Ph. 594; 15 L. J., N. S., Ch., 107; 10 Jur. 148.

1. Bill by some partners against the committee of partnership, for account, etc., must be on behalf of themselves and other partners not of the committee. *Baldwin* v. *Lawrence*, 2 Sim. & S. 18.

2. A., being a partner in a firm, to which he was indebted jointly with B., with the concurrence of B. deposited with the firm, as a security, the title-deeds of an estate, of which they were tenants in common. Upon A.'s death, a bill was filed by the surviving partners against his heir and B., for the sale of the estate:—Held, that A.'s personal representative was a necessary party for the purpose of taking the accounts between A.'s estate and the firm. *Scholefield* v. *Heafield*, 7 Sim. 667; 5 L. J., N. S., Ch., 218.

3. In a suit for an account by a surviving partner against a debtor to the firm, it is not in general necessary to make the personal representative of the deceased partner a party. *Haig* v. *Gray*, 3 De G. & Sm. 741.

4. Upon a suit to wind up a partnership and for contribution, the representatives of a deceased partner cannot be dispensed with upon an allegation in the bill that the deceased partner had died insolvent, and had no personal representative. *Cox* v. *Stephens*, 9 Jur., N. S., 1144; 11 W. R. 929; 8 L. T., N. S., 721.

Quære, whether in such a case it is sufficient to bring before the Court an administrator *ad litem*. S. C. 2 N. R. 506.

5. In a creditor's suit for the recovery of a partnership debt against the assets of a deceased partner, the surviving partner is a necessary party; and the case is not within this order, which enables a plaintiff to proceed against one or more persons severally liable. *Hills* v. *M'Rae*, 9 Hare 297; 15 Jur. 766; 20 L. J., Ch., 533.

6. Plaintiff was widow and administratrix of C., a joint lessee and co-partner with others in working a colliery, of which he was entitled to one-sixth. C. died in 1836. In 1839 plaintiff assigned all intestate's "shares in collieries" to her children, in satisfaction of their claims under the Statute of Distributions, but without notice to the other partners, until 1849; meanwhile plaintiff joined in certain undertakings of additional property by the partnership, and continued to receive the profits of the one-sixth up to 1849, when, the old colliery lease having expired, defendants determined the partnership by notice. In 1845 some of the partners privately renewed the colliery lease, of which renewal plaintiff had notice in April 1846. In June 1849 she filed a partnership dissolution bill, which also prayed specifically that the new lease might be administered as partnership property, and for a receiver:—Held, upon motion to discharge an order of the Court below, appointing a receiver of the plaintiff's one-sixth of the profits, and overruling an objection on the ground of laches, that she was the proper party to sue *in respect* of the one-sixth, and that her children were not necessary parties. *Clegg* v. *Fishwick*, 1 Macn. & G. 294; 1 H. & Tw. 390; 19 L. J., N. S., Ch., 49, 993.

7. By a contract between A., B., and C. to perform certain works, which formed the agreement for the limited partnership between them, it was stipulated that the co-partnership should cease and determine on the completion of such works. Before the completion, one of the partners, C., had left for Australia, and was out of the jurisdiction. On a bill by A. against B. and C. for a dissolution, and the consequential accounts:—Held, that the Court had jurisdiction to declare that the partnership ceased and determined on the completion of such works, notwithstanding the absence of C. out of the jurisdiction, and to direct the usual accounts. *Duxbury* v. *Isherwood*, 10 L. T., N. S., 712.

Form of order of reference to an arbitrator nominated by the representatives of A. (who had died) and B., instead of taking the accounts by the judge's chief clerk. *Ib.*

8. Three only out of four residuary legatees filed a bill to administer their testator's private estate, and for an account of his assets used in partnership with one of the executors, and to enforce a lien in respect of a purchase of a moiety of the partnership premises made by one of the executors under a power in the will, charging wilful default, and praying an injunction and receiver against the partner:—Held, that the bill was not demurrable for either, first, want of parties; or, secondly, multifariousness. *Pointon* v. *Pointon*, 40 L. J., Ch., 609; 12 L. R., Eq., 547; 19 W. R. 1051.

9. When A. by a private arrangement with B. stipulated that A. should receive 33, eventually 35, out of 59, eventually 67, per cent. of the gains of a co-partnership, being B.'s ostensible share of such gains, and when C., who was the partner of B., was privy to the arrangement, although not a party to it, and asked the executors of A. for a discharge for himself and his firm in respect of the moneys belonging to A.:—Held, that C. was a necessary party to the suit. *Spartali* v. *Constantinidi*, 20 W. R. 823.

10. After a dissolution of partnership between J. and P., J. assigned all his interest in the partnership to B., by way of mortgage, to secure 500*l*. J. subsequently assigned all his property to the plaintiffs, the trustees of a creditors' deed. B. was trustee of the mortgage for R., who made an affidavit in the suit that his mortgage was satisfied:—Held, that the suit might proceed in the absence of B., as he was a mere trustee, and in the absence of R., as he could not, after making the affidavit, insist that he was a necessary party in respect of his interest under the mortgage. *Williams* v. *Poole*, 21 W. R. 252; 28 L. T., N. S., 292.

VI. PLEADING.

11. Defendant need not set forth an account of the transactions of a trade in which the plaintiff pretends to have been a partner, if there is a clear denial of the partnership. *Jacobs* v. *Goodman*, 2 Cox 282.

12. Bill for an account of a co-partnership, defendant pleaded an award, averring the

matter in question comprised in the award; plaintiff replied generally to the plea; and though the plaintiff ought to have set down the plea to be argued, and not to have replied to it, yet Court decreed defendant to account; but afterwards, though this decree was signed and enrolled, Court ordered defendant only to answer over. *Farrington* v. *Chute*, 1 Vern. 72.

1. Upon a bill filed against the executor and surviving partner, for an account of the partnership transactions, charging an unfair valuation, and that there was no settled account, or, if any, that it was fraudulent and collusive, the defendant pleaded to the whole bill (except as to the fraud and collusion, which he denied), a settled account with the executor:—Held, that the plea was irregular, as being only to part of the relief and discovery, but that the defendant was not bound to set forth the settled account, or aver that he had delivered over the vouchers to the executor, and that although the alleged unfair valuation was not denied expressly, yet, not being inconsistent with a final account, unimpeachable. The plea did not cover too much. *Davies* v. *Davies*, 2 Keen 534; 1 Jur. 446.

2. A plaintiff being in England filed a bill for an account against the executors of a deceased partner, some of whom were in England but acting in concert with the others, who were in Jamaica; the partnership property being also in Jamaica:—Held, upon a plea to the jurisdiction by the executors resident in Jamaica, that the suit was properly instituted in this country. *Hendrick* v. *Wood*, 30 L. J., Ch., 583.

3. To a bill alleging the existence of a partnership between the plaintiff and defendant, the defendant pleaded "to the whole of the relief sought by the bill," alleging that no partnership or agreement for a partnership ever existed between them, and prayed the judgment of the Court whether he should be compelled to make any answer to the bill, except so far as the same sought discovery as to the various circumstances therein stated, or any further or other answer thereto, save such as thereinafter was contained. Then followed the answer, in which the defendant confined himself to the question raised by the plea:—Held, that the plea, though substantially sufficient, was insufficient in point of form. *Jackson* v. *Ward*, 18 W. R. 973.

Prayer in Bill.] 4. A bill to have the accounts of a partnership taken without praying for a dissolution is demurrable. *Loscombe* v. *Russell*, 4 Sim. 8.

5. The Court will direct an account of past partnership transactions, though the bill does not pray a dissolution; but it will make no order for carrying on partnership concerns, unless with a view to a dissolution. *Richards* v. *Davies*, 2 Russ. & M. 347.

6. A bill for an account of partnership transactions must pray for a dissolution of the co-partnership. *Knebell* v. *White*, 2 Y. & Coll. 15; 5 L. J., N. S., Exch. Eq., 98.

7. On a bill for an account of the dealings and transactions of a mining partnership, it is not necessary to pray for a dissolution of the concern. *Bentley* v. *Bates*, 4 Y. & Coll. 182; 9 L J., N. S., Exch. Eq., 30; 4 Jur. 552.

8. A suit respecting a partnership may be maintained without praying a dissolution. *Richardson* v. *Hastings*, 7 Beav. 301; 13 L. J., N. S., Ch., 129; 8 Jur. 72.

9. A creditor of a banking company formed under the 6 Geo. 4, c. 42, after the stoppage of payment by the company, filed a bill on behalf of himself and of all other creditors of the company who should come in and contribute to the expenses of the suit, against one of the public officers as sole defendant. The bill prayed that, in pursuance of the 33 Geo. 2, c. 14, the demand of the plaintiff and the other creditors might be paid out of the personal estate of the society, and if that should prove to be insufficient that they might be paid by the society; and it prayed for an account of the personal estate of the co-partnership to this bill: the defendant demurred for want of equity and for want of parties:—Held, that the prayer for an account of the personal estate of partnership was sufficient, the bill stating that the personal estate of the partnership was sufficient for the payment of its debts. *Fawcett* v. *Hodges*, Fl. & K. 100; 3 Ir. Eq. R. 232.

10. One partner may file a bill against his co-partner for account, without praying a dissolution of partnership. *Harrison* v. *Armitage*, 4 Madd. 143. *See also* 2 Ves. & B. 329.

VII. PRACTICE.

11. Motion by defendants to a bill for a partnership account, for a production of the accounts before answer, refused. *Pickering* v. *Rigby*, 18 Ves. 484.

12. The Masters make it a rule not to take an account of a partnership, unless specially directed, although the order be to take all accounts. *Woolley* v. *Gordon*, Taml. 11.

13. An order for an account between partners directed before the hearing upon motion by the plaintiff, he appearing to be entitled to such account upon the admissions of fact in the answer. *Turquand* v. *Wilson*, 24 W. R. 56.

XIII. Arbitration.

I. *Agreements to Refer*, 5518.
II. *Clauses in Articles*, 5520.
III. *Costs*, 5521.

I. AGREEMENTS TO REFER.

14. On a general reference by three partners, A., B., and C., of all matters in difference to arbitration, the arbitrators, acting upon certain statements of the assets and debts from which it appeared that A. was indebted to the partnership more than his share apparently would come to, directed B. to receive the outstanding debts and effects to pay the debts owing the partnership, and the remainder was to be divided between B. and C. The award was acted upon by all parties, but B. subsequently received some debts which were omitted in the accounts laid before the arbitrators, and on which their award proceeded, and he also

received good debts to a larger amount than had been estimated by the arbitrators. On a bill by A. against his co-partners:—Held, that he was entitled, notwithstanding the reference was of all matters in difference, to an account of the good debts received, beyond the amount estimated by the arbitrators, and to an account of the receipts in respect of dubious debts; and that any over-receipts in respect of good debts ought to follow the directions of the award with respect to the dubious debts. *Spencer* v. *Spencer*, 2 Y. & J. 249.

1. Where a suit for dissolving and taking accounts between partners was referred, and the award provided for the application of the assets only in the case of a surplus, but not in the event of a deficiency:—Held, not therefore necessarily invalid, as the Court might in a proper case intend a state of things in which the latter provision would be unnecessary; neither would the nature of the remedy for enforcing the award, if sufficient, be a ground for impeaching it, nor the omission to award payment of the balance found due, which the Court would enforce; nor the direction of the payment absolutely of a sum forming an item in the account, without reference to the state of the accounts at the time. But where the consideration of the partnership had been a sum of 1,500*l.* paid as to the moiety, and a note given for the residue, the consideration for which, as obtained under fraudulent representation as to the partnership, and in the hands of the defendant, was a subject in dispute, and the arbitrator in his award declared that the liabilities on the note should be unaffected by the award:—Held, to vitiate the award, as not conclusive and final. *Wilkinson* v. *Page*, 1 Hare 276; 11 L. J., N. S., Ch., 193; 6 Jur. 567.

2. By consent of a plaintiff and a defendant within the jurisdiction, the partnership accounts, and all matters in difference, were referred to arbitration, notwithstanding the absence beyond the jurisdiction of the other defendant, who had been a partner with the plaintiff and the defendant before the Court. *Duxbury* v. *Isherwood*, 12 W. R. 821.

3. A. and B., on dissolving partnership in 1866, agreed to refer matters in dispute to arbitration. Arbitrators were appointed in 1869, who held their first meeting in May 1870. A.'s arbitrator shortly afterwards died, and A. refused to appoint another, but filed a bill to have the partnership wound up in chancery. The time for making the award had been enlarged to 25th March 1872. On motion by B. to stay proceedings, it was ordered that proceedings should be stayed till further order, with liberty to both parties to apply if no award should be made before the 25th March 1872. *Kitchen* v. *Turnbull*, 20 W. R. 253.

4. The validity of a notice to dissolve a partnership was disputed, and it was agreed that that question, as well as the price to be paid by the continuing partners for the share of the outgoing partner, should be settled by two valuers named in the agreement or their umpire. One of the valuers died before the valuation was made, and the new valuer (appointed under protest) neglected to join with the other valuer in appointing an umpire. Under these circumstances, and by virtue of *the C. L. P. Act* 1854, s. 12, the Court appointed an umpire to act in the matter, in case his services should be required. *Re Evans*, 18 W. R. 723; 22 L. T., N. S., 507.

5. An agreement to submit the affairs of a partnership to arbitration, and that the submission shall be made a rule of a court of common law, cannot be pleaded in bar to a suit in equity, seeking discovery, complaining of the plaintiff being sued in actions, and praying for a receiver; although before the bill was filed arbitrators were appointed, and since bill filed the submission has been made a rule of the court. *Cooke* v. *Cooke*, 4 L. R., Eq., 77; 30 L. J., Ch., 480; 15 W. R. 981.

The jurisdiction of the superior courts in such a case is not ousted by the provisions of the C. L. P. Act of 1854. *Ib.*

6. On a dissolution of partnership between A. and B., A. offered to sell his interest to B. for 20,000*l.* B. refused, but offered to buy at 18,000*l.*, which A. refused. By a written agreement, reciting the offers and the refusals, it was left to C. to say what price should be paid by B. for A.'s interest:—Held, that C. had no authority to name a sum outside of the limits, 18,000*l.* and 20,000*l.* *Thomson* v. *Anderson*, 9 L. R., Eq., 523; 39 L. J., Ch., 468; 18 W. R. 445; 22 L. T., N. S., 570.

The power to revoke without the leave of Court a submission to arbitration, which does not contain a consent clause for making the submission a rule of Court, is not affected by the C. L. P. Act 1854. *Ib.*

A. and B., having dissolved partnership, signed an agreement by which, after stating that B. had offered A. 18,000*l.* for the purchase of his interest in the partnership business and assets, and that A. had declined the offer, but was willing to accept 20,000*l.*, they agreed to leave it to a referee to say what sum should be paid by B. to A.:—Held, that the agreement was revocable by either party at any time before the award was made. *Ib.*

7. When two partners made an agreement containing a provision that on the determination of the partnership one partner should purchase the share of the other at a valuation to be made by two persons, one to be appointed by each partner, and the partnership was carried on for some time under the agreement:—Held, that though the valuation could not be so made, because no umpire was provided, a court of equity would carry the partnership agreement into effect by ascertaining the value of the share. *Dinham* v. *Bradford*, 5 L. R., Ch., 519.

Where the fixing a value by arbitrators is not of the essence of an agreement, the Court will carry the agreement into effect, and will itself, if necessary, ascertain the value. *Ib.*

8. When a member of a firm which is under a continuing contract retires with an indemnity, the continuing partners are his agents for carrying on the contract. *Oakford* v. *European and American Shipping Co.*, 1 Hem. & M. 182; 9 L. T., N. S., 15.

Continuing partners under such a contract (which gave the firm the power of appointing an arbitrator in case of dispute) entered into an agreement by which they waived a very doubtful point of construction on the original contract, and referred differences to arbitrators, one of whom was selected by themselves, instead of by the firm, as constituted at the

date of the contract:—Held, that this was not such a variation of the original contract as to discharge the retired partner. *Ib.*

1. The managing partner of a colliery worked beyond the boundaries of the colliery without proper inquiry as to such boundaries, and, after notice from the adjoining owner that he was committing a trespass, recklessly continued such workings without consulting his co-partners under the *bonâ fide* belief that the adjoining owner had no title to the disputed area. An action against him for trespass and damages by the adjoining owner was referred to arbitration. The co-partners had no knowledge of the action until after the reference had been agreed to. They attended the reference, however, and did not object to it. The arbitrator found that a trespass had been committed, and assessed the damages at 6,000*l.* The co-partners refusing to contribute, the managing partner brought an action against them claiming a declaration that the 6,000*l.* damages was a partnership debt, and that defendants were bound to contribute ratably to it:—Held, that the co-partners had acquiesced in the arbitration, and were bound by the award, which was equivalent to a verdict by a jury and the judgment of the Court thereon. *Thomas* v. *Atherton*, 10 L. R., Ch. D., 185; 48 L. J., Ch., 370; 40 L. T. 77.

But held, that, inasmuch as the managing partner had acted with culpable negligence in continuing to work in the disputed area after notice from the adjoining proprietor, and without consulting his co-partners, he alone was liable for the damages. *Ib.*

II. CLAUSES IN ARTICLES.

2. An agreement to withdraw the decision of any questions which may arise from the ordinary tribunals of the country is illegal. *Lee* v. *Page*, 7 Jur., N. S., 768; 30 L. J., Ch., 857; 9 W. R. 754.

Articles of partnership comprised an agreement to submit all disputes to arbitration, and until such arbitration should have taken place neither party was to be at liberty to sue the other with reference to the affairs of the partnership:—Held, that although an arbitration clause is legal, there may not be a negative clause superadded to withdraw the decision of the question from the tribunals of the country. *Ib.*

3. The arbitration clauses commonly inserted in partnership articles apply only to questions arising upon the construction of the articles, and to matters of internal dispute thereunder, and not to a case where it is charged that the partnership articles have been wholly broken through, and where a dissolution is sought on that ground. *Cook* v. *Catchpole*, 10 Jur., N. S., 1068; 34 L. J., Ch., 60.

Semble, that the onus of proof that an arbitrator could not give effectual relief lies on the person proceeding otherwise than by arbitration. *Ib.*

4. In a bill in equity for the dissolution of a partnership at will carried on upon the terms of an indenture after the expiration of the period fixed by the indenture, the plaintiff alleged that disputes had arisen between himself and the defendant, his partner, and prayed for a dissolution of the partnership, the realization of the assets, and the appointment of a receiver. The defendant put in a plea stating that one of the clauses of the indenture provided that in case any difference should at any time during the partnership, or after the expiration thereof, arise between the partners, the same should be referred to arbitration, and neither of the partners should proceed against the other at law or in equity until the reference, and that the award should be made a rule of the Queen's Bench. The plea was overruled, on the grounds that the clause did not contemplate the entire dissolution of the partnership, which could not be considered as a matter in dispute; that all the bill prayed could be done without any disputes having arisen at all, and that consequently the plea met an immaterial averment in the bill; and that much of what was prayed by the bill was *dehors* the arbitration clause. *Wood* v. *Robson*, 15 W. R. 756.

5. When a partner proceeded to wind up a partnership concern with the assistance of the Court of Chancery, the defendant moved, pursuant to the Common Law Procedure Act 1856 (Ireland), s. 14, to stay all proceedings in the case, the parties having agreed to refer the matter to arbitration. It appearing that after the dissolution of the partnership the defendant persisted in carrying on the business, the motion was refused, such conduct of the defendant not coming within the section of the partnership deed which provided that all disputes relating to the partnership business arising between the partners should be referred. *Dennehy* v. *Jolly*, 22 W. R. 449.

6. Articles for a partnership for one year contained an arbitration clause. The partnership was continued beyond the year, and ultimately dissolved:—Held, that the arbitration clause was in force, and proceedings in a suit for accounts by one of the partners against the other was stayed under the Common Law Procedure Act 1854, s. 11. *Gillett* v. *Thornton*, 19 L. R., Eq., 559; 44 L. J., Ch., 398; 23 W. R. 437.

7. In 1868 C. was admitted, by purchase, into partnership with A. and B., a firm of solicitors, for a term of fifteen years. It was provided by the articles that if at any time any dispute or difference of opinion should arise between the partners relative to any clause, matter, or thing therein contained, or to the conduct of any of the partners, or upon any other point whatever, the same should be referred to arbitration. On the 17th of June 1873 A. and B. served C. with notice alleging that he had committed several breaches of the articles, and in particular had neglected to keep proper accounts, and to make proper entries of business, and declaring the partnership dissolved and determined from the date of serving the notice, under a power contained in the articles. C. refused to admit the validity of this notice of dissolution, and told his partners that he should submit the question of the validity of the notice to arbitration. On the 1st of July A. and B. filed a bill for a partnership account on the footing of a dissolution from the time of serving the notice, and on the same day C. served them with notice requiring them to refer to arbitration all questions that had arisen relatively to the notice of dissolution:— Held, that he was entitled to an order staying pro

ceedings in the suit, pursuant to the Common Law Procedure Act 1854, s. 11, in order that the questions as to the validity of the notice of dissolution might be determined by arbitration. *Plews* v. *Baker*, 16 L. R., Eq., 564; 43 L. J., Ch., 212. See also *Witt* v. *Corcoran*, 8 L. R., Ch., 476. n.

1. L. and three other persons, G., N., and F., all British subjects, entered into an agreement, in the Russian language and registered in Russia, to trade in co-partnership in Russia, providing that the head office of the firm should be in St. Petersburg, and reserving to G. and N. the right to recall their capital within a year, and, if not paid within a month, the firm was to be wound up; and also providing that "all disputes, no matter how or where they shall arise, shall be referred to the St. Petersburg Commercial Court," whose decision shall be final. L. alleged that there was a contemporaneous English agreement, not registered in Russia, by which G. and N. agreed to compensate him in the event of a dissolution within a year, under the powers reserved to them. The two partners exercised their right within the year to recall their capital, and immediately took steps to wind up the partnership in Russia. L. having thereupon commenced an action in England, alleging that the proceedings of his co-partners, the defendants, were taken without his knowledge and sanction, and were invalid and not binding on him, and claiming a dissolution of the partnership, relief in respect of the English agreement, the appointment of a receiver, and other relief, they moved for a stay of proceedings in the action, and a reference to the St. Petersburg Commercial Court:—Held, that an agreement to refer all disputes to a foreign court is within s. 11 of the Common Law Procedure Act 1854, and that the defendants were entitled to an order on their motion; and that although the Court had jurisdiction to appoint a receiver pending a reference to arbitration, it was not proper to do so unless a special case was made, as the course of litigation before the tribunal chosen by the parties themselves would thereby be interfered with. *Law* v. *Garrett*, 8 L. R., Ch. D., 26; 38 L. T., N. S., 3; 26 W. R. 426. Affirming 37 L. T., N. S., 602.

Semble, if a sufficient case were shown for granting an injunction, the Court would not stay proceedings. *Ib.*

2. Although a particular submission to arbitration may be revoked, a general agreement to refer to arbitration cannot be revoked by one of the parties. *Piercy* v. *Young*, 14 L. R., Ch. D., 200; 42 L. T. 710; 28 W. R. 845. S. P. *Christie* v. *Noble*, 14 L. R., Ch. D., 203. n.

Articles of partnership between the plaintiff and other persons for performing a contract contained an agreement that any dispute between the partners should be settled by arbitration, but there was no agreement that the submission to arbitration might be made a rule of Court. One of the partners became a liquidating debtor, and the defendant was appointed his trustee, and he elected to carry on the contract. The defendant claimed to have purchased the shares of the plaintiff and other partners in the undertaking. The plaintiff brought an action against the defendant asking for an account of the partnership dealings. The main questions at issue were whether the shares of the other partners were purchased on behalf of the plaintiff and defendant or of the defendant alone, and whether the defendant had purchased the share of the plaintiff as well as of the other partners. The defendant moved for an order under the Common Law Procedure Act 1854, s. 11, staying all proceedings in the action, and referring the matters in question to arbitration, but before the motion was heard the plaintiff revoked the agreement for arbitration:—Held, that the matters in dispute were not within the agreement for arbitration, and the motion was accordingly refused. *Ib.*

The question whether the matters in dispute are within the agreement for arbitration is one which the Court will decide, and will not leave to the arbitrator. *Ib.*

Willesford v. *Watson* (8 L. R., Ch., 473) distinguished. *Ib.*

Whether the trustee in the liquidation was a party entitled to make the application within the 11th section of the Common Law Procedure Act, *quære*. *Ib.*

3. In a case where fraud is charged, the Court will in general refuse to send the dispute to arbitration if the party charged with the fraud desires a public inquiry. But where the objection to arbitration is by the party charging the fraud, the Court will not necessarily accede to it, and will never do so unless a *primâ facie* case of fraud is proved. *Russell* v. *Russell*, 14 L. R., Ch. D., 471; 49 L. J., Ch., 268; 42 L. T. 112

Partnership articles between A. and B. provided that, if the business should not be conducted to the satisfaction of B., he should have power to give notice to A. to determine the partnership; the articles also contained an arbitration clause providing, that any differences in relation to the partnership should be referred to arbitration. B. having given notice to A. for the partnership to be determined, A. brought an action against B., alleging various charges of fraud, and claiming that the notice should be declared void, and that B. should be restrained from announcing the dissolution of the partnership, whereupon B. moved that the matters in question should be referred to arbitration:—Held, that the power to give the notice under the articles was exercisable by B. at his own will and pleasure:—Held, also (A. having, in the judgment of the Court, failed to establish a *primâ facie* case of fraud), that the matters in question should be referred to arbitration according to the articles. *Ib.*

Observations in *Willesford* v. *Watson* (14 L. R., Eq., 572), questioned. *Ib.*

Blisset v. *Daniel* (10 Hare 493), and *Wood* v. *Woad* (9 L. R., Exch., 190), distinguished. *Ib.*

III. COSTS.

4. The plaintiff instituted a suit to take the accounts of a partnership between himself and the defendant, the terms of the partnership being that the plaintiff was to receive one-twelfth of the profits, and to bear one-twelfth of the losses, and that the defendant was to receive and bear the remaining eleven-

twelfths. The partnership articles contained an arbitration clause; and an order was made in the suit, under the C. L. P. Act 1854, s. 11., that the matters in difference between the parties be referred to arbitration and the proceedings in the suit stayed, the costs being reserved. Under this order an award was made finding a considerable sum due to the plaintiff:—Held, that the costs of both parties of the suit, reference and award, ought to be taxed and paid as to one-twelfth by the plaintiff, and as to eleven-twelfths by the defendant. *Newton* v. *Taylor*, 19 L. R., Eq., 14; 23 W. R. 330.

XIV. Injunction between Partners.

1. Motion granted for an injunction for one partner against another, the defendant being in contempt, and served personally, and not appearing. *Read* v. *Bowers*, 4 Bro. C. C. 441.

2. A person having, in articles of partnership, covenanted not to do certain acts after a specified period of time, the Court will not, before the arrival of that period, grant an injunction to restrain him from acting in breach of his agreement, nor for mischief, which is no breach at law of the covenant between the parties. *Coates* v. *Coates*, 6 Madd. 287.

3. Two persons having agreed to work a coach from Bristol to London, one provided horses for a part of the road, and the other for the remainder; and in consequence of the horses of one having been taken in execution, the other provided horses for that part which had been undertaken by the first, and claimed the whole profits of the journey; the Court refused an injunction against continuing to provide horses. *Smith* v. *Fromont*, 2 Swan. 330; 1 Wils. 472.

4. An injunction will not be granted to restrain the breach of a covenant in articles of partnership which has not been infringed for any length of time, where the bill does not pray a dissolution of the partnership. Whether the Court will in any case grant such an injunction, unless there is ground for, and the bill prays, a dissolution of partnership, *quære*. *Marshall* v. *Coleman*, 2 Jac. & Walk. 266. See in affirmative *Harrison* v. *Armitage*, 4 Madd. 143; and in negative *Forman* v. *Homfray*, 2 Ves. & B. 329; *Loscombe* v. *Russell*, 4 Sim. 8.

5. Injunction refused to restrain process on a bill of exchange given by one partner to another, where the alleged set-off is in respect of the plaintiff's interest in partnership effects and profits. *Wartnaby* v. *Shuttleworth*, 1 Jur. 469.

6. Court will not treat as a bill to restrain waste, a bill to restrain an acting partner from collecting debts or creating them, and for appointing a receiver; though otherwise if partner has been shown guilty of culpable conduct and is insolvent. *Lawson* v. *Morgan*, 1 Price 303.

7. Injunction against a surviving partner, proceeding by ejectment to obtain possession of a farm of which a joint lease had been made to himself and his deceased partner. *Elliot* v. *Brown*, 3 Swan. 489.

8. Injunction to restrain surviving partners from using the name of a deceased partner in the firm of the trade, refused. *Webster* v. *Webster*, 3 Swan. 490.

9. Injunction to restrain a surviving partner from disposing of the joint stock and receiving the outstanding debts. *Hartz* v. *Schrader*, 8 Ves. 317.

10. Plaintiff and defendant (partners) having agreed to dissolve, and that defendant, on payment of half value of effects, should take the whole, though defendant took possession, but failed to make the payment, and had begun to pull down part of buildings, injunction to restrain him refused. *Cofton* v. *Horner*, 5 Price 537.

11. Where defendant denies charges in bill of fraud and misconduct in partnership, and explains others away, and alleges his inability to put in a full answer by reason that plaintiff withheld improperly the partnership books, Court would not even grant the injunction prayed by bill, but refused it without prejudice. *Littlewood* v. *Caldwell*, 11 Price 97.

12. *Semble*, that the Court will entertain a bill to prevent the destruction of partnership property, though no dissolution be prayed. *Miles* v. *Thomas*, 9 Sim. 606.

13. Mere temptation to the abuse of partnership effects is not sufficient to induce Court to grant injunction. *Glassington* v. *Thwaites*, 1 Sim. & S. 124; 1 L. J., Ch., 113.

All the proprietors of the M. paper being also, with the exception of one, proprietors in the E. paper, an injunction to restrain using effects of former partnership, to assist latter, in consideration of an annual sum, was refused where there had been agreement permitting use on those terms which had been long acted under. *Ib.*

But injunction granted to restrain using effects not included in agreement. *Ib.*

14. A. and B. carried on the business of a pencil maker, under the firm of A. & L. A. died, and B. carried on the business under the firm of B. & Co., successors to A. & L. A.'s executor having commenced the same business, under the firm of A. & L., an injunction was granted to restrain him from suing that firm, until the right should have been tried at law. *Lewis* v. *Langdon*, 7 Sim. 421; 4 L. J., N. S., Ch., 258.

15. Injunction against a co-partner interfering in the management of the business (which was under a contract with the postmaster-general for the service of the mail), where the effect of suffering him to interfere would be irreparable injury to the partnership business, by causing the contract to be put an end to. *Anderson* v. *Wallace*, 2 Moll. 540.

16. A partner having excluded his co-partner, an injunction was granted to restrain him from obstructing or interfering with his co-partner in the exercise and enjoyment of his rights under the partnership articles. *Hall* v. *Hall*, 12 Beav. 414.

17. Under a deed of partnership, it was provided, that the assignees of any bankrupt proprietor should not become proprietors, but might procure some person to become a proprietor in respect of the bankrupt's shares; and that, between the time of bankruptcy and of some person becoming a proprietor of such shares, the rights and privileges attending

such shares should remain in suspense:—Held, that the solvent proprietors were entitled to an injunction against the assignee of a bankrupt proprietor, to restrain him from interfering with the partnership property, or with the management of the business of the partnership. The solvent proprietors being entitled to the possession of the partnership property and effects, a manager or receiver was refused. *Francis* v. *Spittle*, 9 L. J., N. S., Ch., 230.

1. Injunction granted to restrain the defendant, who had removed the partnership books from the place of business, from keeping them at any other place. *Greatrex* v. *Greatrex*, 1 De G. & Sm. 692; 11 Jur. 1052.

2. To entitle one partner to an order for an injunction and receiver, against his copartner, he must either show a dissolution, or facts which, if proved at the hearing, would entitle him to a decree for a dissolution. *Smith* v. *Jeyes*, 4 Beav. 503.

3. The Court will restrain a purchaser from doing acts of waste and destruction, and will restrain a partner from doing an intentional serious injury to the partnership property. *Marshall* v. *Watson*, 25 Beav. 501.

4. If A. obtains a patent, and enters into an agreement with B., the effect of which is to make B. a partner in the patent, B. is entitled not merely to share in the profits, but to interfere in the management of it; and if, upon a bill being filed, A. insists that he alone is entitled to act in the management, and that such was the true intent of the agreement, an injunction will be granted against A. *Blackford* v. *Hawkins*, 1 L. J., Ch., 141.

5. The Court will not restrain one of the several partners in a patent, from publishing a book containing an account of the invention. *Hawkins* v. *Blackford*, 1 L. J., Ch., 142.

6. A party was restrained from using the secret of compounding a medicine not protected by patent, it appearing that the secret was imparted to him, to his knowledge, in breach of faith or contract. *Morison* v. *Moat*, 21 L. J., N. S., Ch., 248; 16 Jur. 321. Affirming 9 Hare 241; 20 L. J., N. S., Ch., 513; 15 Jur. 787.

In June 1823 Morison, the sole inventor and proprietor of a medicine not protected by patent, upon the occasion of entering into partnership with Moat as manufacturers and vendors of the medicine, for the purposes of the partnership communicated to the latter the secret of compounding the medicine. By the partnership-deed either partner was empowered to introduce another partner, by deed, to be attested by the other; and by mutual bonds of even date, Morison bound himself not to communicate the secret of compounding the medicine to any person, except a partner so introduced; whilst Moat bound himself not to communicate such secret to any person whomsoever. Morison afterwards introduced his sons, the plaintiffs, into the partnership; and Moat, shortly before his death, in breach of his bond, communicated the secret to the defendant, his son; and then by deed, duly attested by Morison, appointed the defendant his successor in the partnership. Shortly after the death of Moat, the defendant joined Morison and the plaintiffs, who were ignorant that he had obtained a knowledge of the secret, in executing a partnership-deed, containing a clause declaring the defendant a sleeping partner, and another clause, by which the partners covenanted not to divulge the secret of compounding the medicine to any person whomsoever. The defendant also afterwards executed deeds reciting that the sole property in the secret was in Morison. Morison afterwards died, having by will bequeathed his property in the secret to the plaintiffs. After the determination of the partnership the defendant made use of his knowledge of the secret, communicated to him by his father, in manufacturing medicine, which he sold as the medicine originally manufactured by Morison. Upon the application of the plaintiffs the Court granted an injunction restraining the defendant from selling, under the title or designation of "Morison's medicine," any medicine manufactured by the defendant; and also from compounding any medicine according to the secret mentioned in the plaintiff's bill, and from in any way making use of such secret. *Ib.*

If a partner in a business in which a secret process of manufacture and composition of materials is used, who has not under the partnership contract a right to the knowledge of the secret, should openly take part in the manufacture, and should, with the knowledge and concurrence of his partners, be permitted to acquire a knowledge of the process and ingredients, the other partners will be considered to have waived a right to the preservation of the secret for their separate benefit. *Semble.* *Ib.*

XV. Receiver and Manager.

See also IX. *ante*—MINES AND MINERALS, IX.

7. Surviving partner, trading on his own account with the debtors to the partnership:—Ordered, that an attorney be appointed to sue for the debts, unless the surviving partner would give security to answer a moiety of the debts to the administratrix of the deceased partner. *Estwick* v. *Conningsby*, 1 Vern. 118.

8. On the motion of a partner who had retired, complaining that the continuing partners delayed getting in the old debts for the sake of continuing their customers, a receiver appointed to call in the debts due to the partnership estate, after the usual credit had expired. *Collenridge* v. *Cook*, 1 Jur. 771.

9. Court will not treat as a bill to restrain waste, a bill to restrain an acting partner from collecting debts or creating them, and for appointing a receiver, though otherwise if partner has been shown guilty of culpable conduct, and is insolvent. *Lawson* v. *Morgan*, 1 Price 303.

10. The Court will not, upon motion, appoint a receiver of a partnership, unless it appears that the plaintiff will be entitled to a dissolution at the hearing. *Chapman* v. *Beach*, 1 Jac. & Walk. 594.

11. The Court will not appoint a receiver or a manager of any partnership concern, unless the suit be so framed as that a decree may be

made, either that the concern shall be carried on according to the terms of an instrument, which by the agreements of the parties is to regulate the mode of its being carried on, or that it shall be wholly put an end to. *Const* v. *Harris*, T. & R. 517.

The Court will entertain a bill to compel partners to act according to the provisions of instruments into which they have entered, and where it will interfere for that purpose, will take care that the decree shall not be defeated by anything done in the meantime. Thus, where, in 1812, the then proprietors of Covent Garden Theatre executed a deed, by which they covenanted and agreed, that the profits of the theatre should be exclusively appropriated to particular purposes, and that the treasurer for the time being should be irrevocably directed so to apply the profits; and in 1822, parties then entitled, under the former proprietors, to seven-eighths of the theatre, entered into an agreement, which provided, in some respects, for a different application of the profits, and otherwise affected the rights of a party interested in the remaining eighth, who was not consulted on the subject; the Court, upon a bill filed by that party, for the specific performance of the covenants and agreements contained in the deed of 1812, appointed a receiver. *Id.* 496.

A bill, merely seeking the interposition of the Court to carry on a partnership, cannot be maintained. *Id.* 519.

The exclusion of a partner from his full share of management, the strongest ground for appointing a receiver. *Id.* 525.

1. Receiver appointed of mines, in which several persons were interested; the concern, from the nature of the subject, being a species of trade, and not a mere tenancy in common in land. *Jeffery* v. *Smith*, 1 Jac. & Walk. 298.

2. Where some members of a partnership, either in the ordinary course of trade, or in closing the transactions after a dissolution, seek to exclude others from a just share in the management, the Court appoints a receiver. *Wilson* v. *Greenwood*, 1 Swan. 481; 1 Wils. 223.

3. Motion for a receiver on a mining concern refused, upon a claim of partnership in the equitable interest, not raised until the concern, at a great expense, became prosperous, and denied by the answer. *Norway* v. *Rowe*, 19 Ves. 144.

4. Receiver not ordered merely on a dissolution of partnership; ordered on breach of the duty of a partner, or of the contract, as by continuing trade with joint effects on the separate account. *Harding* v. *Glover*, 18 Ves. 281.

5. The principle upon which a court of equity interferes between partners, by appointing a manager, receiver, etc., is merely with a view to the relief, by winding up and disposing of the concern and dividing the produce, not to carry it on. The Court, therefore, would not, upon motion, appoint a manager, etc., of the Opera House, except upon the principle applicable to any other partnership, as necessary to the relief, a foreclosure; taking into consideration also the difficulties from the nature of the subject, and the contract, an anxious provision for arbitration, and that one party was, by the express contract, manager. *Waters* v. *Taylor*, 15 Ves. 10.

6. Court will not appoint receiver of effects of subsisting partnership, unless on grossest abuses by some of the partners. *Oliver* v. *Hamilton*, 2 Anstr. 453.

7. In a cause for an account of a partnership, both parties being dead, a receiver shall be appointed; *secus*, in the case of surviving partner. *Philips* v. *Atkinson*, 2 Bro. C. C. 272.

8. Receiver of the debts due to a business appointed at the suit of persons to whom a share of the profits had been assigned, against a subsequent assignee of the debts. *Candler* v. *Candler*, Jac. 225.

9. A bill for a partnership account, and a receiver, during the existence of the partnership, is not demurrable, merely on the ground that a dissolution is not prayed: and therefore, where to a bill by one partner against another, alleging that the defendant by conducting himself in violation of the partnership contract, excluding the plaintiff, and applying the assets to his own use, sought to force the plaintiff to dissolve the partnership before the end of the term, and praying an account of the partnership transactions and a receiver, but no dissolution; the defendant answered one interrogatory, and, submitting that the bill was demurrable, declined under the thirty-eighth Order of August 1841 to answer the remainder; exceptions for insufficiency were allowed and sustained. *Fairthorne* v. *Weston*, 3 Hare 387; 13 L. J., N. S., Ch., 263; 8 Jur. 353.

10. Notwithstanding the 152nd section of the 12 & 13 Vict., c. 106, a solvent partner is entitled to have a receiver of the partnership assets appointed by the Court of Chancery, where the other partner has become bankrupt, and assignees of his estate have been appointed. *Freeland* v. *Stansfield*, 16 Jur. 792; 2 Sm. & G. 479; 1 Jur., N. S., 8; 23 L. J., Ch., 293; 2 W. R. 575; 2 Eq. Rep. 1181.

11. A receiver of a partnership granted in a case where no misconduct in management was alleged, on the ground that the defendant insisted on a legal objection as destroying all right of his partner to a share in the partnership. *Hale* v. *Hale*, 4 Beav. 369.

12. Difficulties in appointing a receiver of a partnership upon motion; surviving partners insisted on continuing the partnership with the assets of a deceased partner. The Court thought the representatives of the latter entitled to a receiver. *Madgwick* v. *Wimble*, 6 Beav. 495; 14 L. J., N. S., Ch., 387; 7 Jur. 661.

13. By a memorandum in writing, the defendant, a general merchant, agreed with the plaintiff, in consideration of the general services of the latter, to allow him, in addition to a fixed salary, one-fifth of the net profits on all new business entered into through him; *semble*, a partnership was thereby constituted between the parties; and:—Held, that, at any rate, the plaintiff thereby acquired a right, as against the defendant, to an account of profits, and the appointment of a receiver. *Katsch* v. *Schenck*, 18 L. J., N. S., Ch., 386; 13 Jur. 668.

14. Upon a motion to appoint a receiver of a partnership, where the question raised was whether the partnership had been dissolved, the Court refused to do so, but directed an issue to try the fact. *Fairburn* v. *Pearson*, 2 Macn. & G. 144.

1. The affairs of a partnership being embarrassed, and daily growing worse, the Court, on motion, appointed a person to sell the business and wind up the affairs of the partnership. *Bailey* v. *Ford*, 13 Sim. 495; 12 L. J., N. S., Ch., 482.

2. In a suit to wind up a partnership, the Court will appoint a manager, though the management has been given up to one partner under the provisions of the partnership deed, and no case of mismanagement is made against him. *Tippets* v. *Phillips*, 1 W. R. 163.

3. A. and B., formerly partners trading with the capital of A., dissolved partnership; B., being in insolvent circumstances, negotiated bills of exchange in the name of the firm, and applied the money to his own purposes. A., being responsible for the debt, applied to be appointed receiver of the partnership assets, which were insufficient to meet the debts. Ordered accordingly. *Hoffman* v. *Duncan*, 18 Jur. 69.

4. An arrangement entered into by partners at the termination of the partnership that the debts of the firm should be collected by a third person—though there was no actual contract that neither of the partners should receive any debts—cannot be put an end to, at the will of either, without giving to the other, or to the representative of a deceased partner, the right to have an account and a receiver appointed by the Court. *Davis* v. *Amer*, 3 Drew. 64.

5. Where two persons are owners as tenants in common of a mine, and have agreed to work it together, the Court will not, on a bill not asking for dissolution of the partnership, and in a case where one of the tenants in common has not taken any steps to obstruct the other, grant a manager and receiver of the mine. *Roberts* v. *Everhardt*, 2 W. R. 125; 1 Kay 148; 23 L. J., Ch., 201; 2 Eq. Rep. 780.

6. Where one of two partners has become bankrupt in respect of his separate estate, and an official assignee and creditors' assignees have been appointed, and the partnership has been dissolved by the bankruptcy, the continuing partner is entitled to have a receiver of the partnership debts appointed in Chancery, notwithstanding the 152nd section of the statute 12 & 13 Vict., c. 106. *Freeland* v. *Stansfield*, 16 Jur. 792.

7. On a bill filed by a plaintiff insured in a society (whose funds where liable to pay the insurance money), on behelf of himself and other persons so insured, charging a loss of the fund through the negligence of the directors, and on the answer and affidavits showing that the secretary had absconded with part of the funds, and that some of the directors were in needy circumstances:—Held, that the plaintiff was entitled to the appointment of a receiver, and to an injunction. *Evans* v. *Coventry*, 5 De G. M. & G. 911.

8. In a partnership suit, a decree having been made for the appointment of a receiver, and a receiver subsequently approved and gone into possession:—Held, that such possession was not, as regards strangers to the suit, the possession of the Court till the final appointment of the receiver. *Defries* v. *Creed*, 6 N. R. 17.

9. To entitle one partner to an injunction and receiver against his co-partner, either a dissolution must be shown, or such facts as would entitle the plaintiff to a decree for dissolution, and in so doing the Court will look at the terms of the original contract of partnership, and the duties and obligations arising out of it; and if it sees that the conduct of one is destructive of all confidence, and inconsistent with every duty, so as to make it impossible that it should be carried on with benefit to either party, it will decree a dissolution, before the expiration of the term for which the partnership was entered into. *Smith* v. *Jeyes*, 4 Beav. 503.

10. Where it is not the object of the suit to obtain the dissolution of a partnership, but on the contrary to continue the partnership, it is not according to the practice of the Court, in the course of that suit, to grant a receiver and manager. *Hall* v. *Hall*, 3 Macn. & G. 79; 20 L. J., N. S., Ch., 585; 15 Jur. 363.

Cases, however, may arise in which the conduct of the defendant being such as to endanger the existence of the partnership concern, the Court will appoint an interim receiver and manager. *Ib.*

11. Exclusion is a sufficient ground for appointing a receiver in partnership cases, but partners may, by contract, provide for an exclusion on the happening of certain events. *Blakeney* v. *Dufaur*, 15 Beav. 40.

Upon a motion for a receiver of a partnership, the Court will not determine the questions arising between the partners, the only object then being to protect the assets until the determination of the rights. *Ib.*

12. A plaintiff filed a bill for dissolution of a partnership entered into with the defendant, and moved for a receiver. A question was raised upon the evidence as to the conduct of the parties, and as to whether there was any term fixed for the expiration of the partnership:—Held, that these questions must be decided at the hearing, and that the Court, not being able to say that a dissolution must be declared at the hearing, would not appoint a receiver, which would operate as an injunction. *Baxter* v. *West*, 28 L. J., Ch., 169; 32 L. T. 155.

13. Two partners, on the termination of their partnership, came to an arrangement for mutual convenience that a third person should collect the outstanding assets; it was acted upon for some time, and then one of the partners died:—Held, that the surviving partner could not repudiate the agreement and alone collect the debts, but that the executors of the deceased partner had a right to have a receiver appointed. *Davis* v. *Amer*, 3 Drew. 65.

14. The authority of a partner continues after a dissolution for all purposes of winding up, and, if it be unduly exercised, the remedy is by applying to the Court for the appointment of a receiver. *Butchart* v. *Dresser*, 4 De G. M. & G. 542; 10 Hare 453.

15. Solvent partner appointed receiver, without salary, of the partnership property, etc. *Exp. Stoveld*, 1 G. & J. 303.

16. The power of a solvent partner upon the bankruptcy of his co-partner to sell the partnership property, is given him in his personal capacity, to enable him to wind up the affairs of the partnership, and cannot be transferred by him to another, either by assignment of "all his share and interest" in the partnership, or

by exposing himself, although *bonâ fide*, to a judgment under which all such share and interest is taken in execution. *Fraser* v. *Kershaw*, 2 Kay & J. 496; 2 Jur., N. S., 880; 24 L. J., Ch., 445; 4 W, R. 431.

T. & K. being partners, T., on the 19th February, was declared bankrupt. On the 20th February the defendant, a judgment creditor of K., the then sole solvent partner, issued a fieri facias on all the partnership effects, which were made over to her by the sheriff. The defendant advertised them for sale on the 27th February, claiming to be the sole owner. On the 26th February a joint adjudication took place against T. & K., under which the plaintiff was the official assignee. The defendant attempted to carry out the sale as advertised, but the official assignee entered, and forcibly retained possession of the goods. On a bill filed by the assignee to restrain the defendant from proceeding to sell, and for a receiver, and for a sale and winding-up under the authority of the Court:—Held, first, that the authority of a sole solvent partner to get in the partnership assets is an authority vested in him personally for partnership purposes, and cannot be transferred. *Ib.*

Semble, that even the partner himself might in some cases be restrained. *Ib.*

Held, secondly, that a sale of partnership assets by an execution creditor of a solvent partner claiming the sole property is a tortious conversion such as ought to be restrained. *Ib.*

Held, thirdly, that the previous violence of the plaintiff in taking and keeping possession of goods by force did not disentitle him to his remedy in equity. *Ib.*

1. A partnership existed which had various branch partnerships and businesses at various places, and in the several sub-partnership deeds a proviso was inserted that such partnerships should be determined by the head partner of the general partnership firm upon certain terms, upon giving certain notices. The head partner being desirous of terminating one of the subordinate partnerships, the proper notices were given. The plaintiff denied the validity of these notices, and also disputed the principle upon which the last balance sheet of the profits had been taken and made up. He thereupon filed a bill for an account, and for a receiver:—Held, that, until the validity or invalidity of these notices was determined at the hearing, a receiver would not be appointed, no prospective damage to the plaintiff's concern in the meantime being alleged. *Bowker* v. *Henry*, 6 L. T., N. S., 43.

2. Partnership assets were in the possession of a receiver appointed by the Court, and of which an execution creditor had distinct notice. A seizure of the property, on the part of the execution creditor and of the sheriff, was held to be a contempt, and the Court ordered them to pay the costs of it and of a motion to commit. *Lane* v. *Sterne*, 3 Giff. 629; 9 Jur., N. S., 320.

3. The existence of disputes between different members of the governing body of a company which prevents its affairs being carried on properly, is a ground for the intervention of the Court by injunction and receiver to protect the property of the company, but the interference of the Court will be continued only until a governing body is duly appointed. *Featherstone* v. *Cooke*, *Trade Auxiliary Co.* v. *Vickers*, 16 L. R., Eq., 298.

4. In an action between partners, the writ filed in which claimed—(1) an injunction to restrain the defendant from drawing out of the partnership funds more than the amount stipulated in the articles by way of subsistence money; (2) a receiver; and (3) an account, but did not claim a dissolution of the partnership:—Held, on an interim motion for a receiver, that the Court could appoint a receiver, not being also a manager of the partnership business, although a dissolution was not claimed. *Medwin* v. *Ditcham*, 47 L. T. 250.

5. Pending the winding-up of the business of a partnership, which had become dissolved by the death of one of the partners, it is a ground for appointing a receiver and manager, and for not appointing the surviving partner to the office, that the latter has, while carrying on the business after his partner's death, so acted as to diminish the value of the assets by transferring to a new business to be carried on by himself, the benefit of the custom and goodwill of the business. *Young* v. *Buckett*, 51 L. J., Ch., 504; 46 L. T. 266; 30 W. R. 511.

6. In a partnership action, where there was no default in pleading, a district registrar by consent made a decree for accounts and inquiries, appointed a receiver, and directed a sale of the partnership property:—Held, that all these proceedings were invalid, and the plaintiff must commence afresh as from before decree; but, on motion under the Judicature Act, Ord. XL., r. 11, on admissions in the pleadings, an order was made directing accounts and inquiries to be taken and made in the district registry; the same receiver was, by consent, re-appointed by name by the Court. *Brassington* v. *Cussons*, 24 W. R. 880.

7. When partners have agreed to refer disputes to a foreign tribunal, the Court will not allow proceedings to go on in an action in respect of the same matters, nor appoint a receiver during the liquidation of the partnership affairs, unless it is shown that the rights of the parties cannot be sufficiently protected by the foreign tribunal. *Law* v. *Garrett*, 26 W. R. 426; 8 L. R., Ch. D., 26; 38 L. T., N. S., 3. Affirming 37 L. T., N. S., 602.

8. W. and A. were appointed receivers on the dissolution of the partnership of R. and L. W. was a creditor of L., and L., in consideration of some further advances, gave him a charge on the moneys which should come to his hands as receiver. Subsequently, L. signed an order authorizing W. to pay over "the balance due to him" to G. and B. W. accepted notice of the order, but did not tell G. and B. of his own prior charge. On the bankruptcy of L., G. and B. claimed priority over W.:—Held, that there was no obligation on W.'s part to disclose his charge, and that he was entitled to priority. *Re Lewer*, *Exp. Garrard*, 25 W. R. 364; 5 L. R., Ch. D., 61; 37 L. T. 42. Affirming S. C. *sub. nom. Exp. Wilkes*, *Re Lewer*, 25 W. R. 64; 35 L. T., N. S., 557; 4 L. R., Ch. D., 101.

Held, that W., when he accepted the order, only undertook to pay over to G. and B. the ultimate balance after he had satisfied his own claim. *Ib.*

XVI. Suits.

See also XII. *ante.*

I. *Parties*, 5527.
II. *Pleading*, 5529.
III. *Practice*, 5529.
IV. *Payment into Court*, 5530.
V. *Costs*, 5530.

I. PARTIES.

1. Co-partners must join in plea, etc. *Anon.*, Cary 15.

2. Fourteen shareholders in a joint stock company, which had already ceased to carry on business, filed a bill on behalf of themselves and all other the shareholders, except the defendants, against the defendants, who were the directors of the company, praying that various accounts might be taken, and that the partnership might be dissolved. The company had consisted of about two hundred partners, and the plaintiffs alleged that it would be inconvenient to make them all parties:—Held, upon demurrer, that a bill praying dissolution of a partnership cannot be sustained without all the partners being before the Court. Leave given to amend and assimilate the bill to that in *Wallworth* v. *Holt* (4 Myl. & Cr. 619). Suggestion by the Court that a clause in partnership deeds, allowing a certain number of partners to sue, would obviate this difficulty. *Deeks* v. *Stanhope*, 13 L. J., N. S., Ch., 280; 14 Sim. 57; 8 Jur. 349.

3. There are two general rules of the Court; first, that all persons interested in the subject matter of the litigation ought to be parties; the second, that the Court always endeavours to do complete justice, so that the matters involved in the suit may not be left open to future litigation: but the rules are both occasionally departed from. As to the necessity of the Court modifying its rules and adapting its forms of proceedings to the altered circumstances of society existing at the present day. A bill may be filed respecting a partnership without praying a dissolution. *Richardson* v. *Hastings*, 7 Beav. 323; 13 L. J., N. S., Ch., 142; 8 Jur. 207.

In a continuing partnership, if a few have an interest in a particular subject adverse to all the rest, a bill may be filed against the few, by one on behalf, etc. In the case of an insolvent partnership not formally dissolved, a bill may be filed by one or more, on behalf of the rest, against the governing body, to have the assets collected and applied towards the payment of the debts, without seeking to ascertain the rights and liabilities of the parties as between themselves, but leaving them open to future litigation. *Ib.*

4. To a bill filed by joint creditors for the purpose of obtaining relief against the assets of a deceased partner or joint contractor, the surviving partners or joint contractors must be made parties, though no decree is sought against them, such persons being necessarily interested in taking the accounts. *Thorpe* v. *Jackson*, 2 Y. & Coll. 553.

5. In a bill by a debtor of a firm against the last continuing member of the partnership existing when the debt was contracted, to restrain an action for the debt by such survivor, it was alleged that the debt had been satisfied by dealings with the subsequent partners:—Held, that neither they nor the quondam partners could be made defendants for the purpose of obtaining discovery as to such dealings. *Jones* v. *Maund*, 3 Y. & Coll. 347.

6. The proceeds of several shipments of goods had been brought into court, in an interpleader suit, by the surviving partners of a firm to which they had been remitted. In a subsequent suit by some of the claimants against the other claimants and the surviving partners, a demurrer, on the ground that the representatives of the deceased partner in the firm were necessary parties, was allowed. *Miller* v. *Cranford*, 9 L. J., N. S., Ch., 195.

7. In a suit by a joint creditor, against the representatives of a deceased partner, and the surviving partner, the plaintiff was held to be entitled to satisfaction out of the assets of the deceased partner, though it was not proved that the surviving partner was insolvent. The surviving partner is properly joined as a defendant in such a suit, being interested to contest the demand of the plaintiff, and of all joint creditors, but the remedy against him is altogether at law. *Wilkinson* v. *Henderson*, 1 Myl. & K. 582; 2 L. J., N. S., Ch., 191.

8. *Semble*, that where one of several partners, plaintiffs, dies, the suit survives to the others. *Anderson* v. *Wallis*, 4 Y. & Coll. 336.

9. Testator by will directs his business to be carried on by his executors, and that when his son B. (the bankrupt) attains twenty-one, he should, on performing certain terms, be admitted to a fourth share. B., at the age of twenty, enters into another business on his own account, and never claims the right under the will, or performs those conditions:—Held, nevertheless, that he had not abandoned the right, and, therefore, that his assignees have a right to call the executors of the will before the commissioner and examine them as to the affairs of partnership. *Exp. & Re Marks*, 1 Dea. & Ch. 499; 1 L. J., N. S., Bky., 3.

10. Demurrer to a bill for some members of lodge of Freemasons against others to have the dresses, etc., delivered up, and an injunction was allowed on ground that they affected to sue as a corporate body; but leave was given to amend, the Court holding the jurisdiction for delivering of chattels, and where there is a joint interest permitting some to sue as individuals, representing the rest in other instances than those of creditors and legatees, if inconvenient to justice that all should be parties. *Lloyd* v. *Loaring*, 6 Ves. 773.

11. In a suit for a share of a partnership adventure, all the parties having shares must be parties. *Ireton* v. *Lewes*, Rep. *temp.* Finch, 96.

12. In a bill to establish a title to fish, all persons interested in any one particular adventure, must be parties. *Coppard* v. *Page*, For. Exch. Rep. 1.

13. Some members of a partnership cannot file a bill for a dissolution without making all the partners, however numerous, parties. *Long* v. *Yonge*, 2 Sim. 369.

14. One of two part owners of a ship having assigned his share to the other, the former is

a necessary party to a bill by a creditor of both against the representatives of the latter. *Pierson* v. *Robinson*, 3 Swan. 139.

1. One part owner of a ship cannot bring a bill on behalf of himself and the other part owners, but they must all be parties. *Moffat* v. *Farquharson*, 2 Bro. C. C. 338.

2. At law, where one of the creditors will not join in the action, he is summoned and severed, and the other has judgment *quod sequatur solum*. *Darwent* v. *Walton*, 2 Atk. 510.

Where one partner is abroad, the other partner who is before the Court shall pay the whole of the joint demand. *Ib.*

Where an action is brought against two joint debtors, and one only appears, the creditor may have judgment for his whole debt against the person appearing, and by default against the person who does not appear. *Ib.*

3. Where a contract is entered into for the purchase of an estate by certain persons in their own names, but in fact on their own account, and also as agents for other parties, a bill to rescind the contract may be filed in the names of the agents and the other parties. Where the partners in a company or partnership are numerous, a bill may be filed by some of the partners on behalf of themselves and the other partners to rescind the contract, in a case where it is manifest, from the circumstances and the evidence, that it is for the benefit of all the partners that the contract should be rescinded. *Small* v. *Attwood*, 1 Younge 407; 2 L. J., N. S., Exch. Eq., 1, 6.

Bill by certain persons on behalf of themselves and the other members of a joint stock company, to which an answer was put in and a decree subsequently made, setting aside certain contracts between the plaintiffs and the defendant, and directing various accounts and inquiries. A supplemental bill was afterwards filed, in the name of the same plaintiffs, against the same defendant, seeking, among other things, a specific lien on a part of the purchase money paid to the defendant. The defendant pleaded that one of the parties named as a plaintiff in the supplemental bill had, previously to the filing of it, parted with all his interest in the partnership or company, and had ceased to be any longer a member or proprietor of the company, and that he had not any other interest. The plea was overruled. S. C. 1 Y. & Coll. 39.

4. A joint stock company, established by Act of Parliament, vesting in them all property then belonging to them, and authorising them to bring actions in the name of their treasurer for the time being, purchased an estate pending a suit against the vendors, to compel a specific performance of an agreement to grant a lease of part. On a bill by the vendee against the treasurer and directors, the plaintiff company were declared entitled to a lease, and the treasurer was enjoined from disturbing their possession, though the rest of the proprietors, being very numerous, were not parties; but no decree could be made for the execution of a lease. *Meux* v. *Maltby*, 2 Swan. 277.

5. An Act of Parliament for forming a joint stock company authorised all suits on behalf of the company, against any person, to be commenced in the name of the chairman, and in all proceedings in which it would have been before necessary to state the names of the partners, it was made sufficient to state the name of the chairman only:—Held, that the Act did not authorise suits to be commenced by the chairman, against one of the partners, without making the others parties. *Macmahon* v. *Upton*, 2 Sim. 473; 7 L. J., Ch., 125.

6. Some of the holders of scrip or shares of a loan cannot file a bill on behalf of themselves and the other holders, to have their subscriptions returned. *Jones* v. *Garcia del Rio*, T. & R. 297.

7. *Semble*, some difficulty may arise with regard to that provision of the Judicature Rules (1875) which enables partners to be sued in the name of the firm, because we have not yet introduced into our law the notion that a firm is a *persona*. Supposing (*e.g.*), there to have been an entire change in the constitution of the firm, and that although the name of the firm continued, the firm, at the time when the action was brought, consisted of entirely different persons from those of whom it consisted at the time when the contract was made; for instance, if A., B., and C. were the partners at the time of the action, and E., F., and G. at the time of the contract. *Exp. Blain, Re Sawers*, 12 L. R., Ch. D., 522; 41 L. T. 46; 28 W. R. 336.

Semble, it may be that under the circumstances the firm could not be sued. *Ib.*

8. A., a member of the firm of A. Brothers, of South America, went to Hong Kong to enforce a debt due by B. & Co., of that place, to his firm. Upon B. & Co. being threatened with proceedings, they applied to C. & Co. for assistance. C. & Co. agreed to advance B. & Co. the money to pay their debt, by remitting the amount to A. & Co., and afterwards, in pursuance of this agreement, and in consideration of A.'s not proceeding to sue B. & Co., gave an undertaking in writing, whereby C. & Co. promised to remit the amount to A.'s agent in London, at the expiration of six months, whereon A. gave B. & Co. a receipt in full for the debt due to the firm of A. & Co. C. & Co. afterwards repudiated their obligation to remit the amount to A. & Co. A. brought an action, in his own name, against C. & Co.:—Held, that the contract being entered into with A. personally, upon his undertaking not to sue B. & Co., constituted a personal agreement; and that A. was entitled to sue C. & Co. in his own name, without joining his partners. *Agacio* v. *Forbes*, 14 Moo. P. C. 160; 4 L. T., N. S., 155; 9 W. R. 503.

9. Previously to December 8th 1880, W. did work for a firm in which Y. was a partner. On that date Y. retired, the other partners continuing the business in the firm's name. The dissolution was duly advertised on December 15th, and on the 18th W. issued a writ against the firm in the firm's name. On the 21st the writ was personally served on one of the continuing partners at the firm's place of business. Y. was not served. No appearance was entered for any of the partners, and on December 29th W. signed judgment for default. In June 1881 W. took out a debtor's summons, founded on the judgment against Y. Y. applied to the Court to dismiss the summons, and his appli-

cation was refused:—Held (*dissentiente* Brett, L. J.), that the summons should have been dismissed. Per Selborne, L. C., on the ground that Ord. XLII., r. 8, shows that even if a partner retired at the date of the writ he could be sued under the firm's name; judgment in the firm's name could not be held conclusive of his liability, and is therefore, without more, not a good foundation for a debtor's summons. Per Cotton, L. J., that Ord. XVI., r. 10, applies only to persons who are partners at the date of the issue of the writ. Per Brett, L. J., that Ord. XVI., r. 10, applies to all persons liable for the debt for which the action is brought, and judgment obtained against the firm can be enforced against them in any valid way except by issuing execution which is restrained by Ord. XLII., r. 8. *Exp. & Re Young*, 45 L. T. 493.

In Case of Joint Stock Companies.] See COMPANY—PRACTICE (PARTIES).

II. PLEADING.

1. Negative plea, as no partnership, not going to collateral circumstances, charged as evidence of it, insufficient. *Evans* v. *Harris*, 2 Ves. & B. 364.

2. In an action for dissolution of partnership, the plaintiffs by their statement of claim alleged that they and the defendant had agreed to take a lease of certain premises and to enter into partnership; that draft articles of partnership were considered and approved by the plaintiffs and the defendant at an interview on a day named, subject to their being finally revised by the defendant's solicitor; that the draft articles had not yet been revised, nor the articles executed; that, although the draft articles were only settled subject to revision, the terms of the arrangement between the plaintiffs and defendant as therein provided were definitely agreed upon at the interview; that the defendant had not intimated any objection to the terms of the articles; that it was soon afterwards agreed that certain sums should be brought in by the plaintiffs and defendant; that they had proceeded with the partnership undertaking, and the defendant had taken an active part in it, but that he had not contributed his share, and notice had been given him to withdraw from the undertaking. The defendant, in his statement of defence, admitted that he had agreed to enter into partnership as alleged, and added, "The defendant denies that the terms of the arrangement between myself and the plaintiffs were definitely agreed upon as alleged":—Held, that the denial was evasive within the Judicature Act, Ord. XIX., r. 22. *Thorp* v *Holdsworth*, 3 L. R., Ch. D., 637; 46 L J., Ch., 406.

Held, also, upon motion for judgment on admissions of fact in the pleadings under Ord. XL., r. 11, that there should be a decree for dissolution, with an inquiry, if desired by the defendant, as to the terms of the arrangement for partnership. *Ib.*

3. A plaintiff, by his statement of claim, claimed to have an agreement for a partnership with the defendant in a land speculation cancelled, on the ground that he had been induced to enter into it by the misrepresentation of the defendant, and in ignorance of its real effect; or, in the alternative, that the partnership created by the agreement might be dissolved and the accounts taken, and the defendant restrained from interfering with the management of the works in violation of the agreement. The defendant moved for an order for the plaintiff to amend his statement of claim by confining it to one of the alternative claims:—Held, that there was no inconsistency in the alternative claims, or in the allegations in support of them; and the motion was refused. *Bagot* v. *Easton*, 7 L. R., Ch. D., 1.

III. PRACTICE.

4. An order on two solicitors as partners is not duly served by serving it on one of them, and leaving a copy at the place where the partnership business is carried on. *Young* v. *Goodson*, 2 Russ. 255.

5. Bill against two partners, one abroad; service of subpœna against him permitted on the other, on motion. *Coles* v. *Gurney*, 1 Madd. 187.

6. A suit for specific performance of a contract made with a partnership was instituted against the members of the firm after the partnership had been dissolved:—Held, that the fact of one being out of the jurisdiction was no reason why a decree should not be made against those who were within the jurisdiction. *Southern* v. *Harriman*, 12 W. R. 794; 10 L. T., N. S., 263.

7. In a decree for the dissolution of a partnership, a defendant was ordered to concur in procuring the insertion of notice of dissolution in the London Gazette. *Troughton* v. *Hunter*, 18 Beav. 470.

8. A partnership at will held dissolved as from the date of the filing of a bill which prayed for its dissolution. *Shepherd* v. *Allen*, 33 Beav. 577.

9. A partnership having, in an action brought by the plaintiff, been by order of the Court dissolved, the plaintiff and defendants signed an agreement of compromise, whereby it was agreed that the plaintiff should be paid a sum of money for his share in the business. The plaintiff subsequently repudiated the agreement, and proposed to proceed with his action, alleging that his signature had been obtained by fraud:—Held, that the Court had, under the Judicature Act 1873, s. 24, sub-ss. 5, 7, jurisdiction to order the stay of all further proceedings in the action. *Eden* v. *Naish*, 7 L. R., Ch. D., 781.

Held, also, that as the defendants had severed upon the summons, and been represented by four counsel, the costs to be paid by the plaintiff would be for one counsel only for each defendant. *Ib.*

10. One of two members of a defendant partnership made default in appearance. The other put in a statement of defence in the name of the firm. A motion to take it off the file was refused. *Taylor* v. *Collier*, 51 L. J., Ch., 853; 30 W. R. 701.

11. Per Lord Selborne, L. C.: Whether the provision of the Judicature Act, Order XVI., rule 10, that partners may be sued in the name of their firm, applies, not only to a partnership existing at the time when the

writ is issued, but also to a partnership dissolved before the issue of the writ in respect of a cause of action which arose during its existence, *quære*. But, if it does, still judgment in the action is not *per se* binding on any member of the dissolved firm who has not been served with the writ as a partner, or has not admitted on the pleadings that he is or has been adjudged to be a partner. Leave ought not to be given to issue execution on the judgment against such a person, if he disputes his liability, without the previous determination of the question of his liability; nor can a debtor's summons be properly issued against him on the judgment *per se*. *Exp. & Re Young*, 19 L. R., Ch. D., 124; 51 L. J., Ch., 141; 45 L. T. 493; 30 W. R. 330.

Per Cotton, L. J.: Order XVI., rule 10, applies only to a partnership existing at the time when the writ is issued. It does not apply to a partnership dissolved before the issue of the writ. *Ib.*

A partnership consisting of several members was dissolved as to one of them on the 17th of December, and the business was thenceforth continued by the others under the old firm name, and at the old place of business. On the 18th of December a creditor of the old partnership, who was ignorant of the dissolution, commenced an action against the partners (suing them in the firm name) in respect of a debt contracted before the dissolution. On the 21st of December the writ was served personally on one of the continuing partners. The retired partner was not served in any way. No appearance was entered to the writ, and on the 29th of December the plaintiff signed judgment by default. Execution was issued, but the sheriff found no goods of the partnership upon which to levy. No application was made under rule 8 of Order XLII. for leave to issue execution against the retired partner. In the following May, the retired partner having had no previous notice of the action, the plaintiff served him with particulars of demand of the judgment debt, and, he not having paid it, the plaintiff served him with a debtor's summons founded on the judgment debt. He denied the debt, and applied to the Bankruptcy Court to dismiss the summons:—Held, by Lord Selborne, L. C., and Cotton, L. J. (*dissentiente* Brett, L. J.), that the judgment would not support the debtor's summons, and that the summons must be dismissed. *Ib.*

IV. PAYMENT INTO COURT.

1. Order for a partner to pay into court partnership money received by him contrary to good faith; but in general, a partner insisting that the balance of the account is in his favour is not obliged to bring into court what is in his hands, unless the other partners do the same. *Foster* v. *Donald*, 1 Jac. & Walk. 252.

2. Under a decree for account of proceeds of a joint adventure, on bill by one party on behalf of himself and the others, and inquiry who are concerned with the plaintiff, the Master, having by advertisement as usual declared those who should not come in excluded, reported several persons who had not come in to claim entitled to shares; further advertisements directed, but payment into court of those shares refused, and the decree not to be executed as to those who should not come in. *Good* v. *Blewitt*, 19 Ves. 336.

3. Money admitted to have been received by a surviving party on account of the late partnership, ordered to be paid into court, although by his answer and examination he alleged that partnership debts to a large amount were still outstanding, for which he was liable, and also that his co-partner had drawn out of the partnership sums to the amount of double the sums drawn out by himself; it appearing that there was a sufficient sum in court to pay the outstanding debts, and that, taking into consideration the true shares of the partners, which the defendant had not done, the co-partner had not over-drawn his co-partnership account. *Toulmin* v. *Copland*, 3 Y. & Coll. 625.

The partnership of A. & B. being dissolved is succeeded by that of B. & C., who take upon themselves to adjust the affairs of the former partnership. B. dies, and his executors file a bill against C. for an account of the partnership dealings of B. & C. In the progress of the suit, the Court directs the accounts of both partnerships to be taken, and C. by his answer and examination admits that he has received a sum on account of the partnership of A. & B.:—Held, that he must pay that sum into court, notwithstanding A.'s representatives are not parties to the suit, inasmuch as he must be taken to have received it (subject to his explanation to the contrary) as surviving partner of B. *Ib.*

4. The former partners of a testator (who had retired before his death) were appointed his executors, with power to apply certain policy moneys in their trade, provided they gave such security to the residuary legatees as W. might approve. W. refused to act; and the executors, without giving security, applied the policy moneys in payment of a partnership debt, for which the testator had mortgaged them. They were directed to pay the amount into court, as well as an admitted balance due to the testator from the partnership. *Costeker* v. *Horrow*, 3 Y. & Coll. 530; 3 Jur. 996.

5. A partner who had drawn out money standing to the partnership account, in derogation of the partnership articles, was ordered, upon motion, to pay that sum into court. *Birley* v. *Kennedy*, 6 N. R. 395.

6. Court of equity will order fund of annuity company into Court when members are about to abuse their trust. *Cartland* v. *Lyster*, 1 Ridgw. L. & S. 580.

V. COSTS.

7. The personal representatives of one of two partners demanded from the surviving partner an account of the partnership transactions. He refused to render the accounts, unless they would give him security for a balance which he claimed to be due to him. They then filed a bill for an account. He filed a cross-bill. On the Master's report, a balance was found due from him to the representatives

of the deceased partner:—Held, that the costs of both suits must be given against the surviving partner. *Payne* v. *Felton*, 4 L. J., Ch., 175.

1. Though contribution among partners is now enforced at law, the jurisdiction of courts of equity is not ousted, and therefore, though the bill was dismissed, the object having been attained in an action directed, the Court will not dismiss it with costs. *Wright* v. *Hunter*, 5 Ves. 792.

2. Costs of a suit for dissolution of partnership, on the ground that the defendant had become a lunatic, though not so found by inquisition, ordered after decree declaring the partnership dissolved, to be paid out of the partnership. *Jones* v. *Welch*, 1 Kay & J. 765; 1 Jur., N. S., 994.

3. The usual rule as to costs in partnership suits applies also to a suit for winding up the affairs of a partnership which had been dissolved before the filing of the bill. *Timothy* v. *Hindley*, 14 W. R. 382.

4. In a suit by the executors of a deceased partner against a surviving partner who was bound under the articles to pay them annually half the profits of the business, the bill alleging that no accounts had been rendered, though application had been made for some years, but not alleging that anything was due from the defendant, and praying for an account and for the winding-up of the partnership—the defendant having by his answer admitted the allegations in the bill and submitted to render an account without alleging that nothing was due:—Held, that the defendant must pay the costs up to the hearing. *Norton* v. *Russell*, 19 L. R., Eq., 343; 23 W. R., 252.

5. In a partnership suit, when the matters in difference were referred to arbitration instead of the accounts being taken in chambers:—Held, that the costs of the suit, including those of the reference and award, ought to be borne by the parties in proportion to their respective partnership shares. *Newton* v. *Taylor*, 23 W. R. 330; 19 L. R., Eq., 14.

6. The costs of a suit to take partnership accounts are ordinarily paid out of partnership assets. *Bonville* v. *Bonville*, 35 Beav. 129.

7. The balance found due in a partnership action from the firm to one of the partners must be paid out of the assets in priority to the costs of the action. *Austin* v. *Jackson* (11 L. R., Ch. D., 942. n.) approved and followed. *Potter* v. *Jackson*, 13 L. R., Ch. D., 845; 49 L. J., Ch., 232; 42 L. T. 294; 28 W. R. 411.

8. The rule as to costs in a partnership action is the same as in any other administration action, that is, they are payable out of the assets; "partnership assets" meaning the assets remaining after payment of all the partnership debts, including balances due to any of the partners. If the assets are insufficient for payment of the costs of the action, then such costs must be borne by the partners in proportion to their shares in the profits. Where, however, a partnership action has been rendered necessary by the negligence or other misconduct of a partner, the Court will order that partner to pay the costs of the action so far as they have been occasioned by his misconduct, including the costs up to the trial. *Hamer* v. *Giles*, 11 L. R., Ch. D., 942; 48 L. J., Ch., 508; 41 L. T. 270; 27 W. R. 834.

9. Where a joint creditor takes the benefit of a decree for administering the estate of an insolvent partner, and obtains an order for payment of his debt and costs, the executors' costs are prior charges; but where the executors have denied assets, their costs are postponed to the debt and costs of the joint creditor. *Lodge* v. *Pritchard*, 4 Giff. 295.

10. When a dissolution of partnership is caused by the act of God, the costs after the hearing will be paid out of the partnership property. The costs up to the hearing will be paid out of the partnership property, or by each party, according to circumstances. *Rowlands* v. *Evans*, *Williams* v. *Rowlands*, 14 W. R. 882.

PART-OWNER.

— *As Party to Suits.* See PRACTICE (PARTIES).

See also FENCES AND PARTY WALLS—JOINT TENANT—PARTITION—PARTNERSHIP—SHIPPING—TENANT IN COMMON.

PART PERFORMANCE.

See LANDLORD AND TENANT, I. v.—SETTLEMENT, I. AND II.—SPECIFIC PERFORMANCE.

PARTY AGGRIEVED.

See BANKRUPTCY—GAMING AND WAGERING—OATHS.

PARTY WALL.

See FENCES AND PARTY WALLS.

PATENT.

— *Use of Trade Name of Patented Article after Expiration of Patent.* See TRADE, II. 4.

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1. New Inventions, Manufactures, or Discoveries.

1. Where one part of an invention is not new, the patent is void as to the whole. *Kay* v. *Marshall*, 1 West 682; 5 Jur. 1028; 8 Cl. & F. 245. Affirming 1 Beav. 535. See S. C. 5 Bing., N. S., 492; 7 Scott 548; 8 L. J., N. S., C. P., 261.

Before the grant of the plaintiff's patent, the reach in spinning machines varied from less than an inch, to thirty-six inches, according to the length of the fibre of the material. The plaintiff discovered a new and improved mode of preparing flax and other fibrous substances, in

which process the fibre became shortened, and the length of the reach in spinning it was necessarily diminished. The plaintiff obtained a patent first for thus preparing the flax and other fibrous substances; and, secondly, for spinning it at a shorter reach than had been done before—namely, at two-and-a-half inches:—Held, that the second part of the patent could not be supported, and that the patent was therefore invalid. *Ib.*

1. If, having a particular purpose in view, a person takes the general principles of mechanics and applies one or other of them to a manufacture to which it has not before been applied, this is sufficient ground to warrant an application for a patent; assuming such manufacture to be new, desirable, and a public utility. *Dangerfield* v. *Jones*, 13 L. T., N. S., 142.

2. It is not every useful discovery that can be made the subject of a patent, but the words "new manufacture" in 21 Jac. 1, c. 3, will comprehend not only a production, but the means of producing it. *Ralston* v. *Smith*, 11 H. L. Ca. 223; 13 L. T., N. S., 1; 35 L. J., C. P., 49.

A patent cannot be taken out for one particular use of a known machine, though the patentee may have discovered how to use the machine more beneficially than the owner. *Ib.*

R., in his specification, described his patent for improvements in embossing and finishing woven fabrics, as enabling him upon the roller, either spirally or longitudinally, or in a circular form, to groove, or flute, or engrave, or mill, or otherwise indent any design. The fact was, that if the design was engraved longitudinally it would destroy the material. R., therefore, in a disclaimer, altered "upon" into "around the roller":—Held, first, that the disclaimer was bad, as it sought in effect to extend the specification or to convert a bad specification into a good one by adding words. *Ib.*

Held, secondly, that the construction of the specification, as amended by the disclaimer, excluded spiral engraving, and confined it to circular engraving or grooves. *Ib.*

Held, thirdly, the description "or roller of hard metal, or other suitable material," was not too vague as regards material. *Ib.*

Held, fourthly, that having regard to what was previously known, the subject-matter of the specification was not a new manufacture, thought it might be a useful discovery. *Ib.*

3. Hoops of whalebone, cane, and other substances, suspended from the waist and forming a petticoat, had long since been used by ladies. A person took out a patent for using, for the same purpose, hoops made of steel watch spings:—Held, that this was not an invention which could properly be made the subject of a patent. *Thompson* v. *James*, 32 Beav. 570.

4. Where an invention consists of the discovery of particular means for attaining a result, which result is already perfectly well known, the invention is only for the means; and the invention of one set of particular means does not interfere with the invention of another set of means to the same end, provided that the two sets of means are distinct, and the latter does not involve a colourable imitation of the former, or an incorporation of the former with additions. *Curtis* v. *Platt*, 11 L. T., N. S., 245.

5. D., in 1804, took out a patent for making "a new article of trade, which I denominate 'Albion metal,' and which I apply" to various purposes, such as the facings of cisterns, coffin furniture, "and other things which are required to be made of a flexible" substance. D. stated in his specification the principle of his invention, and that he proposed to unite lead and tin by pressure; but he did not state the exact proportions of the two metals, nor give with precision the mode by which they were to be combined. It did not appear that the patent had been acted on. In 1849, B. took out a patent for "a new manufacture of capsules, and of a material to be employed therein, and for other purposes;" the new material was to be composed of lead and tin combined. B. specified the proportions of the two metals, gave the details of the mode of working in order to combine them, and did not claim the production of the new material except according to the directions he had given for its production:—Held, that this was not a case in which the Court, looking at the two instruments, could determine the validity of the latter patent as a matter of construction only; that evidence must be resorted to; and that then it was apparent that the earlier patent only stated a principle, and that the latter patent, as it did not claim the discovery of the principle, but only a new mode of carrying it into effect, was valid. *Betts* v. *Menzies*, 10 H. L. Ca. 117; 9 Jur., N. S., 29; 11 W. R. 1; 7 L. T., N. S., 110; 31 L. J., Q. B., 233.

An antecedent specification, declaring a principle, but not disclosing a practicable mode of obtaining a result, is not to be held to be an anticipation of a subsequent specification relating to the same matter, which does disclose a practicable mode of producing the result. If the latter specification alone supplies that practicable mode, it forms the groundwork for a valid patent. *Ib.*

A barren general description, probably containing some suggested information, or involving some speculative theory, cannot be considered as anticipating a subsequent specification of an invention which involves a practical truth, which is productive of beneficial results, unless the antecedent publication involves the same amount of practical and useful information. *Ib.*

6. Where there are two things similar in form used for a similar object, and capable of the same application, one of them having been known to mechanics, the introduction of the other into use will not constitute a good ground for a patent. *Harwood* v. *Great Northern Railway Co.*, 11 H. L. Ca. 654; 35 L. J., Q. B., 27; 12 L. T., N. S., 771.

A slight difference in the mode of application is not sufficient for such a purpose, nor will it be sufficient to take a well-known mechanical contrivance and apply it to a subject to which it has not been hitherto applied. *Ib.*

The use of fishes as supports was known, and the use of fishes made with a groove or recess in their outer surface was also known. A person took out a patent, which he thus described:—"My invention consists in form-

ing a recess or groove in one or both sides of each fish, so as to reduce the quantity of metal at that part, and to be adapted to receive the square heads of the bolts, which are thus prevented from turning round when the nuts are screwed on." His claim was for constructing fishes for connecting the rails of railways with a groove adapted for receiving the ends of the bolts or rivets employed for securing such fishes, and the application of such fishes for connecting the ends of railways in manner hereinbefore described; the constructing of fish-joints for connecting the rails of railways with grooved fishes fitted to the sides of the rails, and secured to them by bolts or nuts or rivets, and having projecting wings firmly secured to, and resting upon, the sleepers or bearers so as to support the rails by their sides and upper flanges. It was proved that before the date of his patent fish-joints had been used to connect and strengthen the rails of railways; in some cases the fishes were flat pieces of iron, with round holes for bolts, the heads of the bolts being held in their places by separate means; in others the extreme ends of the holes were made square, and the boltheads square to put into them, and in some square recesses were made in the flat pieces of iron for the same purpose; but till the time of the patent fishes for connecting the rails of railways had never been made with a groove in their lateral surfaces so as to receive the square heads of the bolts, and render the fish lighter for equal strength, or stronger for an equal weight of metal:—Held, that the patentee had merely transferred a known thing from one use to another, and an analogous use, and that what he claimed as his invention was not a good ground to sustain a patent. *Ib.*

1. The new application of any means or contrivance may be the subject of a patent, if it lies so much out of the track of the former use as not naturally to suggest itself, but to require some application of thought and study. *Penn* v. *Bibby*, 2 L. R., Ch., 127; 36 L. J., Ch., 455.

2. It is no objection to the grant of a patent that another person has been making experiments and working towards a similar invention. *Exp. Henry*, 8 L. R., Ch., 167; 42 L. J., Ch., 363; 21 W. R. 233.

3. A patent for improvements will not be bad on the ground of prior user, though previous use is proved of an article of the same kind, with appendages exactly answering the words of the specification, if the appendages to the article previously used had a different object to that of the patented improvements, and did not produce the same effect. *Poupard* v. *Fardell*, 18 W. R. 127.

Under these circumstances the specification is not bad for being too extensive, and including the article previously used, provided the description and diagrams are such as to enable any workman of ordinary intelligence to produce at once the article intended to be patented. *Ib.*

4. A patent for a new material is not anticipated by a former patent from which a skilled workman never had made, and even with the aid of subsequent knowledge and improved machinery could not make, a similar material. And the material being new a claim for its application to a purpose not new does not affect the validity of the specification. *Neilson* v. *Betts*, 40 L. J., Ch., 317; 5 L. R., H. L., 1; 19 W. R. 1121.

5. When the law officer has reported that part of an invention for which a patent is sought is identical with part of an invention which is the subject of an existing patent, a second patent will not, except under special circumstances, be granted for that part, although the validity of the first patent is disputed. *Exp. Manceaux*, 6 L. R., Ch., 272.

6. W. took out a patent for improvements in ladies' veils, consisting in the folds being the same on both sides, instead of, as theretofore made, one side having been a wrong side. R. bought the patented articles of W. for some time, and ultimately employed a manufacturer of veils, who supplied him with 174 dozen veils identical with those of W., and admitted to be made after the pattern of one of them. On a bill for an injunction to restrain the manufacturing and selling, and infringement of the patent:—Held, that there was no proper subject for a patent, and the bill dismissed, but without costs. *White* v. *Toms*, 17 L. T., N. S., 348; 37 L. J., Ch., 204.

7. R. obtained a patent for the use of animal fibre, by preference Russian wool, or wool of a coarse texture, in the manufacture of artificial hair to be made up as ladies' headdresses, and for upholstery, and other like purposes. Upon a bill filed to restrain an infringement of the patent:—Held, that the specification was too extensive; that even the use of a new material to produce a known article could not be the subject of a patent unless some invention and ingenuity were displayed in the adaptation; that in this case a prior user of wool for the same purpose was proved, and that the bill must be dismissed with costs. *Rushton* v. *Crawley*, 10 L. R., Eq., 522.

8. The inventor of a painting-machine, by his final specification, claimed the various parts of the machine, and, among others, "The shallow sliding tray T., arranged and used substantially in the manner and for the purpose specified," being, in fact, an ordinary movable tray, used for catching the drippings of the paint from the brushes and other parts of the machine, and being a thing commonly known and used before the date of the papers. He also claimed the general construction and combination of the several parts of the machine. Upon an action by the owner of the patent to restrain an alleged infringement:—Held, that the patent was bad for the want of novelty, inasmuch as it was impossible to construe the claim for the sliding tray otherwise than a distinct claim for a separate invention, and that the plaintiff's cause of action must fail on that ground. *Roberts* v. *Heywood*, 27 W. R. 454.

9. A patent is not invalid because part of the invention claimed has been anticipated, so long as there is sufficient amount of utility and advantage to be derived from what remains after striking out the part so anticipated; and in such a case the remaining part is a proper subject for the grant of letters patent. *Frearson* v. *Loe*, 27 W. R. 183; 9 L. R., Ch. D., 148.

An injunction will be granted at the suit of

a patentee to restrain a threatened infringement, even though no actual infringement may have taken place. *Ib.*

Though an invention protected by letters patent may be imitated with impunity by way of *bonâ fide* experiment, yet, where a right is claimed to the manufacture, even to a limited extent, of articles so protected for profit, and the experiments are conducted with a view thereto, such a proceeding is an infringement of the patent, and will be restrained by injunction. *Ib.*

1. Patentees of lamp-burners claimed by their specification as their invention the construction of burners "in the manner described and illustrated in the figures; that is to say, the employment in the same burner of two or more flat or curved wick-cases or holders in which two or more flat wicks are placed so as to produce thereby one or more flat flames, or elliptical or nearly circular flames." The figures referred to showed burners with two wicks passing through a double-slotted cone. The use of two wicks with a single-slotted cone was old: —Held, that the claim could not be read as limited to burners with a double-slotted cone, and that the patent was bad for want of novelty. *Hinks* v. *Safety Lighting Co.*, 4 L. R., Ch. D., 607; 36 L. T., N. S., 391; 46 L. J., Ch., 185.

A description in the specification of a lamp-burner omitted to state where the hole for the admission of air was to be:—Held, that the specification was insufficient. *Ib.*

2. A patentee claimed, first, a mode of applying rollers and runners to the footstand of skates so that they might be cramped or turned so as to cause the skate to run in a curved line by the canting or tilting of the footstand; and secondly, the mode of securing the runners and making them reversible, as above described:—Held, that, assuming that there was nothing novel in the mode of securing the runners to the footstand, yet that the want of novelty in the second claim did not invalidate the patent, because the second claim must be read as claiming a subsidiary invention to be used only in connection with the principal invention. *Plimpton* v. *Spiller*, 6 L. R., Ch. D., 412; 37 L. T., N. S., 56.

2. Combinations of Old and New Processes and Matters.

3. A new adaptation of old materials is sufficient to ground an injunction against the infraction of a patent. *Luckie* v. *Robson*, 2 Jur. 201.

4. Patent granted where neither the material nor the shape of the article to be manufactured nor the mode of making it was new, but where the three particulars were now usefully combined for the first time. *Re Martin and Hyam's Patent*, 3 W. R. 433.

5. A patent was taken out for "a new and improved mode of manufacturing silk, cotton, linen and woollen fabrics." The specification, and a disclaimer, set forth that the patentees claimed "the mode hereinbefore described of producing or preparing stripes of silk, cotton, woollen, or linen, or of a mixture of two or more of these materials, in such a manner that the weft, or lateral fibres of both cut edges of each stripe, are all brought up on one side, and into close contact with each other, and the reweaving of such stripes with the whole fur or pile uppermost, into the surfaces of carpets, etc." One of these processes was old. The judge directed the jury, that if one was new, the patent could be supported for the combination of them, and would only be invalid if there had been a public use of both before the date of the patent:—Held, that this direction was erroneous, and that the patent was void. *Templeton* v. *Macfarlane*, 1 H. L. Ca. 595.

6. When a machine for which a patent had been granted was shown to produce work more expeditiously, more economically, and of a better quality than any previous machine:—Held, that the patent could not be invalidated on the ground that the machine was formed by the mere arrangement of common elementary mechanical materials, producing results of the same nature as those previously accomplished by other mechanical arrangements and construction. *Murray* v. *Clayton*, 7 L. R., Ch., 570; 20 W. R. 649.

The public exhibition of a machine in which there are defects, owing to which it proves an entire failure, does not affect the validity of a subsequent patent for a machine, in which, though similar in some of its details to the former, the defects are remedied so as to produce a serviceable machine. *Ib.*

And where, the combination being claimed as the invention, it was only so far ascertained by the specification that the latter referred to certain drawings and their description, which did but describe an entire machine and the composition and working of its several constituent parts, without in any manner indicating where the improvement lay, or in what it consisted:—Held, that the patent was void at law. *Ib.*

In a patent for an improved arrangement or a new combination of machinery, the specification must describe the improvement and define the novelty, otherwise, and in a more specific form, than by the general description of the whole machine: it must assign the *differentia* of the new combination. *Ib.*

7. An arrangement of apparatus so constructed as to bring into operation a well-known dynamic agent so as to produce a useful effect for a particular result constitutes an invention of a combination for which a valid patent may be granted. *Cannington* v. *Nuttall*, 40 L. J., Ch., 739; 5 L. R., H. L., 205.

To adopt a combination of machinery or arrangement of apparatus originally directed to one purpose, and to use it for another and additional purpose, is an infringement of the patent which first introduced that combination or arrangement. *Ib.*

8. A valid patent for an entire combination for a process gives protection to each part that is new and material for that process; but a part which in itself could not have been the subject of a patent, or the advantages of which are merely collateral to the objects of the invention, is not protected. *Parkes* v. *Stevens*, 18 W. R. 233; 22 L. T., N. S., 635; 5 L. R., Ch., 36.

The adaptation of a sliding door to a spherical lamp, sliding doors having previously been applied to cylindrical lamps and to other

glazed surfaces, cannot of itself be the subject of a patent. *Ib.*

1. A patent for a mechanical arrangement whereby a particular operation may be performed for a particular purpose, the mechanical contrivances so arranged not being new in themselves, but thus first combined for that particular purpose, is not infringed by the adoption of the same arrangement or combination of mechanical contrivances for a similar purpose, if the mode of operation is sufficiently distinct, and different in principle from that which was described or claimed in the patent, and the object achieved is also sufficiently distinct or novel, and does not form an essential part of the patent. *Saxby* v. *Clunes*, 43 L. J., Exch., 228.

The principle of an invention for simultaneously moving railway points and making it possible to move the signal lever is not equivalent to the principle of simultaneously moving the signals and the points. *Ib.*

2. When a person has invented an improvement in the form of a particular apparatus or machine, but combines that individual improvement with other things which are not his inventions, his specification must claim that particular individual thing, and not leave it doubtful whether the claim is made for the whole combination, of which that thing really only forms a part. *Clarke* v. *Adie* (No. 1), 2 L. R., App. Cas., 315; 36 L. T., N. S., 923; 46 L. J., Ch., 585.

A patent for a new combination or arrangement is a patent for the entire combination; but there may be an essence or substance underlying the mere accident of form, and the invention may be pirated by a theft in a disguised or mutilated form. There will be in every case a question of fact: Is the alleged piracy the same in substance and effect, or is it a substantially new or different combination? S. C. 33 L. T., N. S., 295; 23 W. R. 898; 10 L. R., Ch., 667.

When there is a patent for a certain combination of parts, that patent does not give protection to any subordinate combination of some of those parts unless such subordinate combination is expressly or impliedly claimed in the specification as a distinct invention. *Ib.*

3. A patent for a new combination or arrangement is entitled to the same protection on the same principles as any other patent. *Clarke* v. *Adie*, 45 L. J., Ch., 228; 3 L. R., Ch. D., 134; 24 W. R. 1007; 35 L. T., N. S., 349.

A patent for a combination of several improvements is not necessarily infringed by a sub-combination of some parts only of the original combination. *Ib.*

4. If the combination and application of old machinery are new and beneficial, the invention of this combination may be protected by patent. *Harrison* v. *Anderston Foundry Co.*, 1 L. R., App. Cas. (Sc.), 574.

If there is a patent for a combination, the combination itself is the novelty, and also the merit, which must both be proved by evidence. *Ib.*

3. Chemical Discoveries.

5. Inventions in mechanics are as totally different from inventions in economical chemistry as the laws and operations of mechanical powers differ from the laws of chemical affinities, and the results of anaylsis in the comparatively infant science of chemistry with its boundless field of undiscovered laws and substances. *Young* v. *Fernie*, 4 Giff. 577; 4 N. R. 218.

Where, therefore, prior to the date of a patent, something necessary for the useful application of a chemical discovery for manufacturing purposes remained to be discovered, which the plaintiff's invention supplied:—Held, that the manufacture, with the materials and processes in the specification, was a "new manufacture not in use" at the date of the patent. *Ib.*

The law recognises the right of an inventor who finds out and supplies for commercial purposes an article known previously only as a chemical curiosity. *Ib.*

The Court looks with distrust on experiments conducted with a view to litigation. *Ib.*

The invention or discovery of a means of producing in abundance, suitable for economical and commercial purposes, an article previously known and obtainable in minute quantities only is a good subject of a patent. S. C. 10 Jur., N. S., 926; 12 W. R. 901; 10 L. T., N. S., 861.

The principle laid down in *Brooke* v. *Aston* (4 Jur., N. S., 279; 5 Jur., N. S., 1025), that the mere application of a known process to a new article, the mode of application not being new, is not a good subject of a patent, does not apply where the process is chemical. *Ib.*

6. A person claimed an invention for the purification of gas, by means of hydrated or precipitated oxides of iron, and also a process of revivification, by which the old materials could again be applied as a purifying element:—Held, that an application to the purification of gas of a natural substance called bog ochre, containing precipitated oxides of iron, was not an infringement of the patent, but the revivification of that natural substance was. *Hills* v. *Liverpool United Gaslight Co.*, 9 Jur., N. S., 140; 32 L. J., Ch., 28; 7 L. T., N. S., 537.

7. A specification is to be understood according to the acceptation of practical men at the time of its enrolment. Therefore, where a specification stated that the apparatus mentioned would extract gas "from any substance from which gas capable of being employed for illumination can be extracted by heat," and the apparatus was not suited to extract gas from oil:—Held, that this did not avoid the patent, oil not then being considered fit for the manufacture of gas for lighting towns, though it was then known as a chemical fact that gas might be produced from oil by heat, and this property has since been applied to the purposes of illumination. *Crossley* v. *Beverly*, 1 Russ. & M. 166.

8. When a patent has been obtained for the use of a known substance, described by its specific name, and it is afterwards discovered that the use of two other and equally known substances will produce the same effect, though the evidence of scientific men may go to show that the two substances became, in the act of so using them, the one substance described in the patent, their use will not constitute an infringement of the patent. *Unwin* v. *Heath*, 5 H. L. Ca. 505; 16 C. B. 713; 2 Jur., N. S., 1029; 25 L. J., C. P., 8.

1. The discovery of a more skilful and efficient mode of working a process already known and in use is not the proper subject of a patent. *Patterson* v. *Gaslight and Coke Co.*, 45 L. J., Ch., 843; 2 L. R., Ch. D., 812; 35 L. T., N. S., 11.

P. was one of three referees appointed under an Act of Parliament to inspect the works of gas companies and investigate the processes of manufacture carried on therein, with the view of ascertaining the means adopted therein for purifying gas, and to ascertain with what degree of purity each company could reasonably be required to make and supply gas, and to prescribe the maximum amount of impurity with which gas should be allowed to be charged, and by the Act the gas companies were directed to give to the referees all facilities for the performance of their duties. In the performance of their duties, the referees came to the conclusion that the best results would be obtained by adopting a new system of working the lime purifiers, so as to absorb a larger amount of carbonic acid gas than before:—Held, that this was not the proper subject of a patent. *Ib.*

4. Prior Publication or User.

2. Evidence of the use of an invention in England previous to the date of a patent for it in Scotland, is admissible and sufficient to make the patent void, *et vice versâ*. *Brown* v. *Annandale*, 8 Cl. & F. 437.

3. The defendant in a suit for an infringement of a patent, who relies upon the specification of an anterior patent as being in anticipation of the plaintiff's patent, and that the same result would be produced by a skilled workman in operating according to that specification, is bound to show conclusively that the invention protected by the anterior patent was used or capable of being used by the means designated by that specification. *Betts* v. *De Vitre*, 11 L. T., N. S., 445.

It is no ground of proof of the effect of an anterior patent, that scientific persons of the present day, with all the superior knowledge and intelligence obtained by the advance of science, can depose that now they could produce the same result by the process disclosed by the anterior patent as that designated by the subsequent one. *Ib.*

In a patent of 1804, the effect of rolling two metals together of equal or unequal thicknesses was to produce a metal of a particular character. By a patent of 1848 the same result was indicated as being capable of being produced by the forced adhesion of the same two metals of prescribed thicknesses by rolling:—Held, that the former invention was not an anticipation of the subsequent patent, which was held to be a valid patent. *Ib.*

4. A person to be entitled to a patent for an invention must be the first and true inventor, and there must not be any public use thereof by himself or others, prior to the grant of the patent. *Housebill Coal Co.* v. *Neilson*, 9 Cl. & F. 788.

Trials of an incomplete invention, by way of experiment, are not evidence of a prior use for the purpose of invalidating a patent. Prior use for this purpose means public use and exercise of the invention. *Ib.*

Evidence of the existence of a completed invention, once in public use, although abandoned or the use long discontinued but not altogether lost sight of, is sufficient to invalidate a patent which is subsequently granted for the same invention. *Ib.*

5. What previous user will invalidate, and what user, if any, can be admitted in contravention of the patent right, are different questions, depending one upon the extent of previous knowledge, the other upon the effect of the grant. *Caldwell* v. *Vanvlissengen*, 9 Hare 428; 16 Jur. 115; 21 L. J., Ch., 97.

6. Where a man, having conjectured a new method of effecting a desired object, takes out a patent for it, but never puts it in practical operation, that will not invalidate letters patent taken out for the same process by a subsequent inventor, who shall of himself discover the same method. *Betts* v. *Menzies*, 3 Jur., N. S., 357; 10. H. L. Ca. 117; 9 Jur., N. S., 29; 11 W. R. 1; 7 L. T., N. S., 110.

B. obtained, in 1849, letters patent for a mode of combining lead and tin for making capsule plates, by placing plates of each, of unequal thicknesses, in contact, and subjecting them to great pressure, by repeated rolling or otherwise, so as to effect great cohesion and tenuity. In 1856 W., having two processes by which he made capsules abroad, the first being the same as B.'s, and the second being commenced by dipping heated lead into melted tin, and then rolling out the plated block, which last W. affirmed to be the cheapest way, introduced some of such capsules into England with a view to effect sales thereof. B. immediately commenced proceedings in Chancery against the agent in England of W.; W. not assisting in the defence, a decree and injunction were taken by consent against the agent, who submitted when he found the defence thrown on him. In 1857, B. discovered that W. was again transmitting to this country capsules for sale. W. swore that they were all made according to his dipping process, but he did not state how he made sure of that fact, although it was sworn on the other side that no man could distinguish between the capsules made by the two processes. W. also alleged that he had, since October 1856, discovered that in 1804 a patent had been taken out for effecting cohesion by pressure; but it did not appear that that patent had ever been worked, or was capable of being worked, for it directed equal thicknesses of lead and tin to be rolled together, which B. alleged would not do, but they must be unequal:—Held, first, that the previous publication in 1804, as it did not appear to have been ever worked, and did not appear to be proper for working, did not invalidate B.'s patent, although it pointed out the mode of effecting cohesion by pressure. *Ib.*

Held, secondly, that even if there were great doubt as to the validity of B.'s patent, yet the long undisturbed enjoyment for eight years, and the conduct of W. in not trying the question when B. raised it in 1856, entitled him to an injunction until the validity of the patent could be tried at law. *Ib.*

Held, thirdly, *semble*, that W.'s second process was an infringement of B.'s patent; but that under the circumstances the injunction

would be granted, although the question of the infringement required also to be sent to a jury. *Ib.*

1. A contractor for harbour works had in the progress of his undertaking invented an apparatus which greatly facilitated the works, but which could only be tested in a place accessible to the public. After having used the apparatus for four months in the progress of the work, he applied for a patent:—Held, that such user amounted to a dedication to the public, and that he was not entitled to a patent. *Re Adamson's patent*, 6 De G. M. & G. 420; 25 L. J., Ch., 456; 3 W. R. 473.

2. Publication of an invention in terms of mere generality, or not true to their full extent, will not invalidate a subsequent patent, the specification of which is limited and accurate, and gives a specific rule of practical application. *Hills* v. *Evans*, 4 De G. F. & J. 288; 31 L. J., Ch., 457; 8 Jur., N. S., 525; 6 L. T., N. S., 90.

Where something remains to be ascertained which is necessary for the useful application of the discovery, that affords sufficient room for another valid patent. *Ib.*

To support an allegation of want of novelty, whatever is essential to the practical working and real utility of the invention must be found substantially in the prior publication. *Ib.*

Prior knowledge to avoid a patent, must be knowledge equal to that required to be given by a patent; that is, such knowledge as will enable the public to perceive the very discovery, and to carry the invention into practical use. *Ib.*

A prior publication, to have that effect, must be one from which a person with ordinary knowledge would be able practically to apply the discovery without further experiment. *Ib.*

3. A prior publication will not invalidate a patent unless it has imparted information so as to enable any one working upon it to reckon with confidence on the result. *Betts* v. *Neilson*, 3 L. R., Ch., 429; 37 L. J., Ch., 321; 18 L. T., N. S., 165.

In order to establish the prior public use of a patented article so as to invalidate the patent, it is not necessary to show that the article had been manufactured for sale. *Ib.*

When the subject of a patent in England is made in a foreign country, and applied to the purpose for which it was made, and under these circumstances is sent to this country for transmission to another foreign country:—Held, that this is a sufficient user of the patent in England to constitute an infringement. *Ib.*

4. The public exhibition of a machine in which there are defects, owing to which it proves an entire failure, does not affect the validity of a subsequent patent for a machine, in which, though similar in some of its details to the former, the defects are remedied so as to produce a serviceable machine. *Murray* v. *Clayton*, 7 L. R., Ch., 570; 20 W. R. 649.

5. Although a party may believe himself to be the first and original inventor, yet he cannot shelter himself under wilful ignorance, but will be fixed not only with what he knew, but with that which he might have known had he made the inquiries which it was incumbent upon him to make. *Re Honiball's Patent*, 9 Moo. P. C. 378.

A first and original inventor means a person who could claim the merit of the first invention without reference to the user. *Ib.*

6. Upon the construction of a patent:—Held, that the antecedent existence of an invention, not shown to have been brought to any successful result, and which was so far similar, that if subsequent in date to the patent, it would have been held a colourable and clumsy imitation for the purpose of effecting the same result, did not invalidate the patent by anticipation. *Daw* v. *Eley*, 3 L. R., Eq., 496.

Held, also, that although the patent included matters some of which were new and some old, it might be upheld by limiting the claim to the particular combination in the particular manner described in the specification. *Ib.*

7. Where a provisional specification contained a description of an invention, part of which was omitted from the final specification:—Held, that the part omitted did not amount to prior publication of the invention so as to avoid for want of novelty a subsequent patent taken out for such omitted part. *Stone* v. *Todd*, 46 L. J., Ch., 32; 4 L. R., Ch. D., 58.

8. The district of Natal is a British colony with a separate government, under a governor appointed by the Crown; and a law has been passed by the legislative council of Natal, providing for the granting, in the colony, of patents for inventions:—Held, that the validity of letters patent under the great seal for license to use an invention in the United Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man, would not be impeached by the fact, if proved, of prior use of the invention in Natal. *Rolls* v. *Isaacs*, 19 L. R., Ch. D., 268; 51 L. J., Ch., 170; 45 L. T. 704; 30 W. R. 243.

9. The discoverer of a new principle or idea as regards any art or manufacture who shows a mode of carrying it into practice, as by a machine, may patent the combination of principle and mode, although the idea or the machine would not alone be the proper subject of a patent. The description, in a specification, of a machine is sufficient, if it tells the maker and user, without requiring him to use an inventive faculty, how to make and use the machine, although parts of it, without which it would be unworkable, have been omitted from the specification. Although it is *primâ facie* evidence of want of utility that the patentee does not make and vend his machine, evidence of non-user and non-sale is not sufficient to prove want of utility, if immediately afterwards the patentee has improved upon his machine and made and vended the improved machine. Where want of novelty in a patented invention is set up, and the alleged anticipation is in writing alone—*e.g.*, the specification of another person's prior patent, no existence of a prior machine being shown, the interpretation of the prior writing is for the Court, and it is not sufficient to establish want of novelty to show that, if a machine had been made by a person who had read that writing and such machine had been used, something in it would by user have been an anticipation; but it must be shown that a person conversant with such matters would, on reading the writing, find in such writing alone

a reasonably clear description of the impeached invention. *Otto* v. *Linford*, 46 L. T. 35.

1. If an invention becomes (without fraud) known to the public, no subsequent patent can be granted for it. It is not necessary that it should have been used by the public, as well as known to the public. *Patterson* v. *Gaslight and Coke Co.*, 3 L. R., App. Cas., 239; 47 L. J., Ch., 402; 26 W. R. 482; 38 L. T., N. S., 303. Affirming 2 L. R., Ch. D., 812; 35 L. T., N. S., 11; 45 L. J., Ch., 843.

Where a report, on a particular subject, is made to a public office, by referees specially appointed under an Act of Parliament to inquire into and report on such subject, the knowledge contained in that report being fully possessed by the referees, it must, from that moment, be treated as absolutely the property of the public and as being publicly known, although, in fact, the report was not formally published till some days afterwards. *Ib.*

If the knowledge thus obtained in the course of the discharge of his duty by one referee, was, by his communication of it to his colleagues, possessed by all the referees, the moment they became possessed of it, it became public property, and they had no power whatever to agree among themselves to treat its communication as confidential, nor would their doing so enable one of their number to take out a patent in regard to it. *Ib.*

The Board of Trade, under the City of London Gas Act 1868 (32 & 33 Vict., c. cxxv.), appointed three gas referees, whose duties were to inspect the works of the gas companies, with the view of ascertaining the means adopted therein for purifying gas, and to test the gas and prescribe the maximum of impurity to be allowed; the companies were required by the Act to give to the referees all facilities for the performance of their duties. The referees made experiments at the works of a gas company at Beckton, with a view to improvements in the purification of gas; and in January 1872 drew up a report thereon, which three months afterwards they submitted to the Board of Trade. Shortly before the report was submitted, one of the referees took out a patent for improvements, the principle of which had been indicated in the report:—Held, that the material processes claimed by the specification were shown to have been known to and used by the public before the date of the patent, and that, even if it had been otherwise, all the contents of the report were public property, so that there was no consideration for a patent. *Ib.*

Where Invention described in Books.] 2. A publication of a new discovery takes place when the inventor of it, either by himself or by his agent, having written a description of it in a book, and sent it to a bookseller, such book is offered or exposed for the purpose of sale. *Lang* v. *Gisborne*, 8 Jur., N. S., 736; 31 L. J., Ch., 769; 10 W. R. 368; 6 L. T., N. S., 771; 31 Beav. 133.

If the invention is first described in a foreign work published abroad, and sent over to a bookseller in England, and is offered by him for sale, this is a sufficient publication in this country. *Ib.*

3. An instrument, which was alleged to be an anticipation of an invention, patented in 1876, for improvements in electric telephony and telephonic apparatus, was described, in a paper written in German, in a scientific journal, called the *Zeitschrift*, of the German-Austrian Telegraph Union, which was published in Berlin in 1862. The description was illustrated by figures. A copy of the *Zeitschrift* was in the library of the Patent Office in London, and another copy was in the library of the Institute of Civil Engineers in London, where it was accessible to all the members, more than 3,000 in number, and to friends introduced by them. It was, however, entered in the catalogue only under the head of "Journals," not under the head of "Telephones" or "Telegraphs." A telegraphic engineer gave evidence that, before the date of the patent, he had seen the description in the *Zeitschrift*, and that, though he could not read German, yet, from his knowledge of the technical words used, he was able, with the assistance of the plates, to understand the substance of the invention:—Held, that there had been a sufficient publication in England of the prior invention before the date of the patent. But held, upon the facts, that the prior invention was not an anticipation of the patented invention. *United Telephone Co.* v. *Harrison*, 21 L. R., Ch. D., 720; 51 L. J., Ch., 705; 46 L. T. 620; 30 W. R. 724.

4. A man is the first and true inventor within the Statute of Monopolies, 21 Jac. 1, c. 3, if he is the first to introduce a foreign invention, or is the first to take out a patent in the case of contemporaneous inventions; or patents an invention previously invented, but not sufficiently disclosed. *Plimpton* v. *Malcolmson*, 45 L. J., Ch., 505; 3 L. R., Ch., 531; 34 L. T., N. S., 340.

To avoid a patent on the ground of prior publication, it is not enough that the invention has been published; it must have been made public to such an extent that a knowledge of it may be assumed among persons conversant with the subject. *Ib.*

When, therefore, the only substantial evidence of prior publication lay in the fact that a single copy of an American book had been presented to the Patent Office library, where it lay untouched in a private room:—Held, that there had been no prior publication. *Ib.*

A prior publication to avoid a patent must contain a description equivalent to a sufficient specification. *Ib.*

5. In order to invalidate a patent by prior book publication, it is not enough to show that the invention was described in a published book, but it must also appear that it became known to a sufficient part of the public. *Plimpton* v. *Spiller*, 6 L. R., Ch. D., 412; 37 L. T., N. S., 56; 47 L. J., Ch., 211; 26 W. R. 285. Affirming 34 L. T., N. S., 340.

On the 25th of August 1865, a patent for improvements in the construction of skates was granted to the agent of the inventor, resident at the time in America, to whom the patent was subsequently assigned. In 1863, an American book containing a brief description of the invention, not, however, accurate enough to enable persons to manufacture the skates, was sent to the library of the Patent Office in London. On the 20th of July 1865, an American book of illustrations, containing drawings of the invention, was sent to the

same library. The latter book did not reach the head librarian, although it was received by a sub-librarian, as appeared from a pencil entry in the book made at the time. It was not entered in the donation book or the catalogue. Nothing was further known of it until 1866 or 1867, when it was seen by an assistant in the corridor (to which the public had access) leading to the public room of the library:—Held, that there was no prior publication in England. *Ib.*

Semble, that in an action on a patent, where such an issue has been raised, evidence of the existence of foreign specifications of an earlier date, preserved in and obtained from the Patent Office, might be admissible. *Ib.*

II. TO WHOM GRANTED.

1. *Agents or Servants*, 5540.
2. *Alien Resident Abroad*, 5540.
3. *Importer of Invention from Abroad*, 5540.
4. *Co-owners*, 5540.

1. Agents or Servants.

1. *Semble*, an agent in this country of an inventor abroad receiving a confidential communication of an invention, not in a practically useful state, may take out a patent for his own benefit, if he, pursuing the idea thus thrown out, discovers a practical way of carrying it into effect. *Milligan* v. *Marsh*, 2 Jur., N. S., 1083. See *Steedman* v. *Marsh*, 2 Jur., N. S., 391.

Where a patent is taken out as for an original invention, the subject of the patent being in fact a communication from a British subject resident abroad, the patent is void. *Ib.*

T., a British subject resident abroad, having conceived an improvement in making pianos, gave to the son of his London agent, who happened to be on a visit at T.'s house, a full description and drawings of the invention, marked "private," and requested the son, on his return to London, to take out letters patent or to register the invention for him, T. The son returned to London, and delivered the drawings to his father, M., being T.'s London agent. T. about the same time wrote a letter to M., not marked private, and not desiring him to take out a patent on behalf of the writer, but inquiring generally as to the invention, and whether a patent for it was being taken out. Shortly afterwards M. took out a patent for the improvement in question in his own name, and as for an invention of his own. Then, T. having employed S. to make such pianos on his own account, M. brought an action for the infringement of his patent against S. Thereupon T. filed a bill to restrain the action, and the use of the patent by M. M. insisted that the invention, as described in T.'s commmunication, would not work:—Held, on motion for an injunction, that the whole question must stand over to await the result of the action. *Ib.*

2. Where a master and his foreman both invented certain improvements, for which the master sought letters patent:—Held, that they ought only to be granted on the terms of their being vested in trustees for the master and the foreman. *Re Russell*, 2 De G. M. & G. 130.

In this case the petitioner's specification consisted of three parts, and the objector only claimed to have been the true inventor of two parts, but he insisted that the third was worthless:—Held, that the whole patent should be in trust for both, as if it had been granted to both. Though no steps had been taken by the objector before the Attorney-General, and his own specification was not in evidence, on its production by an officer from the patent office the Lord Chancellor took judicial notice of it and informed himself of its contents. S. C. 6 W. R. 95.

3. When a servant filed a provisional specification for an invention, after which the master filed a provisional specification for a similar invention, and subsequently filed a complete specification and obtained letters patent:—Held, that the great seal might be affixed to the letters patent for the servant's invention, and that the letters patent might bear the date of his provisional specification. *Exp. Scott and Young*, 6 L. R., Ch., 274; 19 W. R. 425.

2. Alien Resident Abroad.

4. Letters patent may be granted to an alien resident abroad for an invention communicated to him by another alien also resident abroad. *Re Worth's Patent*, 12 L. R., Ch. D., 303; 28 W. R. 329.

3. Importer of Invention from Abroad.

5. An importer of an invention from abroad is an inventor within 5 & 6 Will. 4, c. 83. *Re Claridge's patent*, 7 Moo. P. C. 394. And see *Steedman* v. *Marsh*, 2 Jur., N. S., 391.

6. Consideration of the course to be taken by the Court in a suit respecting a patent, where the plaintiff alleged himself to be the inventor when abroad, and to have communicated the invention confidentially to the defendant, who thereupon fraudulently took out a patent in his own name. *Milligan* v. *Marsh*, 2 Jur., N. S., 1083.

7. A man is the first and true inventor within the Statute of Monopolies, 21 Jac. 1, c. 3, if he is the first to introduce a foreign invention. *Plimpton* v. *Malcolmson*, 45 L. J., Ch., 505; 3 L. R., Ch. D., 531; 34 L. T., N. S., 340.

8. *Semble*, the grantee of a patent for an invention communicated to him by a foreigner resident abroad is only bound to tell the public all that he himself knows, yet, if the original inventor has not told him enough to enable him so to describe the invention as that it can be constructed by the aid only of the specification, the patent will be invalid. *Wegmann* v. *Corcoran*, 13 L. R., Ch., 65; 28 W. R. 331; 41 L. T., 358.

4. Co-owners.

9. Where letters patent are granted to two or more persons, any one of them may use the

invention for his own benefit without the consent of the others. *Mathers* v. *Green*, 11 Jur., N. S., 845; 35 L. J., Ch., 1; 14 W. R. 17; 13 L. T., N. S., 420.

The inability of one of several joint-patentees profitably to use the invention without the consent of his co-patentees, as owners of a prior patent, does not entitle him to share with his co-patentees in the profits made by them from the use of the patent, there being no principle of law, in the absence of contract, to prevent any person not prohibited by statute from using any invention whatever, and no implied contract, where several persons jointly obtain letters patent, that no one of them shall use the invention without the consent of the others, or that he shall use it for their joint benefit. *Ib.*

A joint owner of a patent is not entitled to work the patent on his own account, but is subject to render an account of profits to his co-owner. Mode of taking the account in the case of a double patent. *Re Russell's Patent* (2 De G. & J. 130) distinguished. S. C. 5 N. R. 358.

1. Where a patent is vested in trustees upon trust for several tenants in common or joint tenants, *quære*, whether any one of them is at liberty to work the patent on his own account. *Hancock* v. *Bewley*, 1 Johns. 601.

2. *Semble*, that joint owners of a patent are answerable for losses occasioned by their co-adventurers only to the extent of their respective shares. *Lorell* v. *Hicks*, 2 Y. & Coll. 481; 6 L. J., N. S., Exch. Eq., 85; 5 *id.* 101.

See also VII. XI. 1 *post*.—IV. 2 *infra*.

III. SEALING AND OPPOSITION THERETO.

1. *In General*, 5541.
2. *Costs*, 5543.

1. In General.

3. The Court refused to seal a patent for representing Italian operas, because the provisions for carrying it on were by agreement with the Lord Chamberlain, his executors, and administrators, and the right to the patent was not sufficiently connected with the property in the house. Not sufficient for the party applying merely to answer objections, but he must lay a proper case. Upon such application, the Court will take care that the King is not deceived, or his object disappointed, and will represent the whole to the King, but will not decide upon the merits of the various claimants. Essential to the complaint of an old market against a new one set up near it, that the old is competent to the accommodation of the public; so here the old proprietors must be able to keep it up properly; the accommodation of the public being the principal thing. *Exp. O'Reilly*, 1 Ves. J. 112.

4. The Solicitor-General having overruled objections to an application for letters patent under the 15 & 16 Vict., c. 83, and having issued his warrant to seal, to which also objections were lodged, a petition was presented to the Lord Chancellor to affix the great seal and extend the time for filing the specification. Order made without a second reference, on the ground that such a *primâ facie* case was made out as entitled the petitioners to be placed in a position to litigate the validity of their patent with the public. *Re Simpson and Isaacs*, 1 W. R. 259.

5. On a petition for the sealing of a patent, the Lord Chancellor, with the consent of the petitioner and the opposing party, adjourned the petition for the opinion of the Assistant Commissioner in the Patent Office, upon the point whether the specification was an infringement of a patent already granted. *Re Stoll's patent*, 1 W. R. 472, 483.

6. Where the sealing of letters patent has been delayed by the entering of a *caveat*, the Lord Chancellor has a discretion to extend the time beyond one month from the expiration of the six months of provisional protection. *Re Tillie and Anderson's patent*, 2 W. R. 182.

7. Where there was but one affidavit distinctly swearing to the public use and sale of an alleged invention prior to the date of the application for a patent, the great seal was ordered to be affixed to the patent. *Re Tolhausen's patent*, 14 W. R. 551.

8. The time within which the application for the warrant and for the letters patent ought to be made under the rules of the patent commissioners extended, where the delay was small and accidental. *Re Hersee*, 1 L. R., Ch., 518; 14 L. T., N. S., 842.

9. A person may give notice of objection, and oppose the sealing of a patent before the Lord Chancellor, without previously applying to the Court for leave to enter opposition. *Re Vincent's patent*, 2 L. R., Ch., 341; 15 W. R. 524.

The Lord Chancellor, on an application for sealing a patent, will not interfere with the decision of the law officer of the Crown, unless in a case of fraud, or of surprise, or of some material fact having come to the knowledge of the party since the case was before the law officer. *Ib.*

The sealing of a patent was opposed on the ground of previous public user of the invention, in reply to which the applicant made the case, that such user was obtained by fraud on him, so as to bring the case within 15 & 16 Vict., c. 83, s. 10:—Held, that such a case ought to be tried before a jury, and that the patent ought to be sealed that such trial might not be precluded. *Ib.*

10. A party who has not opposed the sealing of a patent before the law officer of the Crown under 15 & 16 Vict., c. 83, s. 12, will not be allowed to oppose before the Lord Chancellor. *Re Mitchell's patent*, 2 L. R., Ch., 343.

11. When the sealing of a patent is objected to, on the ground that the invention is a colourable imitation of one which is the subject of an existing patent, a reference will be made to the law officer whether, having regard to the prior patent, the seal ought to be fixed to the patent as applied for. *Exp. Yates*, 5 L. R., Ch., 1; 18 W. R. 1.

And the law officer having certified against the patent, the petition was dismissed with costs, notwithstanding no opposition had been

made to the petitioner's application for a patent until he had applied to have it sealed, and he had given all the requisite notices. S. C. 18 W. R. 153.

1. When the sealing of a patent is opposed on the ground that the invention is similar to one which is the subject of an existing patent, a reference will be made to the law officer whether, having regard to the prior patent, the seal ought to be affixed to the patent as applied for; the opponent paying the costs of the hearing, unless there has been fraud on the part of the applicant. *Exp. Manceaux*, 5 L. R., Ch., 518; 18 W. R. 854.

2. Letters patent will not be sealed where a prior patent has been granted for the same invention. *Re Manceaux's patent*, 18 W. R. 1184.

3. Unless a patent is clearly bad, the Lord Chancellor will not refuse to seal it, as the effect of such refusal, if erroneous, would be irremediable, whereas the sealing of a bad patent leaves every one at liberty to dispute it. *Re Spence*, 3 De G. & J. 523.

4. B. lodged his provisional specification on the 31st March, and C. on the 3rd April. B. on the 21st May gave notice to proceed. C., on the 22nd May, had the great seal affixed to his patent, and on the 29th lodged a caveat against B. B., having neither lodged a caveat against C. nor opposed him before the law officer, took no step to have his patent sealed till the 27th September:—Held, that B. was in time to have his patent sealed, but it would be dated subsequently to C.'s patent, there being reasonable ground for supposing that B.'s patent comprehended some of the objects contained in C.'s patent. *Re Bailey's patent*, 21 W. R. 31; 27 L. T., N. S., 430; 8 L. R., Ch., 60; 42 L. J., Ch., 264.

Held, also, that it would make no difference in this respect if C. had been guilty of fraud, as B. ought to have proceeded on that ground before the law officer, and his proper remedy would be to get the letters patent annulled by a scire facias. *Ib.*

5. Where it appeared that a master and his foreman had both invented certain improvements for which the master sought letters patent:—Held, that they ought only to be granted on the terms of their being vested in trustees for the master and the foreman. *Re Russell*, 2 De G. M. & G. 130; 6 W. R. 95.

In general, when there is a doubt as to the validity of the grounds of opposition to a patent, the proper course is to grant the letters patent, as an error in refusing them would be irremediable, while one in granting them would not. *Ib.*

6. In opposing the grant of letters patent, the burden is on the opponent to show that the grant would be clearly wrong. *Exp. Sheffield*, 8 L. R., Ch., 237; 42 L. J., Ch., 356; 21 W. R. 233.

When the facts on which the opponent relies were within his knowledge when he opposed before the law officer, he cannot when before the Lord Chancellor raise a new legal argument on these facts; nor can he then bring forward evidence which he might have brought before the law officer. *Ib.*

7. Where a person objecting to the grant of letters patent for an invention had not seen any notice of the application for the letters patent till after the sealing of the warrant for sealing them:—Held, that notwithstanding delay he was entitled to oppose before the Lord Chancellor, and the matter was referred back to the Attorney-General. *Re Brennard's* or *Brennaud's patent*, 3 De G. F. & J. 695; 7 Jur., N. S., 690; 4 L. T., N. S., 456.

8. No caveat against the sealing of letters patent can in future be entered without the express leave of the Lord Chancellor. *Re Heathorn's patent*, 10 Jur., N. S., 810; 12 W. R. 1068; 10 L. T., N. S., 802; 4 N. R. 489.

9. Where a petition to have the great seal affixed to a patent had been filed, and the respondents served with notice two months before the first day of Michaelmas term, for which day the petition was answered, and the respondents only filed affidavits on the morning of that day:—Held, that they could not be read, and the patent was ordered to be sealed. *Re M'Kean's patent*, 1 De G. F. & J. 2; 8 W. R. 1; 1 L. T., N. S., 19.

10. Where the granting of a patent was opposed by the owner of a similar patent on the ground that the application was, under the circumstances, a breach of good faith on the part of the applicant, the Lord Chancellor directed the patent to issue upon certain terms. *Re Daine's patent*, 26 L. J., Ch., 298; 4 W. R. 455.

11. Letters patent were sealed in a case where the evidence showed great similarity between the alleged invention and one for which a patent was already in force. *Re Tolson's patent*, 6 De G. M. & G. 422; 4 W. R. 518.

12. Sealing letters patent after time for provisional protection had expired under 15 & 16 Vict., c. 83, ss. 19, 20. *Re Mackintosh's patent*, 2 Jur., N. S., 1242; 2 W. R. 194.

13. The Crown can at any time before the great seal is affixed, upon a proper case being made out, countermand the warrant. *Re Schlumberger*, 9 Moo. P. C. 1. S. C. nom. *Re Shlumberger*, 2 Eq. Rep. 36.

14. L. & W. were joint patentees of an invention for propelling vessels, and whilst engaged in making experiments with regard to it, an accident happened, which appeared to have suggested to each an improvement upon the method previously adopted. They communicated their ideas to each other, but neither took any steps to secure the benefit of the invention for two years, when L. applied for a patent, against the sealing of which W. entered a caveat, on the ground that he (W.) was the first inventor. The evidence on this point being conflicting:—Held, that L. having first applied, was entitled to have his patent sealed, though possibly W. might be able to get it repealed upon a scire facias. *Re Lowe's patent*, 25 L. J., Ch., 454; 4 W. R. 429.

15. Where a caveat was lodged before the great seal was affixed to a patent, the Lord Chancellor declined to enter into the merits of the opposition, but referred the matter back to the Attorney-General. *Re Fawcett's patent*, 2 De G. M. & G. 439.

16. On an application to the Lord Chancellor to withhold the great seal from a patent, he will only consider whether it is legal or not, and not whether the Crown ought or ought not to grant it. *Exp. Daly*, Vern. & Scriv. 499.

There are three stages in which a patent may be opposed: 1. While it is under the con-

sideration of His Majesty; 2. When it coms to the privy seal; and 3. When it comes the great seal. *Ib.*

1. When a servant filed a provisional specification for an invention, after which the master filed a provisional specification for a similar invention, and subsequently filed a complete specification and obtained letters patent:—Held, that the great seal might be affixed to the letters patent for the servant's invention, and that the letters patent might bear the date of his provisional specification. *Exp. Scott and Young*, 6 L. R., Ch., 274; 19 W. R. 425.

2. When, upon the hearing of several applications for letters patent by rival inventors before the law officer of the Crown, the evidence is conflicting, it is the duty of the law officer himself to decide upon it, and not by issuing his warrant for the sealing of both patents, to leave the matter to be contested before the Lord Chancellor. *Re Henry*, and *Re Farquharson*, 42 L. J., Ch., 363; 8 L. R., Ch., 167; 21 W. R. 233.

The 15 & 16 Vict., c. 83, s. 9, giving to an applicant for a patent, who has filed his complete specification in the first instance, protection for six months, with the like powers, rights, and privileges, as might have been conferred upon him by letters patent duly sealed, has not the effect of giving him priority over a rival inventor who has made earlier application, so as to prevent the latter from having his patent sealed during that period. *Ib.*

3. Applications were made for two patents for inventions alleged to be similar. The second applicant obtained a patent. The first applicant then presented a petition to have the great seal affixed to letters patent for his invention, alleging that his delay had been caused by the representations of the second applicant, and also that the inventions were not similar. The Lord Chancellor examined the provisional specification of the first applicant, and the complete specification of the second applicant, and finding no substantial similarity between the inventions, directed the letters patent of the first applicant to be sealed. *Re Harrison*, 9 L. R., Ch., 631.

4. When rival applicants had applied on the same day for patents, and had afterwards mutually agreed to withdraw opposition, letters patent bearing date the day of application were granted to one applicant, although letters patent bearing that date had a'ready been granted to the other. *Re Gething*, 9 L. R., Ch., 633.

On the hearing before the Lord Chancellor of a petition for the great seal to be affixed to letters patent, witnesses may be examined *viva voce*. *Ib.*

5. Upon the hearing of a petition that the great seal may be affixed to letters patent, the Lord Chancellor will not give effect to an objection going to a matter of form, such as an objection to the jurat of a declaration. *Re Wirth's patent*, 12 L. R., Ch. D., 303.

W. was an alien resident abroad. He acted as the agent of M. & Co., and applied for letters patent in England for an invention of the latter. He made the usual statutory declaration, which was filed with his petition. In it W. was described as an alien resident abroad, and it was declared before H. B. M. consul at Frankfort:—Objection founded on these facts overruled. *Ib.*

6. The word "caveat" in the 20th section of the Patent Law Amendment Act means anything in the nature of an opposition at any stage, and is not confined to opposition before the Lord Chancellor. *Re Somerset and Walker's patent*, 13 L. R., Ch. D., 397; 42 L. T. 635; 28 W. R. 709. See also *Re Johnson's patent*, 13 L. R., Ch. D., 398. n.; 28 W. R. 709. n.

There is jurisdiction to seal a patent notwithstanding that application for the seal may not have been made within the period of provisional protection and one month further, provided the delay has been caused by opposition. *Ib.*

The Lord Chancellor has power, in such a case, to extend the time for filing the final specification beyond one month after the expiration of the term of provisional protection. *Ib.*

7. The Crown will in some cases, after granting one patent, grant a second patent for a similar invention. *Re Dering's patent*, 13 L. R., Ch. D., 393; 42 L. T. 634; 28 W. R. 710.

D. and R. independently applied, on the 29th of April 1879, for letters patent for inventions, which were, for the purpose of the decision, taken to be similar. R.'s letters patent were sealed on the 25th of July 1879, and on the 5th of August 1879 he entered an opposition to the sealing of D.'s letters patent. There was no suggestion of fraud:—Held, that D.'s letters patent ought to be sealed and be dated as of the day of application, which was also the date of R.'s letters patent. *Ib.*

8. Terms upon which a compromise as to a right to a patent will be allowed. *Re Brandies' patent*, 1 Eq. Rep. 121.

2. Costs.

9. Notice of objections was filed to sealing of letters patent, and afterwards withdrawn. On petition, the costs occasioned by such objections were ordered to be paid by the person who had filed them. *Re Cobley's patent*, 8 Jur., N. S., 106; 31 L. J., Ch., 333; 5 L. T., N. S., 387.

10. No costs where the caveat was not unreasonable. *Exp. Fox*, 1 Ves. & B. 67.

Patent granted for an improved steam-engine, as not infringing upon an existing patent. If the improvements could not be used without the engine, for which a patent had been granted, they must wait the expiration of that patent. *Ib.*

11. No costs when questions fairly raised on a caveat. *Stains* v. *Morris*, 1 Ves. & B. 8.

12. A party, who had lodged an unsuccessful caveat against the granting of a patent, ordered to pay to the patentee the taxed costs occasioned by the caveat. *Semble*, such costs will be taxed upon the principle upon which costs in a cause are taxed as between party and party. *Re Cutler's patent*, 4 Myl. & C. 510; 3 Jur. 693.

13. The sealing of letters patent having been prevented by the filing of objections which were subsequently withdrawn by the objector, the objector was ordered to pay the costs. *Re Ashenhurst's patent*, 2 W. R. 3.

14. Where a caveat had been lodged against the sealing of a patent, and the intended

patentee had been compelled to present a petition to the Lord Chancellor, praying that the patent might be forthwith sealed, which was unsuccessfully opposed by the party who had lodged the caveat, it was held, that his lordship had only jurisdiction to give to the petitioner the costs, and not the costs, charges, and expenses, of and occasioned by such caveat and opposition to the petition. *Re Coates's patent*, 10 L. J., N. S., Ch., 248.

1. When the sealing of a patent is objected to, on the ground that the invention is a colourable imitation of one which is the subject of an existing patent, a reference will be made to the law officer whether, having regard to the prior patent, the seal ought to be fixed to the patent as applied for. *Exp. Yates*, 5 L. R., Ch., 1; 18 W. R. 1.

And the law officer having certified against the patent, the petition was dismissed with costs, notwithstanding no opposition had been made to the petitioner's application for a patent until he had applied to have it sealed, and he had given all the requisite notices. S. C. 18 W. R. 153.

IV. REGISTER OF PROPRIETORSHIP.

1. *Jurisdiction of Court*, 5544.
2. *Expunging Entries*, 5544.

1. Jurisdiction of Court.

2. The jurisdiction over the register of patent proprietors which was conferred on the Master of the Rolls by 15 & 16 Vict., c. 83, s. 38, is assigned to the High Court of Justice by s. 16, sub-s. 1, and is not retained by the Master of the Rolls under s. 17, sub-s. 6, of the Judicature Act 1873. *Re Morgan's patent*, 24 W. R. 245.

3. There is no right of appeal against an order made by the Master of the Rolls to expunge an entry in the register. *Re Horsley and Knighton's patent*, 4 L. R., Ch., 784; 17 W. R. 1000.

2. Expunging Entries.

4. A patentee, in 1853, assigned his patent, but the assignees omitted to register it. Afterwards, in August 1855, the patentee assigned the patent to another person, who registered it on the same day. The first assignees registered their assignment a week afterwards. The Court, in 1857, on the motion of the first assignees, ordered the register of the second assignment to be expunged, and with costs. *Re Green's patent*, 24 Beav. 145.

5. As to the jurisdiction of the Court to expunge, vacate, and vary "entries on the register of proprietors" of patents, under the 15 & 16 Vict., c. 83, s. 38. *Re Morey*, 25 Beav. 581; 6 W. R. 612.

The Court can, on motion, expunge an entry fraudulently made; it can direct any facts relating to the proprietorship to be inserted on the register, but not the legal inferences to be drawn from them. *Ib.*

A patentee assigned half a patent to A., and afterwards he assigned the whole to B. by a deed, reciting that he had already granted a licence to work and use to A. B.'s assignment was first registered:—Held, that B. had constructive notice of A.'s rights, and an entry was ordered to be made in the register that the licence referred to in B.'s assignment was the deed of assignment to A. subsequently entered. *Ib.*

6. The Court will, on the motion of the persons aggrieved, correct an entry in the register of proprietors of patents which purports to affect the rights of persons not parties to the deed registered. *Re Horsley and Knighton's patent*, 39 L. J., Ch., 157; 8 L. R., Eq., 475; 17 W. R. 1054; 21 L. T., N. S., 345.

One of two joint patentees by deed assigned his interest in the patent to a third person, and released to him all the rights of action against him of both the patentees; and the deed was set out completely on the register:—Held, that the other joint patentee was entitled to have the entry struck out. *Ib.*

V. STAMP DUTY.

7. Letters patent, dated the 26th of February 1855, were, under the 16 & 17 Vict., c. 5, s. 2, to cease at the expiration of three years from the date thereof, unless there was paid before the expiration of the three years an additional stamp duty of 50*l*. This stamp duty was paid on the 26th of February 1858:—Held, that the payment had been made within the time, and that the patent was subsisting. *Williams* v. *Nash*, 28 Beav. 93; 5 Jur., N. S., 696; 28 L. J., Ch., 886.

VI. FOREIGN (15 & 16 Vict., c. 83, s. 25).

See also III. IV. *post.*

8. An inventor took out a patent in France, and subsequently an English patent, the subject matter of which was wholly included in the French patent. He afterwards allowed the French patent to drop, by default in paying the annual dues required by the French law to keep it alive; and accordingly this patent was, by the judgment of a French Court, given on the 22nd of February 1864, declared void as from the 6th of February 1864. In March 1865, a bill was filed by an assignee of the English patent to restrain the defendant from infringing it; and in January 1866, a decree was made establishing the patent and awarding an injunction. On motion, in 1867, to commit the defendant for breach of this injunction:—Held, first, that, under 15 & 16 Vict., c. 83, s. 25, the patent, and with it the injunction, had now expired. *Daw* v. *Eley*, 36 L. J., Ch., 482; 3 L. R., Eq., 496; 15 L. T., N. S., 559.

Held, secondly, that although the French patent was declared void as from a date anterior to the decree, yet the defendant was not estopped by the decree from raising this defence on the motion. *Ib.*

Held, thirdly, that the judgment of the French Court, given in the presence of the inventor, was binding on his assignee. *Ib.*

The 15 & 16 Vict., c. 83, s. 25, applies where

a foreign patent is *de facto* granted, though it is afterwards cancelled *ab initio*. *Ib.*

1. By the Patent Law Amendment Act (15 & 16 Vict., c. 83, s. 25) it is enacted that where foreign letters patent are granted for a foreign invention before the grant of a patent for such invention in the United Kingdom, the rights under the English patent shall cease on the determination of the foreign patent. An English patent for a foreign invention was dated the 17th of September, but sealed on the 17th of December, and between the two dates a foreign patent was granted:—Held, that the patent must be taken to have been granted on the 17th of September, and therefore that s. 25 was not applicable. *Holste* v. *Robertson*, 4 L. R., Ch. D., 9; 46 L. J., Ch., 1; 35 L. T., N. S., 457. Affirming 24 W. R. 1064.

VII. SCOTCH.

2. It is essential to the validity of a Scotch patent, that the invention or improvement for which it is granted should be made in England as well as in Scotland. Accordingly, evidence of the use of an invention in England previous to the date of a patent for it in Scotland is admissible, and sufficient to make the patent void, *et vice versâ*. *Brown* v. *Annandale*, 8 Cl. & F. 437.

3. The use of an invention in England prior to the date of letters patent granted for Scotland will invalidate the Scotch patent; and the judicial committee accordingly refused to confirm a Scotch patent, the invention being used in England before the date of the Scotch patent. *Re Robinson's patent*, 5 Moo. P. C. 65.

VIII. RIGHT OF USER BY THE CROWN.

See also III. 1. *post*.

4. A grant of letters patent to a subject for an invention, does not exclude the crown from using the invention without a licence of the patentee. *Feathers* v *Reg.*, 12 L. T., N. S., 114.

The Crown is not responsible, by way of petition of right, for an infringement of a patent by the Lords of the Admiralty, but the remedy is by action against the wrong-doers. *Ib.*

5. New letters patent may be subject to the condition which has become now a usual one in cases of inventions which are likely to be required for use by the Government, that the Government and its contractors should be entitled to use the invention. *Re Napier's patent*, 6 L. R., App. Cas., 174; 50 L. J., P. C., 40; 29 W. R. 745.

6. The patentee of a patent for improvements in the manufacture of firearms had received large sums of money from Government for the expenses of experiments, and by way of bounty and reward, but from the nature of the patent had not, in the opinion of the Judicial Committee, received sufficient remuneration for his invention, and in granting an extension the committee refused to impose a condition in the new grant that the Crown should be at liberty to use the invention for the public service without licence from the patentee. *Re Lancaster's patent*, 2 Moo. P. C., N. S., 189.

7. The Crown has the right to the use of a patented process or invention without compensation to the patentee. *Dixon* v. *London Small Arms Co.*, 1 L. R., App. Cas., 632; 46 L. J., Q. B., 617; 35 L. T. 559; 25 W. R. 142. Reversing 1 L. R., Q. B. D., 384; 35 L. T. 559; 24 W. R. 766; and affirming 10 L. R., Q. B., 130; 44 L. J., Q. B., 63; 31 L. T. 830; 23 W. R. 317.

This right of the Crown is not because the Crown is impliedly excepted from the effect of letters patent, but because the privilege thereby granted is granted against the subjects only, and not against the Crown. *Ib.*

A patent was granted for an improvement in the manufacture of firearms. The secretary at war issued a notice for a tender for the supply of 13,875 rifles of the description known as that patented. The price was settled, minus the cost of the steel barrels and the stocks, which the War Office was to supply. The rifles were to be delivered within a certain time, the manufacture of them might be inspected at any time, and they might be rejected by officers at the War Office, if not made according to pattern, or not delivered in time. The persons who took the contract employed the patented process in the formation and insertion of the lock:—Held, that they were liable to the patentee for an infringement of the patent, for that they were not servants or agents of the Crown doing the work of the Crown, but were private contractors with the Crown to supply a certain manufactured article, and were therefore not protected in what they did by any particular privilege attaching to the Crown. *Ib.*

8. In all cases where the utility of a patent has not been tested by actual employment the question to be considered is, whether the evidence is sufficient to rebut the presumption arising from its non-use that the invention is one of no practical utility. Application for a prolongation of the term granted after strong and unanswered evidence of utility, though the patent had not been used in England during the whole of the term. On grounds of public policy the condition was annexed that the Government and all contractors employed by the Government should be at liberty to use the invention. *Re Hughes' patent*, 4 L. R., App. Cas., 174; 27 W. R. 493. And see *Re Pettit Smith's patent*, 7 Moo. P. C. 133.

9. The Crown has always exercised a control over the trade of the country; and though restrained by the common law and the Statute of Monopolies (21 Jac. 1, c. 3), within reasonable limits the Crown might grant the exclusive right to trade with a new invention for a reasonable period. The 21 Jac. 1, c. 3 did not create but controlled the power of the Crown in granting to the first inventors the privilege of the sole working and making of new manufactures. *Caldwell* v. *Vanvlissengen*, 9 Hare 415; 16 Jur. 115; 21 L. J., Ch., 97.

IX. PROOF OF.

10. The grant of letters patent by a foreign country (being an act done by the governing body in a matter which is to affect the public

interests, restraining them for the present, and giving a particular individual specific rights, but throwing open and protecting the public rights after the expiration of a certain term) is an act of state within 14 & 15 Vict., c. 99, s. 7, and is therefore provable by a copy of the letters patent, purporting to be sealed with the seal of such foreign state, without proof of the seal or signature, or judicial character of the person signing the same. *Re Bett's patent*, 1 Moo. P. C. 49; 9 Jur., N. S., 137; 11 W. R. 221; 7 L. T., N. S., 577.

II. Specification.

I. *Provisional*, 5546.
II. *Variance between Provisional and Complete Specification*, 5546.
III. *Construction and Interpretation*, 5547.
IV. *The Claim*, 5547.
V. *Complete Specification, Sufficiency of*, 5548.
VI. *Enrolment or Filing*, 5550.
VII. *Amendment*, 5550.
VIII. *Disclaimer*, 5551.
IX. *Copyright in*, 5552.

I. PROVISIONAL.

1. The difference between the provisional and complete specifications of a patent considered. *Foxwell* v. *Bostock*, 3 N. R. 546.

2. A provisional specification, if allowed by the law officer of the Crown, cannot be impeached as being too general. *Penn* v. *Bibby*, 2 L. R., Ch., 127; 36 L. J., Ch., 455; 15 W. R. 208; 15 L. T., N. S., 399.

3. The existence of a prior provisional specification is not a ground on which the Attorney-General ought to refuse to allow a second provisional specification by another inventor to be filed; and in the event of the latter applicant for provisional protection being the first to obtain a grant of letters patent, his patent is a bar to the grant of letters patent for the same invention to the earlier applicant for such provisional protection. *Re Bates and Redgate*, 38 L. J., Ch., 501; 4 L. R., Ch., 577; 17 W. R. 900; 21 L. T., N. S., 410.

4. An application under s. 2 of the 16 & 17 Vict., c. 115, for the inspection of the provisional specification of letters patent, on the ground that the subject matter was the same as that for which the applicant had obtained letters patent, was refused. *Re Tolson's patent*, 4 De G. M. & G. 422; 4 W. R. 518.

5. A provisional specification is not, in general, intended to give a complete description of an invention to the public, but only to protect the inventor until the description is perfected in the final specification. *Stoner* v. *Todd*, 4 L. R., Ch. D., 58; 46 L. J., Ch., 32; 35 L. T., N. S., 661; 25 W. R. 38.

The omission from a final specification of part of the provisional specification is notice that the omitted part has been abandoned by the inventor, and any one is at liberty to work up, and may obtain a valid patent for, an invention sketched out in the abandoned part. *Ib.*

II. VARIANCE BETWEEN PROVISIONAL AND COMPLETE SPECIFICATION.

6. *Semble*, that on an issue, whether the specification did "particularly describe and ascertain the nature of the invention," the question of variation between the provisional and complete specification may be gone into. *Penn* v. *Jack*, *Penn* v. *Bibby*, 15 W. R. 208; 15 L. T., N. S., 399; 2 L. R., Ch., 127; 36 L. J., Ch., 455.

After the law officer of the Crown has allowed a provisional specification, it is no longer open to objection on the ground of mere generality, although a departure in the complete specification from the description in the provisional one will invalidate the patent. *Ib.*

The complete specification must not claim anything different from that which is included in the provisional specification, but need not extend to everything so included. *Ib.*

The provisional specification of a patent for an improvement in the bearings and bushes for the shafts of screw and submerged propellers described the invention as consisting in employing wood in the construction of such bearings and bushes. The complete specification, after describing the mode in which the wood was to be used, claimed the employing of wood in the construction of bearings and bushes "as therein described":—Held, this was no such variation between the provisional and complete specification as invalidated the patent. *Ib.*

7. In a patent for improvements in preserving animal substances the provisional specification described the nature of the invention as a mixture of a solution of gelatine with a solution of bisulphite of lime with which the substance to be preserved was to be washed. In the complete specification the solution of bisulphite of lime was described as solution No. 1, and solutions Nos. 2, 3, and 4 were described as being formed by a mixture of solution No. 1 with various other component parts; and the patentee claimed the use of solution No. 1 for preserving animal substances (without describing any separate use to be made of it), and the use of solutions Nos. 2, 3, and 4 for the preservation of particular substances in the manner more particularly described. A. made use of bisulphite of lime for the purpose of preserving meat:—Held, that A. had not infringed the patent, since the complete specification, if large enough to cover the use of bisulphite of lime, as adopted by A., would disclose an invention larger than and different from that contained in the provisional specification, and would be bad for want of a sufficient description of that process. *Bailey* v. *Roberton*, 3 L. R., App. Cas. (Sc.), 1055; 27 W. R. 17; 38 L. T. 854.

8. A patent held void on the ground that the nature of part of the invention described in and claimed by the complete specification, had not been sufficiently described in the provisional specification. *United Telephone Co.* v. *Harrison*, 21 L. R., Ch. D., 720; 51 L. J., Ch., 705; 46 L. T. 620; 30 W. R. 724.

III. CONSTRUCTION AND INTERPRETATION.

1. The words used in a patent must be construed, like the words of any other instrument, in their natural sense, according to the general purpose of the instrument in which they are found. *Clarke* v. *Adie* (No. 2), 2 L. R., App. Cas., 423; 37 L. T., N. S., 1; 25 W. R. 45; 47 L. J., Ch., 598.

In this case the word "parallel" was construed in its popular and not its purely mathematical sense, *Ib.*

A. obtained a patent for improvements in horse-clipping machines, and granted to C. a licence to manufacture machines in accordance with the patent. The improvement described in the specification comprised, among other items, the parallelism of the teeth of the comb, and the addition of an extra comb-plate when required so as to regulate the length to which the hair might be clipped. C. manufactured clippers not having parallel teeth nor an extra comb-plate, but, in other respects, similar to those patented by A., and resisted payment of the royalties under the licence in respect of these clippers, on the ground that the remaining items were old, and that the specification must be so construed as to exclude these items from the claim. As evidence in support of this intention, it was sought on behalf of C. to produce prior specifications of English and American inventions:—Held, that upon the natural construction of the specification it included a claim, not only in respect of the parallel teeth and extra comb-plate, but also in respect of the other items, and that C. was not entitled to contest the validity of the patent so as to excuse him from payment of royalty under the licence. *Ib.*

In the case of a patent for improvements prior specifications relating to similar machines are admissible in evidence to show the state of the manufacture at the time when the patent was granted, but not to show that the language of the specification is to be taken in other than its natural meaning. *Ib.*

2. Although the construction of a specification belongs to the Court, the explanation of the words used therein, or of technical terms of art, is matter of fact upon which it is the province of a jury to decide. *Hills* v. *Evans*, 8 Jur., N. S., 525; 31 L. J., Ch., 457; 6 L. T., N. S., 90; 4 De G. F. & J. 288.

In the comparison of two specifications, each of which is filled with terms of art, and with the description of technical processes, it is the duty of the Court to give the legal construction. *Ib.*

The question of the identity of two specifications, for the purpose of deciding as to the novelty of an invention, is one of fact, to be left to the jury. *Ib.*

A specification of a patent does not differ from any other publication of an invention for the purpose of invalidating a subsequent patent for the want of novelty. *Ib.*

3. The drawing is part of the specification. *Poupard* v. *Fardell*, 18 W. R. 127.

4. The construction of two specifications, alleged to be on the same subject, is not a pure question of law. Even if there is identity of language in the specifications, yet, if there are terms of art in one and also terms of art in the other, it is impossible to predicate of the two with certainty that they describe the same identical external object, unless it is ascertained that the terms of art used in the one have precisely the same signification and denote the same external objects at the date of the one specification as they do at the date of the other. Therefore evidence is required on these points. *Betts* v. *Menzies*, 10 H. L. Ca. 117; 9 Jur., N. S., 29. And see *Patent Type Founding Co.* v. *Richard*, 6 Jur., N. S., 239; 31 L. J., Q. B., 233; 11 W. R. 1; 7 L. T., N. S., 110.

5. The rules governing the construction of specifications are the ordinary rules for the interpretation of written instruments; but, unless a specification particularly describes the nature of an invention, and in what manner the same is to be performed, in such a manner as to be intelligible to a workman of ordinary knowledge, the grant of the letters patent is void. *Simpson* v. *Holliday*, 13 W. R. 577; 12 L. T., N. S., 99; 1 L. R., H. L., 315; 35 L. J., Ch., 811; 5 N. R. 340.

6. In an action for an alleged infringement of a patent where the defence is that the supposed invention is not new, the judge may compare the plaintiff's specification with the specification of a previous patent, and may on such comparison direct the jury to find a verdict. *Bush* v. *Fox*, 5 H. L. Ca. 707; 2 Jur., N. S., 1029; 25 L. J., Exch., 251; 4 W. R. 675; 2 W. R. 269.

7. When a question of novelty, or infringement, depends merely on the construction of the specification, it is one entirely for the judge; but where it also depends on other circumstances, such as the degree of difference or of similitude between two machines, it is a mixed question of law and fact. What the jurymen find to have been done is a matter of fact, but the judge must apply that fact according to the rules of law, and is entitled and bound to say whether what has been done amounts to an infringement. *Seed* v. *Higgins*, 8 H. L. Ca. 550; 30 L. J., Q. B., 314; 6 Jur., N. S., 1264.

The opinion of scientific witnesses as to whether there has or has not been an infringement ought to be received. *Ib.*

IV. THE CLAIM.

8. The object of a claim is not to claim anything which is not mentioned in the specification, but to disclaim something which might otherwise be supposed to be claimed, and it must always be construed with reference to the whole context of the specification. *Plimpton* v. *Spiller*, 47 L. J., Ch., 211; 26 W. R. 285; 6 L. R., Ch. D., 412; 37 L. T., N. S., 56.

A patentee of an improvement in skates described his invention in his specification as relating to an improvement in attaching the rollers or runners to the stock or footstand of a skate, whereby the rollers or runners were made to turn or cant by the rocking of the stock or footstand, so as to facilitate the turning of the skate on the ice or floor. He described also a mode of making the skate applicable to ice by substituting flat runners for rollers, and a mode of securing the runners by clamping them between pairs of discs, the runners having smooth angular edges so that

they might be reversed when the inner edges lost their angularity by wear, and a fresh sharp edge obtained, and when both edges of one surface became worn, the runner might be inverted and two more sharp edges obtained. He claimed first applying rollers or runners to the stock or footstand of a skate as described; so that the rollers or runners might be clamped or turned so as to cause the skate to be moved in a curved line; and, secondly, the mode of securing the runners and making them reversible as above described:—Held, that the second part of the claim was to be read with reference only to the first part, and not as a substantive claim, and that the want of novelty in the second part of the claim did not invalidate the patent. *Ib.*

1. The office of the claim at the end of a specification is to tell the public exactly what the invention is, and when, according to the natural construction of the claim, a patent would be void for want of novelty, the patentee is not at liberty to refer to the descriptive part of and drawings accompanying the specification, for the purpose of validating the patent by showing that some other is the true construction. *Hinks* v. *Safety Lighting Co.*, 46 L. J., Ch., 185; 4 L. R., Ch. D., 607; 36 L. T., N. S., 391.

V. COMPLETE SPECIFICATION, SUFFICIENCY OF.

2. To establish the validity of a patent, the invention must be both new and useful, and the specification must accurately describe it; also, if the specification seeks to cover more than is actually new and useful, it vitiates the patent, rendering it ineffectual, even to the extent to which it might otherwise have been supported. *Hill* v. *Thompson*, 3 Meriv. 629.

3. To support a patent the specification should be so clear as to enable all the world to use the invention from the moment of the expiration of the patent. *Newbery* v. *James*, 2 Meriv. 446.

4. The specification of an invention, which consists in the use of known materials in new proportions, is not necessarily bad for uncertainty, though the patentee does not limit himself to the proportions recommended. *Patent Type Founding Co.* v. *Richard*, 1 Johns. 381; 6 Jur., N. S., 39.

A specification stated in substance that the usual practice in the manufacture of type was to employ lead and antimony, and in some cases to add a small percentage of tin; that the object of the invention was to obtain tougher metal, by employing tin in large proportions with antimony, greatly reducing or wholly omitting the use of lead; that the best proportions were seventy-five of tin and twenty-five of antimony, but that this might be to some extent varied, and that if lead were used, it must not exceed fifty per cent. of the whole, one part of antimony to three of tin, or tin and lead, being the best:—Held, that the specification was not bad on the face of it for uncertainty, and that the evidence of persons acquainted with the usual modes of manufacture was necessary to determine whether the invention was stated with sufficient precision. *Ib.*

5. Injunction upon possession under a patent, until the right can be tried, though subject to considerable doubt; the patent being for improvements upon a machine, the subject of a former patent expired, and the specification describing the original machine, with the improvements, as one entire machine, the subject of the latter patent, not distinguishing the improvements. *Harmer* v. *Plane*, 14 Ves. 130.

Patent for improvements valid; but not to restrain the use of the original machine. *Ib.*

6. Where a patented invention is partly original and partly communicated from a foreign country:—*Semble*, that the part communicated from the foreign country should be defined in the patent and in the specification, which should particularise what is new in the invention, and what is old. And when this is not done, the Court, upon an interlocutory application, will refuse an injunction to restrain its alleged infringement. And this rule will apply, not merely to this, but to other matters, when the letters patent and specification fail in explicitness; and the age or date of the patent is, under such circumstances, a material element in the consideration. *Renard* v. *Levinstein*, 10 L. T., N. S., 177.

7. An invention for giving paper, by the application of a certain composition, such a surface as renders the lines of copper, and other plate printing, more clear and distinct, may properly be described in a patent, as an improvement in copper and other plate printing. One of the ingredients in the composition was a white substance, imported from Germany, and which could be purchased at one or two colour shops in London; the only description or denomination given to it in the specification was, "the purest and finest chemical white lead"; but there was no article known by that denomination in the trade, or in the shops where white lead is usually sold; and the finest white lead which could be obtained would not answer the purpose:—Held, that the specification was insufficient. *Sturz* v. *De la Rue*, 5 Russ. 322; 7 L. J., Ch., 47.

8. If, in the specification of an improved gas apparatus, no direction is given respecting a condenser, which is a necessary part of every gas apparatus, this will not invalidate the patent, if it appears that every one capable of constructing a gas apparatus must know that a condenser must form a part of it. *Crossley* v. *Beverley*, 1 Russ. & M. 166.

9. A specification, when construed grammatically, claimed to effect a particular object by two processes, one of which would not effect the object, but evidence showed that no skilled practical workman would be misled, as such a one would know that the one process would be ineffectual, and would adopt the other:—Held, that the specification was defective, and the patent void. *Simpson* v. *Holliday*, 1 L. R., H. L., 315; 35 L. J., Ch., 811; 12 L. T., N. S., 99; 13 W. R. 577.

The specification was as follows:—"I mix aniline with dry arsenic acid, and allow the mixture to stand for some time, *or* I accelerate the operation by heating it to or near to its boiling point":—Held, that the word "or" could not be read as "and." *Ib.*

10. The description, "a roller of hard metal or other suitable material," is not too uncertain,

on account of the use of the words "or other suitable material"; such words would mean any material equally sufficient for the purpose with hard metal. *Ralston* v. *Smith*, 11 H. L. Ca. 223; 35 L. J., C. P., 49; 20 C. B., N. S., 28; 13 L. T., N. S., 1.

1. S. took out a patent for an improvement in machinery used for roving cotton. His specification appeared to claim the discovery of the application of the principle of centrifugal force for such a purpose, but he filed a disclaimer, declaring that he intended to claim only the application of centrifugal force in the particular manner described in the specification:—Held, that taking these two instruments together they sustained the patent. *Seed* v. *Higgins*, 8 H. L. Ca. 550; 30 L. J., Q. B., 314.

The particular manner described was by the use of "a weight." The defendant employed a machine similar in many respects, but though using weight, or pressure occasioned by weight, as a force, not using "a weight":—Held, that this did not amount to an infringement of the patent. *Ib.*

2. When a specification in the first instance describes the invention in too general terms, but afterwards in describing the method of performing the invention, refers to figures in drawings annexed thereto, and the claim made is for the manufacture of the invention described with reference to those figures, the specification is sufficient. *Daw* v. *Eley*, 14 W. R. 126; 13 L. T., N. S., 399.

3. The specification of a patent may describe the process to be adopted so insufficiently as to invalidate the patent, and yet disclose enough to show that what is claimed by a subsequent patent is not new. *Betts* v. *Neilson*, 3 L. R., Ch., 429; 37 L. J., Ch., 321; 18 L. T., N. S., 165; 16 W. R. 524.

Whether a specification contains a sufficient description can only be ascertained by experiment; and in making the experiment knowledge and means may be employed which have been acquired since the date of the patent. *Ib.*

4. After a patent has stood inquiry and the test of time, the Courts do not encourage verbal objections to the form of the specification. *Neilson* v. *Betts*, 5 L. R., H. L., 1; 40 L. J., Ch., 317; 19 W. R. 1121.

5. A person having a patent for improvements in gas lamps made further improvements in such lamps, and obtained a patent for the subsequent improvements. The specification to the second patent stated that the invention related to the construction of lamps of a class forming the subject of the former patent, and then described the mode of making the improved parts of the lamp:—Held, that the specification was sufficient. *Parkes* v. *Stevens*, 18 W. R. 233; 22 L. T., N. S., 635; 5 L. R., Ch., 36.

When a patentee has taken out a fresh patent for improvements on his original invention it is sufficient if, reading his second specification with the first, an artisan would have no substantial difficulty in ascertaining what was claimed. S. C. 38 L. J., Ch., 627; 8 L. R., Eq., 358; 17 W. R. 846.

6. When a patentee, in his specification, professes to do by machinery what has never been done before by machinery, and describes the machinery by which he does it, his claim is not too large on the face of it, because it claims generally to perform the operation "by machinery." *Arnold* v. *Bradbury*, 6 L. R., Ch., 706.

A patentee described an improved ruffle or frill, and the machinery by which he proposed to make such improved ruffle, and to fasten it to a plain fabric by a single series of stitches. By his claim he claimed "the production by machinery of ruffles, and the simultaneous attachment of them to a plain fabric by a single series of stitches":—Held, that the claim was not, on the face of it, too large. *Ib.*

7. A patent for the combination and arrangement of the various parts of machinery for sewing or stitching with the use of a needle or shuttle would be void from the unlimited extent of the words used, unless they could be cut down by the context so as to apply to a specified combination and arrangement of specified parts of machinery. *Fownell* v. *Bostock*, 4 De G. J. & S. 298; 12 W. R. 723; 10 L. T., N. S., 144.

When the combination of machinery in an amended specification was different from combination in the original specification, and no specification remained of the invention for which the patent was granted, the patent was held to be void. *Ib.*

8. The specification of a patent is bad, if one of the materials to be used is described by a generic term comprising a variety of species, the majority of which would be unsuitable. *Wegmann* v. *Corcoran*, 13 L. R., Ch., D., 65; 41 L. T. 358; 28 W. R. 331. Affirming 27 W. R. 357; 39 L. T. 563.

The specification of a patent is bad if a skilled mechanic would not, without performing a series of experiments, be able to construct the machine from the description. *Ib.*

The specification of a machine for crushing meal described the rollers between which the meal was to be crushed as "to have a surface consisting of material containing so much silica as not to colour the meal or flour. I prefer to make them of iron coated with china, and finally turned with diamond tools"; and the claim was (*inter alia*) for the use of material "of the hardness required." It appeared that the rollers must be made of a very hard china, such as had scarcely been made in Europe during this century, and specially tough, and must be fixed in a peculiar manner to an iron core or spindle which carried them; and according to the evidence, a miller or a skilled mechanic would not, without making a series of experiments, discover of what china the rollers must be made or how they must be fixed to the spindle:—Held, that the specification was insufficient, and the patent invalid. *Ib.*

Semble, though the grantee of a patent for an invention communicated to him by a foreigner resident abroad is only bound to tell the public all that he himself knows, yet, if the original inventor has not told him enough to enable him so to describe the invention as that it can be constructed by the aid only of the specification, the patent will be invalid. *Ib.*

9. A patent may be granted not only in respect of a whole and complete thing described, but in respect, also, of a subordinate

integer of that whole. *Clarke* v. *Adie* (No. 1), 2 L. R., App. Cas., 315; 46 L. J., Ch., 585; 36 L. T., N. S., 923.

When a patent is taken out for a combination, it will protect the several subordinate parts and all subordinate combinations of such parts, provided the subordinate parts or combinations are themselves properly subjects for a patent, and also provided that it is clearly and precisely defined by the specification what are the subordinate parts or combinations of parts in respect of which, as well as the entire combination, protection is claimed. *Ib.*

A patent was taken out for improvements in a machine for clipping horses and other animals; one of the improvements relied upon was the combination in the machine of four things—viz., (1) the arching of the cutter plate so as to give elasticity; (2) the use of fixed stems instead of screws to connect the cutter plate and comb plate; (3) the adjustment of certain nuts and washers so as to prevent friction; and (4) the mode of communicating motion to the cutter plate so as to bring it into the true time of cutting. The first item was not described or referred to in the specification, but was merely shown by drawings attached to the specification; each of the three other items was admitted to have been well known and used in the trade; the specification did not contain any distinct claim in respect of the combination:—Held, that the specification was not sufficient, and that the combination of the four items was not protected by the patent. *Ib.*

1. The test of a sufficient specification is whether it would enable an ordinary workman, exercising the actual knowledge common to the trade, to make the machine. It need not give information of every detail, but it must not tax invention. *Plimpton* v. *Malcolmson*, 45 L. J., Ch., 505; 3 L. R., Ch. D., 531; 34 L. T., N. S., 340.

2. A description in a specification of a lamp burner omitted to state where the hole for the admission of air was to be:—Held, that the specification was insufficient. *Hinks* v. *Safety Lighting Co.*, 4 L. R., Ch. D., 607; 46 L. J., Ch., 185; 36 L. T., N. S., 391.

3. The description, in a specification, of a machine is sufficient, if it tells the maker and user, without requiring him to use an inventive faculty, how to make and use the machine, although parts of it, without which it would be unworkable, have been omitted from the specification. *Otto* v. *Linford*, 46 L. T. 35.

VI. ENROLMENT OR FILING.

4. Enrolment of patent cannot be dispensed with for the purpose of preventing the specification being made public. After patent is passed, the time for enrolment cannot be enlarged without Act of Parliament. *Exp. Hoops*, 6 Ves. 599.

5. The clerk at the Enrolment Office cannot receive an enrolment conditionally, and the Master of the Rolls refused to cancel or vacate an enrolment of a specification which had been left at the office, and had been enrolled, notwithstanding directions not to enrol it until further order. *Re Brough*, 7 Beav. 104.

6. One having obtained a patent for a manufacturing machine, of which he duly enrolled a specification, afterwards obtained another patent for improvements in the machine, in which the grant of the former patent was recited; and the letter patent contained the usual condition that it should be void, if the patentee did not within one month enrol a specification, particularly describing and ascertaining the nature of the invention, and in what manner the same was to be performed:—Held, that a specification containing a full description of the whole machine so improved, but not distinguishing the new improved parts from the old parts, or referring to the former specification, otherwise than as the second patent recited the first, was a performance of that condition. *Harmer* v. *Playne*, 14 Ves. 133; 11 East 101.

7. A clerical error in the enrolment of the specification of a patent will be amended. *Re Redmund*, 5 Russ. 44.

VII. AMENDMENT.

8. The jurisdiction of the Master of the Rolls, as keeper of the records, extends to the amendment only of clerical errors in the enrolment of patents: accordingly, where under the 5 & 6 Will. 4, c. 83, a patentee had, by the authority of the Solicitor-General, entered a memorandum of alteration of the enrolment of the specification, which it was alleged was not according to the provisions of the Act, as being an extension of the patent, to the prejudice of another patentee who petitioned that the alteration might be expunged, it was held that the Master of the Rolls had no jurisdiction to do what was asked. *Re Sharp's patent*, 3 Beav. 245; 10 L. J., N. S., Ch., 86.

9. A clerical error in the enrolment of the specification of a patent will be amended. *Re Redmond* or *Redmund*, 5 Russ. 44; 6 L. J., Ch., 183.

10. Where there is a clerical error in letters patent and in the enrolment, the correction should be first made in the letters patent on application to the Lord Chancellor, before any application is made to the Rolls to correct the enrolment; and where the enrolment had been altered by the Master of the Rolls, without such previous correction, and the Lord Chancellor, on the case coming before him, refused to make the correction, he ordered the enrolment to be brought before him, assisted by the Master of the Rolls, and the error which had been corrected was restored. *Re Nickel's patent*, 1 Ph. 36; 5 Jur. 882.

Where a patent was taken out for an invention of machinery for *covering* fibrous substances, etc.; and the invention was described in the letters patent, and in the other written documents, and also in the enrolment, as one for *recovering*, etc., the error having originated in the Home Office, and the patentee had commenced an action for infringement of the patent; the Lord Chancellor would not make the required correction in the letters patent, except upon the terms of the patentee abandoning and paying the costs of all proceedings then pending against the defendant at law, and undertaking not to bring any action for infringements previous to the correction. *Ib.*

Jurisdiction and practice in correcting clerical errors in letters patent, the proceedings in obtaining them and in the enrolment. S. C. 4 Beav. 563; 5 Jur. 381. And see 4 Beav. 567. n.

1. Instance of a patent amended and re-sealed. *Anon.*, Beam. Ord. 67.

2. A patent bearing date 12th August, but the caveat not discharged till the 27th; the patentee supposing it bore date the latter day, did not enrol till the 18th December, when the four months had expired: the date of the patent cannot be altered. *Exp. Beck*, 1 Bro. C. C. 578.

3. Clerical error, consisting of the insertion of the name of "Charles" instead of "George" in the enrolment of a patent, ordered to be amended. *Re Dismore*, 18 Beav. 539.

4. An application for amendment of a patent granted in 1856 by rectifying an error in the spelling of the name of the patentee was refused on the ground of lapse of time. *Re Blamoud*, 3 L. T., N. S., 800.

5. The engrossment of letters patent bore date two days after the date of the writ of Privy Seal, and the patentee not being aware of the discrepancy, was a day too late in enrolling his patent. Ordered, that the enrolment should be amended, on the ground that the mistake arose from a misprision of the clerk. *Re Adams's patent*, 1 W. R. 259.

6. The Master of the Rolls has jurisdiction, as keeper of the records, to direct the amendment of a clerical error in a specification filed in the Patent Office, such jurisdiction being saved by the Judicature Act 1873, s. 17, sub-s. 6. *Re Johnson's patent*, 5 L. R., Ch. D., 503; 46 L. J., Ch., 555.

When any such amendment has been directed, notice of the order should be given to the commissioners of patents, so that the specification may be reprinted. *Ib.*

7. The 18th section of the Patents, Designs, and Trade Marks Act 1883 does not affect the jurisdiction of the Master of the Rolls to allow an amendment in a patent specification which has been filed under ss. 27 and 28 of the Patent Law Amendment Act 1852, or has otherwise become a record. So long as it is in the Patent Office, and before the patent is sealed, any one applying for an amendment must proceed under s. 18 of the Act of 1883. *Re Gare's patent*, 26 L. R., Ch. D., 105.

VIII. DISCLAIMER.

8. A disclaimer cannot be made use of for the purpose of converting a barren and an unprofitable generality in a specification into a specific practical description, or to convert that which, upon the description in the specification, is not applicable to any one definite form into a description applicable to a specific and definite mode of proceeding. *Ralston* v. *Smith*, 11 H. L. Ca. 223; 35 L. J., C. P., 49; 13 L. T., N. S., 1.

The object of the 5 & 6 Will 4, c. 83, authorizing disclaimers, is, that where a specification, containing a sufficient and good description of a useful invention, is imperilled by reason of the description having something annexed to it which is capable of being severed, leaving the original description good and sufficient, without the necessity of addition (except of such slight additions only as may be required to render intelligible that which remains), the vicious excess may be lopped off by a disclaimer. *Ib.*

The words "not being such a disclaimer as shall extend the exclusive right," do not mean in the ordinary sense of the word "extend," merely by adding to or enlarging the original specification; but are also intended to describe, so confining and restricting its expressions as substantially to amount to a statement of something new. *Ib.*

Therefore, where a specification of a patent for improvements in embossing and finishing woven fabrics alleged the invention to consist in the use of rollers having any design grooved, fluted, engraved, milled, or otherwise indented upon them, and the disclaimer, which was afterwards filed, stated that the effect desired could only be produced by the use of a certain species of roller not particularly described in the specification (namely, a roller of hard metal or other suitable material having circular grooves around its surface), and all other rollers were disclaimed, such disclaimer held to be bad. *Ib.*

9. A. took out a patent for certain improvements in machinery or apparatus for preparing, slubbing, and roving cotton and other fibrous substances. The specification stated that the invention consisted "in the application of the principle of centrifugal force in the flyers employed in the machinery, for the purpose of producing the required elasticity or pressure upon the bobbin, by causing the small spur or lever, which conducts the sliver of cotton or other fibrous material on to the bobbin, to press or bear against the same simply by the action of such force." After mentioning that, in order to illustrate the invention, and the method of carrying the same into practical effect, a sheet of drawings was attached, representing one mode of applying the same to a flyer, as employed in an ordinary roving machine, and next, by reference to the drawings so attached, minutely describing a machine, the specification proceeded: "I would remark, that I do not intend to confine myself to this particular method, but I claim as my invention the application of the law or principle of centrifugal force to the particular or specific purpose above set forth; that is, to flyers used in machinery or apparatus for preparing, slubbing, and roving cotton and other fibrous materials, for the purpose of producing a hard and evenly-compressed bobbin." Under 5 & 6 Will. 4, c. 83, A. entered a disclaimer, reciting that he had been advised that the claim of his invention contained in the specification might be construed in such a manner as to be more extensive than he intended, and declaring that he, for this reason, did thereby disclaim all application of the law or principle of centrifugal force, "except only the application of centrifugal force by means of a weight acting upon a presser, so as to cause it to press against a bobbin, as described in the specification." B. used a similar machine, in which the centrifugal force operated in a lower plane. An action was brought for infringement of the patent, when it was held that the disclaimer was valid under the 5 & 6 Will. 4, c. 83, and that the original

specification and disclaimer being taken together, A. had duly specified his invention, and that the patent was therefore valid. The Court, however, granted a rule for a new trial, on the ground that there was no evidence to go to the jury of an infringement. On appeal, the decision was affirmed. *Seed* v. *Higgins*, *Higgins* v. *Seed*, 8 H. L. Ca. 550; 30 L. J., Q. B., 314; 6 Jur., N. S., 1264.

1. The plain language of the operative part of a disclaimer is not to be controlled or modified by any introductory sentences with which the patentee may think fit to preface such disclaimer. *Cannington* v. *Nuttall*, 40 L. J., Ch., 739; 5 L. R., H. L., 205.

2. When a disclaimer had been filed without the consent of the patentee:—Held, that the Master of the Rolls had jurisdiction without bill filed to order it to be taken off the file. *Re Berdan's patent*, 20 L. R., Eq., 346; 44 L. J., Ch., 544; 23 W. R. 823.

3. A patentee having altered his specification by disclaimer, lodged a complaint against certain manufacturers for breach of an interdict granted anterior to the disclaimer:—Held, that the patentee ought to have instituted a new action; and that, although the instrument of the manufacturers was intended to execute the same work, it was no infringement; although it was cognate, it had not the characteristic feature of the patentee's invention. *Dudgeon* v. *Thompson*, 3 L. R., App. Cas. (Sc.), 34.

The invention as it stood before the disclaimer may have been new, useful, and legal, but it might not have been so under the altered specification. After the disclaimer the question of enforcing the old interdict could not be entertained. *Ib.*

Costs.] 4. On application to the law officer of the Crown under 5 & 6 Will. 4, c. 83, s. 1, for leave to enter a disclaimer of any part of the title or specification of a patent, against which a caveat has been entered, the law officer has no jurisdiction to order the applicant to pay costs. *Kynoch* v. *National Arms Co.*, 26 W. R. 22; 37 L. T., N. S., 31.

5. A bill was filed to restrain the infringement of a patent. The plaintiff, by leave of the Court, brought an action, and failed on the ground of part of the apparatus not being new. The plaintiff then filed a disclaimer of that part. In this state of things the cause came on for hearing, and Wood, V.-C., suggested that, to save the expenses of a new suit, the plaintiff should pay the defendant's costs of suit up to that time, and be allowed to amend the bill, instead of having it dismissed with costs, with liberty to file a new bill; and an order to the above effect was made without the Vice-Chancellor's attention being called to an enactment prohibiting the reading of a disclaimer in any suit pending when it was filed. The costs were paid and the bill amended. The defendant, by answer to the amended bill, insisted on this statutory objection, which the Vice-Chancellor, on a motion for an injunction being made, held fatal to the suit:—Held, that the plaintiff was entitled, on motion, to have his bill dismissed without costs, and without prejudice to a new bill, as he had been misled by the act of the Court. *Lister* v. *Leather*, 1 De G. & J. 361; 3 Jur., N. S., 433.

IX. COPYRIGHT IN.

6. There is no copyright in specification of patents. *Wyatt* v. *Barnard*, 3 Ves. & B. 77.

III. Extension.

I. *Grounds, Terms, and Conditions*, 5552.
II. *Effect of*, 5555.
III. *Grant of, to Assignee of Patent*, 5555.
IV. *Grant of, to Foreign Inventor* (15 & 16 Vict., c. 83, s. 25), 5556.
V. *Account of Profits*, 5558.
VI. *Opposition to*, 5559.

I. GROUNDS, TERMS, AND CONDITIONS.

7. The extension of a patent was opposed by the apprentices of the patentee, who alleged that they should not be able to get employment. It appearing, however, that they had been so instructed as to be able to get employment in another branch of the trade, no condition was imposed on the patentee on that account. *Re Baxter's patent*, 13 Jur. 593.

8. Principles upon which the Judicial Committee of the Privy Council acts in applications for the prolongation of the term of letters patent. *Re Pinkus' patent*, 12 Jur. 233.

The non-reduction of the patent into practical public utility is the strongest evidence against merit and utility. *Ib.*

Semble, the Court may infer want of remuneration to the patentee, from the circumstance that there must have been some expense. *Ib.*

9. The 5 & 6 Will. 4, c. 83, does not authorise the Judicial Committee of the Privy Council to impose terms as conditions on which patents are to be renewed. The authority of the Committee is limited to reporting on matters as between the public and the party applying. *Ledsam* v. *Russell*, 1 H. L. Ca. 687.

There is nothing in the statute to fetter the discretion of the Crown in the renewal, except the length of time for which that renewal is to be granted, and which must not exceed seven years. *Ib.*

An application for a renewal is "prosecuted with effect," within the terms of the statute, if the party applying obtains the report of the Judicial Committee of the Privy Council before the expiration of the original patent. *Ib.*

The Crown is not restricted as to the time within which it may not act upon such report, and renewed letters patent are not void because they are dated after the expiration of the original letters patent. *Ib.*

If the Judicial Committee should impose a condition on a party applying for the renewal of a patent, such party need not, in an action for the infringement of the patent, aver that such condition was complied with before the patent was renewed. *Ib.*

10. Where, upon an application for the extension of the term of letters patent, it appears clearly that the patent is invalid, the Judicial Committee will not grant an extension, and

thereby drive the opposing parties to their *scire facias*; but, if the validity of the patent be only doubtful, and the utility and want of profit be proved, the Court will extend the term of the letters patent. *Re Woodcroft's patent*, 10 Jur. 363.

1. Term extended upon *primâ facie* evidence of no profit, coupled with evidence of utility. *Re Lowe's patent*, 10 Jur. 363.

2. A patent article was unprofitable for ten years after the date of the patent, in consequence of a defect which was not cured until then. Extension of the term refused. *Re Bell's patent*, 10 Jur. 363.

3. Upon an application for a prolongation of a patent, the invalidity of the patent for want of novelty is not a proper ground of objection; inasmuch as the prolonged patent does not stand on firmer ground than the original patent, and is granted subject to all objections which could be made to the original patent. *Re Galloway's patent*, 7 Jur. 453.

In a case where the evidence tended to show that the patent article, in the exact form described in the drawings attached to the specification, was not, at the time of the application for a prolongation, practically useful; but where it was clearly proved that the same combination of parts or mechanical method for which alone the patent was taken out, with certain alterations and improvements in matters not included as parts of the invention, was of great practical utility, the committee granted a prolongation, although there was no patent for the alterations and improvements, which were therefore open to the public, and yet could not be used without infringing the prolonged patent. *Ib.*

4. Extension of the term of letters patent refused, although the profits derived from the patent article were less than the expenditure incurred upon the patent, the utility of the invention being small. The fact of an invention, when known, not getting into general use, is a presumption against its utility. *Re Sinister's patent*, 4 Moo. P. C. 164; 7 Jur. 451.

5. Extension of patent granted pending a suit respecting its validity. *Re Kay's patent*, 3 Moo. P. C. 24.

6. Term of letters patent for improvement in manufacturing gas tubes extended by the Judicial Committee, under the 5 & 6 Will. 4, c. 83, for six years, on the ground of the great merit and utility of the invention, and the inadequate remuneration in consequence of litigation necessary for the protection of the patent right. *Re Russell's patent*, 2 Moo. P. C. 496.

Where the inventor, a mechanic, had assigned his interest to the patentee, his master, the Judicial Committee, under the circumstances, made it a condition of their recommendation to the Crown to prolong the term of the patent, that the assignee of the patent should secure the inventor an annuity during the period of the extension. *Ib.*

7. In cases for the extension of the term of letters patent, the Attorney-General represents the Government and the public generally. An application by the Lords of the Admiralty to enter a caveat, and be heard against a petition for an extension, such caveat not having been filed within the time required by the rules of the Privy Council Office, refused, as the Attorney-General was present to watch the interests of the Government. Extension of letters patent granted for five years, the invention being of great merit and public utility; but the patentees and his grantees had received no remuneration, in consequence of the originality of the patent being disputed at law. In granting such prolongation the Judicial Committee imposed a condition, that the Commissioners for executing the office of High Admiral should have the right of manufacturing such invention for the service of Her Majesty, without any licence from the patentee. *Re Pettit Smith's patent*, 7 Moo. P. C. 133.

8. A patentee entered into an agreement with certain parties to work the patent, but owing to disputes between them, the invention was not prosecuted until a short time before the expiration of the term of the letters patent; in such circumstances an extension was refused. *Re Patterson's patent*, 6 Moo. P. C. 469; 13 Jur. 593.

9. The circumstance of there being a *lis pendens* respecting the validity of the letters patent is no objection to the grant of an extension of the original letters patent. *Re Heath's patent*, 8 Moo. P. C. 217.

Term of letters patent extended for seven years, on the ground of the meritorious nature of the invention and the extensive litigation the patentee had been put to in protecting his patent rights, which had prevented any remuneration. *Ib.*

Form of order in council, pursuant to the stat. 15 & 16 Vict., c. 83, s. 40, directing the Lord Chancellor to make and seal new letters patent upon the report of the Judicial Committee recommending an extension of the term under the provisions of the statutes 5 & 6 Vict., c. 83, and 7 & 8 Vict., c. 69. *Ib.*

No accounts were kept by the deceased patentee of the expenditure or receipts on account of his patent. Upon its appearing that his estate was of little value (his effects being sworn for administration under 100*l.*), the petitioner, the administratrix of the patentee, on the allegation that there had been no profits, but considerable loss to such estate, was examined to prove that fact. *Ib.*

10. By the 5 & 6 Will. 4, c. 83, s. 4, it is provided, "that no extension shall be granted if the application shall not be made and prosecuted with effect before the expiration of the term originally granted in such letters patent": —Held, by the Judicial Committee, that the petition for such prolongation must be brought to a hearing before the expiration of the letters patent, and that the pendency thereof is not sufficient to bring it within the proviso. *Re Bodmer's patent*, 2 Moo. P. C. 471.

This rule was acted on where the petitioner had been prevented prosecuting his petition before the expiration of the letters patent by the conduct of parties objecting, and from the circumstance of the Judicial Committee not being sitting, but the 5 & 6 Will. 4, c. 83, s. 4 having been repealed by the 2 & 3 Vict., c. 67, their lordships, upon a fresh petition, granted an extension of the letters patent for seven years under that Act, on the ground that the invention was an ingenious one, and that it did not appear that the patentee had received any remuneration until within the

three years previous to the expiration of the patent. *Ib.*

The rules enacted for practice in patent cases under the 5 & 6 Will. 4, c. 83, must be observed in an application for a prolongation, under the 2 & 3 Vict., c. 67. *Ib.*

1. Where letters patent for improvements in machinery, tools, or apparatus for cutting, planing, turning, drilling, and rolling metals, embraced several subjects, one only of which, namely, the rolling of metals, had been worked out, and that part of the patent was affected by subsequent patented improvements by the same patentee, and could not be effectually used without such subsequent improvements, the Judicial Committee, before recommending an extension of the term of the first patent, put the petitioner upon terms of disclaiming all the parts of the original patent not worked out, and restricted the prolongation to the unexpired term of the subsequent patents. *Re Bodmer's patent*, 8 Moo. P. C. 282.

2. A prolongation of the term of letters patent for seven years was granted, the invention being a meritorious one, and of great value as a raw material for the manufacture of paper; no profit having been made either by the inventor or his assignees. *Re Houghton's patent*, 3 L. R., P. C., 461; 7 Moo. P. C., N. S., 309.

3. Circumstances showing a want of adequate remuneration, an extension of the term of letters patent granted for six years. *Re Carr's patent*, 4 L. R., P. C., 539; 9 Moo. P. C., N. S., 379.

4. The Judicial Committee has, under the 4th section of the 3 & 4 Will. 4, c. 41, jurisdiction to entertain a petition, referred to them by the Crown, seeking to revoke an order in council, made upon their recommendation, upon an application by patentees for a prolongation of letters patent under the 5 & 6 Will. 4, c. 83, and to recall the warrant for sealing such letters patent. *Re Schlumberger*, 9 Moo. P. C. 1. S. C. *nom. Re Shlumberger*, 2 Eq. Rep. 36.

Patentees applied under the 5 & 6 Will. 4, c. 83, for an extension of the term, and the Judicial Committee recommended a prolongation for six years, which recommendation was confirmed by the Crown by an order in council, and a warrant issued for sealing the letters patent. No step was taken by the patentees to procure the sealing of the new letters, and after a delay of nearly three years, a party interested in opposing the renewal petitioned the Crown to revoke the order in council and the warrant to seal. It did not appear that the petitioner, or the public, had suffered any loss by the laches of the patentees. The Judicial Committee, to whom the petition was referred, considered the laches not of sufficient magnitude to deprive the patentees of all benefit of the renewed patent; but made it a condition, before dismissing the petition, that the patentees should pay the petitioner a gross sum for costs, and give an undertaking not to prosecute for any infringement which might have occurred from the date of the order in council to the date of dismissal of the petition. *Ib.*

5. A patentee, formerly in partnership with J. & W., by a deed of dissolution stipulated that they should have the exclusive right of granting, in certain cases, licences for manufacturing the patent article. In recommending an extension of the term of the letters patent, the Judicial Committee imposed a condition upon the patentee to secure to J., in whom the interest under the deed of dissolution then vested, the same interest in the new letters patent as related to the granting of licences as was provided by the deed of dissolution, but refused to allow J. to substitute new licences for those granted under the original letters patent, in the event of the original licencees declining to renew their licences from him under the new grant. *Re Normandy's patent*, 9 Moo. P. C. 452.

6. Opposition to an application for extension or confirmation of letters patent is rather encouraged than otherwise, and upon a successful opposition, the opposer's costs will, in general, be allowed. *Re Honiball's patent*, 9 Moo. P. C. 378; 3 Eq. Rep. 225.

7. To entitle a patentee, or his assignee, to an extension of the term of letters patent, he must establish three things: first, the merit of the invention; secondly, that the parties interested had done all in their power to bring the invention into public use and to turn it to advantage; and, thirdly, that from circumstances beyond their control they had been unable to obtain adequate remuneration. *Re Markwick's patent*, 13 Moo. P. C. 310; 8 W. R. 333.

The accounts produced at the hearing were unsatisfactory, owing to the non-production of the books. The committee recommending a prolongation of the term of the letters patent, directed a proper account of the profits and losses of the patent to be verified by affidavit, with an explanation accounting for the non-production of the books, to be laid before the Attorney-General, subject to which they extended the term. *Ib.*

8. The patentee of a patent had received large sums of money from Government for the expenses of experiments, and by way of bounty and reward, but from the nature of the patent had not, in the opinion of the Judicial Committee, received sufficient remuneration for his invention. In granting an extension, the Committee refused to impose a condition in the new grant, that the Crown should be at liberty to use the invention for the public service without license from the patentee. *Re Lancaster's patent*, 2 Moo. P. C., N. S., 189.

9. A patentee, who was not a manufacturer, granted a licence to a manufacturing firm to manufacture the patented article, which, by agreement between them, was of an almost exclusive character. In granting a prolongation, the new letters patent were directed to be made upon condition that licences should be granted by the patentee to the public upon terms similar to the one already granted. *Re Mallet's patent*, 1 L. R., P. C., 308.

10. The power given by 7 & 8 Vict., c. 69, s. 2, to recommend an extension of the term of letters patent for an invention, is exhausted when an extension has been once recommended, and new letters patent granted; and the Judicial Committee has no jurisdiction to entertain a petition for a further prolongation of the new letters patent. *Re Goucher's patent*, 2 Moo. P. C., N. S., 532.

In the objections filed by the objectors, this point was not taken:—Held, that the objection

could be raised on the application to fix a day for hearing of the petition. *Ib.*

1. It is essential, in order to obtain an extension of the term of letters patent, for the petitioner to establish that the invention is of considerable merit, of public utility, and of inadequate remuneration. *Re McDougal's patent*, 2 L. R., P. C., 1; 37 L. J., P. C., 17; 5 Moo. P. C., N. S., 1.

Although the Judicial Committee will not adjudicate upon the validity of letters patent, the term of which is sought to be prolonged, yet where it appears from the specification that the subject matter is not sufficient to sustain such patent, they will not, in the exercise of their discretion, recommend the Crown to extend the term. *Ib.*

Where, therefore, the specification of a patent described it as improvements in treating, deodorising and disinfecting, sewage and other offensive matter, and also for deodorising and disinfecting in general, and as being composed of two ordinary well-known chemical acids in combination, such acids being in common use for disinfecting purposes by the public before and after the letters patent:—Held, not to be an invention of such merit and utility as to justify an extension, to the detriment of the public in the use of known sanitary agents. *Ib.*

2. The subject matter of an invention was the employment of a metallic soap, composed of well-known chemical substances in common use, which the specification described as applicable for coating of iron and wood to prevent the fouling of ships' bottoms, and for other useful purposes. A prolongation of the term of such letters patent refused on the ground, first, that the recommendation of an extension being discretionary, it would be detrimental to the public interest to grant the exclusive benefit of a metallic soap made from substances in common use; and, secondly, that the patentee had, as it appeared from the accounts, been adequately remunerated for his invention. *Re McInnes's patent*, 2 L. R., P. C., 54; 37 L. J., P. C., 23; 5 Moo., P. C., N. S., 72.

3. If an invention has not been brought into practical use during the term of the letters patent, it raises a strong, though not conclusive, presumption against its utility; and unless there are circumstances to rebut such presumption, an extension will not be granted. *Re Herbert's patent*, 1 L. R., P. C., 399.

The fact of a patent of a valuable nature, but having a limited market, not having been so generally used as to remunerate the inventor, is sufficient to remove the presumption against the utility of the invention. *Ib.*

4. In all cases where the utility of a patent has not been tested by actual employment the question to be considered is, whether the evidence is sufficient to rebut the presumption arising from its non-use that the invention is one of no practical utility. Application for a prolongation of the term granted after strong and unanswered evidence of utility, though the patent had not been used in England during the whole of the term. On grounds of public policy the condition was annexed that the Government and all contractors employed by the Government should be at liberty to use the invention. *Re Hughes' patent*, 4 L. R., App. Cas., 174; 48 L. J., P. C., 20; 27 W. R. 493.

5. Where the utility of a patent has not been tested by actual employment, for a period of fourteen years, although efforts have been made by the patentee to bring it into use, it raises a very strong presumption against its practical utility, which presumption can only be rebutted by the strongest evidence. *Re Allan's patent*, 1 L. R., P. C. C., 507; 36 L. J., P. C., 76.

6. Two cognate patents, having different terms to run, extended so that both should expire on the same day. *Re Johnson's and Atkinson's patents*, 5 L. R., P. C., 87.

II. EFFECT OF.

7. The prolongation of a patent is, by 5 & 6 Will. 4, c. 83, and 16 & 17 Vict., c. 115, the same as a new grant. *Re Betts' patent*, 1 Moo. P. C. C., N. S., 49; 9 Jur., N. S., 137; 11 W. R. 221; 7 L. T., N. S., 577.

III. GRANT OF, TO ASSIGNEE OF PATENT.

8. The assignees of letters patent may, under the first and fourth sections of the 5 & 6 Will. 4, c. 83, lawfully obtain a renewal of such patents. *Ledsam* v. *Russell*, 1 H. L. Ca. 687. And see S. C. 14 M. & W. 574; 16 *id.* 633.

9. Upon an application by an assignee of a patent for a prolongation of it, the committee, for the protection of the public, will require proof of the petitioner's title, even though the opposing counsel are willing and offer to admit such title. *Re Galloway's patent*, 7 Jur. 453.

10. Where the executor of the surviving assignee of a patentee petitioned for an extension of the term of the letters patent, and it was established that a valuable consideration had been given for the assignment, and that the assignee had sustained considerable loss, the Judicial Committee, in granting an extension of the term, refused to impose terms upon the petitioners, in favour of the patentee. *Re Bodmer's patent*, 6 Moo. P. C. 468.

11. Extension of term of letters patent granted to assignees of patentee. *Re Hardy's patent*, 6 Moo. P. C. 441; 13 Jur. 177.

The inventor and patentee had lost largely by the patent, but his assignees had lately made very considerable profits, and from their position in the trade were likely to command a very large sale of the patent article. The patent was of high merit, and of great service to the public safety. In such circumstances, a prolongation of the term was granted to the assignees for four years, upon conditions, first, that the assignees secured to the patentee half the profits derived from the sale; and, secondly, that the patented article should be sold by the assignees to the public at a certain fixed price. *Ib.*

In estimating the profits made under a patent, the profits arising from the sale of the patented article for exportation must be included. *Ib.*

12. To obtain the extension of a patent, the applicant must show its merits, the endeavours of the parties interested to bring it out, and their failure to obtain an adequate remunera-

tion. *Re Markwick*, 8 W. R. 333; 13 Moo. P. C. 310.

For this purpose satisfactory accounts must be produced and verified. *Ib.*

An extension will be granted to the assignee of a patent on an adequate remuneration (an annuity) being secured to the patentee. *Ib.*

1. The Committee has power, under 7 & 8 Vict., c. 69, s. 4, to grant an extension of the term of letters patent to the assignee of the patentee. *Re Napier's patent*, 13 Moo., P. C., 543; 9 W. R. 390.

Prolongation of the term of letters patent granted to a public company who were the assignees of a patentee. The patentee had ceased to have any connection with the working of the patent, and the assignees were prevented from working it at a profit by reason of the discovery of the gold fields in southern Australia, which caused a derangement and scarcity in the labour market. *Ib.*

2. Although by 7 & 8 Vict., c. 69, s. 4, the assignee of a patentee is entitled to apply for an extension, yet he does not, unless under peculiar circumstances, stand on the same favourable footing as the original inventor, as the ground that the merits of the inventor ought to be properly rewarded, in dealing with an invention which has proved useful and beneficial to the public, does not exist in the case of an assignee, unless such assignee is a person who has assisted the patentee with funds to enable him to perfect and bring out his invention, and thus to bring it into use. *Re Norton's patent*, 1 Moo. P. C., N. S., 339.

A petition by the assignee of a patent, which he had purchased from the inventor in 1853, and which he had not employed in any way since that time, although actively engaged in the particular manufacture:—Held, that the non-user during ten years constitutes a sufficient objection to the grant of prolongation. S. C. *Exp. nom. Salt*, 1 N. R. 557.

3. An extension was recommended in favour of an assignee, on his securing an annuity to the inventor during the subsistence of the new letters patent. *Re Whitehouse's patent*, 2 Moo. P. C. 496.

4. Where the inventor, a mechanic, had assigned his interest to the patentee, his master, the Judicial Committee, under the circumstances, made it a condition of their recommendation to the Crown to prolong the term of the patent, that the assignee of the patent should secure the inventor an annuity during the period of the extension. *Re Russell's patent*, 2 Moo. P. C. 496.

5. To entitle an equitable assignee to appear with the legal assignees of a patent, on a petition for a prolongation of the letters patent, the name of such equitable assignee must appear with the other petitioners in the advertisements required by 5 & 6 Will. 4, c. 83, s. 4, and rule 2, made in pursuance thereof. *Re Noble's patent*, 7 Moo. P. C. 191.

6. An assignee of the patentee who had taken an assignment of four-fifths of the patent within a few months of the expiration of a patent, which had only just been brought into use, for a small consideration, is not entitled to any extension. *Re Normand's patent*, 3 L. R., P. C., 193; 6 Moo. P. C., N. S., 477.

7. When a patentee entered into an agreement with parties to work the patent, but owing to disputes between them the invention was not prosecuted until a short time before the expiration of the letters patent, an extension was refused. *Re Patterson's patent*, 6 Moo. P. C. 469; 13 Jur. 593.

8. After an assignee of a patentee had incurred considerable loss in carrying out a patent for a smoke prevention apparatus, a statute passed to compel the owners of furnaces in the metropolis to construct them so as to consume their own smoke:—Held, on an application for a prolongation of the letters patent, that though the Act might, in effect, compel the use of the petitioner's patent, yet that such circumstance formed no objection to a renewal of the term of the letters patent, the merits of the invention and loss incurred in carrying it out being established. *Re Foarde's patent*, 9 Moo. P. C. 376.

9. Petition for prolongation by a patentee, together with the assignees of a moiety of the patent. After the presentation of the petition, and before the hearing, the patentee died, having by his will appointed his widow executrix and residuary legatee. Extension granted to the assignees on condition that they held the moiety of the patent in trust for the widow of the patentee. *Re Herbert's patent*, 1 L. R., P. C., 399.

IV. GRANT OF, TO FOREIGN INVENTOR (15 & 16 Vict., c. 83, s. 25).

10. The Judicial Committee holding that a foreigner granting licences for his patent to parties in this country who inserted the advertisement required by the 5 & 6 Will. 4, c. 83, s. 4 was a sufficient compliance therewith, the public advantage having been considerable, and the advantage which had yet accrued to the inventor small, granted an extension for six years. *Re De Rosne's patent*, 4 Moo. P. C. 416.

11. An importer of a foreign invention by which the public is benefited is entitled to be put upon the same footing as an original inventor when applying for a prolongation of such foreign importation. *Re Berry's patent*, 7 Moo. P. C. 187.

In a case, therefore, where the invention was of considerable commercial value, and the importers had embarked a large capital upon machinery in trying to introduce it to general use, and incurred considerable loss in so doing, the Judicial Committee recommended an extension of the letters patent for six years. *Ib.*

12. The importer of an invention from abroad is an inventor within the meaning of the stat. 5 & 6 Will. 4, c 83, and entitled to apply for an extension of the term; but the Judicial Committee will look with jealousy into the merits of the invention imported. *Re Claridge's patent*, 7 Moo. P. C. 394.

Application for an extension by the trustees of a joint stock company (the assignees of the patentee) refused, the invention imported having been in common use in France, and no great risk or expenditure incurred by the patentee or his assignees in introducing it to the public. *Ib.*

13. An alien resident abroad, who was interested in an English patent by a foreign

inventor, and who had also considerable dealings in this country in respect of sales of the patented machine and in granting licences for the use of such patent, held, in the circumstances, to have such a *locus standi* as to entitle him to petition the Crown to revoke an order in council for granting an extended term of an English patent, and to recall the warrant for sealing such patent. *Re Schlumberger*, 9 Moo. P. C. 1. S. C. *nom. Re Schlumberger, Exp. Gibson*, 2 Eq. Rep. 1.

Quære, whether an alien living abroad, without such interest, could inform the Crown by petition, as to any matters touching letters patent. *Ib.*

1. Letters patent for an invention communicated by a foreigner resident abroad, extended for five years. The invention (machinery for letter-press printing) was of a meritorious and useful character, but of an expensive nature, and only at the latter end of the term of the letters patent brought into public use; and although the patent had been worked at a profit, it was not, in the opinion of the Judicial Committee, sufficiently remunerative, considering the value of the invention. *Re Newton's patent*, 14 Moo. P. C. 156; 10 W. R. 731.

2. A patent (a communication from a foreigner abroad) was taken out in England, and the inventor a few weeks afterwards obtained letters patent for the invention in America. An application was made for a prolongation of the English patent before the American patent had expired:—Held, that the case fell within the spirit of the provisions of 15 & 16 Vict., c. 83, s. 25, and the application was refused. *Re Newton's patent*, 15 Moo. P. C. 176; 9 Jur., N. S., 109.

3. The 15 & 16 Vict., c. 83, s. 25, does not deprive the Judicial Committee of the power to entertain an application for an extension of the term of letters patent taken out first in England though a patent has been obtained for the same invention in a foreign state; and the foreign patent would expire before the expiration of the prolonged term. *Re Poole's patent*, 1 L. R., P. C., 514.

Secus, if the patent was first obtained abroad by a foreign subject, and afterwards taken out in England. *Ib.*

4. Exposition of the principles which regulate the Judicial Committee in recommending the Crown to extend the term of letters patent of an invention, consisting of a communication from a foreigner residing abroad, who had previously to the English patent taken out a patent for the same invention in a foreign state. *Re Johnson's patent*, 4 L. R., P. C., 75; 8 Moo. P. C., N. S., 282.

Where Foreign Patent expired.] 5. The provisions of s. 25 of the stat. 15 & 16 Vict., c. 83, enacting that letters patent obtained in the United Kingdom for patented foreign inventions are not to continue in force after the expiration of the foreign patent, apply only to patents granted in the United Kingdom, subsequent to the passing of that statute. *Re Bodmer's patent*, 8 Moo. P. C. 282.

6. Section 25 of the 15 & 16 Vict., c. 83, enacts, "That no letters patent for or in respect of an invention for which any such patent of like privileges shall have been obtained in any foreign country, and which shall be granted in the United Kingdom, from the expiration of the term for which such letters patent or privilege was granted or was in force, shall be of any validity." The 16 & 17 Vict., c. 115, s. 7 enacts, that new letters patent granted by way of prolongation, should be granted according to the provision of the 15 & 16 Vict., c. 83. Application was made under the 5 & 6 Will. 4, c. 83, and 2 & 3 Vict., c. 69, by assignees of a patentee, for extension of an English patent for a foreign importation, patented in France. At the date of the application the French patent had expired:—Held, dismissing the petition, that as the foreign patent had expired, no renewed grant would be valid by s. 25 of the 15 & 16 Vict., c. 83, as s. 7 of the 16 & 17 Vict., c. 113, made an extended patent a new patent, within the provisions of s. 25 of the 15 & 16 Vict., c. 83. *Re Aube's patent*, 9 Moo. P. C. 43.

7. On an application for the prolongation of a patent granted in the United Kingdom in January 1849, it was proved that the applicant obtained letters patent in France in respect of the invention in January 1850, and letters patent in Belgium in respect of the invention in January 1852, which last letters patent had expired at the time of the application:—Held, that the earlier part of s. 25 of the 15 & 16 Vict., c. 83 applies only to cases where patents have been granted in foreign countries before the grant of the patent in the United Kingdom, and that the words in the proviso, "any such patent or like privilege," must be taken to refer to the entire description of the patents mentioned in the foregoing part of the section, and to no others. *Re Betts' patent*, 1 Moo. P. C., N. S., 49; 9 Jur., N. S., 137; 11 W. R. 221; 7 L. T., N. S., 577.

When a patent is taken out in a foreign country before a patent for the invention in the United Kingdom, the latter patent is to terminate at the same time as the foreign patent. *Ib.*

Where the term in a foreign patent has expired, a grant of letters patent in the United Kingdom made after that period is of no validity. *Ib.*

A patent was granted in England for fourteen years to an English subject, who subsequently obtained French and Belgian patents for different terms. On petition a prolongation was granted, notwithstanding the expiration of the Belgian patent. S. C. 1 N. R. 137.

8. When a foreigner patented his invention first in England and afterwards in France, which latter patent, at the date of the application for a prolongation of the English patent, had a year to run, the Privy Council will not recommend the Crown to extend the term upon the chance of the French patent being extended. *Re Normand's patent*, 3 L. R., P. C., 193; 6 Moo. P. C., N. S., 477.

Held, also, that if the French patent had expired there was no power to recommend an extension of the English patent. *Ib.*

9. The 15 & 16 Vict., c. 83, s. 25 does not apply where an English patent is taken out in this country, before a patent for the same invention is obtained in a foreign country. *Re Winan's patent*, 4 L. R., P. C., 93; 8 Moo. P. C., N. S., 306.

A patent by American subjects was taken out in this country, and shortly afterwards in

America and France for the same invention. After the expiration of the French patent, and within a few months of the expiration of the American patent, an application was made for a prolongation of the English patent. Such application was refused, as the Judicial Committee would not, on the ground of general policy, recommend a renewal of the English patent after the French patent had been allowed to expire. *Ib.*

1. A patent was first taken out in America, afterwards in England, and two days after the date of the English patent the invention was patented in France. The French patent was allowed to drop. On an application for a prolongation of the English patent:—Held, that although the Judicial Committee might have jurisdiction under 15 & 16 Vict., c. 83, s. 25, to entertain the application, yet on the ground of public policy, as the French patent had been allowed to expire, they would not, in the exercise of the discretion vested in them, recommend the extension of the term of the English patent. *Re Blake's patent*, 4 L. R., P. C., 535; 9 Moo. P. C., N. S., 373.

2. An English patent may be renewed though a foreign one has been taken out and allowed to expire. *Re Adair's patent*, 6 L. R., App. Cas., 176; 29 W. R. 746.

V. ACCOUNT OF PROFITS.

3. In taking an account of the profits and loss of the working of a patent, the patentee is entitled to charge, as part of his expenses, for loss of time in endeavouring to bring the invention into general use. *Re Newton's patent*, 14 Moo. P. C. 156; 10 W. R. 731.

4. The accounts produced at the hearing of an application for extension of a patent were unsatisfactory, owing to the non-production of the books. The committee recommending a prolongation of the term of the letters patent, directed a proper account of the profits and losses of the patent to be verified by affidavit, with an explanation accounting for the non-production of the books, to be laid before the Attorney-General, subject to which they extended the term. *Re Markwick's patent*, 13 Moo. P. C. 310; 8 W. R. 333.

5. In calculating whether any profit has been obtained through or by means of a patent, it is correct to deduct, in the first place, beyond the cost price, a fair manufacturer's profit on the articles sold; and the mere preference of the market obtained by the manufacturer is not to be deemed a profit derived from the patent. *Re Galloway's patent*, 7 Jur. 453.

6. The account of profit and loss of the patentee in working a patent ought to be clear and precise; and it is the duty of a patentee, if engaged in any other business, or as a manufacturer of his own invention, to keep the accounts of the patent and the manufacture separately. *Re Betts' patent*, 1 Moo. P. C., N. S., 49; 9 Jur., N. S., 137; 11 W. R. 221; 7 L. T., N. S., 577.

If a patentee is also manufacturer of his patent article, in taking account of the profits of the patent he is entitled to deduct his profits as a manufacturer. *Ib.*

7. The most unreserved and clear statement of the patentee's remuneration is an indispensable condition for extension. *Re Hill's patent*, 1 Moo. P. C., N. S., 258; 9 Jur., N. S., 1209; 12 W. R. 25; 9 L. T., N. S., 101.

The patentee was also manufacturer and sold the patented articles. In his accounts he deducted two-thirds as profits from the manufacture and sale, and only credited the patent with one-third:—Held, to be an unreasonable deduction. *Ib.*

Although law expenses by the patentee in maintaining his patent rights are allowed in deduction of his profits, yet where the patentee compromised suits and gave up costs to which he had an apparent title, a deduction on that head will not be allowed. *Ib.*

8. The books of a petitioner in respect to the profits having been lost during his bankruptcy, the account of profit and of loss was taken upon his own evidence. *Re Hutchinson's patent*, 14 Moo. P. C. 364.

9. To entitle a patentee to a prolongation of the term of letters patent, he must satisfactorily establish the amount of his profits. *Re Trotman's patent*, 1 L. R., P. C., 118.

A patentee did not manufacture or sell the patented article (ship anchors), but granted licences to ironsmiths to manufacture, from whom he received royalties. On an application by him for an extension of the term of the letters patent on the ground of inadequate remuneration, the accounts produced of his own expenditure in carrying on the patent being unsatisfactory, and no accounts given of the profits derived by the licences, a prolongation of the letters patent was refused, first, as the patentee's accounts were unsatisfactory, and, secondly, from the patentee having so dealt with his patent rights as to deprive him of the power of showing the amount of profit derived from the working of the patent. *Ib.*

Licences stand, with respect to the profits, in the same position as assignees of the patent. *Ib.*

10. A patentee, residing in America, for the purpose of getting the patented article into general use in England, arranged with an agent in England, and in consideration gave him a moiety of the royalties:—Held, that in estimating the profits of the patentee derived from the patent, such moiety was to be deducted. *Re Poole's patent*, 1 L. R., P. C., 514.

11. The Judicial Committee will refuse to enter upon accounts in a patent case if they have not been filed as required by the 9th rule. *Re Johnson's and Atkinson's patents*, 5 L. R., P. C., 87.

12. A patentee, in order to obtain a prolongation of the term of a patent, must satisfy the Judicial Committee by his accounts, in a manner which admits of no controversy, what has been the amount of remuneration which, in every point of view, the invention has brought him, and it it his duty to frame the accounts in such a shape as to leave no doubt as to what the remuneration has been that he has received. *Re Sawby's patent*, 19 W. R. 513; 7 Moo. P. C., N. S., 182.

When the patentee is also the manufacturer, the profits which he makes as a manufacturer, although not strictly profits of the patent, must

yet be taken into consideration in estimating the amount of his remuneration. *Ib.*

Therefore, when a patentee was also the manufacturer of the patented article, and was himself necessarily engaged in fixing and putting up the patented apparatus, and the accounts for such services were so intermixed as to render it impracticable on their face to separate the items of profit received from the patent, and the receipts were large, and even on the balance alleged a considerable gain to the patentee, the Judicial Committee held that such accounts were unsatisfactory, and refused an application for a prolongation of the patent, but without costs. *Ib.*

1. A prolongation of the term of letters patent for seven years was granted, the invention being a meritorious one, and of great value as a raw material for the manufacture of paper; no profit having been made either by the inventor or his assignees. The statement of accounts furnished being *primâ facie* satisfactory, the petitioners were allowed to prove the merits of the invention before going into the accounts. *Re Houghton's patent*, 3 L. R., P. C., 461; 7 Moo. P. C., N. S., 309.

2. A patentee, seeking the grace and favour of the Crown, in applying for an extension of the term of letters patent, is bound to bring his accounts before the committee in such a shape as to leave no doubt what the remuneration has been that he has received from the patent. *Re Clarke's patent*, 3 L. R., P. C., 421; 7 Moo. P. C., N. S., 255.

A petition for extension, and the accounts furnished by the patentee not containing sufficiently full and accurate information in respect to the patent, or the remuneration received by him, the Judicial Committee declined to recommend a prolongation of the term. *Ib.*

3. An account of profits and loss filed by a patentee on his application for a prolongation of the term of letters patent, being *primâ facie* unsatisfactory, the Judicial Committee directed the question of accounts to be taken before considering the merits of the invention. *Re Wield's patent*, 4 L. R., P. C., 89; 8 Moo. P. C., N. S., 300.

The accounts of the patent not being satisfactorily explained, the application for extension of the term of the patent was refused. *Ib.*

4. Where a patentee, whether English or foreign, has obtained foreign patents, they should be stated to the Privy Council, and the fullest information afforded as to the profits thereof. *Re Adair's patent*, 6 L. R., App. Cas., 176; 29 W. R. 746.

A patentee should preserve the clearest evidence of everything which has been paid and received on account of the patent. Whether or not his remuneration has been adequate, his furnishing a satisfactory account is a condition precedent to his obtaining an extension of his term. *Ib.*

5. Circumstances showing a want of adequate remuneration, an extension of the term of letters patent granted for six years. *Re Carr's patent*, 4 L. R., P. C., 539; 9 Moo. P. C., N. S., 379.

In estimating the profits derived from the patent, the Judicial Committee will take into consideration a deduction from the profits of the patent for the personal expenses of the patentee for the exclusive devotion of his time in bringing the patent into practical operation and public notice. *Ib.*

6. Application, under 14 & 15 Vict., c. 99, s. 6, by parties who opposed an extension, for production and inspection of the petitioner's accounts previously to the hearing of the petition, refused, with costs. *Re Bridson's patent*, 7 Moo. P. C. 499.

VI. OPPOSITION TO.

1. *Proceedings on*, 5559.
2. *Contents of Petition*, 5559.
3. *Costs*, 5560.

1. Proceedings on.

7. Practice respecting hearing of counsel where several parties enter caveats. *Re Woodcroft's patent*, 3 Moo. P. C. 171.

8. An application by the Lords of the Admiralty to enter a caveat, and be heard against a petition for an extension, such caveat not having been filed within the time required by the rules of the Privy Council Office, refused, as the Attorney-General was present to watch the interests of the Government. *Re Smith's patent*, 7 Moo. P. C. 133.

In cases for an extension, the Attorney-General represents the Government and the public generally. *Ib.*

9. The Judicial Committee will not permit a party to be heard in opposition to an application for a prolongation, unless a caveat has been entered in his name. *Re Lowe's patent*, 8 Moo. P. C. 1.

Any one of the public has a right to enter a caveat, and to be heard in opposition. *Ib.*

10. A petitioner inserted the last advertisement of his intention to petition for a prolongation on the 24th May, but did not present his petition until the 5th June. The registrar refused to receive the petition, as being too late. Upon a special application for that purpose, it appearing that the delay arose from a mistake of the petitioner's agent, an order was made admitting the petition. A caveat had been entered:—Held, that as the party filing the caveat was interested in sustaining the objection to the reception of the petition, notice of the application must be served on him. *Re Hutchinson's patent*, 14 Moo. P. C. 364.

11. It is sufficient, prior to tendering evidence of instances of anticipation, to state the grounds of objection to the extension of letters patent without stating all the particulars of those objections. *Re Ball's patent*, 4 L. R., App. Cas., 171; 48 L. J., P. C., 24; 27 W. R. 477.

2. Contents of Petition.

12. As the recommendation to the Crown for the prolongation of the term of letters patent is a matter of discretion in the Judicial Committee, it is imperatively necessary that the petition for a prolongation should state fairly and fully everything relating to the patent;

an omission to do so is fatal to the application. *Re Pitman's patent*, 4 L. R., P. C., 84; 8 Moo. P. C., N. S., 293.

When a petition omitted to state that the patent was, in fact, a communication from a foreigner living abroad, who had previously to the English patent patented the invention in America, and that the American patent had expired, though afterwards renewed in America, the Judicial Committee refused the application. *Ib.*

3. Costs.

1. Opposition to an application for extension or confirmation is rather encouraged than otherwise, and upon a successful opposition the opposer's costs will, in general, be allowed. *Re Honiball's patent*, 9 Moo. P. C. 378; 3 Eq. Rep. 225.

2. When a petition is abandoned, it is not necessary that the opposers should serve the petitioners with notice of their intended application to the Court for costs of opposition. *Re Bridson's patent*, 7 Moo. P. C. 499.

Costs given to all the opposers upon petitioner's abandoning petition before hearing. *Ib.*

3. On a petition for prolongation, a day was fixed for hearing. Objections were lodged against an extension. Before the hearing, the petitioners abandoned the prosecution of the petition, and the costs of the opposition were allowed. *Re Hornby's patent*, 7 Moo. P. C. 503.

4. The Judicial Committee will exercise a discretion as to the allowance of an opposer's costs upon an abandoned petition for extension of letters patent. *Re Milner's patent*, 9 Moo. P. C. 39.

A gross sum allowed for costs of opposers, instead of referring their costs to taxation. *Ib.*

An affidavit of merits by the petitioner, upon the question of costs, rejected, as no copy had been served upon the opposers. *Ib.*

5. Where there were two opponents to an application for a prolongation of a patent upon substantially the same grounds of objection, the Judicial Committee, upon a successful opposition, allowed a gross sum for the costs of both parties. *Re Jones's patent*, 9 Moo. P. C. 41.

Opponents' costs directed to be taxed at 100*l.*, and divided between the opponents. *Ib.*

6. When there were several opponents, on dismissing the petition a lump sum was awarded to the opponents, to be divided *pro ratâ* for costs. *Re Johnson's patent*, 4 L. R., P. C., 75; 8 Moo. P. C., N. S., 75.

7. Considerations which induce the Judicial Committee to give costs to *bonâ fide* opponents in patent cases. *Re Wield's patent*, 4 L. R., P. C., 89; 8 Moo. P. C., N. S., 300.

IV. Confirmation.

8. The use of an invention in England prior to the date of a patent granted for Scotland:—Held, to invalidate it, and confirmation refused by the Judicial Committee of the Privy Council, under 5 & 6 Will. 4, c. 83. *Re Robinson's patent*, 5 Moo. P. C. 65.

9. To entitle a patentee to a confirmation of letters patent, under the stat. 5 & 6 Will. 4, c. 83, s. 2, the patentee must show that he believed himself the first and original inventor, as, for instance, by evidence of the course of experiments by which he arrived at the knowledge of the invention. *Re Card's patent*, 6 Moo. P. C. 207; 12 Jur. 507.

Upon an application for a confirmation of letters patent, it was proved that the patent article was not publicly and generally known prior to the letters patent; but that some persons had systematically used an article identical with the patent article, for several years prior to the grant of the letters patent, and that the subject of the patent was little more than an application of a well-known article in trade; in such circumstances:—Held, by the Judicial Committee, that it was not a case in which the statute was intended to apply, and their lordships refused to recommend the confirmation of the letters patent. *Ib.*

10. The authority conferred upon the Crown by the 5 & 6 Will. 4, c. 83, s. 2, to confirm letters patent is discretionary in the Judicial Committee, to recommend or not a confirmation. *Re Honiball's patent*, 9 Moo. P. C. 378; 3 Eq. Rep. 225.

The jurisdiction is one which is most cautiously and sparingly to be exercised, as the effect of a confirmation of letters patent is to give force and validity, by a quasi legislative authority, to a grant of monopoly actually void, and to exclude from the use of the invention not only other subjects of Her Majesty in England, but even the first and original inventor, who may have actually brought it into public, though not into general use, before the patent was taken out. *Ib.*

Two conditions are required from a petitioner applying for a confirmation, to establish to the satisfaction of the Judicial Committee, first, that before the date of the letters patent (the subject of application) the invention was not publicly and generally used; and, second, that the grantee of such letters patent believed himself the first and original inventor. *Ib.*

The 5 & 6 Will. 4, c. 83, s. 2, applies to confirmation of letters patent for an extended term, as the grant of such extended term is a grant of new letters patent, which are subject to the same conditions, and open to the same objections, and entitled to the same advantages as the original letters patent. *Ib.*

In 1852, an assignee of a patentee obtained an extension of letters patent originally granted in 1838. In 1854, it was determined at a trial in an action for infringement, that the letters patent were invalid by reason of the prior use and sale of the patent article. Upon an application by the assignee of the patentee to the Judicial Committee for a confirmation, under 5 & 6 Will. 4, c. 83, s. 2, of the new letters patent, it was proved that the patentee was not the first inventor, and that the principle had been discovered ten years before the date of the original patent, but that the invention, though publicly known, had not been generally used at the date of the grant of the original letters patent, and that the patentee had notice not

only of the original invention, but of the use of such invention. In such circumstances, the Judicial Committee refused to recommend the Crown to confirm the letters patent. *Ib.*

V. Repeal.

1. In a scire facias to repeal a patent, the venue cannot be changed from Middlesex to any other county. *Rex* v. *Haine*, 2 Cox 235.

2. The writ of scire facias to repeal a patent does not issue, nor is the fiat for that purpose granted by the attorney-general as of course, *semble*. *Re Prosser*, 11 Beav. 306; 18 L. J., N. S., Ch., 35.

3. A patentee applied to the Court of Chancery to stay all proceedings on a scire facias to repeal the patent, or that a *nolle prosequi* might be entered, on the ground, first, that the prosecutor was an alien; secondly, that he had no special interest in the patent or the repeal of it, but was acting in collusion with other persons, with a view to oppress the patentee; and, thirdly, that the security for costs given by the prosecutor was improper and insufficient:—Held, that the Court had no authority to interfere in the matter. *Reg.* v. *Prosser*, 11 Beav. 306; 18 L. J., N. S., Ch., 35; 13 Jur. 71.

In the ordinary course of proceeding upon a writ of scire facias to repeal letters patent, it is within the discretion of the Attorney-General to determine upon what or whose information, or on what terms or security, he will permit the action to be prosecuted, and the exercise of his discretion, in the conduct of the action, is not subject to the control of the Court in which the proceeding takes place. *Ib.*

An illegal monopoly is a public grievance, and the Crown having been informed of such a grievance, and having the power and duty to remove it, if it be such, ought not to be disabled from directing the necessary proceedings to ascertain the truth, because the information was given by an alien, or by a person who had no special or direct interest in the matter, or was endeavouring to promote the interest of some other person, or was actuated by some improper motive. *Ib.*

The practice of requiring security from the prosecutor in a scire facias to repeal a patent is not founded on any law or rule of court, but seems to have been very properly introduced by the authority of the Attorney-General alone, almost within living memory. There is no instance whatever of the Court having interfered upon that subject. *Ib.*

4. Bill in equity lies to set aside letters patent obtained by fraud. *Att.-Gen.* v. *Vernon*, 1 Vern. 277, 370; 2 Ch. Rep. 353.

5. After a judgment in scire facias in the Court of Queen's Bench, annulling letters patent, and directing that they should be restored to the Court of Chancery to be cancelled, the Lord Chancellor has no jurisdiction to stay the execution of the judgment, his duty in cancelling the enrolment being only ministerial. *Reg.* v. *Eastern Archipelago Co.*, 4 De G. M. & G. 199; 2 Eq. Rep. 513; 2 W. R. 387.

6. A writ of scire facias having issued out of Chancery to repeal letters patent, the patentee presented a petition to the common law side of the court, alleging that the writ contained improper recitals and suggestions, which, if used as a defence in an action for the infringement of a patent, would be inadmissible, and praying that the writ might be quashed or reformed by striking out the objectionable matter. The Ld. Ch. declined to exercise the jurisdiction reserved to him by the 46th section of the 12 & 13 Vict., c. 109, on the ground that by the 39th section jurisdiction in such cases was conferred on the judges of the superior courts of common law, and that they could more satisfactorily dispose of the question of pleading involved in the case. *Reg.* v. *Hancock*, 5 De G. M. & G. 332; 3 W. R. 525.

7. Pending a proceeding in scire facias to repeal a patent, the patentee disclaimed a part. The prosecutor still proceeded, and ultimately failed:—Held, that he ought to pay the costs subsequent to the disclaimer. *Reg.* v. *Mill*, 14 Beav. 312.

Application for liberty to sue on a bond, given to the clerk of the petty bag for securing costs to the defendant in scire facias to repeal a patent. *Ib.*

VI. Licences, Assignments, and Sales.

See also I. IV. 2 *ante*—III. III. *ante*.

I. *In General*, 5561.
II. *Of Future Patents*, 5563.
III. *Account*, 5563.
IV. *Estoppel*, 5565.

I. IN GENERAL.

8. A patentee of an invention for improved beaters for threshing-machines granted a licence to the defendants to make, manufacture, and sell machines, as described in the specification, for a term of years, and during the period to apply the invention to other machines made, or to be made, paying a royalty of 1*l.* for every threshing-machine manufactured by them, and the like sum for every machine made, or to be made, to which the invention should be wholly or in part applied by them; and they covenanted to affix royalty plates to every new and altered machine which should be manufactured or applied by them:—Held, that the defendants were not intended to pay royalty merely on every threshing-machine, but that the true construction of the licence was, that they were to pay on all beaters manufactured by them according to the patent, and applied to machines originally, or by way of renewal. *Goucher* v. *Clayton*, 11 Jur., N. S., 462; 13 L. T., N. S., 111.

9. A patentee agreed with H. that he should be the sole manufacturer under the patent.

This agreement was embodied in a deed, which was prepared by the solicitor of the patentee, H. employing no legal adviser. The deed was not registered in compliance with the Patent Law Amendment Act 1852, s. 35, until after bill filed. Subsequently the patentee granted a right of manufacture to M., who had full notice of the previous agreement with H. The grant to M. was also unregistered:—Held, that, under the circumstances, the patentee could not avail himself of an objection based upon the non-registration of the agreement with H., and that as the grant to M. was also unregistered, M. also was not entitled to take the objection. *Hassall* v. *Wright*, 40 L. J., Ch., 145; 10 L. R., Eq., 509; 18 W. R. 821.

Semble, that registration of the assignment of a patent relates back to the date of the assignment, so as to entitle the assignee to maintain a suit to restrain an infringement instituted between the dates of the assignment and the registration. *Ib.*

1. A., sole patentee, worked a patent with B. for four years under circumstances which constituted a partnership at will between them, B. supplying all the necessary funds, and A. and B. being extensively advertised as joint patentees. A. afterwards left B., and assigned his patent to C. and D., as promoters of a limited company formed to work the patent. An agreement to assign to C. and D., as well as a subsequent assignment to the company, was duly registered. C. and D. had notice that A. and B. had worked the patent together, but relied upon A.'s statement that B.'s interest was only in the manufacture formerly carried on together with A., and that he had no interest in the patent itself. C. and D. searched the register of patents and found no previous assignment by A. registered. The company was formed with A., C., and D. as the only directors. On an action by the company for an injunction against B:—Held, that B. had acquired a right to work the patent independently of the legal title which was vested in the company. *Kenny's Patent Buttonholing Co.*, v. *Somervell and Lutwyche*, 26 W. R. 786; 38 L. T., N. S., 878.

Held, also, that all the directors having notice of some claim on the part of B., the company had notice of B.'s right, and that the registering of a company, and registering a legal assignment of the patent to the company, could not deprive B. of this right, and, therefore, that no injunction would be granted. *Ib.*

On a counter-claim by B:—Held, that B. had not acquired such a right in the patent itself as to entitle him to have the company declared trustees for him of a moiety of the patent. *Ib.*

2. Where the owner of a patent manufactures and sells the patented article in a foreign country as well as in England, the sale of the article in one country implies a licence to use it in the other. But if he has assigned his patent in either country, the article cannot be sold so as to defeat the rights of the assignee. *Betts* v. *Willmott*, 6 L. R., Ch., 239; 25 L. T., N. S., 188; 19 W. R. 369.

3. The defendants, an English company, who were owners of patents in England and Belgium for an invention for ornamenting glass, granted to the plaintiffs, a company incorporated and carrying on business in Belgium, a licence to employ the invention for making glass at their factory in Belgium and not elsewhere. By the terms of the licence, all points in difference were to be submitted to arbitration in Belgium. The plaintiffs assuming their right to do so, sold in England goods manufactured by them under the licence, whereupon the defendants issued circulars warning persons in the trade that the sale in England of glass articles made abroad by employing their inventions, was a violation of their English patent. On application for an injunction to restrain the issue of such circulars:—Held, that the licence did not imply a right to sell goods made by the plaintiffs under the licence in any country where the sale would be a violation of the patent law of the country. *Société Anonyme des Manufactures de Glaces* v. *Tilghman's Patent Sand Blast Co.*, 25 L. R., Ch. D., 1; 49 L. T. 451; 32 W. R. 71; 53 L. J., Ch., 1.

Quære, whether the plaintiffs if assignees of the Belgian patent would have had the right to sell in England goods manufactured under that patent in Belgium. *Ib.*

4. A patentee who grants a licence cannot without derogating from his grant publish advertisements and circulars which have the effect of deterring usual customers or the public from dealing with his licencee. *Clarke* v. *Adie*, 21 W. R. 456. Affirmed 21 W. R. 764,

5. Injunction granted to restrain an infringement of a patent, at the suit of the exclusive licencees of the patent; their co-plaintiffs, the owners of the patent, having, since bill filed, assigned all their interest in the patent. *Renard* v. *Levinstein*, 13 W. R. 382; 11 L. T., N. S., 766; 2 Hem. & M. 628; 5 N. R. 301.

6. A contract for the sale of a patent specifically enforced at the suit of the vendor, although all that he required was the payment of the purchase money. *Cogent* v. *Gibson*, 33 Beav. 557.

7. Joint owners of a patent are considered as partners, and where a party had been induced by the fraud of one of such joint owners to purchase from him, by an agreement to which all were parties, the use of a patent right, which turned out to be of no value:—Held, that each of the parties to the contract, one of whom had no interest in the patent at the time of the contract, was liable to refund the whole of the purchase-money fraudulently obtained. *Lovell* v. *Hicks*, 2 Y. & Coll. 481; 6 L. J., N. S., Exch. Eq., 85. See S. C. 2 Y. & Coll. 46; 5 L. J., N. S., Exch. Eq., 101.

Quære, as to effect on right of plaintiff to recover the whole from each, had it been proved that he knew that three of the parties to the contract were, by special agreement, entitled in severalty to different proportions of the profits of the patent, and that one of them had no interest in it whatever. *Ib.*

Semble, that joint owners of a patent are answerable for losses occasioned by their co-adventurers only to the extent of their respective shares. S. C. 2 Y. & Coll. 46; 5 L. J., N. S., Exch. Eq., 101.

8. Agreement to share a patent: 50*l.* down, 50*l.* on the 30th October, 100*l.* on the 30th November, and "as soon as possible, but not later than the 31st December, 300*l.* to be applied in taking out foreign patents." The first 200*l.* was paid and received in payment, though not at the precise periods at which the

different sums were to be paid, but the 300*l.* was not paid on the 31st December, nor by the 8th January, to which day the patentee extended the time for payment, that being the last day for enrolling the specification:—Held, that time was of the essence of the contract, it being the object of the parties to procure the foreign patents before the specification was enrolled, and that the patentee was at liberty to rescind the contract. *Payne* v. *Banner*, 7 Jur 1051; 15 L. J., N. S., Ch., 227.

1. An agreement was entered into between four persons who were interested in certain patents and inventions relating to gutta-percha, that all patents taken out, or in the course of being taken, or intended to be taken out, or that might at any time thereafter be taken out by any or either of them, or on account of and for the benefit of any or either of them in relation to the preparation and application of gutta-percha, or the manufacture of any article therefrom, should be assigned to trustees, and held for their common benefit. Subsequently one of the parties took out a patent for "improvements in apparatus and machinery for giving shape and configuration to plastic substances," and refused to assign the patent to the trustees, alleging that it was not comprised in the agreement:—Held, that the patent, so far as it related to gutta-percha, was subject to the trusts of the agreement, and that it could not be treated as not being so, because it was for machinery which might be applied to the manufacture of articles of gutta-percha, and was not for the manufacture of any such articles. *Bewley* v. *Hancock*, 6 De G. M. & G. 391; 2 Jur., N. S., 289; 4 W. R. 334.

2. The plaintiff and the defendant entered into an agreement for the joint working of letters patent for an invention. The agreement was for experiments being made in the first instance at the costs of the plaintiff, but under the management of the defendant, after which, if successful to the satisfaction of the plaintiff expressed in writing, the defendant was to be employed by him at a salary and percentage on the profits of the concern. The agreement provided further stipulations as to the working of the concern. The experiments were made, and proved that the invention could be worked on the stipulated terms. The defendant neglected then to work the concern according to his part of the agreement, and the plaintiff worked it at a loss. The defendant absconded. The plaintiff filed a bill to set aside the agreement:—Held, on demurrer, that the plaintiff's remedy was at law, and the demurrer must be allowed. *Osborne* v. *Jullion*, 26 L. J., Ch., 6; 4 W. R. 767.

3. D. had verbally agreed with C. to be supplied by C. with machines constructed according to patents of which C. was the owner, and to pay royalties for the use of such machines, and for the use of any machines supplied to him by anybody else which embodied the principle of C.'s patents. D. was afterwards supplied by S. with machines, on the use of which C. claimed a royalty as embodying the principle in his patents, and he also charged D. with an infringement of the patents. D. defended himself against the claim, denying, first, that the agreement amounted to a license; secondly, that the patents were valid; and thirdly, that there had been an infringement:—Held, that the verbal agreement must be treated as a licence. *Crossley* v. *Dixon*, 10 H. L. Ca. 293; 9 Jur., N. S., 607; 32 L. J., Ch., 617; 11 W. R. 716; 8 L. T., N. S., 260.

II. OF FUTURE PATENTS.

4. An agreement by the vendor of a patent to assign to the purchaser all future patent rights, which the vendor may hereafter acquire of a like nature to the patent sold, is not contrary to public policy. *Printing and Numerical Registering Co.* v. *Sampson*, 19 L. R., Eq., 462; 44 L. J., Ch., 705; 32 L. T., N. S., 354; 23 W. R. 463.

An agreement by which the defendant contracted to sell to the plaintiff company his share of several letters patent relating to inventions applicable to the mechanism or apparatus employed for numbering and printing tickets consecutively, and for containing and delivering tickets or continuous lengths of paper, or other similar materials, contained a recital that it had been agreed that the company should purchase the shares in the several letters patent, and all patent rights and rights of a like nature, of the vendors, with respect to the inventions described in the letters patent, or the specifications thereof or otherwise relating to the mechanism or apparatus employed for numbering and printing tickets consecutively, or to the containing and delivering tickets or continuous lengths of paper or other similar material, and any improvements thereof. Subsequently, the defendant obtained letters patent for an invention of "an improved rotary and multiplicate printing and numbering machine," whereby, according to the specification, strips or lengths of paper, card, or other material could be continuously printed with any desired subject matter, and consecutive numbers impressed thereon; such strips being applicable to the manufacture of railway and other tickets, which required that certain subject matter with consecutive numbers should be printed or impressed thereon:—Held, that the defendant's patent, being a combination of a printing machine, a perforating machine, and a numbering machine, and an invention to produce a result of a like nature or of a similar kind to that which was produced by the invention which he had sold to the company, came within the agreement to assign future patent rights of a like nature, and the defendant was decreed to execute an assignment to the plaintiff company. *Ib.*

III. ACCOUNT.

5. A patentee filed a bill against a person whom he had licensed to use his invention, and the partner of the latter, for an account on the footing of the license, and for an injunction to restrain the defendants from using the invention in case they should dispute his right to the payments reserved by the licence on the ground that the licence had become void. A general demurrer to the bill was overruled. *Haddan* v. *Smith*, 16 Sim. 42; 17 L. J., N. S., Ch., 43; 11 Jur. 959.

1. E. being owner of one-third of an American patent assigned to N., in consideration that N. would pay to him one-fifth of all profits to arise from the sales of the invention in America, either alone or coupled with improvements patented in England only, for which profits N. was to account, N. retaining all control over the granting of licences, and the taking of accounts. N. made this bargain as agent of a company, for whom he was trustee of the remaining two-thirds of the patent, and of certain other improvements patented in England, and he afterwards became sole licencee and manufacturer of the invention in England, at a fixed price higher than cost price, but was bound to manufacture for the company only. The company granted to G. an exclusive right to sell the invention in America, and directed N. to sell machines to him at certain prices (which were higher than those paid by the company to N.), in consideration that G. would pay to the company one-half the net profits made in America:—Held, first, that G. was not liable to account to E. for profits; secondly, that N. was not liable to account for profits made by him as manufacturer; thirdly, that the company was bound to account to G. for one-fifth of all the profits which they had received from G.,—viz., both in respect of the prices charged to G. for the machines, and also of the moiety of the net profits made by G. in America. *Edwards* v. *Normandy*, 12 W. R. 548; 3 N. R. 562.

2. An agreement was entered into between K. and P. that K. should take out a patent for purifying paraffine, and assign it to P.; that P. thereupon would work it for fourteen years, if it could be so long worked with profit; would not purify paraffine by any other process, and would pay to K. a royalty upon all purified paraffine sold; that P. would keep accurate accounts of all paraffine purified according to the patent, render them half-yearly and verify them, and that the provisions of this agreement, and all other provisions usual and proper in such deeds, should be incorporated in the deed of assignment of the patent, such deed to be prepared by counsel to be agreed on by the solicitors of the parties. The patent was taken out, and P. commenced working under it, but shortly afterwards abandoned the use of the process, alleging that it could not be worked at a profit, and refused to pay any royalty. K. thereupon brought an action for royalties, and recovered judgment. Pending this action, P. gave notice to determine the agreement, because the invention could not be worked to a profit. H., after obtaining judgment, filed his bill, asking for an account of subsequent royalties, an injunction to restrain the defendant from purifying paraffine under any other process, and for a reference to chambers to settle a proper deed of assignment, or, if the Court should hold the agreement to have been determined, then for relief against the defendant as an infringer of the patent:—Held, that in a case of this nature it was in the discretion of the Court whether it would direct an account, or leave the parties to their remedy at law, and that, the account being only a part of an agreement which the Court could not wholly enforce, the plaintiff ought to be left to his remedy at law, and that for the same reason the execution of the assignment ought not to be decreed. *Kornot* v. *Potter*, 3 De G. F. & J. 447.

3. A patentee agreed with a machine maker, that the machine maker should make machines according to the patent and sell them, taking a certain sum upon each machine for himself, and paying to the patentee as a royalty the amount charged for the machines above that sum:—Held, that the patentee could not maintain a suit in equity for an account against the machine maker as agent. *Moxon* v. *Bright*, 4 L. R., Ch., 292; 20 L. T., N. S., 961.

In one case the machine maker received a sum of money for the patentee:—Held, that this was not sufficient to support the suit, and that the patentee's remedy was at law. *Ib.*

4. When an assignment is made of a share of profits (arising, *e.g.*, from the working of a patent by licencees) the assignee is entitled to an account from the licencee, but the account must be taken once for all in the presence of all the parties interested. The licencee is not bound to account to the assignor and to each assignee of a share separately. And the assignee who asks for an account must place himself in the position of the assignor by offering to pay to the accounting party anything which may be due to him by the assignor. An account of profits will not be directed if it is clear that no profits have been made. *Bergmann* v. *Macmillan*, 17 L. R., Ch. D., 423; 44 L. T. 794; 29 W. R. 890.

5. A patentee assigned letters patent to A. and B., who covenanted with him that they, their executors, administrators, and assigns, would use their best endeavours to introduce the invention by granting licences or working the patent or selling it, and that the patentee should be entitled to receive 5*l.* per cent. of all net profits, whether arising from royalties, sale, or otherwise, which should be received by A. and B. or the survivor of them, or the executors or administrators of the survivor, their or his assigns, and that an account of profits should be rendered yearly to the patentee, and his share of profits paid to him by A. and B. and the survivor of them, and the executors or administrators of such survivor, their or his assigns, with a proviso that after a sale had been made of the patent the interest of the patentee in the profits should cease, and a final account be come to. A. and B. had taken the assignment with a view of forming a company to work the patent. The company was formed and the patent made over to them. The patentee sued the company for an account of profits. The company demurred, on the ground that there was no privity between them and the plaintiff, and that the plaintiff's right, if any, was against A. and B. only:—Held, that the plaintiff could sue the company for an account of profits, for that the stipulations of the assignment to A. and B. amounted to a contract that the owners for the time being of the patent should account for and pay to the plaintiff a share of profits unless a sale within the meaning of the deed was effected, and that no person taking the patent with notice of this contract could refuse to give effect to it. *Werderman* v. *Société Générale d'Electricité*, 19 L. R., Ch. D., 246.

IV. ESTOPPEL.

1. N. obtained a patent for the application of the principle of smelting iron by the use of heated air applied to furnaces. B. obtained a licence from him to use this process, on the payment of 1*s.* per ton on the iron thus smelted. Disputes, and then litigation, arose between them, and it was agreed, by an instrument dated 11th November 1833 (which recited the previous circumstances), that both parties should withdraw their law processes; that, "in consideration of the present payment of 400*l.*, to be accepted by N. in full of 1*s.* per ton on the whole iron smelted from the erection of B.'s works up to the 11th day of November current, and in consideration of the payment of 1*s.* per ton upon the whole iron which shall be smelted from the 11th of November current till the expiry of the letters patent, by the use of heated air, in any of the modes heretofore applied, or in any other mode falling under the said patent," N. should grant to B. a licence, which further on in the agreement was described to relate to "the application or use of heated air in any of the modes heretofore practised at B.'s works, or in any other mode falling under the description in the said patent, or in the specification thereof." N. afterwards instituted a suit to compel B. to perform this agreement. B. instituted a cross suit to suspend N.'s proceedings, on the ground that the process of smelting by heated air used at B.'s works did not fall within the patent:—Held, that after this agreement, B. could not set up such a defence to the claim of N. *Baird* v. *Neilson*, 8 Cl. & F. 726.

2. Validity of patent as between parties contracting to work it and the patentee. *Muntz* v. *Foster*, 8 Jur. 206. Affirming S. C. *nom.* *Muntz* v. *Grenfell*, 7 Jur. 121. And see S. C. at law, 6 Man. & Gr. 734 7 Scott N. R. 471; 13 L. J., N. S., C. P., 1; 7 Jur. 1110; 1 D & L. 737, 942.

3. D. had verbally agreed with C. to be supplied by C. with machines constructed according to patents of which C. was the owner, and to pay royalties for the use of such machines, and for the use of any machines supplied to him by anybody else which embodied the principle of C.'s patents. D. was afterwards supplied by S. with machines, on the use of which C. claimed a royalty as embodying the principle in his patents, and he also charged D. with an infringement of the patents. D. defended himself against the claim, denying, first, that the agreement amounted to a licence; secondly, that the patents were valid; and thirdly, that there had been an infringement:—Held, that the verbal agreement must be treated as a licence; that D., while he continued to act under that licence, could not dispute the validity of the patents. He can only be allowed to contend that the second machine does not embody the principle of the patent. *Crossley* v. *Dixon*, 10 H. L. Ca. 293; 9 Jur., N. S., 607; 32 L. J., Ch., 617; 11 W. R. 716; 8 L. T., N. S., 260; 1 N. R. 540.

4. The rule that an assignee of a patent is estopped from disputing its validity does not prevent his partner from separately raising that defence to an action for infringement. *Heugh* v. *Chamberlain*, 25 W. R. 742.

5. Upon the dissolution of a partnership between the plaintiffs and the defendant, the defendant assigned to the plaintiffs all his interest in a patent which formed part of the assets:—Held, that the defendant could not afterwards set up the invalidity of the patent as against the plaintiffs. *Chamberlain* v. *Crichley*, 33 Beav. 374.

6. An agreement to purchase a licence to use a patent will not, in equity, preclude a party from disproving its validity. *Baxter* v. *Combe*, 1 Ir. Ch. R. 284.

7. A licencee under another's patent is not estopped thereby from contesting the novelty of such patent. *Dangerfield* v. *Jones*, 13 L. T., N. S., 142.

8. A patentee brought an action for damages for infringement against a certain firm, who gave judgment by consent before declaration, and immediately took a licence to use the patent for a term. On a bill being filed by the patentee, after the expiration of the licence, to restrain a further infringement of his patent by the defendants in the action, and certain other persons who had joined the firm after the date of the judgment:—Held, upon motion for decree, that the defendants in the suit were not estopped, either by the licence or by the judgment, from denying the validity of the patent. *Goucher* v. *Clayton*, 11 Jur., N. S., 107; 34 L. J., Ch., 239; 13 W. R. 336; 11 L. T., N. S., 732; 5 N. R. 360.

9. The fact of a patent having been found invalid at law upon proceedings between the patentee and third parties, is no answer to a suit, based upon the same patent, for an injunction and consequent relief against a licencee who has covenanted to pay royalties, and is selling the invention, contrary to his covenant, without payment of the royalties. *Grover and Baker Sewing Machine Co.* v. *Millard*, 8 Jur., N. S., 714.

10. A licencee under a patent cannot, in any way, question its validity during the continuance of his licence. But he may show that what he has done (in respect of which patent royalties are claimed from him) does not fall within the limits of the patent, but is something extraneous to it. *Clarke* v. *Adie* (No. 2), 2 L. R., App. Cas., 423; 46 L. J., Ch., 598; 39 L. T., N. S., 1; 26 W. R. 45. Affirming 3 L. R., Ch. D., 134; 24 W. R. 1007; 35 L. T., N. S., 349.

A licencee under a patent is in a situation analogous to a tenant, who, during the tenancy, cannot dispute the title of the lessor to any of the land held under the lease; but who is, nevertheless, at liberty to show that part of the land he actually occupies is really not comprised within the lease, but belongs to himself under some other right. *Ib.*

11. A. and B entered into partnership for the purpose of working a patent taken out by B., the partnership deed providing that the patent rights should belong solely to B. During the continuance of the partnership the partners issued circulars asserting the validity of the patent, and warning the public against its infringement, although they had been advised that the patent was in fact void. The partnership, having continued for seven years, was dissolved by deed, and A. and B. each proceeded to manufacture the patented articles for himself; but shortly afterwards B. commenced issuing circulars to A.'s customers asserting that A. was infringing his patent

and threatening them with legal proceedings in case they purchased from A. A. then moved for an injunction to restrain B. from issuing these circulars, contending that, the patent being void, he had an equal right with B. to manufacture the articles intended to be protected by it:—Held, that although A. had, during the continuance of the partnership, precluded himself from disputing the validity of the patent, yet, after the expiration of the partnership, he was as much at liberty as any other person to dispute its validity, and that B.'s proper course for asserting his claim to the patent was, instead of issuing the circulars complained of, to have instituted proceedings against A. to establish its validity. On B. declining to undertake to institute any such proceedings, the Court granted the injunction. *Aemann* v. *Lund*, 43 L. J., Ch., 655; 18 L. R., Eq., 330; 22 W. R. 789; 31 L. T., N. S., 119.

VII. Infringement.

I. *General Principles*, 5566.
II. *What Amounts to*, 5566.
III. *By Transhipment or Importation of Goods*, 5568.
IV. *By Agents or Servants*, 5569.
V. *Ignorance of Existence of Patent—Effect*, 5569.
VI. *Where Patent has Expired*, 5570.
VII. *Property in Goods Infringing Patent*, 5570.
VIII. *Damages*, 5570.
IX. *Account of Profits*, 5571.
X. *Allegation of, by Circulars or Advertisements*, 5572.
XI. *Actions in Respect of*, 5573.
XII. *Injunction*, 5582.

I. GENERAL PRINCIPLES.

1. Whether previous user will invalidate, and what user, if any, can be admitted in contravention of the patent right, are different questions, depending one upon the extent of previous knowledge, the other upon the effect of the grant. *Caldwell* v. *Vanvlissengen*, 9 Hare 428; 21 L. J., N. S., Ch., 97; 16 Jur. 115.

Whether there might not be a case of necessary user of an invention, which the Court would not regard as the infringement of a patent, *quære*. *Ib.*

The prohibitory words of the patent, which are addressed only to the subjects of this country, are in aid of the grant and not in derogation of it. *Ib.*

Foreigners in this country, as well as British subjects, are liable to actions for the injury done by their infringing upon the sole and exclusive right granted by the Crown to patentees of inventions in conformity with the law and constitution of this country; and the powers of the Court of Equity, which are founded on the insufficiency of the legal remedy, must be enforced against them as well as against British subjects. *Ib.*

2. In determining whether a defendant has infringed the plaintiff's patent, the Court will regard the substance of the invention, and if the defendant has infringed the substance of the invention, although he may have made immaterial variations or used mechanical equivalents, an injunction will be granted. *Thorn* v. *Worthing Skating Rink Co.*, 6 L. R., Ch. D., 415. n.

3. It is sufficient to constitute user of a patented article, that the same sort of benefit, however temporary and indirect, has been in fact derived from it in its ordinary use. It is immaterial whether the use of the article is active or passive. *Betts* v. *Neilson*, 11 Jur., N. S., 679; 34 L. J., Ch., 537; 13 W. R. 1028; 12 L. T., N. S., 719; 3 De G. J. & S. 82; 6 N. R. 221.

4. A patentee can sustain an action for an injunction to restrain a threatened infringement of his patent, even if no actual infringement has taken place. *Frearson* v. *Loe*, 9 L. R., Ch. D., 48; 27 W. R. 183.

When articles which are the subject of a patent are made without a licence from the patentee simply for the purpose of *bonâ fide* experiments, those who so make them are not necessarily liable to an action; but when they are made and used for profit, or with the object of obtaining profit even to a limited extent, such making and using constitute an infringement of the patentee's rights, and will be restrained by injunction. *Ib.*

5. Where a patent is obtained for the use of particular chemical materials for arriving at a particular chemical result, it is no infringement to arrive at the same result by the use of other chemical materials which were not known to be equivalents for the materials mentioned in the specification at the time when the patent was obtained. *Badische Anilin und Soda Fabrik* v. *Levenstein*, 24 L. R., Ch. D., 156; 52 L. J., Ch., 704; 48 L. T. 822; 31 W. R. 913.

Where a patent is obtained for a new process for arriving at a known result, it is no infringement to arrive at the same result by a different process. *Ib.*

Where a patent is obtained for a new result, and one process of arriving at that result is described in the specification, it is an infringement to produce the same result by any process. *Ib.*

II. WHAT AMOUNTS TO.

1. *In Case of Patents for Combinations*, 5566.
2. *In Other Cases*, 5567.

1. In Case of Patents for Combinations.

6. *Semble*, it is piracy to use part of an improvement, for which a patent has been obtained, in another improvement. *Weiss* v. *Maw*, 4 L. J., Ch., 224.

7. A patent for an entire combination is not infringed by a different combination, for the same object, of the same elements, though important, or of equivalents for them, if not a mere colourable evasion or imitation. *Curtis* v. *Platt*, 35 L. J., Ch., 852.

Semble, in considering the question of colourable evasion, the Court will look at the novelty of the object of the combination and of the parts combined. *Ib.*

A plaintiff alleged an infringement of his patent. The patent was granted in 1854, and specified a combination of mechanism applicable to spinning mules; and the first claim was for the novel construction, combination, and application of mechanism hereinbefore described, whereby one-half of the clutch or catch-box, hereinbefore described, or any mechanical equivalent therefor, is connected or acts upon cams or other similar parts of mechanism direct. The defendant's patent, granted in 1860, specified a combination of mechanism which embodied the leading idea of the plaintiff's patent, and by which one-half of a clutch-box was made to act upon cams direct, and he adopted some of the elements combined by the plaintiff, but he disposed them in a different manner. These were important parts of the prior combination, and, though old, the mechanical contrivances were new in respect of the particular mode in which the plaintiff applied them; and the immediate object of their combination by him was new—viz., to make a catch-box on cams direct. The effect brought about by the direct action of catch-box on the cams had long previously been produced, but less advantageously, by other contrivances of various kinds. The defendant's mode of combination effected the common object of each patent in a more beneficial manner than it was or could be effected by the mode of combination specified in the plaintiff's patent, and it displayed an equal amount of inventive genius:—Held, first, that the plaintiff's claim was limited to the entire combination claimed, as before described in his specification. *Ib.*

Held, secondly, that the defendant's combination was not a mere colourable evasion, and that there was no infringement. *Ib.*

1. In a suit to restrain an infringement of a patent, the Court directed four issues to be tried at law, one being, whether the invention was a new manufacture. The judge, in the course of the trial of the issues, expressed his opinion that a question of law would arise, whether there was upon the facts a sufficiency of invention to warrant the granting of a patent. The judge, nevertheless, went on with the trial, and put two issues to the jury: "Is the invention new?" and, "Is it a substantial improvement?" The jury found for the plaintiff in the affirmative upon both issues. Upon the cause coming back to equity Romilly, M. R., took up the point of law reserved, without considering the verdict of the jury, and, on the motion of the defendant, granted a new trial:—Held, on appeal, that the judge in equity ought to have considered the verdict of the jury, and that had he done so, the only point of law remaining would have been this: whether a combination of things previously well known, which combination could be rightfully denominated a substantial improvement, could be the subject of a patent? the answer to which must have been in the affirmative. *Spencer* v. *Jack*, 10 L. T., N. S., 242; 1 N. R. 114.

2. When a combination of instruments is the invention patented, an infringement of the patent must be an infringement of the combination. *Dudgeon* v. *Thompson*, 3 L. R., App. Cas., 34.

3. A patent for a combination of several improvements is not infringed by using a combination of some only of those improvements. *Clark* v. *Adie* (No. 1), 10 L. R., Ch., 667; 33 L. T., N. S., 295; 23 W. R. 898.

The plaintiff, who was assignee of a patent for a machine for clipping horses, made a new machine for the same purpose, for which he did not take out a patent. The plaintiff's machine was very unlike the patented machine, the general combination of the parts of the latter machine not being copied, but a subordinate combination of some of the parts (not expressly or impliedly claimed as a distinct invention in the specification of the patentee) being embodied in the plaintiff's machine. The defendant made and sold clipping machines in exact imitation of the plaintiff's machine:—Held, that the patent did not protect the subordinate combination; that the defendant had not infringed the patent, and that the plaintiff was not entitled to an injunction against the defendant. *Ib.*

4. In a patent for an arrangement and a combination of parts so as to form an entire machine, and not for any particular part of the machine, protection will not be given to a particular part, the advantages of which are altogether collateral to the invention for which protection is claimed by the specification, and which would not in itself be patentable. *Parkes* v. *Stevens*, 8 L. R., Eq., 358; 38 L. J., Ch., 627; 17 W. R. 846.

Therefore protection being claimed by the specification of a patent for improvements in spherical gas lamps for railway stations and public places, for "the arrangement and combination of parts hereinbefore described and represented in the drawings annexed, in the manufacture of railway station and other lamps":—Held, that the use by another of a sliding spherical door for spherical lamps, which was a feature in the patentee's lamps, and one of the parts described in his specification, was no infringement of his patent. *Ib.*

5. Though the manufacture in this country of the several parts of a patented machine, and the exportation of those parts, may not be an infringement of the patent, the machine being the novelty, and the parts being old, it is otherwise where the part exported is itself the patented invention. *Goucher* v. *Clayton*, 11 Jur., N. S., 462; 13 L. T., N. S., 115.

6. A manufacturer who professes to sell to the public a machine under his own name, as one with all the newest improvements, will not be restrained from selling it on an allegation that it is an infringement of the plaintiffs' patent for a machine which was an old machine, but which had not the modern improvements to it. *Willcox and Gibbs Sewing Machine Co.* v. *Wood*, 20 L. T., N. S., 10.

2. In Other Cases.

7. The plaintiffs were patentees of a stopper for stoppering bottles containing aerated waters, which was described in their specification as being made "of hard wood, having a greater specific gravity than water, such as lignum vitæ, or other suitable material." The object gained by the patent was that, in filling the bottles in an inverted position, the stopper, which had been thrust into the bottle, would

sink of its own weight into the neck, where it would be retained by the gases in the bottle and so stopper it. The defendant obtained a patent for a stopper of wood, originally of less specific gravity than water, to which he affixed a metal clip, which pulled the stopper down till the bottle was filled. The clip was then removed and used in filling other bottles in the same way. There was evidence that the defendant's stopper became by immersion of greater specific gravity than water:—Held, that the defendant's stopper was a colourable imitation of that of the plaintiffs, and that the plaintiffs were entitled to an injunction. *Barrett* v. *Vernon*, 25 W. R. 343; 35 L. T., N. S., 755.

1. S. took out a patent for an improvement in machinery used for roving cotton. His specification appeared to claim the discovery of the application of the principle of centrifugal force for such a purpose, but he filed a disclaimer, declaring that he intended to claim only the application of centrifugal force in the particular manner described in the specification:—Held, that taking these two instruments together they sustained the patent. *Seed* v. *Higgins*, 8 H. L. Ca. 550; 30 L. J., Q. B., 314.

The particular manner described was by the use of "a weight." The defendant employed a machine similar in many respects, but though using weight, or pressure occasioned by weight, as a force, not using "a weight":—Held, that this did not amount to an infringement of the patent. *Ib.*

2. In a patent for "improvements in instruments for controlling by sound the transmission of electric currents, and the reproduction of corresponding sounds at a distance," the patentee claimed (1) "In an instrument for transmitting electric impulses by sound a diaphragm or tympan of mica, substantially as set forth; (2) In an instrument for transmitting electric impulses by sound, the combination with a diaphragm or tympan of electric tension regulators substantially as hereinbefore described for varying the resistance in a closed circuit substantially as set forth." The plaintiffs, the owners of the patent, used, in the instruments which they manufactured and sold, a diaphragm or tympan of mica to receive the air vibrations produced by the voice; below this diaphragm and in its centre, but of smaller size than it, was a cork, below the cork was a piece of platina foil of the same size as the cork, and in a cavity or box below the platina was placed the substance which was used as a tension regulator. The platina foil formed one electrode and the bottom of the box the other, the current of electricity passing from one to the other through the tension regulator. The plaintiffs used for this purpose lampblack, artificially compressed into a button. The defendants made and sold similar instruments, but they dispensed with the mica diaphragm and the cork, the air vibrations being in their instrument received directly on the platina foil, below which was placed the substance used as a tension regulator. The defendants employed loose particles of coke for this purpose. At the date of the plaintiffs' patent it was not known that the instrument would work without the independent mica diaphragm; this was a subsequent discovery. The defendants adduced evidence to show that their instrument would work equally well if the platina foil above the tension regulator was removed and the air vibrations were received directly on the particles of coke:—Held, that in the defendants' instrument the platina foil acted as a diaphragm or tympan, and that the defendants had infringed the plaintiffs' patent. *United Telephone Co.* v. *Harrison*, 21 L. R., Ch. D., 720; 51 L. J., Ch., 705; 46 L. T. 620; 30 W. R. 724.

III. BY TRANSHIPMENT OR IMPORTATION OF GOODS.

3. The importation and sale in England of articles manufactured abroad according to the specification of an English patent is an infringement. *Elmslie* v. *Boursier*, 9 L. R., Eq., 217; 39 L. J., Ch., 328; 18 W. R. 665.

4. Demurrer to a bill stating that defendants imported barks and sold them to dyers, who used them in infringement of the plaintiff's patent, overruled. *Bancroft* v. *Warder*, Romilly's Notes of Cases, 103.

5. A foreign sovereign bought in Germany shells made there, but said to be infringements of an English patent. They were brought to this country in order to be put on board a ship of war belonging to the foreign sovereign, and the patentee obtained an injunction against the agents of the foreign sovereign and the persons in whose custody the shells were, restraining them from removing the shells. The foreign sovereign then applied to be and was made a defendant to the suit. An order was then made by the Master of the Rolls, and affirmed on appeal, that notwithstanding the injunction he should be at liberty to remove the shells. *Vavasseur* v. *Krupp*, 9 L. R., Ch. D., 351; 27 W. R. 176; 39 L. T., N. S., 437.

6. Injunction granted against subjects of the kingdom of Holland, to restrain them from using on board their ships, within the dominions of England, without the licence of the plaintiffs, an invention, to the benefit of which the plaintiffs were exclusively entitled under the Queen's patent. *Caldwell* v. *Vanvlissengen*, 9 Hare 415; 21 L. J., N. S., Ch., 97; 16 Jur. 115.

7. Where a patent has been granted in England for a new process for producing more cheaply a chemical product which was previously known, the importation and sale in England of this substance made abroad according to the patented process is an infringement of the patent. *Von Heyden* v. *Neustadt*, 14 L. R., Ch. D., 230; 50 L. J., Ch., 126; 42 L. T. 300; 28 W. R. 496.

8. A patent having been granted in this country for making the handling of nitroglycerine less dangerous, by causing it to be absorbed in porous unexplosive substances, a material manufactured abroad by the patent process was imported into British waters:—Held, that such importation, though for the purpose only of transhipment for exportation, and not for the purpose of having the material landed and stored in this country, was a continuing user in this country of the invention, and hence an infringement. *Nobel's*

Explosives Co. v. *Jones*, 17 L. R., Ch. D., 721; 50 L. J., Ch., 582; 44 L. T. 593. Affirmed 8 L. R., App. Cas., 5; 52 L. J., Ch., 339; 48 L. T. 490; 31 W. R. 388.

At a trial of an action for alleged infringement of a patent by the importation into British waters of a material manufactured abroad according to the patent process, for the purpose of having it transhipped for exportation, evidence was given that the defendants had acted as custom-house agents for the foreign manufacturing firm, in getting the goods landed and stored in this country. Leave was given to the plaintiff, at the hearing of the trial, to amend the statement of claim by alleging this practice, and that such practice was an infringement:—Held, that the acting as custom-house agents for an importing firm was not an infringement of an English patent, although the importation might have been itself an infringement. *Ib.*

1. B. held an English patent for the manufacture of a combined metal, to be applied as capsules to put on bottles. T. (who resided and carried on the business of a brewer in Scotland) purchased capsules, made according to the process described in the patent, from a foreign manufacturer, and, in Scotland, put these capsules upon his beer bottles, which he then sent to his agents in England for transhipment and exportation. There was no evidence that the beer was sold in England for consumption here:—Held, that though the capsules were put on in Scotland, their user while the beer remained here was a continued user of them which amounted to an infringement of the patent. *Neilson* v. *Betts*, 5 L. R., H. L., 1; 40 L. J., Ch., 317; 19 W. R. 1121. Affirming 37 L. J., Ch., 321; 3 L. R., Ch., 429; 16 W. R. 524; 18 L. T., N. S., 159; 6 N. R. 221. And see 3 De G. J. & S. 82; 34 L. J., Ch., 537; 13 W. R. 1028; 12 L. T., N. S., 719; 11 Jur., N. S., 679.

In ordinary cases, the duty of establishing that the thing patented has been pirated lies on the patentee, and courts of equity grant limited orders of inspection for the purpose of enabling him to discharge that duty. Such orders cannot be granted where the piracy alleged has taken place abroad, and *semble*, that then it becomes the duty of the defendant to give evidence of a negative character to prove (in answer to the *primâ facie* case made by the patentee) that the process used was of a different character from that which had been patented. Where that negative evidence was not given by the defendant, but positive evidence on the part of the patentee was given by one workman that he had been employed at the foreign manufactory, and there saw the capsules manufactured by a process not distinguishable from that of the patentee:—Held, that these circumstances justified the conclusion of identity of material and process, and were sufficient warrant for the grant of an injunction. *Ib.*

IV. BY AGENTS OR SERVANTS.

2. An action was brought against the master of a ship to restrain him from using pumps which were an infringement of the plaintiff's letters patent. He denied having used any pumps which were an infringement of the patent, and did not suggest that the owners ought to be parties. It was shown that the ship was fitted up exclusively with pumps which were an infringement of the letters patent, but had been so fitted up before the defendant, who was not a part owner, had taken command of her; he had nothing to do with putting them on board, and they had never been worked in British waters:—Held, that the injunction was rightly granted on the ground that the defendant, being in command of a ship exclusively fitted up with pumps which were an infringement of the letters patent, was intending to use the patented invention. *Adair* v. *Young*, 4 L. R., Ch. D., 13; 40 L. T. 598.

3. A patent was granted in England for an invention rendering nitro-glycerine less dangerous. Foreigners imported into England an article compounded of nitro-glycerine and other substances which they had manufactured abroad according to the patent process. The respondents, acting as Custom House agents for the importers, passed the article through the Custom House, and obtained permission (as required by the Explosives Act 1875) for landing and storing it in magazines belonging to the importers:—Held, that the respondents being only Custom House agents for the importers, and not themselves the importers, and having neither possession of nor control over the goods, their acts did not amount to an exercise or user of the patent, and that no action could be maintained against them for an infringement of the patent. *Nobel's Explosives Co.* v. *Jones*, 8 L. R., App. Cas., 5; 52 L. J., Ch., 339; 48 L. T. 490; 31 W. R. 388. Affirming 17 L. R., Ch. D., 721; 50 L. J., Ch., 582; 44 L. T. 593.

4. Where the principals of a firm, which had infringed a patent, were out of the jurisdiction, and not amenable to the process of the Court, the Court restrained the managers, who, though out of the jurisdiction, had appeared to the bill. *Betts* v. *Neilson*, 6 N. R. 221.

5. The directors of a company are personally responsible for the infringement of a patent by their workmen, notwithstanding such infringement may be in contravention of orders. *Betts* v. *De Vitre*, 37 L. J., Ch., 325; 3 L. R., Ch., 429; 18 L. T., N. S., 165; 16 W. R. 529.

6. A patent consisted of the application of cards or strips of leather covered with wire to rollers at "wide distances." A person who contracted to clothe rollers and supplied to a "nailer" cards of such width that when applied to the rollers they must of necessity leave wide spaces, and who himself paid the nailer, was held to have infringed the patent, though he alleged that his business was that of a cardmaker only, and did not include the nailer's work. *Semble*, the conclusion would have been the other way if he had merely supplied the cards without making the nailer his agent. *Sykes* v. *Howarth*, 12 L. R., Ch. D., 826; 48 L. J., Ch., 769; 41 L. T. 79.

V. IGNORANCE OF EXISTENCE OF PATENT—EFFECT.

7. The doctrine laid down by the Court of

Exchequer, that, if a patent has been infringed unintentionally, the patentee is not entitled to redress, disapproved of. *Heath* v. *Unwin*, 15 Sim. 522; 16 L. J., N. S., Ch., 283; 11 Jur. 420. And see S. C. 13 M. & W. 583.

1. Ignorance of the existence of a former invention is no answer to a charge of infringement, where the second invention is capable of being accurately represented as an imitation of the former. *Curtis* v. *Platt*, 11 L. T., N. S., 245.

But where an inventor described his invention as "improvements applicable to certain machines commonly known as self-acting mules, particularly those constructed with the improvements of L. and R.," and a second inventor having taken the same elements of construction produced a new combination of agents, arriving at the same result, but by a process of thought in which he did not appear to have derived assistance from his knowledge of the former invention, there was held to be no infringement. *Ib.*

2. A patentee cannot maintain a suit against a retail dealer who unwittingly sells articles which are an infringement of his patent, provided such retail dealer gives full information as to the persons from whom he obtained the articles complained of, and promises not to retail any more. *Betts* v. *Willmott*, 18 W. R. 946. And see *Nunn* v. *D'Albuquerque*, 34 Beav. 595.

VI. WHEN PATENT HAS EXPIRED.

3. Injunction granted generally to restrain the sale, both before and after the term limited by the patent, of machines piratically manufactured, while the patent was in force. *Crossley* v. *Derby Gas Light Co.*, 1 Russ. & M. 166. *See also* S. C. 4 L. J., N. S., Ch., 25.

4. The plaintiff was a gunmaker, who manufactured rifles, purchasing some of the different parts from various makers, and putting them together to form a complete rifle, which after having been viewed and approved by him, was stamped with his name and trade mark on the lockplate as a guarantee that it had been examined and approved by him. He also fitted to the rifles levers manufactured by himself, for which he had taken out a patent, and these levers were also marked with his name. The plaintiff's rifles so marked with his name had a great reputation. He supplied rifles so marked and guaranteed by him to the Government, and when they became unsuitable for Government purposes, they were taken to pieces and some of the parts mutilated and sold as old stores. The defendant bought some of these old stores, including levers and lockplates with the plaintiff's name and trade mark upon them, and fitted them to old rifle barrels, which had been cut down to the size of carbine barrels, and were not suited to the action which formed part of the rifles as passed and guaranteed by the plaintiff. At this time his patent for the levers had expired:—Held, that the defendant might be restrained from making and selling such firearms. *Richards* v. *Williamson*, 30 L. T., N. S., 746; 22 W. R. 765.

VII. PROPERTY IN GOODS INFRINGING PATENT.

5. There is a right of property in an article made in infringement of a patent, although the Court would order the article to be destroyed. *Vavasseur* v. *Krupp*, 9 L. R., Ch. D., 351; 27 W. R. 176; 39 L. T., N. S., 437.

A foreign sovereign bought in Germany shells made there, but said to be infringements of an English patent. They were brought to this country in order to be put on board a ship of war belonging to the foreign sovereign, and the patentee obtained an injunction against the agents of the foreign sovereign and the persons in whose custody the shells were, restraining them from removing the shells. The foreign sovereign then applied to be and was made a defendant to the suit. An order was then made by the Master of the Rolls, and affirmed on appeal, that notwithstanding the injunction he should be at liberty to remove the shells. *Ib.*

VIII. DAMAGES.

1. *In General*, 5570.
2. *Measure of*, 5571.
3. *Election between Damages and Profits*, 5571.

1. In General.

6. In a suit to restrain the further infringement of a patent right, and for the consequent account, where the account is a simple one—such as where licences or royalties have been granted—the Court will assess the amount of consequent damages. And in the case of a complex account, the Court has jurisdiction to direct the necessary inquiries to be made in chambers to ascertain the amount of such an account. *Betts* v. *De Vitre*, 11 L. T., N. S., 533; 5 N. R. 165.

But, in the latter case, a trial at law by a jury is the more fitting tribunal by which the amount of such an account can be ascertained. *Ib.*

Therefore, where a patentee has obtained an injunction to restrain the further infringement of his patent right, and waives the usual account of profits, such an action will be directed, in addition to the injunction, the defendant giving all necessary facilities for the ascertainment of the profits in the meantime. *Ib.*

The jurisdiction conferred by 21 & 22 Vict., c. 27, of awarding damages in suits to restrain the commission of wrongful acts, applies to the case of suits to restrain the infringement of patents; and the circumstance that the Court was in the habit, before the Act, of affording a partial remedy in such suits by directing an account of profits, constitutes no ground for excluding the jurisdiction newly conferred. S. C. 11 Jur., N. S., 9; 34 L. J., Ch., 289.

7. The Court has jurisdiction under the 21 & 22 Vict., c. 27 to grant an inquiry as to damages, where the patent has expired between the filing of the bill and the hearing, notwithstanding the rule, no injunction no account.

Davenport v. *Rylands*, 1 L. R., Eq., 302; 12 Jur., N. S., 71; 14 W. R. 243; 14 L. T., N. S., 53.

The inquiry will not be as to damages, if any, as in a trade mark case, but generally. *Ib.*

1. Where a patent for a combination of machinery only has been infringed, the Court will not order the defendant's machines to be broken up, but will order them to be marked. *Needham* v. *Oxley*, 11 W. R. 852; 8 L. T., N. S., 604.

It is in the option of the Court whether it will direct an account of profits, or an inquiry as to damages. It will not direct both. *Ib.*

When a plaintiff neglects to ask for damages until a jury has given a verdict and been dismissed, the Court will not direct an inquiry as to damages, but will exercise its option by directing an account. *Ib.*

2. Where bills in equity to restrain the infringement of a patent have been filed against both the person who manufactures and the person who uses the article, and issues of fact have been found for the plaintiff, it is the right of the plaintiff to have not only an account against the manufacturer, but also damages against the person using the article wherever it may be found. *Penn* v. *Fernil*, 3 L. R., Eq., 308.

The Court of Chancery has jurisdiction under 21 & 22 Vict., c. 27 to award damages for the infringement of a patent in addition to directing an account of profits; and this although damages may not be specifically prayed for by the bill. *Ib.*

3. The Court will not entertain a bill for the mere purpose of giving relief in damages for the infringement of a patent, when the bill has been filed so immediately before the expiration of the patent as to render it impossible to have obtained an interlocutory injunction. *Betts* v. *Gallais*, 10 L. R., Eq., 392; 18 W. R. 945.

2. Measure of.

4. A patentee of an invention applicable to part of a machine who, himself a manufacturer, has been in the habit of licensing the use of his invention by other manufacturers on payment of a fixed royalty for each machine, having obtained against an infringing manufacturer a decree for damages, "by reason of the user or vending" of the invention, is not entitled to claim, by way of damages, any sum beyond the ordinary royalty. *Penn* v. *Jack*, 5 L. R., Eq., 81; 37 L. J., Ch., 136; 16 W. R. 243; 17 L. T., N. S., 407.

Therefore he is not entitled to claim, in addition to his ordinary royalty, a manufacturing profit; and, *à fortiori*, not such a manufacturing profit as he would have made if every unlicensed machine had been sent to him to be fitted with the invention. *Ib.*

Secus, if he had been in the habit of charging infringers with a higher royalty than ordinary licencees. *Ib.*

A plaintiff having, in another suit, obtained a decree against certain wrongful users (not being manufacturers) of unlicensed machines fitted by the defendant with his invention, had in some instances been paid his ordinary royalty by such users:—Held, that, in every such instance, no further royalty was payable by the manufacturer. *Ib.*

3. Election between Damages and Profits.

5. Where the Court directed an inquiry as to damages, and also an account of profits:—Held, that the plaintiff should be called upon to elect between the two which he would adopt, since an account of profits amounts to a condonation of the infringement. *Neilson* v. *Betts*, 5 L. R., H. L., 1; 40 L. J., Ch., 40; 19 W. R. 1121.

6. The rule that, upon a decree against a party for the infringement of a patent, the patentee is not entitled, under 21 & 22 Vict., c. 27, ss. 2, 5, to have both an account of profits and an inquiry into damages, is now established, and applies to every case of infringement. The patentee must therefore elect which of the two forms of relief he will adopt. *De Vitre* v. *Betts*, 6 L. R., H. L., 319; 21 W. R. 705.

IX. ACCOUNT OF PROFITS.

7. Practical difficulties in working out a decree directing an account of the profits made by the piratical use of an invention to which the plaintiff had an exclusive right. *Crosley* v. *Derby Gas Light Co.*, 3 Myl. & Cr. 428; 3 Jur. 692.

8. The right of a patentee to an account of profits made by an infringer is not a demand in the nature of unliquidated damages within s. 31 of the Bankruptcy Act 1869, and the amount of such profits is provable in the bankruptcy of the infringer. *Watson* v. *Holliday*, 52 L. J., Ch., 543; 48 L. T. 545; 31 W. R. 536. Affirming 20 L. R., Ch. D., 780; 51 L. J., Ch., 906; 46 L. T. 878; 30 W. R. 747.

The sole defendant becoming bankrupt, his trustees were added as defendants, and an order made that the action proceed against the trustees. The trustees did not move to discharge the order, and on the hearing appeared and cross-examined the plaintiff's witnesses:—Held, that they were liable to the costs of the action, but the account of profits was limited to an account of the profits received by the bankrupt. *Ib.*

Semble, the order making the trustees parties was improper, and would have been discharged, if an application had been made for that purpose at the proper time. *Ib.*

9. The right to a decree in equity for an account of the profits made by the manufacture and use of articles, in infringement of a patent, is incident to the right to an injunction to restrain future infringements; and where no case is made for the injunction, the account will not be decreed. *Smith* v. *London & South Western Railway Co.*, 1 Kay 408; 43 L. J., Ch., 562.

The owners of a patent for a peculiar mode of manufacturing iron wheels for railway carriages, having discovered that several railway companies were violating their patent, brought an action for damages against one of such companies only, but did not in any way give notice to the other companies to discontinue their infringements of the plaintiff's right. In the action, the validity of the patent was disputed, and it was not decided until three years after the patent had expired, when a verdict was given for the plaintiffs, with

large damages. Thereupon the plaintiffs filed a bill for an account of profits, and an injunction against another of the companies who had infringed their patent, complaining of acts done nine years before:—Held, that the delay was not excused by the pendency of the action, but was fatal to the plaintiffs' case. *Ib.*

1. The rule in patent cases, that a court of equity cannot decree an account unless it can grant an injunction, applies, notwithstanding it may appear at the hearing that since an interim injunction was moved for the defendant has sold articles which, had the facts and law been then sufficiently ascertained, the Court would have restrained him from selling. *Price's Patent Candle Co.* v. *Bauwen's Patent Candle Co.*, 4 Kay & J. 727.

2. A suit had been instituted by a patentee to restrain the defendants from infringing his patent, and asking for an account of profits made by the defendants by sale or manufacture of the materials which formed the subject of the patent. The validity of the patent, and the fact of infringement by the defendants, had been decided in the plaintiff's favour by the Court without a jury. The plaintiff asked, at bar, for damages, or for an account of the profits of which he had been deprived by reason of such infringement. The Court directed an account of profits made by the defendants by the infringement, and an inquiry what sum ought to be paid by the defendants in respect of the damage sustained by the plaintiff. *Betts* v. *De Vitre*, 11 Jur., N. S., 9; 34 L. J., Ch., 289.

3. F. obtained a patent for umbrella ribs, and enjoyed it uninterruptedly to its conclusion, with the exception of an action for damages by H. another patentee, who recovered 300*l.* and a manufacture and sale of the ribs by D. six months before it expired. F. filed a bill, and restrained D., and the cause came to a hearing nine months after the expiration of the patent:—Held, that the Court could direct an account, notwithstanding the expiration of the patent; but it must be a case where there was no doubt as to its validity. *Fox* v. *Dellestable*, *Fox* v. *Jones*, 15 W. R. 194.

Held, that F.'s invention was neither novel nor important, the two requisites to support a patent, and the bill must be dismissed with costs. *Ib.*

4. A defendant having, in ignorance, infringed the plaintiff's patent submitted and offered before suit to pay the amount of profits made, which were very trifling. At the hearing, though a perpetual injunction was granted, no costs were given, and an account was granted only upon the plaintiff's request, and at his peril. *Nunn* v. *D'Albuquerque*, 34 Beav. 595.

X. ALLEGATION OF, BY CIRCULARS OR ADVERTISEMENTS.

See also TRADE, III.

5. A. and B. entered into partnership for the purpose of working a patent taken out by B., the partnership deed providing that the patent rights should belong solely to B. During the continuance of the partnership the partners issued circulars asserting the validity of the patent, and warning the public against its infringement, although they had been advised that the patent was in fact void. The partnership, having continued for seven years, was dissolved by deed, and A. and B. each proceeded to manufacture the patented articles for himself; but shortly afterwards B. commenced issuing circulars to A.'s customers, asserting that A. was infringing his patent, and threatening them with legal proceedings in case they purchased from A. A. then moved for an injunction to restrain B. from issuing these circulars, contending that, the patent being void, he had an equal right with B. to manufacture the articles intended to be protected by it:—Held, that although A. had, during the continuance of the partnership, precluded himself from disputing the validity of the patent, yet, after the expiration of the partnership, he was as much at liberty as any other person to dispute its validity, and that B.'s proper course for asserting his claim to the patent was, instead of issuing the circulars complained of, to have instituted proceedings against A. to establish its validity. On B. declining to undertake to institute any such proceedings, the Court granted the injunction. *Axmann* v. *Lund*, 43 L. J., Ch., 655; 18 L. R., Eq., 330; 22 W. R. 789; 31 L. T., N. S., 119.

6. The plaintiff claimed damages and an injunction against the defendant, who was a patentee, and who was alleged in the statement of claim to have systematically threatened persons proposing to deal with the plaintiff with legal proceedings for an injunction, and in certain specified instances to have warned the plaintiff or his customers against infringing his patent. The statement of claim did not allege that the threats and warnings were given otherwise than *bonâ fide*, or that the defendant intended to continue his course of action. The defendant had not taken any legal proceedings:—Held, that as there was no allegation of want of *bona fides*, the plaintiff could not be entitled to damages, and that as there was no allegation that the defendant intended to continue his threats, the plaintiff could not go into evidence in support of his claim for an injunction, and he was therefore nonsuited. *Halsey* v. *Brotherhood*, 15 L. R., Ch. D., 514; 49 L. J., Ch., 786; 43 L. T. 366; 29 W. R. 9. Affirmed 19 L. R., Ch. D., 386; 57 L. J., Ch., 233; 43 L. T. 640; 30 W. R. 279.

There is no law compelling a man to assert his legal right by action, and this applies to patentees who give notice of infringement. *Ib.*

In many cases it is a man's duty to give notices to persons that they were infringing his legal rights before he brings an action. *Ib.*

7. There is no presumption in law in favour of the validity of a patent, and therefore a patentee is not entitled to publish statements of his intention to institute legal proceedings, in order to deter persons from purchasing alleged infringements of his patent, if he has no *bonâ fide* intention to follow up his threats by taking such proceedings, and the Court will, in such case, restrain him from making such publication. *Rollins* v. *Hinks*, 13 L. R., Eq., 355; 41 L. J., Ch., 358; 20 W. R. 287; 26 L. T., N. S., 56.

A person alleging the invalidity of a patent is not bound to assert his claim by scire facias, in order to establish his right to restrain the publication of statements by the patentee, threatening with legal proceedings persons buying articles of his manufacture alleged to be infringements of the patent. *Ib.*

1. Where a plaintiff brings an action to restrain a defendant from issuing notices to the plaintiff's customers that the plaintiff in selling goods is infringing the defendant's patent rights, it is for the plaintiff to prove that the defendant's statements are false; and if no *mala fides* is proved, and no damages could be obtained, the Court will not grant the injunction. If in a judicial proceeding the statements are proved to be false in fact, an injunction would be granted against continuing them, as that would be acting *mala fide*. *Burnett* v. *Tak*, 45 L. T. 743.

2. A patentee who grants a licence cannot without derogating from his grant publish circulars or advertisements which have the effect of deterring usual customers from dealing with his licencee. *Clarke* v. *Adie*, 21 W. R. 456. Affirmed 21 W. R. 764.

XI. ACTIONS IN RESPECT OF.

1. *Who may Sue*, 5573.
2. *Particulars of Breaches*, 5573.
3. *Particulars of Objections*, 5574.
4. *Pleading*, 5574.
5. *Issues*, 5575.
6. *Certificate of Breaches*, 5578.
7. *Evidence*, 5578.
8. *Interrogatories and Discovery*, 5579.
9. *Order for Inspection or Analysis*, 5580.
10. *Appeal*, 5581.
11. *Costs*, 5581.

1. Who may Sue.

3. An exclusive licencee of a patent has a right to use the name of the patentee to restrain any infringement of the patent, and an interlocutory injunction for that purpose will, in a proper case, be granted. *Renard* v. *Levinstein*, 2 Hem. & M. 628; 13 W. R. 382; 11 L. T., N. S., 766.

It is no sufficient answer to a motion for an interlocutory injunction in such a case that the party has volunteered to keep an account. *Ib.*

4. To a bill stating an agreement made between a general agent of the patentees of an American invention to introduce and sell the invention in Great Britain, and the plaintiff, whereby he was to have the sole agency and control of the working of the patent in England, upon certain terms, including a share of royalties and profits, praying for an account for damages, and an injunction to restrain future infringement, the defendants, who were alleged to be using the invention, demurred:—Held, that the plaintiff was a mere agent for the sale of the invention, and was in no such position as gave him the right to file such a bill, which was in the form of a patentee's bill for infringement. *Adams* v. *North British Railway Co.*, 29 L. T., N. S., 367.

5. The plaintiff brought an action for an account of royalties to which he was entitled for user by the company of his patent. The patent was dated in 1873, and the user was alleged to have begun in that year. The statement of claim showed that in the years 1875 and 1876 the plaintiff had assigned shares in his patent to several other persons, retaining for himself only one-sixth. The company at the hearing took the objection that the other persons interested in the patent should have been made parties:—Held, that one of several joint owners of a patent can sue for an injunction, and even for an account, without joining the other owners. *Sheehan* v. *Great Eastern Railway Co.*, 16 L. R., Ch. D., 59; 50 L. J., Ch., 68; 43 L. T. 432; 29 W. R. 69.

Secondly, that, even if valid, the objection for want of parties ought to have been taken by interlocutory motion, and could not be entertained at the hearing. *Ib.*

6. Where a plaintiff files his bill for an injunction to restrain a defendant, the maker of a similar description of articles in trade as himself, which he had designated as patent, from selling those articles, the plaintiff's articles not being, in fact, protected by any patent right, the bill will be dismissed with costs. *Morgan* v. *M'Adam*, 15 L. T., N. S., 348.

2. Particulars of Breaches.

7. The practice prescribed by 15 & 16 Vict., c. 83, s. 41, with respect to actions for the infringement of letters patent, ought to be followed in suits in equity as closely as circumstances will permit. *Finnegan* v. *James*, 19 L. R., Eq., 72; 44 L. J., Ch., 185; 23 W. R. 373.

A plaintiff in a patent suit ought either to state in his bill the particulars of the breaches complained of, or to deliver along with his bill a written statement of such particulars, which statement need not be filed. A defendant suit ought to set forth in his answer the particulars of any objections on which he relies. *Ib.*

8. Although upon the trial of questions in a patent suit the particulars of breaches should give the defendant full, fair, and distinct notice of the case intended to be made against him, it is not necessary, in the case of an alleged infringement of a patent for improvements of a particular article (*e.g.*, cartridges), for the particulars to point out the precise portions of the specification alleged to have been infringed when the matter alleged to be an infringement has been made an exhibit. *Batley* v. *Kynock*, 19 L. R., Eq., 229; 44 L. J., Ch., 219; 31 L. T., N. S., 573; 23 W. R. 209.

9. Particulars of breaches delivered with a view to a trial of a patent case in the Court of Chancery are sufficient if taken together with the pleadings; they give the defendant full and fair notice of the case to be made against him. *Needham* v. *Oxley*, 1 Hem. & M. 248; 9 Jur., N. S., 598; 11 W. R. 745; 8 L. T., N. S., 532; 2 N. R. 267.

10. A plaintiff in equity is bound by the particulars of breaches delivered, and the principle of the 15 & 16 Vict., c. 83, s. 41 is applicable to trials in the Court of Chancery, in which particulars of breaches are ordered, as well as to trials at Common Law. *Curtis* v. *Platt*, 35 L. J., Ch., 852.

1. Particulars of breach of a patent alleged divers sales between certain dates, and particularly to two persons. An answer of the defendant admitted a sale to H., a third person. Evidence of the transactions with H. was admitted. *Sykes* v. *Howarth*, 12 L. R., Ch. D., 826; 48 L. J., Ch., 769; 41 L. T. 79; 28 W. R. 215.

3. Particulars of Objections.

2. The principle upon which the Court proceeds in regulating the form of particulars of objections on the trial of a patent is to guard against a surprise upon the plaintiff by production on the trial of evidence of prior user or publication of which he has no notice. Therefore, it will require a defendant, in stating those instances on which he intends to rely, to put the plaintiff in possession of all he himself knows, so far as to enable him to identify the instances alleged. *Curtis* v. *Platt*, 8 L. T., N. S., 657.

3. Leave granted to a defendant during the trial of a patent case, and after the plaintiff's case was concluded, to amend his particulars of objection by stating a prior publication of the invention, and give evidence in support of such new objection (which was not specified in the particulars delivered before trial), on payment of the costs occasioned by the application. *Renard* v. *Levinstein*, 13 W. R. 229; 11 L. T., N. S., 505.

4. A plaintiff, in a suit to restrain an infringement of a patent, who has filed replication, and issues have been refused, is not entitled to require the defendant, by analogy to the practice at law, to deliver particulars of his objections to the validity of the patent. *Bovill* v. *Goodier*, 11 Jur., N. S., 900; 14 W. R. 91; 13 L. T., N. S., 489; 35 L. J., Ch., 174; 35 Beav. 264.

5. The object in directing issues to be tried at law is to ascertain the real state of the facts; and therefore the Court will allow further particulars of prior user of the invention to be brought forward on proper notice. *Bovill* v. *Goodier*, 36 L. J., Ch., 360.

6. In a patent case, evidence cannot be given on the trial of an issue in respect of objections not specified in the particulars required to be delivered under 15 & 16 Vict., c. 83, s. 41, even though the evidence was not discovered till after the delivery of the particulars; but a specific motion must be made for leave to put it in. *Daw* v. *Eley*, 11 Jur., N. S., 923; 14 W. R. 48.

7. Particulars of objections filed by a defendant were ordered to be amended by the insertion of words specifying "the persons by whom, the places where, the dates at, and the manner in which," there had been the alleged user prior to the date of the plaintiff's patent. *Penn* v. *Bibby*, 2 L. R., Eq., 548.

In complying with this order the defendant was permitted, in his amended particulars, to preface his statement of the specific instances of alleged prior user with the words "amongst other instances," in order to give him an opportunity of applying for leave to re-amend by inserting any further instances of prior user which he might discover. *Ib.*

Upon an application by a defendant for leave to re-amend objections by inserting certain further specified instances which had come to his knowledge, he was ordered to pay the costs of the application, and the costs arising out of and consequent upon the reamendment were reserved. *Ib.*

8. Particulars of objections alleging a prior user must specify with particularity the time, place, and manner in which such user took place. *Morgan* v. *Fuller*, 2 L. R., Eq., 297; 14 L. T., N. S., 353.

In a suit to restrain an infringement of a patent for improvements in the construction of carriages, the alleged invention consisting of a particular mode of opening and closing the heads of carriages, particulars of objections stating that head-joints similar to those used in the alleged invention had been, before the date of the patent, commonly used by carriage builders generally throughout Great Britain, and that head-joints, similar to those described in the specification, had been actuated in their motions in the way described, before the date of the patent, by various carriage builders in or near London, Liverpool, Manchester, and Southampton, and various other of the principal towns of Great Britain, are insufficient. *Ib.*

9. In a patent suit the form of order requiring defendant to furnish further and better particulars of objections should follow the words of the Patent Law Amendment Act, s. 41, and require the defendant to state in his particulars merely "the place or places at, or in which, and in what manner, the invention is alleged to have been used or published prior to the date of the patent," but under such an order the defendant must furnish full and sufficient particulars. *Flower* v. *Lloyd*, 45 L. J., Ch., 746; 25 W. R. 17; 35 L. T., N. S., 454.

10. In granting the defendant in a patent action after issue joined, and a day has been fixed for the hearing, leave to amend his particulars of objection, the Court will place the plaintiff in the same position as to discontinuing the action, or disclaiming a portion of his invention, as he would have been if the original particulars of objection had contained the new instances of prior publication proposed to be introduced by amendment; and accordingly all costs incurred by the plaintiff subsequently to the delivery of the original particulars of objection will be ordered to be paid to him by the defendant in case he elects, within a time fixed by the order, to discontinue his action. Form of order. *Edison Telephone Co.* v. *India-Rubber Co.*, 17 L. R., Ch. D., 137; 29 W. R. 496.

4. Pleading.

11. Where a bill is filed to restrain the infringement of a patent, a sufficient case to justify the injunction must be stated on the bill, as the plaintiff must not depend solely on the admissions contained in the defendant's answer for the granting or continuing of the injunction. *Curtis* v. *Cutts*, 8 L. J., N. S., Ch., 184.

12. In a bill to restrain an infringement of a patent an express averment of the novelty of the invention protected by the patent is not necessary. *Amory* or *Amery* v. *Brown*, 8 L. R.,

Eq., 663; 38 L. J., Ch., 593; 17 W. R. 849; 20 L. T., N. S., 654.

1. Leave to amend the pleadings given after the plaintiff's evidence was put in. *Nobel's Explosives Co.* v. *Jones*, 49 L. J., Ch., 726; 42 L. T., N. S., 754; 28 W. R. 653.

2. The Court will at any time during the progress of a patent suit allow a defendant to raise a fresh issue on the discovery of facts which could not with due diligence have been discovered before. *Holste* v. *Robertson*, 4 L. R., Ch. D., 9; 46 L. J., Ch., 1.

3. To a bill in Chancery for the infringement of a patent, the defendant pleaded that the plaintiff was not the first inventor:—Held, that the defendant need not answer any fact alleged by the bill which would not be evidence to go to a jury on such an issue, as, for instance, the accuracy of the specification; the novelty of the process; the assignment of the patent; the expenditure of money on it; the obtaining Scotch and Irish patents for the process or allegations as to the opinions of third parties as to the invention, and the truth of the assertions of third parties respecting it, etc., etc. *Young* v. *White*, 17 Beav. 532; 18 Jur. 277; 23 L. J., Ch., 190

On a motion for an injunction to restrain the alleged infringement of a patent, the defendant insisted, first, on the validity of the patent; and, secondly, that he had not infringed it; and an action was directed. Afterwards, the defendant pleaded in equity simply the want of novelty of the patent. This Court on allowing the plea gave the plaintiff liberty to apply to modify the order made on the application for the injunction, so as to make it conformable to the issue tendered by the plea. *Ib.*

4. In an action to enforce a contract for the sale of a patent without warranty, it is not open to the defendant by way of defence to put in issue the validity of the patent; such a defence may be struck out under (Jud. Act) Ord. XXVII. r. 1. *Liardet* v. *Hammond Electric Light and Power Co.*, 31 W. R. 710.

5. Issues.

5. Injunction granted against infringement of patent, that the validity of a patent might be tried at law; verdict for the patentee, subject to the opinion of the Court. Upon a case the Court were equally divided. The patentee must bring another action; but the Court on the possession would not impose any terms upon him, nor dissolve the injunction in the meantime. *Boulton* v. *Bull*, 3 Ves. 140.

6. Injunction upon possession under a patent until the right can be tried, though subject to considerable doubt; the patent being for improvement upon a machine, the subject of a former patent expired, and the specification described the original machine with the improvement as one entire machine, the subject of the latter patent, not distinguishing the improvements. *Harmer* v. *Plane*, 14 Ves. 130.

7. Equitable jurisdiction, upon the 34 Geo. 3, c. 23, is not excluded by the special remedy thereby provided. Independent of that remedy the statute vests in the inventor a right of property, which, though only of three months' duration, equity will protect by injunction, if the title be satisfactorily established. In this case, the evidence as to title not being conclusive, the injunction was dissolved and an issue directed, the defendants keeping an account. *Sheriff* v. *Coates*, 1 Russ. & M. 159.

8. Where the validity of the patent was not clear, nor evidence of exclusive possession satisfactory, the Court refused an injunction until the validity had been tried in an action at law; so where, after a verdict, a rule *nisi* for a new trial was pending, the right at law being still undecided. *Collard* v. *Allison*, 4 Myl. & C. 487.

9. In August 1835, a patentee filed a bill to restrain an alleged infringement of his patent, and the defendant having by his answer denied the validity of the patent, and also the fact of the alleged infringement, the plaintiff made no interlocutory application for an injunction, but went into evidence in support of his case, and in May 1839 brought the cause to a hearing. The Master of the Rolls, being of opinion that the plaintiff, upon the evidence, had not made out a case which would have supported an injunction if applied for in the interlocutory stage, refused to give him an opportunity of establishing his title at law by retaining the bill, with liberty to bring an action; and dismissed the bill with costs; and the Lord Chancellor on appeal affirmed this decision. *Bacon* v. *Jones*, 4 Myl. & C. 433; 1 Beav. 382; 3 Jur. 476, 994.

10. In a patent case, a motion for an injunction was ordered to stand over for the plaintiff to bring an action to establish his right. The plaintiff obtained a verdict, but the defendant tendered a bill of exceptions, which could not be determined without some considerable delay. Upon the motion being renewed, the Court, under the circumstances, ordered it to stand over till the bill of exceptions had been disposed of. Principles on which this Court proceeds upon an application for an interim injunction in patent cases. *Brisdon* v. *M'Alpine*, 8 Beav. 229.

11. In a suit to restrain the infringement of a patent, the plaintiff may, on motion, obtain liberty to proceed to try the question at law, notwithstanding the cause in equity is at issue, if publication has not passed. *Walker* v. *Thomason*, 10 L. J., N. S., Ch., 218.

12. Upon the trial of an action directed by this Court in a patent case, the plaintiff established the validity of his patent, but failed to prove the alleged infringement. His two principal witnesses were indicted for perjury, but acquitted, evidence (of which the plaintiff had no knowledge at the trial of the action) having been brought forward in confirmation of their testimony which tended to show an infringement. The plaintiff did not move for a new trial at common law after the production of this evidence, and judgment was obtained by the defendants upon the issue as to the infringement found in their favour:—Held, that this Court would not assist the plaintiff, who after obtaining subsequent evidence had allowed the legal right to be concluded against him, by directing an issue upon the simple point as to the infringement, which could not have been obtained for a motion upon a new trial at common law; the circumstance that the plaintiff would be hampered at common law by having to try over again the validity of his patents not

being a ground to justify the interference of this Court. *Price's Patent Candle Co.* v. *Bauwen's Patent Candle Co.*, 6 W. R. 318.

1. T., the plaintiff, a British subject, resident abroad, having conceived an improvement in making pianos, gave to the son of his London agent, who happened to be then on a visit at T.'s house, a full description and drawings of the invention, marked "private," and requested the son, on his return to London, to take out letters patent or to register the invention for him, T. The son returned to London, and delivered the drawings to his father, the defendant M., being T.'s London agent. T. about the same time wrote a letter to M., not marked private, and not desiring him to take out a patent on behalf of the writer, but inquiring generally as to the invention, and whether a patent for it was being taken out. Shortly afterwards M. took out a patent for the improvement in question in his own name, and as for an invention of his own. Then, T. having employed S. to make such pianos on his own account, M. brought an action for the infringement of his patent against S. Thereupon T. filed a bill to restrain the action, and the use of the patent by M. The defendant M. insisted that the invention, as described in T.'s communication, would not work:—Held, on motion for an injunction, that the whole question must stand over to await the result of the action. *Milligan* v. *Marsh*, 2 Jur., N. S., 1083.

2. On an infringement of a recent patent, it is not a matter of course to require the plaintiff to establish his right at law, but the Court will have regard to the whole case made on the pleadings and by the evidence. *Clark* v. *Fergusson*, 1 Giff. 184; 5 Jur., N. S., 1155.

3. The Court, in a suit respecting the infringement of a patent, will grant an issue to determine whether the invention described in the specification is actually that for which the patent was granted. *Needham* v. *Oxley*, 2 N. R. 232.

4. The Court will, since the 25 & 26 Vict., c. 42, enter into the question of the validity of a patent on a motion for an interim injunction. The powers of the Court are not limited by the above Act. The circumstances and the terms under and upon which the Court will still grant an interim injunction to restrain an alleged infringement. *Davenport* v. *Jepson*, 1 N. R. 173; 35 L. J., Ch., 204; 1 L. R., Eq., 202.

5. It is the rule of a court of equity not to grant a perpetual injunction to restrain the infringement of a patent, unless the legal validity of the patent has been conclusively established. *Hills* v. *Evans*, 31 L. J., Ch., 457; 6 L. T., N. S., 90.

6. In a suit to restrain an infringement of a patent, where there are mingled questions of fact and law, the proper course is for the validity of the patent to be tried by the Court of Chancery, under 25 & 26 Vict., c. 42, and not by an issue at law. *Young* v. *Fernie*, 12 W. R. 221; 3 N. R. 270.

The 25 & 26 Vict., c. 42 lays down a rule that all questions of fact brought before the Court are to be determined by the Court itself; the exception contained in the Act operates only by way of permission, and in order to bring a case within the exception the Court must be satisfied that the administration of justice will be more conveniently exercised and promoted by sending the matter to be tried at law. S. C. 9 L. T., N. S., 590.

7. Where two parties have obtained patents for the same invention, the Court will not interfere by injunction, but leave them to try the legal right by scire facias, being disabled, by reason of s. 1 of 25 & 26 Vict., c. 42, from directing a case for the opinion of a court of law. *Copeland* v. *Webb*, 11 W. R. 134; 1 N. R. 119.

8. A defendant in a suit to restrain an infringement of a patent is entitled to dispute the validity of the patent, although the plaintiff has obtained a judgment at law against another person establishing its validity; but until he has proved its invalidity he will be restrained from infringing on it. *Bovil* v. *Goodier*, 2 L. R., Eq., 195; 12 Jur., N. S., 404; 35 L. J., Ch., 432.

In a suit to restrain an infringement of a patent, the validity of which has been established at law against another defendant, the Court at the hearing being satisfied of the sufficiency of the specification, the utility of the invention, and the fact of the infringement, granted an injunction to restrain him from infringing the patent, and directed an issue to be tried at law as to the novelty of the invention. *Ib.*

An objection to the validity of a patent, on the ground of the expiration of a foreign patent for the same invention, cannot be taken at the hearing of a suit to restrain the infringement of the patent, unless it has been raised by the answer. *Ib.*

9. The usual issues may be granted in a patent suit before the hearing of the cause, although the defendant denies the validity of the plaintiff's patent on the ground of the generality of the claim in the specification. *Arnold* v. *Bradbury*, 6 L. R., Ch., 706.

10. One hundred and thirty-four suits were instituted against as many defendants by a patentee for infringement of his patent, and interrogatories were served. Seventy-seven defendants, combining together amongst themselves so as to make four bodies in all, moved, before putting in any answers, that the plaintiff might be directed to proceed with one suit only until it should have been determined, or until the validity of the patent should have been finally decided, or until further order; and that the proceedings in the other suits might in the meantime be stayed, or that the time for answering and producing documents might be enlarged, the moving defendants undertaking to be bound by the result of the selected suit so far as the question of the validity of the patent was concerned. The Court, upon terms, and the plaintiff not opposing, made an order with a view of trying before itself the question of validity in the first instance, before entering upon the question of infringement. *Foxwell* v. *Webster*, 4 De G. J. & S. 77; 10 Jur., N. S., 137; 12 W. R. 186; 9 L. T., N. S., 528.

11. A defendant in a suit to restrain an infringement of a patent has no right to have the issues of fact referred to a jury *ex debito justitiæ;* and where the issues raised have been already determined, such reference will

in general be refused. But if it appears that there is a really doubtful question at issue, the Court will not decide it for itself if either party desires a jury. *Davenport* v. *Goldberg*, 2 Hem. & M. 282; 5 N. R. 484.

1. Where a patentee has once successfully maintained the validity of his patent in a trial before a jury, this Court will not, on the application of the defendants, direct the usual issues as to the novelty of the invention or the sufficiency of the specification to be tried before a jury, unless the defendants have distinctly raised such questions by their answer, or unless it shall appear to the Court, at the hearing of the cause, that such issues ought to be granted. Where a patentee had obtained a verdict at law upon an action brought by him against a person who had infringed his patent, and where the same patentee had obtained a verdict on the usual issues directed by this Court in a suit brought by him against another person for infringement, and where, in a suit brought by the same patentee against a third party for infringement, the defendant had denied the infringement by his affidavits in such a manner that the plaintiff had not ventured to move for an interlocutory injunction, but the defendant had not distinctly denied the want of novelty of the invention, or the sufficiency of the specification, by his answer, and the plaintiff had given notice of motion for a decree, the Court, on the application of the defendant, directed an issue as to the infringement to be tried before a jury at the same time as the motion for decree came on, but refused to direct any other issues to be tried; and where the defendant had not denied infringement by affidavit the Court refused to direct an issue as to it. *Davenport* v. *Goldberg*, and *Davenport* v. *Phillips*, 5 N. R. 484.

2. Where in a patent suit questions of fact have to be determined, the parties have no absolute right to have those questions tried by a jury. *Bovill* v. *Hitchcock*, 16 W. R. 321; 3 L. R., Ch., 417; 37 L. J., Ch., 223.

3. In the absence of special circumstances the ordinary issues in a patent suit will be tried before the Court itself without a jury. *Patent Marine Inventions Co.* v. *Chadburn*, 16 L. R., Eq., 447; 21 W. R. 745; 28 L. T., N. S., 614.

Practice on Trial of.] 4. A defendant will not be allowed to add a totally new issue of fact not in any way suggested by his answers to the issues which have been already directed for trial. *Morgan* v. *Fuller*, 2 L. R., Eq., 296; 14 W. R. 497.

5. On an issue directed in a patent suit on the question of novelty, the defendant is entitled to have the question of newness of manufacture tried apart from the question of newness of invention. *Spencer* v. *Jack*, 3 De G. J. & S. 346; 8 Jur., N. S., 1165; 1 N. R. 114.

6. Where a question of novelty, or infringement, depends merely on the construction of the specification, it is one entirely for the judge; but where it also depends on other circumstances, such as the degree of difference or of similitude between two machines, it is a mixed question of law and fact; what the jurymen find to have been done is a matter of fact, but the judge must apply that fact according to the rules of law, and is entitled and bound to say whether what has been done amounts to an infringement. *Seed* v. *Higgins*, 8 H. L. Ca. 550; 30 L. J., Q. B., 314; 6 Jur., N. S., 1264.

The question of infringement is one of mixed law and fact; the construction of the specification is for the Court, with the aid of such facts as are admissible, to explain written documents. The opinion of scientific witnesses is only admissible as proof of facts; their opinion as to whether there has been an infringement or not, though sometimes received in order to save time and trouble, is, strictly speaking, inadmissible, and, if objected to, ought to be rejected. *Semble. Ib.*

7. The plaintiff obtained letters patent for improvements in the manufacture of iron and steel. In his specification he declared his invention to be the use of carburet of manganese in any process whereby iron is converted into cast steel, and he described the process which he claimed thus:—"I do it by introducing into a crucible bars of steel broken into fragments, mixtures of cast and malleable iron, or malleable iron and carbonaceous matter along with from one to three per cent. of their weight of carburet of manganese." He then stated that he did not claim the use of the mixture of cast and malleable iron and carbonaceous matter as any part of his invention, but only the use of carburet of manganese, in any process for converting iron into cast steel. The defendant produced the same result,—a superior and more valuable description and quality of cast steel,—as certainly and more cheaply, by substituting for the carburet of manganese, its elements—viz., oxide of manganese and coal tar, which, being put into the crucible with the iron, according to the evidence of chemists, would form carburet of manganese before the iron was in a state of fusion, and consequently before any combination therewith could take place. The judge told the jury that there was no evidence of infringement:—Held, a right direction. *Unwin* v. *Heath*, 5 H. L. Ca. 505.

8. Where the Court directs an action, instead of granting an injunction against the equitable assignee of a patent, it will not exact from the defendant any admissions as to the validity of the patent. *Pidding* v. *Franks*, 1 Macn. & G. 56; 1 H. & Tw. 220; 18 L. J., N. S., Ch., 295; 13 Jur. 593.

9. A jury empanelled to try certain questions of fact relating to a patent, having been discharged without giving a verdict, Wood, V.-C., refused to decide such questions of fact on the evidence he had heard without the concurrence of both parties; but allowed the questions of law arising on the face of the patent to be argued previously to another trial. *Davenport* v. *Jepson*, 1 N. R. 471.

10. The Court, in the exercise of its discretion, will refuse to consider the questions arising on the construction of the specification of a patent, until the evidence on the whole of the case has been heard. *Young* v. *Fernie*, 4 N. R. 218.

11. Numerous suits had been instituted for the infringement, by different defendants, of the same patent. The defendants moved to stay proceedings in the several suits, on the

ground that the plaintiff ought first to establish the validity of his patent, which they denied:—Held, that, under the circumstances, the Court would take measures to have the question of validity tried first, and would allow all the defendants to be represented at the trial, by three selected by the rest. *Foxwell* v. *Bradbury*, 3 N. R. 105, 180.

1. When a patent is taken out for an invention consisting of the combination in one thing of several subordinate parts, the question whether or not a person taking and using a certain number of such parts and omitting others has taken the substance of the invention and thereby infringed the patent is a question not of law but of fact, to be decided by the jury or Court with reference to the circumstances of the particular case. *Clarke* v. *Adie* (No. 1), 46 L. J., Ch., 585; 36 L. T., N. S., 923; 2 L. R., App. Cas., 315.

6. Certificate of Breaches.

2. When, at the trial of an action for the infringement of a patent, the Court is of opinion that there has been an infringement by the defendant, but holds on a legal ground that the patent is void, it will not give the plaintiff a certificate, under s. 43 of the Patent Law Amendment Act 1852, that breaches of the patent by the defendant have been proved. *United Telephone Co.* v. *Harrison*, 21 L. R., Ch. D., 720; 51 L. J., Ch., 705; 46 L. T., N. S., 620; 30 W. R. 724.

3. A proprietor of a patent filed a number of bills against parties selling and using machines, of which he claimed to be patentee, praying an injunction for inspection, and an account. On a motion of a number of the defendants to stay proceedings, an order was made for the validity of the patent to be tried in the first instance, such trial to be conducted by one or more of the defendants before the Court on behalf of the rest, and to be heard before the Lord Chancellor, with liberty for the others to apply to be made parties to the order, and all proceedings to be stayed in the meantime. *Foxwell* v. *Webster*, 12 W. R. 186; 9 L. T., N. S., 528.

The Court will not give a certificate that a special jury was requisite, but will give such certificate as described in 15 & 16 Vict., c. 83, s. 43. *Ib.*

4. In a suit to restrain infringement of a patent, the Court refused, under the circumstances, to order the destruction of the defendant's machines which had been found to be an infringement of the plaintiff's patent. An inquiry as to the damages sustained by the plaintiffs by the infringement of their patent by the defendant was likewise refused, an issue as to the damages not having been submitted to the jury, which had already in the same suit tried the validity of the plaintiffs' patent. The Court granted a certificate in accordance with the 5 & 6 Will. 4, c. 83, s. 3., that the validity of the patent had come in question in the suit, and had been determined in favour of the plaintiffs. *Semble*, it is not necessary to certify for a special jury where questions of fact are tried before the Court itself under the 21 & 22 Vict., c. 27. *Needham* v. *Oxley*, 2 N. R. 388.

7. Evidence.

5. Exemplification of part of a patent, not suffered to be read in evidence, notwithstanding the statutes of 3 & 4 of Edw. 6 and 12 Eliz., where the other side have no time to consult the patent roll, and so may be surprised by an imperfect exemplification. *Att.-Gen.* v. *Taylor*, Pre. Ch. 59.

6. A licensee of a patented invention was ordered to account for all instruments made by him pursuant to the patent. He alleged that the instruments which he had made were not covered by the patent according to its true construction, and in support of his contention tendered in evidence a prior American specification (a copy of which was in the Library of the Commissioners of Patents, but was not proved to have been known to the patentee), for the purpose of showing that a construction large enough to cover the instruments made by the licencee would make the patent bad for want of novelty, and therefore ought not to be adopted by the Court:—Held, that the evidence was inadmissible. *Adie* v. *Clark* (No. 2), 3 L. R., Ch. D., 134; 24 W. R. 1007.

7. In a suit to restrain the sale of a patented article, it is incumbent on the plaintiff not only to prove the sale, but to prove that the article was not made by himself or his agents, *Betts* v. *Willmott*, 6 L. R., Ch., 239; 25 L. T., N. S., 188; 19 W. R. 369.

The owner of an English patent manufactured the patented article in France as well as in England. In a suit to restrain the sale of the article in England, the plaintiff proved that it was not made at his manufactory in England, but could not prove that it was not made at his manufactory in France; the bill was dismissed with costs. *Ib.*

8. Upon the trial of issues in a patent case the plaintiff is entitled to call evidence in reply, for the purpose of rebutting a case of prior user set up by the defendant. *Penn* v. *Jack*, 2 L. R., Eq., 314; 14 W. R. 760; 14 L. T., N. S., 495.

But after the evidence for the defence has been summed up, the defendant will not be allowed to adduce further evidence in answer to that given by the plaintiff in reply. *Ib.*

9. When a defendant to a suit in which replication is filed has given evidence of instances of prior user not mentioned in his answer, and leave has been granted to the plaintiff to adduce fresh evidence to disprove these instances, the defendant will not necessarily be entitled to bring further evidence to rebut the fresh evidence so adduced by the plaintiff. *Poupard* v. *Fardell*, 18 W. R. 59.

10. In a patent suit which had been set down for hearing, an application made by the defendant, after notice given to the plaintiff, for leave to produce at the hearing of the cause the evidence as to prior user of a new witness discovered since the closing of the evidence, was allowed. *Wilson* v. *Gann*, 23 W. R. 546.

11. In ordinary cases, the duty of establishing that the thing patented has been pirated lies on the patentee, and courts of equity grant limited orders of inspection for the purpose of enabling him to discharge that duty. Such orders cannot be granted where the piracy alleged has taken place abroad, and *semble*,

that then it becomes the duty of the defendant to give evidence of a negative character to prove (in answer to the *primâ facie* case made by the patentee) that the process used was of a different character from that which had been patented. Where that negative evidence was not given by the defendant, but positive evidence on the part of the patentee was given by one workman that he had been employed at the foreign manufactory, and there saw the capsules manufactured by a process not distinguishable from that of the patentee:—Held, that these circumstances justified the conclusion of identity of material and process, and were sufficient warrant for the grant of an injunction. *Neilson* v. *Betts*, 5. L. R., H. L., 1; 40 L. J., Ch., 317; 19 W. R. 1121.

Where a patent had been taken out by D. in 1804, and another patent had been taken out by B. in 1849, and B. took proceedings against N. for infringement, to which N. set up as an answer want of novelty, and proved D.'s patent, evidence of all that was done in the trade to which the patent related between the date of D.'s patent and of B.'s patent was admissible on this question of novelty. *Ib.*

Of Scientific Witnesses.] 1. Where in a patent case the evidence is conflicting and indecisive on a scientific point, the Court is at liberty to obtain competent independent scientific assistance in determining the matters at issue. *Badische Anilin und Soda Fabrik* v. *Levinstein*, 24 L. R., Ch. D., 156; 52 L. J., Ch., 704; 48 L. T. 822; 31 W. R. 913.

Where in a patent case the defendant denies infringement, but objects to state in open court the process he actually practises, on the ground that it is the subject of a valuable secret, of the benefit of which he would be deprived by disclosure, the Court will first ascertain whether the defence fails in all other respects than infringement, and then, unless the defendant prefers to submit to an injunction, will hear the evidence and arguments with respect to the alleged infringement by the secret process with closed doors, and, with a view to further protecting the secret, will order the shorthand notes of the private hearing to be impounded until either an appeal is entered or the right to appeal is abandoned. *Ib.*

2. *Semble*, the opinion of scientific witnesses as to whether there has or has not been an infringement ought to be received. *Seed* v. *Higgins*, 8 H. L. Ca. 550; 6 Jur., N. S., 1264.

8. Interrogatories and Discovery.

3. A bill having been filed by an assignee of certain alleged patent inventions, for an injunction to restrain the infringements of the patents, and for an account of the profits made by their use, the defendants, by their answer, insisted that the patents were originally invalid; and, also, that if originally good, they have been made void by subsequent acts of the patentee. By the decree made at the hearing of the cause, the bill was retained for three years, with liberty for the plaintiff to bring an action; and the defendants were directed to admit that the plaintiff was the assignee of the patents, and that they (the defendants) had used the alleged inventions; and the plaintiff was ordered to produce certain deeds at the trial, and to admit their execution. The defendants then filed a bill of discovery against the plaintiff, but the discovery sought by that bill had reference only to the acts by which it was alleged that the patents became void subsequently to their creation. The defendant afterwards finding the necessity of a discovery as to the original invalidity of the patents, applied to the Court for permission to file another bill of discovery which should relate to such original invalidity, and the Court granted the permission desired. Whether it was regular to file the first bill of discovery without leave of the Court, *quære*. *Few* v. *Guppy*, 1 Myl. & C. 487.

4. In a suit to restrain the alleged infringement of a patent, the defendant is not bound to answer interrogatories which assume the fact of infringement, as if the fact of infringement be established at the hearing, all the discovery required will be then obtained under the decree, while, if that fact be not then established, the discovery required will be immaterial. A defendant seeking to protect himself from giving such discovery by answer, is not bound to put in a plea denying infringement. *Delarue* v. *Dickinson*, 3 K. & J. 388.

5. In a suit to restrain the infringement of a patent, the defendants were required to set out the names and addresses of all persons from whom they had received sums of money for the use of articles alleged to be manufactured in infringement of the plaintiff's rights, even though such persons might reside abroad. *Crossley* v. *Stewart*, 1 N. R. 426.

6. Numerous suits having been instituted against different defendants for the infringement of the same patent, the defendants, before any of them had answered, moved to stay proceedings in all the suits but one:—Held, by the Vice-Chancellor, that the Court could not interfere with the plaintiff's right to have a separate answer from each defendant:—Held, also, that in a patent case a defendant would not be excused from answering fully and at once, on the ground that the validity of the patent would require to be established by an issue. *Foxwell* v. *Webster*, 1 N. R. 103. But see *Foxwell* v. *Bradbury*, 3 N. R. 180.

7. A plaintiff in a patent case, where the novelty of the invention is denied by the answer, has no right to a discovery of the particulars on which the defendant relies, as showing a user of the thing patented prior to the date of the patent. *Daw* v. *Eley*, 2 Hem. & M. 725.

8. In a suit to restrain an infringement of a patent which is contested on the ground of anticipation by prior user, the plaintiff is not entitled to discovery from the defendant in answer to a general interrogatory as to the instances of prior user on which he relies. *Bovill* v. *Smith*, 2 L. R., Eq., 459.

9. A defendant, though he deny any infringement of the plaintiff's patent, is bound to answer fully, whether he uses in his process the materials mentioned in the specification; whether he makes any addition to those materials; and whether such additions make any

difference in the process. *Renard* v. *Levinstein*, 10 L. T., N. S., 94.

Nature and extent of the discovery which a plaintiff must give in answer to the defendant's concise statement and interrogatories in respect of a patent. S. C. 11 L. T., N. S., 79; 3 N. R. 665.

1. A plaintiff in a patent suit is bound to answer all the interrogatories of a defendant which are fairly calculated to show that the patent is not a good patent, or that that which the plaintiff alleges to be an infringement is not an infringement. *Hoffman* v. *Postill*, 17 W. R. 901; 20 L. T., N. S., 893.

2. Upon a bill charging the defendant with infringing the plaintiff's patent, and asking for an account of his dealings and transactions, and seeking to make him answerable for the profits received by him in consequence of the infringement:—Held, that the defendant must answer the interrogatories, though he disputes the title of the plaintiff, and insists that the discovery will be an act of oppression upon him; and that there was little probability that the Court, at the hearing, would direct an account upon the facts if disclosed. *Swinborne* v *Nelson*, 22 L. J., Ch., 331; 1 W. R. 155.

3. A patentee of improvements in brick-cutting machines, who was a manufacturer of the machines by an agent at the agent's works and not a licencee, having obtained a perpetual injunction against defendants, who were also manufacturers of brick-cutting machines, from infringement, the defendants were ordered to file an affidavit stating the number of machines made by them since the date of the patent, and the names and addresses of the persons to whom the same had been sold, and of the agents concerned in the transactions:—Held, that the plaintiff was entitled to have discovery of the names and addresses of the purchasers, but not of the agents concerned, there being nothing to show that any agents had been employed. *Murray* v. *Clayton*, 15 L. R., Eq., 115; 42 L. J., Ch., 191; 21 W. R. 118, 498; 27 L. T., N. S., 644.

4. In a patent action where the plaintiff or defendant, as the case may be, makes out a proper case the Court has jurisdiction to order interrogatories to be answered notwithstanding the provision in the Patent Law Amendment Act 1852 for the delivery of particulars. *Birch* v. *Mather*, 22 L. R., Ch. D., 629; 52 L. J., Ch., 292; 31 W. R. 362.

The plaintiff is also entitled under the 41st section of the same Act to the names and addresses of the persons by whom prior user is alleged to have been made as well as the places where the prior user has taken place. *Ib.*

5. In a suit to restrain the infringement of a patent the defendant was required to state whether he was not making articles in all respects identical with those of the plaintiff, and to set forth in what respects they differed, and by what process they were made:—Held, that the defendant, who alleged prior user by himself and others, had sufficiently answered by stating that, save so far as the articles manufactured by him before the date of the patent were similar to those of the plaintiff, the articles he now made differed from those made by the plaintiff, but he could not show in what they differed without ocular demonstration. *Crossley* v. *Tomey*, 2 L. R., Ch. D., 533; 34 L. T., N. S., 476.

Held, also, that the defendant was bound, in alleging prior user by other persons, to set forth the names of some of those persons. *Ib.*

9. Order for Inspection or Analysis.

6. Form of order for inspection in patent cases. See *Davenport* v. *Jepson*, 1 N. R. 307.

7. The plaintiffs were owners of a type-founding patent. The defendant was a printer, who used types alleged to be colourable imitations of the type patented by the plaintiffs. On a bill for an injunction:—Held, that the Court had jurisdiction to order the defendant to deliver a sample of type to the plaintiffs for analysis. *Patent Type-Founding Co.* v. *Walter*, 1 Johns. 727; 8 W. R. 353.

In an action against a printer for an infringement of a patent for improvements in the manufacture of type, the improvements consisting in the use of lead, tin, and antimony in certain proportions, the plaintiff applied to the Court under s. 42 of the 15 & 16 Vict., c. 83, for leave to inspect, and if necessary to take specimens of the type for the purpose of analysis. The affidavit stated that he had obtained from the defendant specimens of the type and caused them to be analysed by a chemist who was dead, and that the type so analysed was an infringement of the patent; but did not set out the report of the chemist or state its substance, or whether or not it was in writing. The Court refused to make an order that the plaintiff should be at liberty to take specimens for analysis. S. C. 5 H. & N. 192; 6 Jur., N. S., 103; 29 L. J., Exch., 207.

But the plaintiff subsequently filed a bill in equity against the defendant, and an order was made for inspection and the delivery of a competent portion of the type for the purposes of analysis. S. C. 1 Johns. 727.

Held, also, that laches sufficient to defeat the plaintiffs' right to an interlocutory injunction was no bar to an order on the same motion for inspection and samples. *Ib.*

8. In a suit to establish the validity of a patent, and to restrain infringement, upon an application by the plaintiff for inspection of all the sewing machines of every kind on the defendant's premises, the defendant was ordered to verify the several kinds of sewing machines which he had sold or exposed for sale, and to produce at his solicitor's office one of each class for inspection by the plaintiff's solicitor, and two of their scientific witnesses. *Singer Manufacturing Co.* v. *Wilson*, 13 W. R. 560; 12 L. T., N. S., 140; 5 N. R. 505.

9. The Court must be satisfied, that the plaintiff has made out such a case as at the hearing of the cause he will obtain the relief prayed, and that the previous inspection required by him of the defendant was material to such a case, before it will grant inspection of his process by which an alleged infringement of a patent was to be made out. *Piggott* v. *Anglo-American Telegraph Co.*, 19 L. T., N. S., 46.

10. An order will not be made on the application of a plaintiff, in a suit to restrain an

alleged infringement of his patent, for inspection of the defendant's works and machinery, unless the Court is satisfied that the inspection is essential to enable the plaintiff to prove his case. *Batley* v. *Kynock*, 19 L. R., Eq., 90; 44 L. J., Ch., 89; 23 W. R. 52.

In a suit for infringement of a patent for cartridges a motion on behalf of the plaintiff to inspect the defendant's manufactory was refused. *Ib.*

10. Appeal.

1. Where an order had been made by the Court below directing an issue, and the plaintiff's solicitor had at first intimated his intention to acquiesce in the decision, and the issues had been settled between the parties:—Held, that the plaintiff was not thereby precluded from afterwards appealing against the order, such appeal being presented in reasonable time. *Young* v. *Fernie*, 12 W. R. 221; 3 N. R. 270.

2. A. B., a patentee, had obtained a verdict at law establishing his right to a patent, and that such right had been infringed by C. D.; and the Court of Queen's Bench had unanimously discharged a rule *nisi* for a new trial obtained by C. D. C. D. applied, under s. 35 of the Common Law Procedure Act 1854, for leave to appeal, and leave was granted by the Court of Queen's Bench to appeal upon one point only:—Held, that notwithstanding the pendency of the appeal, A. B. was entitled to an injunction against C. D. to restrain the infringement of the patent, his right having been long enjoyed and established by the verdict of the jury, while an appeal under the Common Law Procedure Act was allowed on grounds of law only, and not on questions of evidence. *Lister* v. *Leather*, 5 W. R. 550; 3 Jur., N. S., 433.

3. The 21 & 22 Vict., c. 27, s. 3, does not, by reference to proceedings at common law, impose limits upon the right of appeal previously existing against any order made in the Court of Chancery. *Curtis* v. *Platt*, 1 L. R., H. L., 337; 35 L. J., Ch., 852.

Where, therefore, an order had been made in the Court of Chancery by a Vice-Chancellor, on his own findings upon a trial without a jury, and that order had been confirmed by the Lord Chancellor on appeal:—Held, that the order of the Lord Chancellor was the subject of appeal to the House of Lords. *Ib.*

4. The Court of Appeal in Chancery has not, under the 21 & 22 Vict., c. 27, power, on an application for a new trial, to reverse the findings of a Vice-Chancellor on issues of fact tried before him; but where the issues raise mixed questions of law and fact, if the decision of one of the questions discussed is sufficient to dispose of the case, the Court of Appeal may give a final judgment upon it without ordering a new trial. *Simpson* v. *Holliday*, 1 L. R., H. L., 315; 35 L. J., Ch., 811.

11. Costs.

5. Where on the invasion of a patent right the plaintiffs were entitled to the protection of an injunction:—Held, that the injunction having been obtained and submitted to, with an undertaking not to continue the infringement, the plaintiff was, nevertheless, entitled to go on in order to obtain his costs; but *semble*, the Court would not grant an account of damages. *Geary* v. *Norton*, 1 De G. & Sm. 9.

6. In a suit for the infringement of a patent, where the Court considers the plaintiff entitled to full costs as between solicitor and client, the decree or order should contain an express direction that the costs be so taxed, notwithstanding the 43rd section of the 15 & 16 Vict., c. 83 provides that he shall have such full costs unless the judge shall certify that he ought not to have them. *Lister* v. *Leather*, 4 Kay & J. 425.

7. On a bill to restrain the infringement of a patent, a motion for injunction was ordered to stand over until after the trial of an action, nothing being said about costs. In the action the plaintiff succeeded on the issue as to the infringement, but failed in establishing the validity of his patent. The bill was afterwards dismissed with costs:—Held, that the defendant's costs of the motion were costs in the cause. Circumstances under which the costs of a third counsel will be allowed. *Betts* v. *Clifford*, 1 John. & H. 74.

8. The directors of a limited company, and acting as its agents, infringed a patent, and were made defendants, together with the company, to a suit, the bill in which prayed for an injunction and costs:—Held, that the decree must be made against the directors as well as the company, and that the directors were personally liable to pay the costs. *Betts* v. *De Vitre*, 11 Jur., N. S., 9.

Form of order for a perpetual injunction to restrain defendants from further infringement of patent, as to costs personally against directors of a limited liability company, and as to accounts and inquiries to ascertain damages sustained by a patentee in consequence of the infringement of his patent. S. C. 11 Jur., N. S., 217; 12 L. T., N. S., 51.

9. A patentee is entitled to full costs, at the discretion of the judge, under 15 & 16 Vict., c. 83, s. 43, in any suit to protect his rights under the patent, although the validity of his patent is not disputed, and has, in fact, been established in prior suits. *Davenport* v. *Rylands*, 1 L. R., Eq., 302; 12 Jur., N. S., 71; 35 L. J., Ch., 204; 14 W. R. 243; 14 L. T., N. S., 53.

10. Where, in a suit to restrain the infringement of a patent, issues are directed and the judge certifies that the validity of the letters patent came in question, the plaintiff cannot, at the hearing of that suit, have more than party and party costs, the provisions of the 15 and 16 Vict., c. 83, applying only to subsequent actions or suits. *Penn* v. *Bibby*, 36 L. J., Ch., 277; 3 L. R., Eq., 308; 15 W. R. 192; 15 L. T., N. S., 385.

11. Upon an application by a defendant for leave to re-amend objections by inserting certain further specified instances which had come to his knowledge, he was ordered to pay the costs of the application, and the costs arising out of and consequent upon the re-amendment were reserved. *Penn* v. *Bibby*, 2 L. R., Eq., 548.

12. In granting the defendant in a patent action after issue joined, and a day has been fixed for the hearing, leave to amend his particulars of objection, the Court will place the plaintiff in the same position as to discontinuing the action, or disclaiming a portion of

his invention, as he would have been if the original particulars of objection had contained the new instances of prior publication proposed to be introduced by amendment; and accordingly all costs incurred by the plaintiff subsequently to the delivery of the original particulars of objection will be ordered to be paid to him by the defendant in case he elects, within a time fixed by the order, to discontinue his action. Form of order. *Edison Telephone Co.* v. *India-Rubber Co.*, 17 L. R., Ch. D., 137; 29 W. R. 496.

1. In a suit to restrain the infringement of a patent, the plaintiff, shortly before the hearing, obtained the common order to dismiss the bill with costs. Amongst the items in the defendant's bill of costs were charges for drawing particulars of breaches, and having the same settled by counsel, which the master had allowed; charges for remuneration of scientific witnesses, which he had reduced; and a charge for the construction of a model, which he had also reduced:—Held, that the Patent Law Amendment Act 1852 (15 & 16 Vict., c. 83), s. 43, had no application to the case of a plaintiff dismissing his own bill before the hearing; that the allowance of remuneration to scientific witnesses was part of the ordinary practice; and that the expense of having a model made might also be allowed. *Batley* v. *Kynock*, 20 L. R., Eq., 632; 33 L. T., N. S., 45.

XII. INJUNCTION.

1. *General Principles*, 5582.
2. *Affidavit*, 5582.
3. *Where Long User of Patent*, 5583.
4. *Delay, Effect of*, 5584.
5. *Suspending*, 5584.
6. *Undertaking as to Damages*, 5584.
7. *Issue at Law*. See XI. 5 *supra*.

1. General Principles.

2. In August 1835 a patentee filed a bill to restrain an alleged infringement of his patent, and the defendant having, by his answer, denied the validity of the patent, and also the fact of the alleged infringement, the plaintiff made no interlocutory application for an injunction, but went into evidence in support of his case, and in May 1839 brought the cause to a hearing. The Master of the Rolls, being of opinion that the plaintiff, upon the evidence, had not made out a case which would have supported an injunction if applied for in the interlocutory stage, refused to give him an opportunity of establishing his title at law by retaining the bill, with liberty to bring an action, and dismissed the bill with costs; and the Lord Chancellor, on appeal, affirmed the decision. *Bacon* v. *Jones*, 4 Myl. & C. 433; 3 Jur. 994. Affirming S. C. *sub nom. Bacon* v. *Spottiswoode*, 1 Beav. 382; 3 Jur. 476.

Consideration of the principles and practice of the Court in granting injunctions in patent cases, upon interlocutory motions and at the hearing. *Ib.*

3. The Court will not, upon interlocutory application, interfere to restrain the exercise of a patent. *Copeland* v. *Webb*, 1 N. R. 119.

4. The Court will, since the 25 & 26 Vict., c. 42, enter into the question of the validity of a patent, on a motion for an interim injunction. *Davenport* v. *Jepson*, 1 N. R. 173.

The powers of the Court are not limited by the above Act. *Ib.*

The circumstances and the terms under and upon which the Court will still grant an interim injunction to restrain an alleged infringement. *Ib.*

5. Upon the invasion of a patent right, the party complaining has a right to the protection of an injunction, although the other party may promise to commit no further infringement, and may offer to pay the costs of preparing the bill; and if the defendant do not, after injunction obtained, offer to pay the costs of it, the plaintiff may bring the suit to a hearing, and will be entitled to the costs of the suit. *Quære*, whether, in such a case, the Court will give an account of damages. *Geary* v. *Norton*, 1 De G. & Sm. 9.

6. A., in May 1836, became purchaser of a patent, which was obtained in May 1835, and which the defendant, as alleged, subsequent to the date of the purchase infringed. A. obtained an injunction *ex parte* to restrain the defendant, on an affidavit in support, which stated that the patent had been recorded, and that it became and was good and valid. On motion to dissolve:—Held, that the recency of a patent was no ground for refusing an injunction *ex parte* to restrain its infringement. *Gardner* v. *Broadbent*, 2 Jur., N. S., 1041.

7. In an action for infringement of a patent, judgment was given for an injunction against manufacture or sale. The registrar refused to insert in the minutes an order against importation or exportation. On motion to vary the minutes in this and other particulars:—Held, that the refusal was right, but that in some other particulars the minutes must be varied; the plaintiff to pay the costs of the motion, having failed on the substantial point at issue. *British Dynamite Co.* v. *Krebs*, 25 W. R. 846.

2. Affidavit.

8. In order to obtain an injunction against violation of a patent, the party must, at the time of applying, swear as to his belief that he is the original inventor. *Hill* v. *Thompson*, 3 Meriv. 622.

9. Affidavits allowed to be read for a patentee of a new invention, upon a motion to dissolve an injunction on the coming in of the answer. *Gibbs* v. *Cole*, 3 P. W. 255; Dick. 64.

10. On an application for an injunction to restrain the infringement of a patent, the party must swear, that at the time of making the application he believes that at the date of the patent the invention was new, or had not been previously known or used in this kingdom. *Sturz* v. *De La Rue*, 5 Russ. 322; 7 L. J., Ch., 47.

11. A., in May 1836, became purchaser of a patent, which was obtained in May 1835, and which the defendant, as alleged, subsequent to the date of the purchase infringed. A. obtained an injunction *ex parte* to restrain him, or an affidavit in support, which stated that the patent had been recorded, and that it became and was good and valid. On motion to dissolve, held that the recency of a patent was no ground for refusing an injunction *ex*

parte to restrain its infringement, but that the party seeking such injunction was bound to support his application by a clear and distinct statement, upon affidavit, that he believed the patentee was the original inventor, and that the invention had not been practised at the time when the patent was granted; and as the injunction obtained *ex parte* was granted upon an affidavit insufficient in this respect, it was dissolved, with costs. *Gardner* v. *Broadbent*, 2 Jur., N. S., 1041; 4 W. R. 767.

1. In an injunction suit to restrain an infringement of a patent, a plaintiff moving for leave to proceed at law must file an affidavit of his belief in his title and in the alleged infringement. *Mayer* v. *Spence*, 1 John. & H. 87; 6 Jur., N. S., 672; 8 W. R. 559.

Order made upon such an affidavit, notwithstanding an application by defendant that the motion might stand over for the cross-examination of the plaintiff. *Ib.*

2. Where a defendant to a bill filed to restrain an infringement of a patent by his answer denies the novelty of the invention, the plaintiff, in support of a motion for an injunction, must make a clear affidavit of his belief in the novelty of the invention. *Whitten* v. *Jennings*, 1 Dr. & Sm. 110; 6 Jur., N. S., 164.

3. Where Long User of Patent.

3. Where there has been a length of exclusive enjoyment under a patent, the Court will grant an injunction in the first instance, without previously putting the party to establish this right by an action at law; otherwise, where the patent is recent. *Hill* v. *Thompson*, 3 Meriv. 622.

4. Principles upon which the Court will interfere to protect a patentee before he has established his right at law in the case of patents which have been long used or enjoyed, or will in the case of new patents suspend its interference until the right at law has been established. *Caldwell* v. *Vanvlissengen*, 9 Hare 424; 21 L. J., N. S., Ch., 97; 16 Jur. 115.

5. The Court will not, in the first instance, interfere by injunction to restrain the infringement of a patent unless there has been long and uninterrupted enjoyment under it, but will direct an action to be brought to try the legal right. Delay in filing the bill is a ground for refusing the injunction. *Baxter* v. *Combe*, 1 Ir. Ch. R. 284. And see *Betts* v. *Menzies*, 10 H. L. Ca. 117; 3 Jur., N. S., 357.

6. If the answer to a bill to prevent the infringement of a patent deny the invention to be new, and also the enjoyment under the letters patent, and state (as is the fact) that the specification is imperfectly set forth in the bill, the Court will dissolve an injunction previously obtained, on affidavit, giving the plaintiff liberty to bring an action, although the defendant admits by his answer that he has made machines upon the principle comprised in the letters patent. *Curtis* v. *Cutts*, 8 L. J., N. S., Ch., 184; 3 Jur. 34.

Long and exclusive enjoyment, under letters patent, will entitle a party to an injunction until an action can be tried at law. *Ib.*

7. Although a patent is of long standing, yet if, from the nature of the alleged invention, or the conflicting evidence as to its novelty, its validity appears to be doubtful, or if the evidence of exclusive possession is not satisfactory, the Court will not grant an injunction until the title has been established at law. *Collard* v. *Allison*, 4 Myl. & C. 487.

After the patentee had obtained a verdict in an action brought to try the validity of the patent, the Court refused to grant an injunction to restrain the infringement of the patent, on the ground that a rule *nisi* for a new trial had been obtained and was pending in the court of law, and that the legal title of the patentee was therefore still undecided. *Ib.*

8. Where there is a *primâ facie* case of an infringement of a patent, the length of time which the patent has been enjoyed by the patentee will influence the Court in granting an injunction against the parties who are alleged so to have infringed his rights. *Davenport* v. *Richard*, 3 L. T., N. S., 503.

Letters patent were dated in November 1851, which were duly assigned to the plaintiff. The defendant's letters patent were dated in January 1859, after the Patent Law Act 1852:—Held, that the first patentees without registration were to be considered as sole owners. *Ib.*

9. Although it is the ordinary rule of the Court not to grant an injunction, unless either the validity of a patent has been established, or the patent has been undisputed for many years, the circumstances of the case may be such as to induce the Court to depart from that rule. *Renard* v. *Levinstein*, 10 L. T., N. S., 94. Affirmed 10 L. T., N. S., 177.

10. An interim injunction will not be granted to restrain the infringement of a patent several years old but never established by legal proceedings, unless there has been an actual user of the patent for a considerable time. *Plympton* v. *Malcolmson*, 20 L. R., Eq., 37; 44 L. J., Ch., 257; 23 W. R. 404.

11. The Court will interfere by interlocutory injunction in support of a patent right, where the patent is an old one, and there has been long and undisturbed enjoyment of it, or where its validity has been established elsewhere, and the Court sees no reason to doubt the result, or where the conduct of the defendant has been such that as against him there is no reason to doubt the validity of the patent. *Dudgeon* v. *Thomson*, 22 W. R. 464; 30 L. T., N. S., 244.

The fact of an interdict having been granted against an infringer in Scotland is, as against him, sufficient *primâ facie* evidence of the validity of a patent for the United Kingdom to warrant an interlocutory injunction. *Ib.*

12. Where a patent had been in force for twelve years, and had been the subject of four suits against different persons, all of which terminated favourably to the patentee, and in two of which verdicts had been given in favour of the validity of the patent:—Held, that in a fifth case the patentee was entitled to an injunction pending the trial of the legal right, although a fresh fact was brought forward, tending to impeach the novelty of the invention. A patentee does not acquiesce in the infringement of his patent by omitting to proceed by scire facias to set aside a subsequent patent extending to part of his invention, unless such subsequent patent is put in practice. *Newall* v. *Wilson*, 2 De G. M. & G. 282.

An allegation as to the defendant's inability to be answerable in damages:—Held, not irrelevant upon a motion for an injunction against the infringement of a patent. *Ib.*

1. The doctrine that "there is no presumption in law in favour of the validity of a patent," or "where letters patent have been recently granted an injunction will not be granted until the right has been established," is not correct. *Halsey* v. *Brotherhood*, 15 L. R., Ch. D., 514; 49 L. J., Ch., 786.

4. Delay, Effect of.

2. A special injunction, on notice, to prevent the infringement of a patent, refused on the ground of delay, notwithstanding the Court had a strong impression in favour of the plaintiff's right. An injunction was refused, and the plaintiff put to establish his legal rights. *Bridson* v. *Benecke*, 12 Beav. 1.

He was successful on the trial, but the defendants tendered a bill of exceptions. An injunction was granted, under the circumstances, before the bill of exceptions had been disposed of. *Ib.*

3. Where an interlocutory injunction to restrain an infringement of a patent was moved for in a suit in which the bill was filed in July, and it appeared that the plaintiff wrote complaining of the infringement in the preceding November, and knew of the defendant's proceedings in the previous August, the injunction was refused on the ground of delay. *Bovill* v. *Crate*, 2 L. R., Eq., 388.

4. Where the patent was obtained in 1846, the alleged infringement of it took place in 1847, and the bill was not filed for more than two years afterwards, the injunction was refused. *Baxter* v. *Combe*, 1 Ir. Ch. D. 284.

5. F. contrived a grate, which he termed "F.'s Patent Kitchener," but no patent was ever taken out. H., formerly a servant of F., obtained surreptitiously lists of his customers and copies of his plans, etc., and used them in constructing an exactly similar article, which he sold under the name of "F.'s Patent Kitchener," but there was no proof that he represented the articles so sold by him as having been actually made by F. Plaintiff suffered four months to elapse without taking any steps:—Held, that the misrepresentation as to the article being patent was so far fraudulent, that, looking also to the lapse of time, the Court would not interfere summarily by injunction to prevent defendant using plaintiff's name in such manner; and therefore the bill was retained for six months, with liberty to bring an action in the meantime. *Flavell* v. *Harrison*, 17 Jur. 368; 22 L. J., Ch., 866; 10 Hare 467; 1 W. R. 213.

6. The owners of a patent for a peculiar mode of manufacturing iron wheels for railway carriages, having discovered that several railway companies were violating their patent, brought an action for damages against one of such companies only, but did not in any way give notice to the other companies to discontinue their infringements of the plaintiffs' right. In the action the validity of the patent was disputed, and it was not decided until three years after the patent had expired, when a verdict was given for the plaintiffs, with large damages. Thereupon the plaintiffs filed a bill for an account of profits, and an injunction against another of the companies who had infringed their patent, complaining of acts done nine years before:—Held, that the delay was not excused by the pendency of the action, but was fatal to the plaintiffs' case. *Smith* v. *London & South Western Railway Co.*, 1 Kay 408; 23 L. J., Ch., 562; 2 W. R. 310; 2 Eq. Rep. 428.

The right to an account is an entirely ancillary right, and is given by equity as its own mode of estimating damages in cases where it has been necessary to interfere primarily by injunction. *Ib.*

5. Suspending.

7. After a trial before the Vice-Chancellor, without a jury, in which issues were found for the plaintiff, a motion for a new trial having been refused by the Vice-Chancellor and on appeal refused by the Lord Chancellor was being taken by appeal to the House of Lords. The Court declined to suspend the final order for an injunction pending the appeal to the House of Lords. *Penn* v. *Bibby*, *Penn* v. *Fernie*, 3 L. R., Eq., 308; 36 L. J., Ch., 277; 15 W. R. 192.

8. In an action to restrain the infringement of a patent for improvements in the method of making ornamental tin plates the plaintiff obtained an injunction. The defendant, being about to appeal, moved to suspend the injunction pending the appeal, offering to give any undertaking as to damages that the Court might think fit to impose, and to prosecute the appeal with diligence, and alleging that if he was prevented from carrying out the numerous contracts he had in hand, the result would be to destroy their connection and to cause him irreparable damage:—Held, no ground for suspending the operation of the injunction, for that the defendant could buy the articles in the market and so fulfil his contracts. *Flower* v. *Lloyd*, 36 L. T., N. S., 444.

6. Undertaking as to Damages.

9. Since the 21 & 22 Vict., c. 27, s. 2, empowering the Court to award damages in cases in which it has jurisdiction to entertain an application for an injunction against the commission of any wrongful act, the Court will be more strict than ever in requiring the plaintiff, as a condition previous to his obtaining an interim injunction against the alleged infringement of a patent, to abide by any order it may make as to damages. *Tuck* v. *Silver*, 1 Johns. 218.

10. An allegation as to the defendant's inability to be answerable in damages:—Held, not irrelevant upon a motion for an injunction against the infringement of a patent. *Newall* v. *Wilson*, 2 De G. M. & G. 282.

11. In a suit to restrain the infringement of a patent relating to roller skates, the plaintiff moved for an injunction against the defendant until the hearing:—Held, that the plaintiff was entitled to an injunction upon *giving* an undertaking as to damages. Inasmuch as the defendant's trade was only a new one, there would be less hardship in stopping it and requiring the plaintiff to give an undertaking as to damages than in compelling the plaintiff to rely upon the defendant's undertaking to keep an account

of his sales and profits. *Plimpton* v. *Spiller*, 4 L. R., Ch. D., 286; 35 L. T., N. S., 656; 25 W. R. 152.

PAUPER.

Proceedings in formâ pauperis. See PRACTICE (PAUPER).

PAWN AND PAWNBROKER.

See PLEDGE.

PAYMASTER OR ACCOUNTANT-GENERAL.

See PRACTICE (PAYMASTER).

PAYMENT.

— *In Particular Currency.* See ANNUITY, XII. 3—INTEREST, IV.—IRELAND, IV. —LEGACY, XII. VII. AND XIII. VII. —PORTION, VI.
— *Part Payment.* See LIMITATIONS, STATUTE OF, V.
— *Of Costs and its Effect.* See SOLICITOR, XVI.
— *Order for.* See PRACTICE (PAYMENT, ORDER FOR).
— *Into Court.* See PRACTICE (PAYMENT INTO COURT) — TRUSTS — TRUSTEE RELIEF ACT.
— *Out of Court,* See PRACTICE (PAYMENT OUT OF COURT).
— *Into Court on Injunction to stay Proceedings at Law.* See INJUNCTION, III., IX. 1.
— *Plea of.* See PRACTICE (PLEA).
— *Off of Incumbrances and Charges.* See FEE TAIL, VI.—LIFE, ESTATE FOR, V. —MERGER, II.
— *To Agents.* See PRINCIPAL AND AGENT, VIII.
— *Of Annuities.* See ANNUITY, XII.
— *Of Debts.* See EXECUTOR AND ADMINISTRATOR, XXIV.
— *Of Dividends.* See BANKRUPTCY, XXVIII. iii.
— *Of Legacies.* See LEGACY, XII.
— *Of Mortgage Money.* See MORTGAGE, XI. I.
— *Of Purchase Money generally.* See VENDOR AND PURCHASER.
— *Of Purchase Money under Compulsory Powers.* See LANDS CLAUSES ACT, XIII.

See also CREDITORS' TRUST DEEDS—EQUITABLE ASSIGNMENT — RECEIPT — RELEASE—SETTLED ESTATES ACTS, IX. —TENDER.

I. IN GENERAL, 5585.
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I. IN GENERAL.

1. Stoppage no payment at law or in equity, unless under special circumstances, and in case of special demands where the balance only is the debt. *Jeffs* v. *Wood*, 2 P. W. 128.

2. Money paid into court upon an injunction and laid out is security, and not payment. *Broughton* v. *Pitchford*, 6 Madd. 295.

3. Payment of money to a trustee, with notice of the trust, is a mis-payment, though the trustee had judgment and execution against the person that paid the money. *Pritchard* v. *Langher*, 2 Vern. 197.

4. Creditor is not obliged except by special agreement to take his debt by driblets. *Wilkinson* v. *Sterne*, 9 Mod. 299.

5. If the bailiff of a manor pays rent into a wrong hand he must pay it over again. *Townsend* v. *Ash*, 3 Atk. 340.

6. A. bound to B. in a bond of 1,000*l.* for payment of 500*l.*; afterwards A., and C. as his surety, give a bond to B. of 200*l.* for payment of 100*l.* as a further security for so much of the 500*l.* Then A. assigns a judgment to B. of 500*l.* towards a further satisfaction of the debt, and B. receives several sums on his judgment, and A., by the consent of B., receives 30*l.*, also part of the money secured on his judgment. This shall not go in exoneration of any part of the money secured by the 200*l.* bond, as it would do if B. had actually received it and lent it to A. *Halford* v. *Byron*, Pre. Ch. 178.

7. Before a payment by a debtor to or under the direction of his legal creditor can be impeached or avoided, to the prejudice of the debtor, it must be shown clearly either that the debtor was subjected to the obligation of seeing to some particular mode of application of the money which was not pursued, or that the debtor, having notice of circumstances rendering it inequitable for the legal creditor to receive or direct the payment, could reasonably and with safety have avoided making the payments. *Rose* v. *Clarke*, 1 Y. & Coll. 534.

Where a bond debt, which was made the subject of settlement, was afterwards paid (contrary to the terms of that settlement) to the husband, by the direction of the obligees of the bond, and the debtor had notice of the existence of such settlement, and had been present as a relation of the wife when it was read over; but the settlement did not in express terms refer to this bond, but stated the amount of the debt to have been paid by the wife to the trustees of the settlement: it was held, that the debtor was not liable to pay the money over again. *Ib.*

8. An averment in an answer of defendant being ready to pay, where his obligation was to offer payment, is no defence against the demand for an account. *Stratford* v. *Aldborough* (*Lord*), Beat. 239.

9. It is quite clear, according to the principles stated in *Cash* v. *Kennion* (11 Ves. 314), that a debtor making default in payment at a particular time and place, is bound to make good the payment, according to the rate of exchange then and there existing; and it was held no ground for dispensing with the rule, that the agent of the creditor had authorised the debtor to retain the money "until a better time," having done so upon the representation of the debtor, which was not proved to be

true, of certain impediments, arising from the political circumstances of the country, to the remittance of the sum in the manner agreed upon. *Bertrand* v. *Bertrand*, 2 Moo. P. C. 212.

1. A bond given at Dublin, or a note in Jamaica, must be paid in the current money. The same with regard to a will. *Saunders* v. *Drake*, 2 Atk. 465.

2. A., resident in Amsterdam, being the owner in possession of a plantation in British Guiana, by an instrument executed on her behalf by her attorney in London in the year 1817, sold the plantation, *cum annexis*, to B., for 100,000 guilders, "Holland currency," and 30,000*l.* sterling, taking, as part of the consideration money, a first mortgage on the plantation for the 100,000 guilders:—Held, that the term in the mortgage-deed, "Holland currency," coupled with the fact of Amsterdam being the place mentioned for payment, meant Dutch currency and not colonial currency. *Macrae* v. *Goodman*, 5 Moo. P. C. 316; 10 Jur. 555.

3. Bill alleging fraud as to quantity and quality of goods sold, not discovered till they were exported to America; that they were in consequence sold at a loss; and that plaintiff, being threatened with an action, paid the original price according to contract, under a protest that he would seek relief in equity; and praying an account and payment in respect of the loss, and a commission to America. Demurrer allowed. *Kemp* v. *Pryor*, 7 Ves. 237.

4. A debtor who was under arrest gave to the creditor at whose suit he was imprisoned a warrant of attorney to confess judgment for the whole amount claimed. On bill filed by the debtor for an account and for an injunction to restrain the creditor from suing on a judgment entered up by force of the warrant of attorney:—Held, that the arrangement having been entered into by the debtor deliberately, with full knowledge of the circumstances, and with professional advice, the bill must be dismissed with costs, although one of the debts for which the warrant of attorney was given, was barred by the Statute of Limitations. *Richards* v. *Curlewis*, 3 Eq. Rep. 278; 18, Beav. 492.

5. The obligor of a bond, which had been afterwards assigned to a trustee, of which assignment the obligor of the bond had notice, but not of the particular terms of the trust, was held not liable for payments not warranted by the trust made by him under the direction of the trustee, but only for such payments as he had made without such direction. *Roberts* v. *Lloyd*, 2 Beav. 376.

6. Payment by a trustee to an infant *cestui que trust*, nineteen years of age, on the false representation by herself and her parents, that she had attained the age of twenty-one, held to be a discharge to the trustee for the sum so paid. *Overton* v. *Banister*, 3 Hare 503; 8 Jur. 906.

7. Payment of money into a banking-house to be placed to the credit of another, upon a condition; the money in the meantime to stand in the bankers' books in the name of the party paying it in. It is at his risk, and the loss is his, if the bankers fail before the condition is complied with, though the other party had written to desire it to be paid in generally. *Calley* v. *Short*, Coop. 148. Affirmed Jac. 631.

8. A., a creditor of a firm, held securities from one of its members for moneys advanced by him, at different times, to the firm, but claimed a balance beyond what those securities would cover. All the creditors of the firm agreed to accept a composition "of 7*s.* for every 20*s.* due to the said creditors respectively." A. was the first to sign this deed; but added to his signature the words "without prejudice to any securities whatever that I hold." The other creditors signed in their respective order, under A.'s signature:—Held, that such a composition, thus accepted, did not affect the rights of A. upon his previous securities, but only related to the balance beyond the sum they would cover, and that he might afterwards enforce those securities in equity. *Duffy* v. *Orr*, 1 Cl. & F. 253; 5 Bli., N. S., 620.

9. A. and B., trustees of a will under which the plaintiff was entitled to a share of residue, which she had assigned to C. and D., the trustees of her marriage settlement, paid it to C. alone, without the knowledge of D. They afterwards transferred a legacy of stock settled upon similar trusts to C. and D., by whom it was subsequently sold out, and the proceeds were received by C. alone. D. left to C. the general management of the trust estate, and the choice of investments. Both funds were partially misapplied and lost by C. The plaintiff sought to have both funds made good:—Held, that the bill was not multifarious, though it asked no relief against A. and B., with respect to the legacy fund. *Margetts* v. *Perks*, 12 W. R. 517.

Held, also, that the conduct of D. did not justify A. and B. in considering C. as his agent authorised to receive the money. *Ib.*

10. The Court, being satisfied that a debtor had the means to pay, ordered payment of the debt by instalments (although the payment of such instalments would, it was alleged, drive the debtor into bankruptcy and cause a forfeiture of the income from which such instalments were obtainable), or, in default, committal to prison. *Re Imperial Mercantile Credit Association, Lewis's case*, 21 W. R. 505; 42 L. J., Ch., 379; 28 L. T., N. S., 396.

11. A creditor may have by contract a good charge for his debt on sums to become due from himself to the debtor. *Exp. Mackay, Exp. Brown, Re Jeavons*, 42 L. J., Bky., 68; 8 L. R., Ch., 643; 21 W. R. 664; 28 L. T., N. S., 828.

An agreement by a creditor for an extension of his security to arise in case of the debtor's bankruptcy, is against the policy of the bankruptcy law, and void. *Ib.*

A patentee assigned his patent in consideration of royalties, with an agreement that the assignees should retain half the royalties in payment of a debt due from him to them; and a provision that in case of his bankruptcy or liquidation they might retain the whole of the royalties. In his liquidation:—Held, that the assignees had a valid charge on the half of the royalties, giving them the usual rights of secured creditors; but that the provision giving them a right to retain the whole of the royalties in case of bankruptcy was a fraud on the bankruptcy laws, and void. *Ib.*

Effect of Part Payment.] 1. As a general rule part payment of a debt raises in law an implied promise to pay the balance. But part payment will not change what is originally a mere moral obligation into a legal debt. *Mostyn* v. *Mostyn, Exp. Barry*, 39 L. J., Ch., 780; 5 L. R., Ch., 457; 18 W. R. 657; 22 L. T., N. S., 461.

II. VOLUNTARY OR BY MISTAKE.

2. When money has been voluntary paid under a mistake the remedy is at law and not in equity. *Lamb* v. *Canfield*, 43 L. J., Ch., 408.

3. Sum of money paid by mistake by assignee of one bankruptcy to assignees of another bankruptcy, and divided amongst creditors, directed to be repaid out of future effects. *Exp. Bignold*, 2 Madd. 470.

4. Construction of a clause in a marriage settlement. A court of equity will not direct payments made under a mistaken construction of doubtful clause in a settlement to be refunded after many years of acquiescence by all parties, and after the death of one of the authors of the settlement, especially where subsequent family arrangements have proceeded on the footing of that construction. *Clifton* v. *Cockburn*, 3 Myl. & K. 76.

5. The distinction between voluntary and compelled payments has been exploded in our courts for more than a century past. *Ashe* v. *Berry*, Beat. 260.

6. A. B. on a sale of certain lands covenanted with C. D., the purchaser, to protect him against "all judgments, charges, and incumbrances, etc." It subsequently appeared that the lands were liable to a judgment, confessed previously to the lands coming into the possession of C. D., and proceedings having been commenced by the conusee against the lands, and A. B. having been called upon by C. D. and having accordingly, and in fulfilment of his covenant, paid off the amount of the judgment:—Held, that this was not a voluntary payment. *Aicken* v. *Macklin*, 1 Dr. & Wal. 621.

7. Voluntary payment, conclusive both in equity and at law, on the principle that litigation is not to be multiplied. *Goodman* v. *Sayers*, 2 Jac. & Walk. 263.

III. BY BILLS.

8. In the absence of an agreement to the contrary, the acceptance of a bill of exchange only suspends the remedy for a debt. *Re London, Birmingham, and South Staffordshire Bank*, 11 Jur., N. S., 316; 34 L. J., Ch., 418; 13 W. R. 446; 12 L. T., N. S., 45.

A banking company which had a lien upon the shares of any shareholder for moneys due from him to the bank took bills of exchange for a debt owing by a shareholder to the bank:—Held, that its lien continued until the bills arrived at maturity. *Ib.*

9. *Quære*, whether a debt for which a bill of exchange is given is thereby completely extinguished, so as to be incapable of supporting a fiat if the bill be negotiated and be out of the possession of the creditor at the time of the act of bankruptcy. *Exp. & Re Magnus*, 2 M. D. & De G. 604; 6 Jur. 808.

10 Manager of colliery paying creditor on it by bill of exchange, which was dishonoured, colliery remains liable to the payment of original debt. *Tempest* v. *Ord*, 1 Madd. 89.

11. Where a debtor delivers to his creditor his promissory note for the amount of the debt, the debt may be considered as actually paid, if the creditor at the time of receiving the note has agreed to take it in payment of the debt, and to take upon himself the risk of the note being paid, or if from the conduct of the creditor, or the special circumstances of the case, such an agreement is legally to be implied. But in the absence of any special circumstances, the transaction does not amount to a discharge of the original debt, but a mere extended credit. *Sayer* v. *Wagstaff*, 5 Beav. 415; 13 L. J., N. S., Ch., 161. Affirmed 14 L. J., N. S., Ch., 116; 8 Jur. 1083.

12. Where it was optional with a creditor to receive payment for an advance to a company, either in shares or money, and a cheque was sent to him by the company's secretary in payment, which, after keeping two days, he returned, requesting to be paid in shares, but in the interim attended a meeting of the company, where his conduct led to the inference that he had accepted the cheque:—Held, that such conduct amounted to an acquiescence in the payment, and debarred him from all further claim to the shares. *Ferguson* v. *Wilson*, 14 L. T., N. S., 12.

13. When by the contract for sale and purchase of goods it is stipulated, that payment should be made by the buyers' acceptances of the sellers' drafts, if before the time for delivery of the goods the purchaser becomes insolvent or the acceptances are dishonoured, the vendor still has a lien for unpaid purchase money. Difference in this respect between acceptances of the purchaser and those of a third person. *Gunn* v. *Bolckow, Vaughan, & Co.*, 44 L. J., Ch., 732; 10 L. R., Ch., 491; 32 L. T., N. S., 781.

By a contract for the supply of iron rails it was agreed, that payment should be made by buyers' acceptance of sellers' drafts at six months' date, against inspector's certficate of approval and wharfinger's certificate of each 500 tons being stacked ready for shipment. Inspector's certificates and wharfinger's certificates were from time to time handed to the buyers in exchange for their acceptances, and were pledged with T. as security for advances made by him, it being an alleged custom of the trade to treat such certificates as delivery warrants. The buyers having become insolvent before the first acceptance became due:—Held, first, that the delivery of the acceptances did not constitute a valid payment for the rails according to the contract. *Ib.*

Held, secondly, that no custom of the trade could give to the certificates the effect of warrants, and T., therefore, had no lien on the rails. *Ib.*

14. Bills of exchange are not proper subjects of mortgage, and are *prima facie* presumed to be given in part payment as they become due. *Hills* v. *Parker*, 14 L. T., N. S., 107.

15. Where, upon the sale of a ship to A. and B., in which A. was to be interested in one-third, and B. in two-thirds, and upon the execution of the bill of sale, although expressing that B. had paid two-thirds of the purchase money, only one-third was actually paid, and

A.'s acceptances given for the remainder, which were, from A. becoming bankrupt, dishonoured:—Held, that B. remained liable to the vendor for the unpaid purchase money, notwithstanding the bills were accepted by A. alone. *Lynn* v. *Chaters*, 2 Keen 521.

1. Vendor's lien on the estate for the purchase money not discharged by taking bills of exchange, which are to be considered not as a security, but as a mode of payment. *Grant* v. *Mills*, 2 Ves. & B. 306.

2. Where, by articles under seal, a party covenanted to pay a certain sum for certain work by bills, to be drawn by B. and accepted by himself:—Held, that as a covenant to pay a certain sum it constituted a specialty debt. *Copland* v. *Martin*, 9 Sim. 433.

3. By the Dutch law the satisfaction of the principal debt extinguishes the mortgage or pledge on which it is secured, unless there is an express contract for keeping alive the original security. Where, therefore, the drawee of bills of exchange, which had been dishonoured, accepted and paid other bills for the amount, taking an assignment of the mortgage upon which the original bills were secured:—Held, by the Judicial Committee, that there being no contract or sufficient evidence to show that the intention of the parties was to keep the mortgage alive, such acceptance and payment operated as an extinguishment of the principal security, and not as a transfer of the bills for which it was originally given. *Wilkinson* v. *Simpson*, 2 Moo. P. C. 275.

4. Bill taken for an antecedent debt, without indorsement, proving bad, the antecedent debt may be resorted to, but if the bill is discounted without indorsement, and no antecedent debt, it is evidence of a purchase, and there is no demand. *Exp. Blackburne*, 10 Ves. 206.

5. A., the holder of a bill, not having paid the consideration for it, remitted the bill to C., from whom he had ordered shipments of corn. C., hearing of A.'s insolvency, endeavoured to stop the corn *in transitu*. C. brought an action on the bill against the plaintiff, who applied for an injunction, on the ground that the answer would show that there was nothing due from A. to C., and that A. had paid no consideration. The Court refused to stop the action, but stayed execution till the coming in of the answer and further order. *Holford* v *Werthemann*, 2 W. R. 51.

6. B. deposited foreign bonds with C., a stockbroker, for the purpose of obtaining a loan thereon. C. obtained the loan by depositing the bonds with A. B. having paid C. the money for redeeming these bonds, is subsequently informed by C. that the money has not been applied for that purpose, but to C.'s own use. B. induces C. to recover the bonds from A. upon the understanding that he (B.) will provide the funds to meet the cheque to be given by C. to A. for their recovery. C. gives A. a crossed cheque for the amount due, and receives back the bonds. The bonds were delivered to B., who thereupon refused to provide the funds for meeting the cheque given to A., which was dishonoured. C. died:—Held, that A. was entitled to recover from B. the amount due upon C.'s dishonoured cheque, or to have the bonds delivered up to him; B. not being entitled to withdraw from his undertaking to meet C.'s cheque on the faith of which the bonds were obtained from A., or to hold them against the person who was rightful owner to the extent for which they were pledged:—Held, also, that there was no such negligence on the part of A. in accepting the crossed cheque without inquiry whether there were assets to meet it as to disentitle him to relief. *Mocatta* v. *Bell*, 4 Jur., N. S., 77; 27 L. J., Ch., 237.

7. By a contract under seal between A., a vendor of the one part, and B. and C., joint purchasers of the other part, B. and C. agreed to pay a certain sum for the subject matter of sale, such payment to be made by instalments, and to be partly in cash, and partly by bills to be drawn by A. and accepted at his option by either B. or C. A. exercised this option by drawing upon C., and after a large portion of the purchase money had been duly paid in cash, and by the acceptances of C., which had been duly honoured, A. further elected as to such portion of the balance of the purchase money as was to be paid by bills, to take the acceptances of C., and received such bills accordingly. Before the bills became due, and while they were in the hands of third parties, both B. and C. stopped payment. A., after having proved against C.'s estate for the amount of the bills, and having received dividends thereon, sought to prove against B.'s estate for the balance of the purchase money which remained unpaid in consequence of the insufficiency of C.'s estate:—Held, that the contract was a contract to pay, and that A. was entitled to have recourse to the estate of B. for the balance of the purchase money remaining unpaid. *Exp. Pearce, Re British and American Steam Navigation Co.*, 17 W. R. 1077; 8 L. R. Eq. 506.

IV. APPROPRIATION OF.

8. Application of indefinite payments, by the rules of the civil law giving the first option to the debtor, the second to the creditor, to be expressed at the time of payment; but if no express declaration by either, presuming an intention in favour of the debtor; or if the debts are equal in their nature, then applying the payments according to priority. *Devaynes* v. *Noble, Clayton's case*, 1 Meriv. 605.

In cases as of a banking account, where there has been a continuation of dealings, the appropriation (in the absence of express declaration) can only be made on the ground of presumption arising from the priority of receipts and payments. If any other appropriation is to be made, it is incumbent on the creditor to declare his intention at the time of payment. *Ib.*

9. According to the Scotch law, where money is paid by a debtor without specific appropriation by him to a creditor to whom he is indebted on several accounts, the creditor may at his option impute it to any of such debts; and it was held that he might do so, when the effect of such option was to leave a mortgage subsisting upon land in Demerara, which is subject to the Dutch law. *Campbell* v. *Dent*, 2 Moo. P. C. 252.

10. The entry by creditor in the books of the

provost-marshal of St. Vincent, though according to the law of that island conclusive evidence of payment, and though made twenty-three years ago, without being questioned in the meanwhile, was held to be not so as to the appropriation of the sum, against a receipt previously given, admitting the sum to be paid upon a different account from that stated in the entry, the receipt referring the payment to the separate account of the debtor, the entry to a joint account on which he was liable together with others. *Fraser* v. *Birch*, 3 Knapp, 380.

1. Where there was a running cash and bill account between the bankrupt and a banking company, who were under considerable advances to him, but part of these advances arose out of illegal transactions; and the bankrupt from time to time deposited bills, and made payments, without any specific appropriation, or any settled account between him and the bankers:—Held, that the payments must be appropriated in reduction of the earlier items of the account, and of the legal, and not the illegal, part of the demand. *Exp. Randleson*, 2 Dea. & Ch. 534.

2. A. is entitled to a rent-charge issuing out of a real estate, and to an allowance out of the same estate for the maintenance of her children during their minority. The tenant for life suffers both the rent-charge and the maintenance to run greatly in arrear, but from time to time pays money to A. on account generally. In this case A. is entitled to carry the money so received to such of the two accounts as she pleases. *Morgan* v. *Jones*, 1 Bro. P. C. 32.

3. When there are two debts, money paid generally shall be applied in discharge of that first contracted, and surplus shall go towards the second. *Wentworth* v. *Manning*, 2 Eq. Abr. 261.

4. If debtor by mortgage and by bond pay money to creditor generally, the creditor may apply it to either debt. *Wilkinson* v. *Sterne*, 9 Mod. 427.

5. A. indebted by specialty and also on simple contract pays several sums and enters them in his book as paid on account of what was due by specialty. This entry not sufficient to make the application. *Manning* v. *Westerne*, 2 Vern. 606.

Quicquid solvitur, solvitur secundum modum solventis. But this rule is to be understood when the person paying, at the time of payment declares on what account he pays the money; but if the payment is general, the application is in the person receiving. *Ib.*

6. ***Quicquid solvitur, solvitur secundum modum solventis:*** therefore, where a man pays money generally, and is indebted for principal and interest, it shall be applied to reduce the interest in the first instance. So, if he be indebted in two sums, the one bearing interest, and the other not, the payment shall be applied to the credit of that debt which carries interest, or is the most penal upon the debtor, even though the creditor declares he received it on the other account. *Chase* v. *Box*, 2 Freem. 261.

7. A creditor by judgment and also by bond, receives 200*l.*, in part, of the purchase of the estate of the debtor, but gives no notice that he would apply it to the bond debt. It shall be applied towards satisfaction of the judgment. *Brett* v. *Marsh*, 1 Vern. 468.

8. An *elegit* creditor, who has obtained an order that the receiver do pay him a moiety of the rents, is entitled to apply these rents, in the first instance, to the payment of the interest which has accrued due on the principal sum since obtaining the order, though at the time the sum due amounted to the penalty of the bond. *O'Bierne* v. *Mahon*, 1 Jones 442.

9. A., indebted on security carrying interest and on simple contract, pays money generally, it shall be taken to be paid towards discharge of the debt which carried interest. *Heyward* v. *Lomax*, 1 Vern. 24. See also *Bois* v. *Cranfield*, Styl. 239; Vin. Abr. tit. *Payment* (M.), pl. 1. *Periss* v. *Roberts*, 1 Vern. 34. *Manning* v. *Westerne*, 2 Vern. 606. *Meggott* v. *Mills*, Ld. Raym. 287. *Anon*, 2 Mod. 236. *Bowes* v. *Lucas*, Andr. 55. *Goddard* v. *Cox*, 2 Stra. 1194. *Hammersley* v. *Knowlys*, 2 Esp. 665. *Dawe* v. *Holdsworth*, Peake N. P. 64.

10. Where bankers, with the knowledge of an act of bankruptcy committed by their customer, took a guarantee from a surety on his behalf to secure to a given amount all sums then or thereafter to become due from the customer, but the surety had no notice of the act of bankruptcy, and afterwards paid to the bankers the full sum for which he was a guarantee without specifying to which portion of the banker's debt the payment was to be applied:—Held, that such payment was to go in reduction of that portion of the banker's debt which was provable under the fiat, and not of that which was not provable. *Exp. Sharp, Re Mason*, 3 M. D. & De G. 490; 8 Jur. 1012.

11. A., with others, committee of a joint-stock company, mortgaged premises of the company, and covenanted personally for payment of the money, and afterwards executed a bond for another debt. On the death of A., who held shares in trust for the company, which were decreed to be sold and applied in payment of the debts for which A. was liable:—Held, that his representatives were entitled to have the proceeds applied in payment of the bond debt in priority of the mortgage. *Lawrence* v. *Kempson*, 7 Beav. 574.

12. When the obligee of a bond bearing interest had, under the bankruptcy of one of the obligors, received dividends amounting altogether to 20*s.* in the pound on the principal debt, he was allowed, in a suit to administer the estate of the co-obligor, to appropriate each successive dividend to the payment, in the first instance, of the arrear of interest due at the time of such dividend being made. *Bower* v. *Marris*, Cr. & Ph. 351; 10 L. J., N. S., Ch., 356.

13. A. gives his promissory note to B., who by deposit thereof at the bank raises money which he pays to A., being indebted to him. Accounts are subsequently settled between A. and B., but the promissory note remains at the bank. The money being still due by B. to the bank, B. becomes insolvent, and the bank brings an action against A. for the note. A. insists that the note has been discharged by B. in the course of his dealings with the bank. Injunction granted to restrain the action at law, and inquiries directed whether B. was a consenting party to the state of the accounts in the bank

books; and secondly, whether the sums paid into the bank by B. were paid in with specific appropriations. *Mostyn* v. *Burdekin*, 3 Jur. 52.

1. A solicitor transacted business for his client and had at the same time a judgment against him bearing interest. The client having made general payments from time to time, the solicitor was held justified in applying those payments to his account for costs accruing due, although the interest on the judgment against his client was accumulating at the same time. *D'Arcy* v. *Burke*, 2 Ir. Eq. R. 1.

2. A., the widow and administratrix of B., continues B.'s trade after his decease; B., at his death, was indebted to C. on balance of account. A. continues to receive goods from, and to make payment to C., as B. had done, and she is charged in account by C. with the debt. The payments made by her to C. exceed the debt, but a balance is ultimately due to C.: —Held, that B.'s debt was discharged by A.'s payments, and that the ultimate balance cannot be proved as a debt against B.'s estate. *Sterndale* v. *Hankinson*, 1 Sim. 393.

3. Where an equitable mortgagee claiming to be a creditor of the mortgagor, both on the mortgage, and on a trade account, at the request of the mortgagor, lent the title deeds to enable the latter to complete a transfer of the premises, the mortgagee acquiescing in the sale, and the mortgagor paid over the first instalment of the purchase money to him:—Held, that it was to be taken as paid by the mortgagor on account of the mortgage debts, and could not be appropriated to the trade debt, although there was no express appropriation by the debtor at the time of payment. *Young* v. *English*, 7 Beav. 10; 13 L. J., N. S., Ch., 76.

4. L., a partner in a firm at Grenada, employs a firm at St. Thomas's to supply articles to fulfil a contract, which the St. Thomas's firm do, believing the contract to have been entered into on behalf of the Grenada firm. The other partners of the Grenada firm write to the St. Thomas's firm to disclaim this contract:—Held, that the Grenada firm were liable for all advances in respect of the contract made by the St. Thomas's firm previously to the day of their receipt of the disclaimer, or subsequently to it, in consequence of liabilities which they had previously incurred, and that the Grenada firm were entitled to credit for all payments made in respect of the contract prior to that day, or subsequent to it, if specifically made in respect of the account then due, and for the balance of all payments made generally in respect of the contract subsequently to that day, after satisfying the amount due to the St. Thomas's house by L. alone. An account current kept by the St. Thomas's house of all their transactions with the Grenada house, both prior to and after the disclaimer of the contract, held not to be evidence of specific appropriation by them of the sums they had received. *Smith* v. *Ure*, 2 Knapp 188.

5. The firm of J. F. & Sons, as agents of the plaintiffs, supplied goods to the firm of S. & W., upon the footing of the latter becoming debtors to the plaintiffs. They also supplied the same firm with other goods on their own behalf. They made no distinction in their accounts between the goods supplied by them as agents of the plaintiffs, and those which they supplied on their own behalf. E. F. was a partner in both firms:—Held, that communications made by the firm of J. F. & Sons to the plaintiffs, admitting a large debt to be due from the firm of S. & W., and undertaking that E. F. would use his influence as a partner with S. & W. to secure its reduction, upon the faith of which communication the plaintiffs forbore to sue S. & W., precluded that firm from treating their debt to the plaintiffs as one which had been liquidated by the appropriation of the payments made by them to the firm of J. F. & Sons in order of date. *Wickham* v. *Wickham*, 2 Kay & J. 478.

6. A. B., a married woman, conveyed her separate estate to C. D. in trust to sell, etc., and pay a debt due to him from her, and further advances, not exceeding in the whole more than 400*l.*, and to hold the surplus for her separate use. C. D. afterwards made further advances, far exceeding the limit, part of which was paid upon bills drawn on him by A. B., with directions "to charge the same to the account of" her separate estate:—Held, that C. D. was not entitled to appropriate his receipts, in the first place, in payment of the advances not covered by the security, the Court considering that C. D.'s receipts could not be considered as indefinite payments; that he had them only for the purpose of paying off the charge, and afterwards for A. B.'s separate use; and that, upon the true construction of the instruments, C. D. was bound to apply the separate estate, which he received, in satisfaction of the charge, and could only consider the surplus, after such satisfaction, as subject to the disposition of C. D., or liable to such ordinary lien as he might acquire by advancing money to her. *Smith* v. *Smith*, 9 Beav. 80.

7. A Calcutta firm, by a letter dated in January, and received in London on the 11th March, 1841, directed their London correspondents to hold a sum of money (equal to a lac of rupees at the current rate of exchange), payable on the 19th November following out of remittances and consignments on the general account, at the disposal of a creditor of the Calcutta firm in Liverpool. The Calcutta house at the same time acquainted the Liverpool house of the directions which had been given. The London house informed the Liverpool house that they had received and registered the order; and after stating that they were in advance of the Calcutta house, and declining to accept bills for any part of the amount, said, that if remittances should come forward to enable them to meet the wishes of the Calcutta house, they would lose no time in advising the Liverpool house. The London house, also, in acknowledging to the Calcutta house the receipt of the order, said that the state of their accounts did not then warrant them in meeting the requisition, but they would meet it, if in a position to do so, before November. The Calcutta house revoked the order by a letter of January 1842, received by the London house on the 12th March, 1842:—Held, that the effect of the triple correspondence between the Calcutta house and the London house, the Calcutta house

and the Liverpool house, and the London house and the Liverpool house, entitled the Liverpool house, as against the London house, to an account in equity of the balance on the 12th March, 1841, on their general account with the Calcutta house (giving the London house credit in such account for all liabilities incurred by them on behalf of the Calcutta house on that day), and of the consignments and remittances of the Calcutta house to the London house in the general account, which came to the hands of the latter between the 12th March, 1841, and the 12th March, 1842. *Malcolm* v. *Scott*, 6 Hare 570.

The London house might have declined the appropriation, and returned the balance of the account to the Calcutta house; but they could not, as against the Calcutta house, have retained any balance due to the Calcutta house, except for the purpose which the latter had directed. *Ib.*

Semble, that the London house was not merely bound to pay to the Liverpool house the amount directed, so far as the balance of account on the 19th November, 1841, enabled them to do so, but was bound to appropriate all the remittances and consignments from the Calcutta house on general account, from the receipt until the revocation of the order, after reimbursing themselves in respect of their advances and liabilities on behalf of the Calcutta house at the time they received it. *Ib.*

Semble, that the communications between the Calcutta house and the London house, and the Calcutta house and their Liverpool creditor, would not have entitled the latter firm to the account as against the London house, without the communications which took place between the London and Liverpool firms. *Ib.*

1. A., a solicitor in the country, received from a client a sum of money, which was to be paid by him into the Court of Chancery, on the client's account. A. obtained a bill for the sum from a country banker, and remitted it to his bankers in London, without stating the reason for which the amount had been paid to him. At the same time, he was indebted to his bankers in 450*l.*, for which they held securities, and as to which they kept an account separate from his general account. A. died, and a few days afterwards the bill became due and was paid, and the bankers carried the amount to A.'s general account. The bankers for some time after they had received notice from the client of the circumstance under which the amount of the bill had been paid to A., continued to keep the accounts separate, but ultimately they deducted the 450*l.* from the proceeds of the bill, and paid the balance to his executrix:—Held, that as there was no agreement binding the bankers to keep separate accounts as to the 450*l.* and the amount of the bill, and as they had no notice till after the amount was received, of the purpose for which it was intended to be applied, the client was not entitled to recover from them any part of the proceeds of the bill. *Grigg* v. *Cocks*, 4 Sim. 438.

2. Messrs. B., shipowners at South Shields, had dealings with K. & Co., bankers in London. The course of dealing was, that Messrs. B. drew bills on K. & Co., which K. & Co. accepted for the accommodation of Messrs. B.; and in order to provide for the payment of these acceptances, Messrs. B. remitted to K. & Co. cash, and deposited with them bills payable to Messrs. B., and the amount of these bills was received by K. & Co. and placed by them to the credit of Messrs. B.'s cash account. Both firms became bankrupt, K. & Co. in July 1812, and Messrs. B. in August of the same year; there was then a large balance owing by Messrs. B. to K. & Co. on the cash account, K. & Co. being also liable to a large amount upon bills accepted by them for the accommodation of Messrs. B., and having in their hands bills also to a large amount deposited with them by Messrs. B. to provide for the payment of such acceptances. Before any dividend was declared upon the estate of K. & Co. their assignees realized from the deposited bills more than sufficient to liquidate the cash balance due from Messrs. B. The holders of the accommodation bills proved against both estates, and were fully paid, receiving from each estate at different times dividends to the amount of 10*s.* in the pound; the sum thus paid in dividends by the estate of K. & Co. exceeded by above 6,000*l.* the total sum realized from the deposited bills. No debt was proved or attempted to be proved by the estate of K. & Co. against the estate of Messrs. B. until 1847, when a further portion of the outstanding estate of Messrs. B. was realized, but to an amount insufficient to complete a payment of 20*s.* in the pound to their creditors, exclusively of K. & Co.:—Held, on a claim being made on behalf of the estate of K. & Co. for that purpose, that the assignees of K. & Co. were entitled to prove as a debt due from the estate of Messrs. B. the amount of the cash balance and also the 6,000*l.*; and that in respect of the 6,000*l.*, and until thereby the sum was repaid, they were entitled to the benefit, as to any future dividends, of the proofs made against the estate of Messrs. B. by the accommodation bill holders. Held, also, that the cash balance was not liquidated by the receipt of the larger sum from the deposited securities by the assignees of K. & Co. previously to the declaration of the first dividend, they being entitled, under the circumstances of the case, to appropriate the sum so received in the way they considered most beneficial to their estate; and that as to the right of the assignees of K. & Co. to stand in the place of the bill holders, the case fell within the provisions of the statute 49 Geo. 3, c. 121. The general doctrine is, that a creditor holding a security is entitled to apply it in discharge of whatever liability of the bankrupt debtor he may think fit. Where two firms deal together, one making payments for and accepting bills for the accommodation of the other, and receiving cash and bills from the accommodated firm by way of payment of and security for the outlay and liabilities made and incurred, the question how the proceeds of the bills so remitted are to be applied must depend on the contract of the parties, express or implied. In a case where, in the absence of express contract, the course of dealing might have led to the presumption that the agreement between the parties was that the proceeds of each bill as it was paid should be applied, as far as it would go, in discharge of the cash balance, this presumption was not held to extend to the

event of bankruptcy, or to establish any agreement which prevented the party who was in the position of a surety from insisting against the bankrupt principal on the same rights on which he might have insisted in the absence of contract. *Exp. Johnson*, 3 De G. M. & G. 218; 22 L. J., Bky., 65.

1. A., a railway contractor, undertook to construct the line of a railway company (L.), and to provide the necessary funds, and act as paymaster. He was also employed to construct the lines of several other railway companies, all forming part of the same railway system. He employed B. as engineer, and paid him various sums, so as, according to the allegation, fully to satisfy the debt due from the company L., and with knowledge by B. that the payments were made with the moneys of L., and for the specific purpose of discharging their debt; B., however, claimed the right to appropriate the payments to the debts due from the other companies, for whom also he had been employed by A. to act as engineer, and brought an action against company L. for the whole amount of their debt. Company L. thereupon filed a bill against B., the other railway companies, and A., for a declaration that B. was not at liberty to appropriate the payments made to him so as to attribute no part of them to the debt of L., for an apportionment and an account between the several companies, and for an injunction to restrain B.'s action. Demurrer allowed for want of equity, as the question of appropriation might have been raised by way of defence to the action, and dealt with at common law; and for multifariousness, as the several companies had been improperly made parties to a suit arising out of a dispute as to the amount paid for work and labour, between company L. and the person employed by them. *Aberystwith and Welsh Coast Railway Co.* v. *Piercy*, 12 W. R. 1000; 10 L. T., N. S., 778; 2 Hem. & M. 713.

2. In a suit by a railway company against a debtor, a final decree was made that he was bound to pay to the company 54,590*l.* This decree was registered against him as a judgment in Yorkshire, where he had real estates. There were at the time two other suits pending by the company against him, in which they claimed from him two other sums of 4,104*l.* and 14,831*l.*, but only decrees for accounts had been made. An agreement was entered into between the company and him for the compromise of his liability in all the three suits. By this agreement he was to pay to the company 33,000*l.* out of the purchase money of an estate which he had contracted to sell, and he was to give the company a mortgage (subject to prior charges) on other estates to secure the sum of 14,566*l.*, which was to be paid in two instalments on two appointed days, but if the two instalments were not paid on the appointed days all the original rights of the company were to be reserved. The sum of 33,000*l.* was paid and the mortgage was given, but the instalments were not paid. The company brought up the prior charges and then filed a foreclosure bill against him and some subsequent mortgagees. It was decided that, according to the true construction of the agreement, the company was not remitted to their original rights merely by way of penalty, but that on failure to pay the two instalments they were entitled to recover the full amount of the original debt due to them. In taking the accounts the company sought to appropriate the 33,000*l.* which they had received in payment in the first instance of their unsecured debts—*i.e.*, these two debts in respect of which they had not any final decree registered: —Held, that, according to the true construction of the agreement, the sum of 33,000*l.* was intended to be paid by way of a composition ratably upon the amount of all the three debts, and that consequently the company had no right to appropriate the 33,000*l.* in any other way. *Thompson* v. *Hudson*, 19 W. R. 645; 24 L. T., N. S., 301; 6 L. R., Ch., 320; 40 L. J., Ch., 28.

3. A., being indebted to B. on three promissory notes, was applied to by B. for payment on account of interest, but without referring to any debt in particular; in consequence of this application, A. paid 5*l.*; at the time of this payment, two of the notes were barred:—Held, that the payment must be attributed as made exclusively in respect of the note not barred, and that the effect was as to it to prevent the operation of the Statute of Limitations. *Nash* v. *Hodgson*, 6 De G. M. & G. 474; 1 Jur., N. S., 946; 25 L. J., Ch., 186; 3 Eq. R. 1025. Reversing on this point 2 Eq. Rep. 1091.

4. A payment by a surety must be appropriated in accordance with his intention, and cannot be controlled for the benefit of the principal. *Waugh* v. *Wren*, 1 N. R. 142.

5. A minor's estate was subject to a mortgage on which more than six years' interest was due. On a reference to the Master to inquire what charges affected the minor's estate, and the principal and interest due thereon, it appeared that certain payments had been made for interest generally:—Held, that the payments should be appropriated to the interest which accrued within six years. *Re FitzMaurice*, 15 Ir. Ch. R. 445.

6. A mining company was formed upon the cost-book principle. In December 1865 calls were made on the shareholders, which H. and J., two of the shareholders, failed to pay. In February 1866 G., who was a creditor of the company for a considerable sum, at the instigation of the company commenced an action against H. for the debt due by the company. The company was desirous by means of this action to compel H. to pay his calls. When the action came on for trial, and a jury had been sworn, it was arranged that a verdict should be found against H, for the amount of calls due from him and costs, and this having been done, judgment was entered up for the amount of the verdict. In May 1866 G., at the instigation of the company, brought a similar action against J. The sum claimed included a part of the debt claimed in the action against H. as well as a debt subsequently incurred by the company. At the trial the jury found a verdict for the plaintiff for a sum which was afterwards raised by the Court to 787*l.* Before judgment could be entered up J. petitioned to wind up the company, and a winding-up order was made, and also an order to stay proceedings in the action by G. against J. After the action against J. various sums were paid by the company to G. These sums exceeded the 787*l.*,

but the evidence showed that the intention of the company in paying them was to apply them in discharge of the debt due to G. before the action against H. On the footing of such an appropriation a balance remained due from the company to G., and he carried in a claim in the winding up for that balance, and that claim was admitted:—Held, that the claim was properly admitted, the company having a right to attribute the payments made by them to H. to the earlier debt. *Exp. Jackson, Re Wheal Ludcott and Wrey Consols Mines Co.*, 21 L. T., N. S., 67; 17 W. R. 745.

1. When in the course of trade dealings between A. and C. the accounts between them are periodically made up in such a manner as to show that sums paid to the credit of A. have, at the termination of each periodical account, been allowed for so as to diminish A.'s indebtedness upon that account, the parties have applied the principle of *Clayton's case* (1 Meriv. 605) for themselves; and, therefore, a debt due on balance of account from A. to B., whose account with A. C. took over, was held to be extinguished by subsequent credits given by C. to A. in the above-mentioned account between them. *Exp. Smith, Re Hamilton*, 25 W. R. 760.

2. The account of a customer of a firm consisted of debits and credits arising from the purchase and sale of goods. The partnership was dissolved, the customer being then greatly indebted to it, but the account was continued in the same mode by the succeeding firm:—Held, that the doctrine of appropriation of payments applied to the debtors' account. *Laing* v. *Campbell*, 36 Beav. 3.

3. Where a lessee tendered rent which had accrued subsequently to breaches of covenant, as rent, but the lessor took it as compensation for occupation, expressly reserving the right of re-entry, it is, by force of the rule, "*solutio accipitur in modum solventis*," a waiver of the forfeiture in respect of such breaches as were known to the lessor. *Croft* v. *Lumley*, 6 H. L. Ca. 672 4 Jur., N. S., 903; 27 L. J., Q. B., 321.

Per Erle, waiver also of known and unknown breaches, where the latter differed not in circumstances from those he knew of—*e.g.*, several breaches of the same covenant. *Ib.*

Per Watson, waiver of all the breaches before the accrual of the rent received. But, *per* Crompton, J., the receipt of such rent is not necessarily a waiver; but the question is, was it in fact received with an intention to waive, and declare the lease still in force? The rule relied on applies only to the case of two distinct debts or demands, and an appropriation by the payer to one of them. *Ib.*

4. S. guaranteed the account of T. at a bank by two guarantees, one for 150*l.*, the other for 400*l.* By the terms of the guarantees the surety guaranteed to the bank "the repayment of all moneys which shall at any time be due from" the customer "to you on the general balance of his account with you;" the guarantee was moreover to be "a continuing guarantee to the extent at any one time of" the sums respectively named, and was not to be considered as wholly or partially satisfied by the payment at any time of any sums due on such general balance; and any indulgence granted by the bank was not to prejudice the guarantee. S. having died, leaving T. and another executors, the bank on receiving notice of his death, without any communication with the executors beyond what would appear in T.'s pass-book, closed T.'s account, which was overdrawn, and opened a new account with him, in which they did not debit him with the amount of the overdraft, but debited him with interest on the same, and continued the account until he went into liquidation, when it also was overdrawn:—Held, by the V.-Ch., that payments in after the death of the surety went in discharge of the overdraft, alike on the terms of the guarantee, and on the principle of *Clayton's case* (1 Mer. 572, 605), and that, as the amount of such payments exceeded the overdraft, the bank were not entitled to prove against the estate of the father-in-law. But held, on appeal, that there was no contract, express or implied, which obliged the debtor and creditor to appropriate to the old overdraft the payments made by the debtor after the determination of the guarantee, and that the bank were entitled to prove against the estate of S. for the amount of the old overdraft less the amount of the dividend which they had received on it in the liquidation. *Re Sherry, London & County Banking Co.* v. *Terry*, 25 L. R., Ch. D., 692; 53 L. J., Ch., 404; 50 L. T. 227; 32 W. R. 394. Reversing 49 L. T. 556; 32 W. R. 270.

5. M., being entitled to the lessee's interest in lands at C., in 1868, deposited, *inter alia*, the title deeds with a bank, to secure any balance due or to become due, accompanied by a letter of deposit. On the 21st November, 1870, he wrote to the manager of the bank, O., asking for the title deeds of C. in exchange for other securities, and stating that he had agreed to put C. in settlement on his marriage; and at the same time he deposited other securities with O. on behalf of the bank. O. thereupon drew two lines through the memorandum of 1868, in the deposit book, and wrote at the foot of the entry "annexed list cancelled and new ones substituted." The bank, however, refused to give up the deeds of C. On the occasion of his marriage, M. executed a settlement, dated the 24th November, 1870, and registered on the 8th February, 1871, charging C. with a sum of 3,000*l.*, which, subject to life interests for himself and wife, was settled in trust for the children of the marriage. M., who was a solicitor, drew the settlement and was the only solicitor engaged in the transaction. Subsequently, in 1871, M. gave the bank a further letter of deposit, in which the title deeds of C. were included. None of the letters of deposit were registered. After the settlement M. paid in to the credit of his current account at the bank sums of money exceeding the amount due from him at the date of the settlement. In a paper attached to the letter of deposit of 1870, O. made a memorandum, stating that it was cancelled by the letter of deposit of 1871, which was taken in case of any irregularity in the former transaction. O. deposed that he did not intend to give up the security of the deposit of 1868, that he had a general authority to substitute one security for another, but not to give up a security altogether:—Held, that the money paid in by M. to his current account with the bank after the 24th Novem-

ber, 1870, must, in the absence of express appropriation, be deemed to be appropriated to the debt due by him previously to that date, which was therefore discharged by such payments. *Re Macnamara's Estate*, 13 L. R., Ir., 158.

1. A merchant at Gibraltar acted as agent for L., a merchant in Liverpool, and also for M., another merchant in the same place, L. and M. having also dealings together. The Gibraltar merchant was accustomed to send to L. monthly accounts of sales of coal which L. had sent to Gibraltar, giving him credit for the proceeds, and debiting him with commission and other expenses. In 1854 L. applied to M. to make him advances, which he agreed to do, provided L. would give orders to the Gibraltar merchant to remit him out of the proceeds of the sale of L.'s coals the sum he might advance. The Gibraltar merchant having a general account with M., instead of actually remitting these advances to him, entered to his credit the amount which he was instructed from time to time by L. to remit, and in the course of his business remitted bills to M. for collection, including some drawn on L. In March 1856, M. requiring further security for any future advances he might make, L. gave him a mortgage on a ship for them, he having previously given him security on the ship for two sums, which had been advanced to him. In August 1856 L. signed the equity of redemption in the ship to the plaintiff, and on the 2nd September he became bankrupt. On the 4th September the plaintiff sent to Gibraltar to take possession of the ship, tendering to M. 900*l.*, being the amount he thought due to him. The ship, which had previously been advertised for sale, was sold to the defendants, who were registered as owners. Some of the bills drawn by the Gibraltar merchant on L., and remitted to M., were dishonoured, but the amounts credited to M. by the Gibraltar merchant remained undiminished and undisturbed. Upon the plaintiff filing a bill to have the sale of the ship set aside, and for an account: —Held, that as M. had consented to substitute for the remittance a credit in the general monthly account, and as the bills remitted were not in respect of those particular items, but indiscriminately for collection, he had no right to select any particular item of credit, and attribute the dishonoured bill to that item, so as to prejudice third parties. *M'Larty* v. *Middleton*, 9 W. R. 861; 4 L. T., N. S., 852.

See also BANKER, IV. 3—BANKRUPTCY, XVII. iii. 2—BILLS OF EXCHANGE, XV.

V. NON-PERFORMANCE OF AGREEMENTS RESPECTING AND REVIVAL OF DEBT.

2. A creditor agreed with his debtor to take 11*s.* in the pound, to be paid by instalments; and the debtor, after the first payment, became a bankrupt. Lord H. held, the whole might be proved under the commission. *Exp. Bennet*, 2 Atk. 527.

Where a creditor agreed to take less than his debt, provided it be paid at the day, and the debtor fail, the general rule of equity is that he cannot be relieved. *Ib.*

3. A debt being payable by instalments, with interest, the debtor made default in payment of one of the instalments. By a deed, reciting that the creditor had agreed to give the debtor time upon having the payment of the debt secured to him, with interest, "by the instalments and in manner thereinafter appearing," provision was made for payment of the debt, with interest, by instalments different from the former ones, with a proviso, that upon default being made in payment of any instalment, the whole unpaid portion of the debt, with interest, should become immediately payable. The debtor made default:—Held, that the proviso was not in the nature of a penalty, and that a court of equity ought not to restrain the creditor from enforcing immediate payment of the whole moneys remaining due. *Sterne* v. *Beck*, 1 De G. J. & S. 595; 2 N. R. 346. Reversing 2 W. R. 12.

4. D. was indebted to C. in 69,000*l.* By deed between D., C., and S. a surety, C. covenanted that if D. or S. should pay him 38,000*l.* on a day named, he would accept it in full satisfaction of the whole debt. D. covenanted to pay it on the day, and D. and S. covenanted to pay interest on it to the day and afterwards. Default was made in payment, but interest was, for four years afterwards, received by C. on the 38,000*l.*:—Held, that D. was liable for the whole debt of 69,000*l.*, and was entitled to no equitable relief against the default in payment on the day fixed. *Ford* v. *Chesterfield (Earl)*, 19 Beav. 428; 2 W. R. 640.

5. A. obtained a judgment against B. for 563*l.* 12*s.* 10*d.*, but agreed to take 200*l.* in discharge, B. giving three acceptances for that sum, and depositing some waggons as security. If none of the bills were paid at maturity, the judgment to be enforceable against B. The last of the bills would mature in March 1871. B. subsequently made payments on account of the bills, and another settlement of account took place in March 1871, when A. claimed 118*l.* 11*s.* 5*d.*, as the balance due on B.'s three acceptances, and it was agreed that B. should give his acceptance for that sum in full of all demands under the three acceptances or otherwise, and deposit title deeds as security. B. did not pay the bill for 118*l.* 11*s.* 5*d.* at maturity, but tendered the money four days after it had been presented to his bankers, which A. refused, declining also to give up the waggons and title deeds:—Held, that as B. had not performed the terms of the first agreement, A. was remitted to his original right as existing at that time, and was at liberty to enforce the judgment. *Barton* v. *Hobson*, 30 L. T., N. S., 230.

6. The reservation of a right to have full payment of money actually due on an existing contract, should there be a failure to pay a smaller sum on a day certain, cannot be treated as a penalty. *Thompson* v. *Hudson*, 4 L. R., H. L., 1; 38 L. J., Ch., 431. Reversing 2 L. R., Ch., 255; 36 L. J., Ch., 388; 15 W. R. 697; 16 L. T., N. S., 254; 2 L. R., Eq., 612; 14 W. R. 597.

Therefore, where a certain sum is due, and the creditor enters into arrangements with his debtor to take a less sum, provided that sum is secured in a certain way and paid at a certain day; but if any of the stipulations of the arrangement are not performed as agreed upon, the creditor is to be entitled to recover the whole of the original debt, such remitter

to his original rights will not constitute a penalty, and equity will not interfere to prevent its observance. *Ib.*

If, in such a case, it is one of the stipulations that a mortgage is to be given on a certain day, and it is not given till two days afterwards, and is then accepted by the creditor, such acceptance, though a waiver as to the mortgage, is not a waiver of the creditor's general rights on the contract. *Ib.*

H. was indebted to T. and S. in three different sums of money, which were the subjects of suits in chancery. In the first and third of these suits the sums had been ascertained, but no final decree had been made respecting them. In the second suit there had been a final decree. H. wished for time and facilities to be afforded him for payment of these debts. T. and S. consented, and deeds were executed, by which it was arranged that H. should admit the amount of the debts claimed in the first and third suits, and should not use his power to appeal against the decree in the second suit; that he should give a first mortgage on his real estate as a security, and that he should pay certain amounts on certain days. On these conditions T. and S. were to accept smaller sums in satisfaction. The deeds contained provisoes which (in different forms of language) expressly reserved to T. and S. the right, if any of the stipulations in the deeds were violated, to enforce payment of the original amounts found and admitted to be due:—Held, that this reservation of the right to enforce existing debts on non-payment of the smaller and covenanted amounts, was not a penalty against which equity would grant relief. *Ib.*

1. Pending the execution of decrees in suits between A., lessee, and B., under-lessee, for the balance of rent, C. purchased B.'s interest in the under-lease. For the protection of the property, suits were then brought by C. against A. An ikrarnamah, or agreement, was afterwards entered into by A. and C., to put an end to the litigation. This agreement recited that C. was indebted to A. in a certain sum, which C. agreed to pay, upon a remission by A. of part of his claim, in two instalments at specified dates; and the agreement then provided that if default was made by C. in paying the instalments then that the remitted money was to be held due to A. by C., and secured upon certain property comprised in the under-lease, as well as by making C. himself liable. No place was specified, nor was there any custom established by the evidence where the money was to be paid. The instalments were paid, but not until some time after the days specified in the agreement. The money had been tendered to A.'s mookhtar, but refused by him, from the fact of A. being absent, and also on the ground that interest was not tendered. A. afterwards brought an action against B. and C. to recover the sum remitted by the ikrarnamah, on the ground that by the conditions of that agreement the instalments should have been punctually paid upon the specified days, which had not been done, nor had any legal tender been made:—Held, first, that although A. had agreed to remit part of his demand on condition of receiving payment on specified days, or in default that the remitted sum was to be paid, yet that there was nothing in the agreement which made the payment of the instalments on the days fixed the essence of the contract, and that the Judicial Committee would not apply the technicalities of the English law with respect to breach of contracts to such an agreement. *Ram Gopal Mookerjea* v. *Massey*k, 8 Moo. Ind. App. 239.

Held, secondly, that the penalty could not be enforced, as there was a *bonâ fide* endeavour to pay the money on the specified days. *Ib.*

Held, thirdly, that the agreement was substantially performed by the payments, and that a strict legal tender was not necessary. *Ib.*

VI. DEDUCTION OF INCOME AND PROPERTY TAX.

2. Executor of obligor of bond having by mistake paid debt and interest without making deduction for property tax provided for by bond, though six years had elapsed:—Held, entitled to have it refunded. It would have been otherwise in case of the obligor himself having paid it. *Smith* v. *Alsop*, M'Clel. 623; 13 Price 823.

3. On a reference to the Master to compute interest on the simple contract debts of a testator, the income tax, in respect of interest on a bill of exchange due from the estate, was deducted from the same interest; and, it appearing to have been the uniform practice of the Masters to deduct the income tax from interest on bills of exchange and promissory notes, the Court declined to disturb the practice, and held the deduction to be properly made. *Dinning* v. *Henderson*, 19 L. J., N. S., Ch., 273; 14 Jur. 1038.

4. Though in dealings between merchants, in discounting bills and the like, and in loans made for short periods, the income tax is not deducted, yet in a mortgage transaction the mortgagor is entitled to deduct it. *Mosse* v. *Salt*, 32 Beav. 269.

5. A debtor, making payments to his creditor from time to time for interest, without deducting property-tax, will not be allowed, upon finally settling the debt, to deduct the amount of back payments in respect of such tax from the balance of the debt due at the time of settlement. *Re Turner*, 13 W. R. 104; 11 L. T., N. S., 352.

6. When a fund was assigned to trustees to pay a fixed sum annually to creditors *pro ratâ*, with interest till payment:—Held, that the assignor was entitled to deduct income-tax on the payments in respect of interest. *Crane* v. *Kilpin*, 6 L. R., Eq., 334; 37 L. J., Ch., 913; 18 L. T., N. S., 350.

7. Where executor paid interest on legacy for seventeen years, without deducting property-tax:—Held, he could not afterwards deduct out of future interest due the amount of property-tax on preceding payments. *Currie* v. *Goold*, 2 Madd. 163.

See also ANNUITY, XII. 2—VENDOR AND PURCHASER.

VII. PRESUMPTION OF.

8. Where a debt is claimed by the plaintiff, and is disputed by the defendant, who admits that it has not been paid, lapse of time cannot

raise a presumption of payment, but may afford a presumption against the original existence of the debt. *Christopher* v. *Sparke*, 2 Jac. & Walk. 223.

1. A decree to carry into execution an erroneous decree being reversed, the cause was remitted, with leave to amend the bill, by adding parties and making a better case as to the original claim, notwithstanding the lapse of sixty years from the date of the deed by which the debt was secured, and of forty years from the date of the erroneous decree. As between the plaintiff creditor, and the debtor, there is no presumption from lapse of time, in such a case, and upon such state of the pleadings, that the debt has been paid. But other creditors, whose debts ought to have been provided for by the decree, might have a right to raise that question. *Hamilton* v. *Houghton*, 2 Bligh 169.

2. S. being indebted to P., in 2,300*l.*, by sundry securities affecting his real estate, joins P., in 1775, in assigning all said securities to L., as security for 1,800*l.* then lent by L. to P. The interest on 1,800*l.* was regularly paid by S. and his heirs to L., but no interest on the surplus of the 2,300*l.* was paid either to P. or L. since 1755:—Held, that the payment of the interest on the 1,800*l.* preserved the right to demand the interest on the surplus, notwithstanding the lapse of time, and that under the circumstances no presumption of the surplus having been paid could arise. *Loftus* v. *Swift*, 2 Sch. & Lef. 642.

3. Every fair presumption is to be made against a stale demand. Matters of record are presumed. Deeds are presumed to be lost. *Pickering* v. *Stamford* (*Lord*), 2 Ves. J. 583.

Presumptions are to be made in favour of a charity. *Ib.*

4. An executor of a house steward to Lord B., after an acquiescence of seventeen years, set up a demand for a large sum for business done by this testator, which Lord B.'s representatives resisted on the Statute of Limitations. *Per cur.* Satisfaction is to be presumed from the length of time, for it is not to be imagined, if anything was really due to the plaintiff, he would have been quiet under it. *Lacon* v. *Briggs*, 3 Atk. 105.

5. Where no demand of principal or interest for twenty years, satisfaction will be presumed, except in cases of mortgages. Mortgagee is supposed continuing in possession, and mortgagor tenant at will to him. *Leman* v. *Newnham*, 1 Ves. 51.

6. In a case of account, in which the Master had stated that it was in his mind impossible to arrive at that degree of certainty which he was anxious to obtain, the Court allowed an exception to his report upon reasonable presumption. *Fenner* v. *Agutter*, 1 Myl. & K. 120.

7. The presumption of payment of a bond after twenty years may be repelled by evidence that obligor had no opportunity or means of paying. *Fladong* v. *Winter*, 19 Ves. 196.

8. Presumption of payment of a bond upon twenty years or less, without payment of interest, unless repelled by circumstances. *Hillary* v. *Waller*, 12 Ves. 266.

Mortgage presumed satisfied, no interest having been received for twenty-five years. *Ib.*

9. Where no demand has been made on a bond for twenty years, the judge will direct a jury to find it satisfied. *Gratwick* v. *Simpson*, 2 Atk. 144.

10. Bond fraudulently obtained fifty years back, under circumstances, deemed satisfied. *Hancock* v. *Hancock*, 10 Mod. 438.

11. Producing receipt for interest within twenty years, indorsed on bond by obligee, is sufficient against presumption of payment, though no proof of when written. *Barrington* (*Lord*) v. *Searle*, 3 Bro. P. C. 593.

12. A bond twenty-two years old shall not be recovered where no interest had been demanded, though the obligor and obligee were neighbours until the last eight years. *Carpenter* v. *Tucker*, 1 Ch. Rep. 42. *Geofrey* v. *Thorn*, *id.* 88. *Dennis* v. *Nourse*, *id.* 106.

VIII. EVIDENCE.

Sufficiency.] 13. A witness stated that he believed, from a reference to his books of account, and from inspection of a cheque and other documents which were produced to him at the time of his examination, that A., on a certain day, paid 500*l.* to B.:—Held, that this was not sufficient evidence of payment. *Cator* v. *Croydon Canal Co.*, 4 Y. & Coll. 405. Affirmed 13 L. J., N. S., Ch., 89.

14. Payment of debt, without taking receipt, is relievable in equity on oath of parties only. *Anon*, Cary 2.

15. The entry by creditor in the books of the provost-marshal of St. Vincent, though according to the law of that island conclusive evidence of payment, and though made twenty-three years ago, without being questioned in the meanwhile, was held to be not so as to the appropriation of the sum, against a receipt previously given, admitting the sum to be paid upon a different account from that stated in the entry, the receipt referring the payment to the separate account of the debtor, the entry to a joint account on which he was liable together with others. *Fraser* v. *Birch*, 3 Knapp 380.

To Explain.] 15. Although the title deeds of a person seised of land are not in general admissible in evidence against third persons to prove the truth of the facts therein asserted, yet where they are offered to show, not that a certain sum was due and paid for a rent-charge, and not for rent of land in the occupation of those who made the payment, but to show what the intention in making that payment probably was, and what they supposed their rights and liabilities to be, the deeds are clearly admissible. *Att.-Gen.* v. *Stephens*, 6 De G. M. & G. 111; 2 Jur., N. S., 51; 25 L. J., Ch., 888.

In 1635 the Earl of Pembroke became tenant, either at will or from year to year, of six acres and a half of charity lands lying interspersed within his Roehampton estate, for which 6*l.* per annum had ever since been paid. In course of time this estate became split up into several portions, passing into the hands of new purchasers from time to time. From recitals in early conveyances it appeared that the whole estate was treated as subject to this charge of 6*l.* per annum, together with three other perpetual charges of 40*l.*, 10*l.*, and 1*l.* per annum. According as parts of the estate were sold off, those parts were exonerated from these charges, until at last the mansion-

house and thirty-one acres of the estate, the property of the defendant, alone remained charged therewith. The defendant and his ancestor had paid this 6*l.* per annum for many years. Upon an information by the trustees of the charity for a commission to mark out the boundaries of the six acres and a half:—Held (reversing 1 Jur., N. S., 1039), that although the defendant had for a long series of years paid the 6*l.* to the parish, upon receipts purporting to be for rent of parish land, he was not precluded from saying that he did not hold the land; and that he was at liberty to refer to his title-deeds to show the *animus solvendis*, and to rebut the entries in the parish books, which were relied on to show that he had by his payments admitted himself to be an occupier of land. *Ib.*

Held, also, that the information must be dismissed, the relators not having shown that the portion of the R. estate in the possession of the defendant included the six acres and a half mentioned in the agreement of 1635. *Ib.*

See also PRACTICE (EVIDENCE).

PAYMENT INTO AND OUT OF COURT.

— *By Trustees.* See TRUSTEE RELIEF ACTS —TRUSTS.

See also PRACTICE (PAYMENT INTO COURT) —PRACTICE (PAYMENT OUT OF COURT).

PAYMENT, ORDER FOR.

See PRACTICE (PAYMENT, ORDER FOR).

PEACE, BILL OF.

— *Injunctions to Quiet Possession.* See INJUNCTION, II. x.

1. Bill of peace for preventing multiplicity of suits, proper. *Evelme Hospital* v. *Andover*, 1 Vern. 266. *How* v. *Broomsgrove*, 1 Vern. 22.

2. Account decreed between two who had dealings only circuitously to avoid multiplicity of suits. *Anon.*, Show. P. C. 17.

3. No injunction to quiet possession, but where the party has been in possession three years before filing his bill, or where the cause has been heard, and the merits determined. *Poine's* (*Lady*) *case*, 1 Vern. 156.

4. A man who has been in possession of a watercourse sixty years, may bring a bill against a mortgagee, who foreclosed the equity of redemption to be quieted in his possession, although he had not established his right at law. *Bush* v. *Western*, Pre. Ch. 530.

5. Court of Chancery may grant a perpetual injunction, after five trials at bar on the same point, and similar verdicts. *Bath* (*Earl*) v. *Sherwin*, 10 Mod. 1.

6. Voluntary devisee in possession may file bill against heir-at-law to quiet his possession. *Woodgate* v. *Woodgate*, 1 Eq. Abr. 132.

7. Bill will not lie to quiet one in possession of a pew in a church, though plaintiff before had a decree before the ordinary for this pew. *Baker* v. *Child*, 2 Vern. 226.

8. One gives her son other lands in lieu of lands entailed, and by her will gives the entailed lands to her daughter, and takes a bond from her son to permit her daughter to enjoy the entailed lands. The son dies leaving an infant son, who, being in possession of the lands that came in recompense, brings an ejectment of the entailed lands. By reason of the infancy of the grandson the bond could not be sued. The daughter brings a bill, and is decreed to be quieted in possession of the entailed lands, until six months after the infant comes of age, and then the infant may show cause. *Thomas* v. *Gyles*, 2 Vern. 232.

A., seised of Blackacre in tail and Whiteacre in fee, by mistake devises the entailed acre, and leaves the fee-simple acre to descend; the devisee upon his bill had a decree to enjoy. *Id.* 233.

9. Where title is defective, and acquiesced in with knowledge of its being so, then the possession is quieted. *Shine* v. *Gough*, 1 Ball. & B. 444.

10. A bill of peace praying an injunction to stay the defendants, who have an interest in the manor of Tunbridge, from proceeding at law against the plaintiffs, for building houses on the manor without leave, and that they may accept of such a compensation as the Court shall think reasonable. Here the Court dissolved the injunction, as it cannot be applied to as an arbitrator, nor have any legislative authority, but acts in a judicial capacity. *Conyers* v. *Abergavenny* (*Lord*), 1 Atk. 285.

11. Where there has been a possession of a fishery for a considerable length of time, a person who claims a sole right to it may bring a bill to be quieted in the possession, though he has not established his right at law; and it is no objection on demurrer to such bill, that the defendants have distinct rights, for upon an issue to try the general right, they may at law take advantage of their several exemptions and distinct rights. *York* (*Mayor*) v. *Pilkington*, 1 Atk. 282; 9 Mod. 273.

12. Demurrer to bill to establish a right to an oyster fishery, as being a matter triable at law, allowed; the dispute being only between two lords of manors. *Tenham* (*Lord*) v. *Herbert*, 2 Atk. 483.

Where a man sets up an exclusive right, and the persons who controvert it are numerous, and he cannot by one action at law quiet that right, he may file a bill of peace, and the Court will direct an issue to determine the right as between lords of manors and their tenants, or tenants of one manor and another. *Ib.*

13. A person having, in articles of partnership, covenanted not to do certain acts after a specified period of time, the Court will not, before the arrival of that period, grant an injunction to restrain him from acting in breach of his agreement, nor for mischief which is no breach at law of the covenant between the parties. *Coates* v. *Coates*, 6 Madd. 287.

14. A bill for an injunction to restrain defendants from disturbing plaintiff in his possession of ferries cannot be sustained as a possessory bill, unless there be an averment of three years' possession; a statement that the plaintiff had recovered judgment against

one of the defendants in an action brought for disturbing him in the enjoyment of the ferries is not sufficient. *Hemphill* v. *M'Kenna*, 2 Con. & L. 76; 3 Dr. & War. 183; 6 Ir. Eq. R. 57.

1. When a large number of persons has similar legal claims against one, he can, by a bill filed against some of them, restrain the proceedings of all until the question as to the validity of the claims has been decided. *Sheffield Waterworks* v. *Yeomans*, 2 L. R., Ch., 8.

Where 1,500 certificates of costs under a special Act had been lodged with a *custos* provided by the Act, which certificates would, under certain circumstances, operate as judgments against a company, the validity of the certificates being disputed by the company, a bill by them against the *custos*, and five of the persons claiming certificates as representing the others, is a proper bill of peace. S. C. 15 W. R. 76; 15 L. T., N. S., 342.

2. A bill to determine manorial customs may be filed by one person, but only as a bill of peace. *Phillips* v. *Hudson*, 15 W. R. 370; 36 L. J., Ch., 301; 16 L. T., N. S., 221; 2 L. R., Ch., 243.

Where there were only two tenants of a manor, a bill by one of them against the lord, seeking a declaration of commonable rights, cannot be maintained as a bill of peace. *Ib.*

A bill in equity will lie against the lord by one copyholder, on behalf of himself and the other copyholders, being numerous, to have their rights of common ascertained; but one copyholder, not suing on behalf of all, cannot maintain such a bill. *Ib.*

PEDIGREE.

See PEER AND PEERAGE—PRACTICE (EVIDENCE)—VENDOR AND PURCHASER.

PEER AND PEERAGE.

— *Letter Missive to Peers.* See PRACTICE (SERVICE).
— *Bankruptcy of Peers.* See BANKRUPTCY, VII. xxiv.
— *Gifts to Procure a Peerage.* See CONDITION, XII.

See also PARLIAMENT—PRACTICE (SEQUESTRATION).

I. PRIVILEGES, 5598.
II. GRANT OF, 5598.
III. DESCENT, 5599.
See also II. *supra.*
IV. RIGHT TO SIT IN PARLIAMENT, 5601.
V. CLAIMS, PROCEDURE AND EVIDENCE ON, 5601.
VI. OTHER MATTERS, 5604.

I. PRIVILEGES.

3. A peer is privileged from arrest under process from the Ecclesiastical Courts. *Westmeath* v. *Westmeath*, 9 L. J., Ch., 177.

4. Where the husband was a lunatic, the wife, though an Irish peeress, committed for not producing him. *Wenman's (Lord) case*, 1 P. W. 701.

5. A plaintiff, who is a peer, and out of the jurisdiction, must give the usual security for costs. *Aldborough (Lord)* v. *Burton*, 2 Myl. & K. 401.

6. Peer not to be a receiver. *Att.-Gen.* v. *Gee*, 5 Ves. & B. 208.

7. Where peer is to perfect answer by examination, etc., he is upon his honour; but where he comes himself to make satisfaction, etc., or to answer interrogatories and examination as witness, he is on his oath. *Meers* v. *Stourton (Lord)*, Dick. 21; 1 P. W. 146; 2 Salk. 512.

8. A peeress ordered to produce deed, confessed in her answer, on honour only, not on oath. *Hamilton* v. *Gerrard*, Pre. Ch. 92.

9. An amendment in the title of an answer being necessary,—namely, instead of "the farther answer to the original amended bill," entitling it "the farther answer to the original bill," and "the answer to the amended bill"; the answer so amended must, in the case of a peer, be again tested upon honour, as in the case of a common defendant it must be resworn. *Peacock* v. *Bedford (Duke)*, 1 Ves. & B. 186.

10. Peeress answering upon honour, in exactly the same situation as another defendant answering on oath. *Gilpin* v. *Southampton (Lady)*, 18 Ves. 469.

11. A peer returning a rental must verify it by affidavit. *Rathborne* v. *Aldborough*, Hayes 334.

12. The answer of a peer, upon his protestation of honour, may be read on the question of costs. *Dawson* v. *Ellis*, 1 Jac. & Walk. 524.

13. Process of contempt cannot issue against a peer. *Pheasant* v. *Pheasant*, 2 Vent. 342.

14. Construction of the General Order, 23rd January, 1794, in the case of a peer defendant, that in the cases specified, upon application for time to answer, the defendant enter his appearance, and undertake, that if the answer is not put in, a sequestration, *i.e.*, a sequestration absolute. *Gregor* v. *Arundel (Lord)*, 8 Ves. 87.

After two insufficient answers, defendant is not entitled to six weeks' time to answer. S. C. 6 Ves. 144.

15. Service of a subpœna to appear, and of an order for a sequestration *nisi*, upon a peer, at a time when he was beyond the jurisdiction, by leaving them at the peer's town residence:—Held, under the circumstances, to be good service. *Thomas* v. *Jersey*, 2 Myl. & K. 398.

16. Since the union with Ireland, Irish peers, with the exception of those who are members of the House of Commons, are entitled to every privilege except sitting in the House of Lords. *Robinson* v. *Rokeby (Lord)*, 8 Ves. 601.

17. Peers and M.P.'s, if they trade, are liable to bankrupt laws. *Exp. Meymott*, 1 Atk. 200.

18. A non-trader, having privilege of parliament, was liable to be made a bankrupt under the Bankruptcy Act 1861, s. 69. *Exp. Morris, Re Newcastle (Duke)*, 5 L. R., Ch., 172; 21 L. T., N. S., 380; 18 W. R. 79.

II. GRANT OF.

19. If one be created a baron, viscount, etc., by patent, and after, in the same patent, the honour is granted to another in remainder, it operates as a new grant; for the king has no reversion of the honour in him, though he has the power of appointing the succession. *Rex* v. *Purbeck (Lord)*, Show. P. C. 5, 11.

20. Whether a subject can refuse a peerage

created either by patent or by writ. *Egerton* v. *Brownlow* (*Earl*), 4 H. L. Ca. 1.

1. Letters patent were granted by the Crown to a commoner, purporting to create him a baron for life, with a seat in parliament; the letters patent were followed by a writ of summons to parliament in the usual form. The House of Lords referred it to a Committee for Privileges to examine and consider the letters patent, and to report their opinion thereon. This reference was made without any previous reference of the matter by the Crown to the House. The committee reported "that neither the letters patent, nor the letters patent with the usual writ of summons issued in pursuance thereof, can entitle the grantee therein named to sit and vote in parliament." The House affirmed the resolution. *Wensleydale Peerage*, 5 H. L. Ca. 958; 2 Macq. H. L. Ca. 479.

The Committee declined to put a question to the judges on this matter, which did not involve the validity of the patent for all purposes, but only the right under it to sit and vote in the House of Lords. *Ib.*

2. A patent conferring a barony contained a clause that, if any person taking under the patent should succeed to a certain earldom, then, and so often as the same should happen, the succession to the dignity should devolve upon the son of the grantee, or the heir who would be next entitled to succeed to the dignity if the person succeeding to the earldom was dead without issue male. In pursuance of executory trusts in the grantee's will, an estate was settled to follow the dignity with a clause following the above clause in the patent. The earldom having devolved on the second son of the grantee (who succeeded her in the dignity):—Held, that, whether the clause in the patent was valid or not, the clause in the settlement took effect, and took effect so as to shift the estate immediately. *Cope* v. *De la Warr* (*Earl*), 42 L. J., Ch., 870; 8 L. R., Ch., 982; 22 W. R. 8; 29 L. T., N. S., 565.

Quære, whether the Crown has any power to make a conditional limitation of a peerage. *Ib.*

Semble, that the Crown has not an unlimited power of limiting dignities in any way that it pleases, and that it cannot create a mode of succession to a title totally unknown to the law. *Ib.*

3. The Crown cannot give to the grant of a dignity or honour a quality of descent unknown to the law. *Wiltes Peerage*, 4 L. R., H. L., 126.

A limitation to heirs in the grant of a peerage may be incapable of taking effect, and yet the patent, so far as the grantee himself is concerned, may not be void. *Ib.*

In the reign of Richard II. an earldom was created *habendum et tenendum*, "*A. et hæredibus suis masculis in perpetuum.*" The grantee sat in parliament as earl under this creation:—Held, that it did not create a dignity descendible to his heirs male general. *Ib.*

The earl was beheaded by Henry of Lancaster when he invaded England, and before he had received or even claimed the crown. There was no evidence whether there had been any trial, or form of trial, before the beheading. When Henry was declared king, a proceeding took place in parliament in which the Commons were represented to have prayed that all that was done in "the pursuit, arrest, and judgment" of the earl might be declared good for the common profit of the realm. The king, with the assent of the lords temporal, declared that it was so. This proceeding was entered on the *Placita Coronæ* in parliament, but not on the rolls of parliament. *Semble*, that this was not an Act of Parliament. *Ib.*

But it was a solemn adjudication pronounced by the king in open parliament at the prayer of the Commons, and with the advice of the Lords, and must be taken as a parliamentary declaration, that, whatever had been the nature of the grant to the earl, it was wholly at an end. *Ib.*

4. There can be no use or trust in the case of a peerage. *Buckhurst Peerage*, 2 L. R., App. Cas., 1.

Therefore when, in a patent of peerage, there were successive limitations of the peerage in the ordinary form of descent, and then a clause was introduced which, on the happening of a collateral event, would transfer the enjoyment of the peerage from the existing peer and his heirs to a new holder, such clause was held to be invalid. *Ib.*

One clause in a patent may be invalid without affecting the validity of the patent itself. *Ib.*

III. DESCENT.

5. An Irish peerage, of which the title was as old as the reign of Hen. 2, was claimed as a peerage in fee tail, descendible to females, created by writ of summons in the reign of Queen Elizabeth. It appeared that, upon several occasions previous to that time, the male heir had succeeded to the title when there were females living nearer in descent; but it was contended that in such cases the title was in abeyance between co-heiresses, and that the more remote male heir had in each case been ennobled by writ of summons. It was shown, however, that during the time that the owners of the title, who were Catholics, were excluded from parliament, the title had gone, as if descendible in tail male, and the person from whom the claimant made title as having been ennobled by summons, would himself also have been entitled to the peerage as heir male. The claim was held not to have been made out, on the ground that the conclusion suggested by the facts was, that the peerage in question, however created, was descendible in tail male. *Slane Peerage*, 5 Cl. & F. 23; 10 Bli., N. S., 1.

It was strongly argued that the summons to sit in the Irish parliament did not, as it does in England, create a peerage in fee tail descendible to females, *sed quære*. *Ib.*

6. A summons to parliament, and a sitting under it, is evidence of a title to a peerage descending to the heirs of the body, including females; so likewise is it evidence of a similar title, where there have been several summonses, both prior and subsequent to a sitting in parliament, and a sitting in parliament, though no sitting under a summons, has been proved, proof being adduced that during the period of that sitting there were no writs of summons in existence. *Hastings Peerage*, West 621; 8 Cl. & F. 144; and see other points there discussed. *Ib.*

7. It appeared, by the parliamentary pawns

of 36 Hen. 8 and 1 Edw. 6, that a writ had been directed to "Thomas Lord Wharton" for each of these parliaments, but there was no evidence of his sitting in either of them, or of the writ itself. The journals of the House of Lords showed that he was summoned to and sat in the parliament of 2 Edw. 6 and subsequent parliaments. Creation of baronies by patent was not then unusual; but no patent, or record, or other trace of a patent creating the barony of Wharton could be found:—Held, that the said barony was created by a writ and sitting in the 2 Edw. 6, and was descendible to heirs general of the body. *Wharton Peerage*, 12 Cl. & F. 295.

1. In a claim to an ancient Scotch dignity, if no patent or other instrument of creation can be produced, it may be presumed that the dignity was created by patent or charter, limiting it in the manner in which it has been actually enjoyed; and if that enjoyment be shown to have been confined to heirs male, in exclusion of nearer heirs female, the dignity must be held to be a male honour, always descendible to the heirs male of the body of the first grantee. *Crawford & Lindsay Peerages*, 2 H. L. Ca. 534.

2. In the absence of the instrument of creation of a Scotch peerage, the limitations are taken from usage to be to the grantee and his heirs male general. *Perth Earldom*, 2 H. L. Ca. 865.

On the death of a peer, leaving his eldest son and heir, who had been attainted, the peerage does not vest in him, nor, on his death, in the nearest heir male, but is forfeited, as much as if he had been a peer at the time of the attainder. *Ib.*

A peerage limited to a man and his heirs male, is one entire estate, and no substitution of heirs takes place. *Ib.*

A peerage limited to a man and his heirs male whomsoever is forfeitable under the Act 26 Hen. 8, c. 13. *Ib.*

3. Where it was shown that the ancestor of the claimant had first sat in parliament in the 25 Hen. 8, but it did not appear by what right, and again in the 28 Hen. 8, on which latter occasion his name appeared among the list of the lords summoned; and upon a diligent search no patent could be discovered, though the patent rolls were complete:—Held, that such ancestor must be presumed to have been called by writ; and there being only one instance in this country of a writ with a limitation of the grant (*i.e.*, in *Bromflete's case*), that such writ must be taken to have created a peerage in fee, descendible to females. *Vaux Peerage*, 5 Cl. & F. 526.

4. B. claimed the right to be summoned to sit in the House of Peers as a baron, by reason of his being, under a will of the Earl of B., tenant for life of the castle, manor, etc., constituting the Barony of B. The claim was disallowed. *Berkeley Peerage*, 8 H. L. Ca. 21; 8 Jur., N. S., 21.

The right to sit in the House of Peers by reason of the tenure of particular lands, if it ever existed, has long been discontinued, and does not exist. *Ib.*

The law of the peerage depends entirely on usage, both as to the power of the Crown and as to any claim that may be made by a subject. *Ib.*

5. It is a settled rule of law as to Scotch peerages that where the origin of the honour is lost in antiquity, and so does not appear in any direct proof, the presumption is that it was in its creation limited to males only. *Herries Peerage*, 3 Macq. H. L. Ca. 585; 2 L. R., H. L. (Sc.), 258.

Though, however, this is undoubtedly the rule, yet as it was always in the power of the Sovereign to make an honour descendible on females as well as males, the general presumption will give way wherever there are circumstances sufficient to show in any particular case that females as well as males were included in the original destination. *Ib.*

It is the presumption in Scotch peerage law that where the patent of creation does not appear, the descent is limited to heirs males. *Ib.*

On the other hand, it is equally certain and equally clear that that presumption may be rebutted. *Ib.*

The legal presumption in favour of heirs male may be rebutted by authoritative evidence, but not by inferential deduction. *Ib.*

By the Scotch peerage law, a husband might sit in parliament *jure uxoris*. *Ib.*

So by the same law a peeress might resign her dignity in favour of her eldest son. *Ib.*

There never was in Scotland a doctrine corresponding with the English doctrine of abeyance in peerage cases. *Ib.*

6. The word peerage in the fifth clause of the fourth article in the Act of Union of Great Britain and Ireland, 39 & 40 Geo. 3, c. 67, means the status and condition of a peer; and therefore where one person held many titles, by any one of which he could sit in the Irish House of Peers, so long as any one of those titles remained in him or his descendants, the loss of any of the others did not constitute an extinction of a peerage. *Formoy Peerage*, 5 H. L. Ca. 716.

A. before the union with Ireland was a peer of Ireland, by the title of Earl M. That title had descended to him from an ancestor, to whom it was granted, with the usual limitation to the heirs male of his body. Before the union took effect, A. received a new patent, creating him Baron of M., remainder to the heirs male of his body, failing whom, to B. and the heirs male of his body. A. died without leaving male heirs of his body, and the Earldom of M. was left without a successor, and the barony of M. passed to B.:—Held, that this was not such an extinction of a peerage as was contemplated by the Act of Union, and consequently could not be taken as one of those extinctions, on the happening of which the Crown could create a new Irish peerage. *Ib.*

Quære, whether, when the validity of an existing grant of a peerage is questioned, the attorney-general is bound to appear to support it. *Ib.*

Attainder. Effect.] 7. An attainder was pronounced in 1538—9 against Margaret Pole and against her son Henry Pole. He was beheaded in that year. She was for a time spared. She united in her own person three baronies, described as having been created by writs of summons and sittings—Montacute (1299), Monthermer (1309), and Montacute

(second of that name, 1357). By the ordinary course of descent Henry would have succeeded to these baronies had he survived his mother. He had himself sat in parliament under the title of Henry Pole, Lord Montague, and was so described in the inquisition taken after his execution in 1539. The attainder against his mother was by Henry VIII. put in force in 1541, when she was beheaded. In 1553 an Act was passed (1 Mary, sess. 2, c. 1), intituled "An Act for the restitution in blood of the heirs of Henry Pole, late Lord Montague." The Act, a private Act, was in the form of a petition to the queen from the two ladies Katherine and Winifred, the only children of Henry. It recited his attainder, and prayed that they and their heirs might be restored and enabled onely in blood as daughters and heirs of Henry, and enabled to demand, ask, have, hold, and enjoy all such honours, castles, manors, lordships, etc., and all other manner of hereditaments, which at any time shall come, remain, descend, or revert from any lineal or collateral ancestor of "your said subjects," etc., "other than such castles, manors, lordships, etc., which were of Henry in possession, reversion, remainder, or otherwise," at the day of his attainder. Margaret was not mentioned in the Act:—Held, that this Act had no effect on the attainder of Margaret, which still remained in full force. It only entitled the two ladies and their heirs to claim inheritances which they might derive from persons as against whose succession the attainder of Henry Pole himself would have been an obstacle. There was, therefore, no succession to the first three peerages, which must be traced through Margaret. *Montacute and Monthermer Peerages*, 7 L. R., H. L., 305.

Held, also, that it was, at least, highly probable that the barony of Montague, by which title Henry had sat in parliament, was (with a mere change of the spelling of the name) one of those held by his mother, and for which he had received a writ of summons in her lifetime; and that the Act 1 Mary, which was not a reversal of his attainder, but only an Act for the restitution in blood of his heirs, had no effect on the barony in respect of which he had sat in parliament. *Ib.*

The fact that a son was sitting in parliament by a writ of summons in virtue of a barony belonging to a parent would not, if that parent was attainted, save that barony from the consequences of that attainder. *Ib.*

1. One of several co-heirs to a barony in abeyance, which had been created by a writ of summons, was attainted of treason, and his heir and descendants were restored in blood by Act of Parliament:—Held, that it is competent to the Crown to terminate the abeyance in favour of the heir of the person so attainted, even though honours, etc., were accepted on the restoration of blood, or of the heir of any of the other co-heirs. *Braye* (*Barony*), West 1; 6 Cl. & F. 757. S. P. *Camoys* (*Barony*), West 34; 6 Cl. & F. 789. *Beaumont Peerage case*, 6 Cl. & F. 868.

2. Scotch peerages, created by patents in 1616 and 1633 respectively, and limited to the grantee and his heirs male, descended through the line of his eldest son, and became in 1699 vested in the fifth baron and earl, who was attainted of high treason in 1715, and died in 1729, without leaving issue. His collateral heir, descended from a younger son of the first peer, claimed the dignities in 1848:—Held, that the attainder was a bar. *Southesk Earldom*, 2 H. L. Ca. 908.

IV. RIGHT TO SIT IN PARLIAMENT.

3. Since the Union, a Scotch peer cannot, by virtue thereof, sit and vote in parliament. *Queensberry's case*, 1 P. W. 584.

4. Under 10 & 11 Vict., c. 52, s. 4, when the right to a Scotch peerage, or the right to vote in respect of a peerage, is established and notified to the lord clerk registrar by order of the House of Lords, no one except the individual whose right is so established will, during his or her life, be allowed to vote in respect of such peerage until the House of Lords otherwise directs. *Breadalbane Peerage*, 2 L. R., H. L. (Sc.), 269.

5. Assuming that, in fact, there existed in the reign of Henry II. a barony of Berkeley, enjoyed by successive barons in respect of the possession of certain hereditaments, no legal right to be summoned to and sit in parliament for such a barony can exist at the present day in any tenant for life or devisee of such hereditaments. *Berkeley Peerage*, 8 H. L. Ca. 21; 4 L. T., N. S., 686.

The 11th section of the 12 Car. 2, c. 24, has not the effect of preserving such barony by tenure, if it ever existed. *Ib.*

V. CLAIMS, PROCEDURE AND EVIDENCE ON.

6. A peer disinherited by his ancestor is entitled to the favour of the Court, and on bill and answer to have the family deeds brought before the Master, in order to see whether anything can be discovered for his advantage. *Suffolk* (*Earl*) v. *Howard*, 2 P. W. 177.

7. An Irish earldom was created, and a holder of that earldom was afterwards created a viscount of the United Kingdom; the patent granting the viscounty described the grantee by the name and title of the Irish earldom. On the death of one holder of these titles, his eldest son received a writ of summons to attend the House of Peers as an English viscount. He did so, and took his seat as a viscount. He subsequently petitioned to have his claim to vote for representative peers of Ireland allowed, and it was allowed. After his death, his son received a writ of summons as an English viscount, and took his seat in that character. He then petitioned to be admitted to vote for representative peers of Ireland, in virtue of the Irish earldom. The petition came before the Committee for Privileges. The patents creating the Irish earldom and the English viscounty, the writ of summons to the previous viscount, and the entry on the journals showing that the preceding peer had taken his seat, and likewise the resolution of the Committee for Privileges admitting his claim to vote for representative peers, were all proved:—Held, that this was not sufficient to establish the title of the present claimant; that the evidence must be such as would of itself, if the claim was now made, without reference to any pre-

vious claim, be sufficient to establish it. Such evidence not being producible at the moment the consideration of the claim was adjourned. *Donoughmore Peerage*, 3 H. L. Ca. 822.

1. Ancient documents of a public character brought from the proper repository are, in the absence of patents of parliamentary records, admissible as evidence of the creation and existence of peerages; and *semble*, that by the law of Scotland, contemporaneous history is admissible for the same purpose. *Cranford and Lindsay Peerages*, 2 H. L. Ca. 534.

An ancient patent without the seal, but with the attestation thereof duly verified, is admissible evidence. *Ib.*

An ancient Scotch dignity might, before the Union, be conveyed by the possessor, together with the territory thereto annexed, to another branch of the family, or even to a stranger, with the king's authority; or it might be resigned to the king, to be regranted by a new patent, with different destinations and with its old precedency. *Ib.*

A witness, brought to prove a copy of an old document, should be able to read and understand the original when he compared the copy with it. *Ib.*

Printed copies of records rejected, the original being accessible. *Ib.*

A patent without a seal, or any record of it, admitted on proof of the attestation. *Ib.*

An admission by the attorney-general, in a peerage case, is not binding on a subsequent committee. *Ib.*

A person accustomed to ancient manuscripts, saying that, by a careful examination of certain signatures, he had, in his mind, such a distinct knowledge of the handwriting as to be able to say, without immediate reference to them, whether any letter shown to him was or was not written by the same person:—Held, a competent witness. *Ib.*

Statements in writing, by a deceased person, of facts within his knowledge relating to the state of his family, without a view to a suit or claim of peerage, are admissible in proof of pedigree. *Ib.*

2. On a claim to a Scotch peerage, there being no patent or charter of creation or inrolment thereof discovered, a copy of an inrolment of a commission under the Great Seal and king's sign manual, dated in February 1605, directing the commissioners to create James Lord Drummond Earl of Perth was received, and held, in conjunction with subsequent entries in the parliament record, to be sufficient proof of the creation of the earldom. *Perth Earldom*, 2 H. L. Ca. 865.

3. Queen Mary's creation of the earldom of Mar in 1565 proved by a long train of circumstantial evidence. *Mar Peerage*, 1 L. R., App. Cas., 1.

4. B. married C. in *facie ecclesiæ* in 1851, had issue, and died in 1872. In an attempt by A. to set up a previous irregular Scotch marriage, a witness gave evidence that B. told him repeatedly after 1851, that A. was his wife and not C.:—Held, that such evidence was not admissible. *Dysart Peerage*, 6 L. R., App. Cas. (Sc.), 489.

Effect of the statute 37 & 38 Vict., c. 64 (1874), held not necessary to decide. *Ib.*

In an attempt on the part of A. to set up an irregular marriage according to the law of Scotland between herself and B., statements prepared by D., the plaintiff, in an action against B. as the alleged husband of A. for A.'s board and lodging; which statements were signed—and in one case, corrected by interlineations—by deceased persons, who, if alive, would have been competent witnesses, were sought to be used as evidence:—Held, that they were not admissible. *Ib.*

5. Where it was shown that the ancestor of the claimant had first sat in parliament in the 25th Hen. 8, but it did not appear by what right, and again in the 28th Hen. 8, on which latter occasion his name appeared among the list of the lords summoned; and, upon a diligent search, no patent could be discovered, though the patent rolls were complete:—Held, that such ancestor must be presumed to have been called by writ; and there being only one instance in this country of a writ with a limitation of the grant (*Bromflete's case*), that such writ must be taken to have created a peerage in fee descendible to heirs general. *Vaux Peerage*, 5 Cl. & F. 526.

Where there are several co-heirs to a dignity, and some only claim it, they must give notice to the others. *Ib.*

The minutes of the Committee for Privilege case, in another peerage case, stating a monumental inscription to have been either admitted or proved, are not evidence of such inscription. *Id.* 541.

6. If a claimant omit to give evidence of the creation and limitation of one of several dignities to which he states, in his petition, that he is of right entitled, the Committee for Privileges will not report that he has made good his claim to that dignity on the presumption that it descended from the same ancestor with the other dignities to which the claimant has proved his right. *Huntly Peerage*, 5 Cl. & F. 349.

In a claim of peerage, it is not sufficient that the petition to the Crown should state that the claimant is of right entitled to the dignity, but it must also pray that he may be declared so entitled; and the defect cannot be supplied by the House, but there must be a new petition to the Crown. *Ib.*

Upon a claim to a Scotch peerage, where no patent of creation could be found, but it appeared from the records of parliament, that the ancestor, through whom the claim was made, had sat in parliament by the title alleged to have been vested in him, an original instrument, purporting to be a grant under the Great Seal of the dignity in question, which was extracted from the repositories of the family, was admitted in evidence. *Ib.*

7. Same doctrine held as in last case, and also that the use of the term banneret, as applied to the ancestor in the writ, did not take the case out of the rule, the term banneret, if not synonymous with baron, being at any rate not inconsistent with it. *Camoys (Barony)*, West 34; 6 Cl. & F. 789.

8. Held, that an entry in the journals of the Committee of Privileges was, upon trial of a claim to vote at the election of representative peers for Ireland, good evidence of the limitations in a patent of peerage, without producing the patent. *Re Dufferin & Clanboye (Lord)*, 4 Cl. & F. 568.

9. The House of Peers is the only tribunal

to determine claims to dignities; and where a question of law arises, the course is by petition to the Crown claiming the dignity, in order that it may be referred by the Crown to the House, with the report of the Crown law officers annexed, when the House will adjudicate on the right, and report to the Crown. *Waterford's (Earl) case*, 6 Cl. & F. 134.

An adjudication in that form by the Irish House of Peers is as binding on that of the United Kingdom, as one by the latter on the claims to the British peerage; but a resolution of the House, affirming the report of its committee, is not equivalent to an adjudication upon a reference from the Crown. *Ib.*

Forms of proceeding and adjudication on claims of peerage. *Id.* 33.

The 28 Hen. 8, c. 3, vested in the Crown of England "all honours, manors, castles, seignories, jurisdictions, and all other possessions and hereditaments held by certain persons named, or by any person to their use, in Ireland":—Held, contrary to the opinion of Sir E. Coke and other judges, upon a reference from the Crown upon the case of a claimant's ancestor, that the titles held by these persons were not taken away by the Act. *Ib.*

1. It is the privilege as well as the duty of the Irish attorney-general to attend the House of Lords on the investigation of claims to Irish peerage, but he may, with leave of the House, depute counsel to attend for him. *Roscommon's (Earl) case*, 6 Cl. & F. 97.

Documents put before the House by a claimant, although not admitted in evidence:—Held, to be fit matter for observation by his adversary's counsel, to prevent prejudice. *Ib.*

The pedigree of a claimant as a descendant from the seventh son of the first peer, created by letters patent, stated that that peer left seven sons, that the issue of the first and second were extinct, and the four next died without issue. There being no contemporaneous account of them, and no evidence but reputation in the family, which agreed with the pedigree:—Held, that it might be presumed they died without issue, especially as, during a long contest for the dignity, no descendant from them claimed it. *Ib.*

On investigation of a claim to vote at the election of representative peers in Ireland, the minutes of proceedings and of evidence taken in an investigation of the same claim before the Irish House of Lords, including depositions taken under an order of that House:—Held, admissible here (the witnesses being dead), not only against the Crown, but against a counter claimant (who had since come forward), who was not a party to the inquiry, but was cognisant of it. *Ib.*

In consequence of his right being doubtful, and of an adverse claim, the petitioner was required to give in a printed case, containing his pedigree and references to proofs. *Ib.*

A claimant to a peerage having made out a *primâ facie* case, but being unable by reason of his poverty to go on with it, the attorney-general was ordered to take it up at the expense of the Crown, but the House makes such orders reluctantly. *Ib.*

2. Circumstances in which the Committee for Privileges will receive in evidence the printed minutes and proceedings before a former committee on the same peerage. *Beaumont Peerage*, 6 Cl. & F. 868.

3. It is a settled rule that where after a careful search no patent can be found, the writ of summons and the sitting under it are conclusive evidence of a peerage in fee. *Braye (Barony)*, West 1; 6 Cl. & F. 757.

The minutes of evidence and proceedings before the Committee of Privileges in one case, are not necessarily receivable as evidence in another case. *Ib.*

A claimant of a barony as co-heir is required not only to give notice to the other co-heirs known to be in existence (and notice through the post office is not sufficient), but also *primâ facie* proofs of pedigree of such of them as decline to claim, to enable the House to report to the Crown. The proper course for a co-heir is to petition the Crown to terminate the abeyance arising from an attainder in his favour, but if he does not claim and has an interest, he will be allowed to appear and protect it. *Ib.*

4. *Semble*, that on a claim to an ancient barony, minutes of proceedings on a former claim before the King in Council are admissible in evidence in the House of Lords. A long abeyance of a barony in fee, satisfactorily explained, is no objection to a claim. *Fitzwalter Peerage*, 10 Cl. & F. 946.

An ancient barony in fee, after having been enjoyed by the lineal heirs of the first baron successively for centuries, then becoming dormant for some time, was claimed and again enjoyed by one who, after full investigation, was found to be the heir of the first and last barons; it afterwards fell into and remained in abeyance among his co-heirs for more than eighty years. *Semble*, that it is not necessary for one of these co-heirs claiming the barony to give proofs of the first creation, and of the divers mesne descents of it. *Ib.*

5. How far is the fact of the precedency of an old peerage being given to a person called by summons by the same title evidence that he sat by virtue of his right by descent to the old peerage, *quære*. *Slane Peerage*, 10 Bli., N. S., 1; 5 Cl. & F. 23.

If, on a claim of peerage, an important question of law arises, the committee will depart from the ordinary rule, and hear two counsel on each side. *Ib.*

F., a petitioner for the barony of Slane, as heir male (the petition being referred to the attorney-general, but no report made thereon), was admitted to appear by counsel, and oppose a claimant as heir general. *Ib.*

In a claim of peerage, where there is no patent of creation, nor inrolment of such patent, and the contemporaneous Lords' journals are not in existence, an old MS. book, purporting to be copied from the journals by an officer whose duty it was to prepare lists of peers present and absent, will be received as evidence of a peer's sitting in parliament. *Ib.*

6. The Committee for Privileges will in its discretion permit documents to be proved by printed minutes of proceedings before a former committee on the same peerage, but as a rule, will require the production of the original documents. *Berkeley Peerage*, 8 H. L. Ca. 21; 4 L. T., N. S., 686.

Semble, that where the nature of the peerage, and not the pedigree of a claimant, is in

question, a plate erected in St. George's Chapel, Windsor, on the installation of a particular person as knight of the garter, is not admissible to prove the description given of him. *Ib.*

A report of the proceedings on another and different claim of peerage can only be referred to for the purpose of argument, but cannot be received in evidence. *Ib.*

A claim of a barony by tenure was made by a devisee (tenant for life) of an estate which was said to give the right to the peerage. A person who did not claim the estate:—Held, to have no *locus standi*, to be heard in opposition to the claim. *Ib.*

1. A. claimed a peerage. An estate was alleged to be annexed to the title. Persons who, in the event of the peerage being extinct, would be entitled to the estate, but who alleged that their title would be defeated if the claim to the peerage should be established, were allowed to appear, and be heard in opposition to the claim. *Shrewsbury Peerage*, 7 H. L. Ca. 1.

A copy of a plate of the arms of knights of the garter existing in the Chapel Royal at Windsor, was received in evidence, the plate itself not being removable, except by authority of the Queen, and no such plate having been removed since first put up in the reign of Henry 5. *Ib.*

Though the rule in peerage cases is, that the original will must itself be produced to the committee, a copy of a will brought by the officer from the Prerogative Court was admitted in evidence, such will having been made at the time when the course of the officers of that Court was to take copies of wills, and to return the originals to the executors, and the persons now opposing the admission of the copy were the representatives of those executors. *Ib.*

When the Legislature has directed that a particular rule as to evidence shall be adopted in every court of civil judicature, though these words do not include a Committee for Privileges, such committee will, if the rule itself is convenient, adopt and act upon it. The 17 & 18 Vict., c. 125, s. 27, which permits in all courts of civil jurisdiction comparison of handwriting as a means of evidence, was therefore adopted by the committee. *Ib.*

If a party is admitted to oppose a claim of peerage, he must make his opening statement after the claimant's evidence has been closed, whether the claimant's counsel sum up or not. *Ib.*

A barrister who had attended as counsel for the claimant of a peerage, during the whole of one session, was, at the commencement of the next, appointed attorney-general. The Committee for Privileges allowed him to continue to act as counsel for the claimant, and accepted the solicitor-general as his representative on the part of the Crown. *Ib.*

2. The decision of the Committee for Privileges as to the advice it shall give Her Majesty upon one particular claim of peerage does not resemble the decision of the House sitting as the tribunal of ultimate appeal upon a question of law in a suit between two adverse parties; it is in no sense a judgment, and cannot, therefore, be treated as a binding authority in another claim of peerage even though the terms of the patents in the two cases may be like each other. *Wiltes Peerage*, 4 L. R., H. L., 126.

3. When the Crown is pleased to refer to the House of Lords the consideration of a patent of peerage, it becomes the duty of the House to inform the Crown what is the construction to be put upon the terms of any clause in the patent. *Buckhurst Peerage*, 2 L. R., App. Cas., 1.

VI. OTHER MATTERS.

4. *Quære*, whether Court of Chancery has jurisdiction for purpose of deciding on plea, to determine to which party the dignity belonged. *Strathmore (Earl)* v. *Strathmore (Countess)*, 2 Jac. & Walk. 541.

5. Legacy left to procure a dukedom, void. *Kingston (Earl)* v. *Pierepont*, 1 Vern. 5.

6. The Sovereign cannot hold a peerage; accordingly, where a member of the royal family, who was a peer of Ireland, succeeded to the Crown, the peerage became extinct. *Oranmore's (Lord)*, 2 H. L. Ca. 910.

7. Although the status of a peer requires him to attend the House of Lords *ad consulendum et defendendum reginam*, whenever summoned for that purpose, and may subject him to a fine for non-attendance, he is not thereby precluded from exercising the right, which every free man possesses, of changing his place of residence, and going abroad and acquiring a foreign domicil. *Hamilton* v. *Dallas*, 33 L. T., N. S., 495; 45 L. J., Ch., 15; 1 L. R., Ch. D., 257; 24 W. R. 264.

PENALTY.

— *Construction of Statutes Imposing.* See STATUTE.
— *Penal Clauses in Leases.* See LANDLORD AND TENANT.
— *Action for, under Parliamentary Oaths Act.* See OATH.
— *Bonds respecting Sailors' Wages.* See SHIPPING, X.

See also BOND—MORTGAGE, I. III. 2—III. III. 2—TRADE, I. 5.

I. LIQUIDATED DAMAGES OR PENALTY, 5604.
II. RELIEF IN EQUITY, 5606.
III. ELECTION TO PAY, 5608.

I. LIQUIDATED DAMAGES OR PENALTY.

8. A bond of indemnity, given to protect a purchaser of land against adverse claims threatened at the time of the purchase, is valid to the full amount of the penal sum named in it, notwithstanding that such penal sum greatly exceeded the original purchase money; there being no equity in the circumstances of the case to justify an interference with the legal right, and the purchaser having, in discharge of the claim and expenses incidental, expended a larger sum than the full amount of the penal sum named in the bond.

Osborne v. *Eales*, 2 Moo. P. C., N. S., 125; 12 W. R. 654.

1. A contractor undertook to do certain works within a given term, or to pay certain fixed sums; whether these were penalties or unliquidated damages, was not necessarily the subject of a bill in equity, but might properly have been decided in an action at law. The fact that a bond with a penalty had been given to secure the payment of them, was itself strong evidence to show that they were liquidated damages. *Ranger* v. *Great Western Railway Co.*, 5 H. L. Ca. 72.

Where under a contract for the execution of railway works certain payments were to be made by the contractor to the company, in the event of his non-compliance with certain terms of the contract:—Held, that these payments were not penalties, but liquidated damages, which the company might set-off against the demands of the contractor under the contract, on these grounds, viz., (1) the injury to be guarded against was one incapable of exact calculation; (2) the sum to be paid was not the same for every default, but increased as the inconvenience would become more and more pressing; and (3) the payments themselves were secured by the penalty of a bond, which was inconsistent with their being themselves penalties to secure something else. Consideration at large of the rights and liabilities of the contracting parties under such a contract. *Ib.*

2. The law on the question of penalty or liquidated damages may now be considered, after a great number of decisions not perhaps all of them strictly reconcilable with each other, to be, however, at length satisfactorily settled; and the hinge on which the decision in every particular case turns is the intention of the parties, to be collected from the language they have used. The mere use of the term "penalty," or the term "liquidated damages," does not determine that intention; but, like any other question of construction, it is to be determined by the nature of the provisions and the language of the whole instrument. One circumstance, however, is of great importance towards the arriving at a conclusion; if the instrument contains many stipulations of varying importance, or relating to objects of small value calculable in money, there is the strongest ground for supposing that a stipulation, applying generally to a breach of all or any of them, was intended to be a penalty, and not in the way of liquidated damages. *Dimech* v. *Corlett*, 12 Moo. P. C. 199.

3. A., being indebted to B. in a sum of money payable by instalments, and having made default in payment of an instalment, executed a deed whereby, in consideration of B. forbearing to take proceedings in bankruptcy against him, he covenanted to pay the debt by fresh instalments, with a proviso that, if he should make default in payment of any instalment, the whole debt should be immediately recoverable:—Held, that the proviso was not a penalty against which relief could be had in equity, but an essential part of the security created by the deed. *Sterne* v. *Beck*, 2 N. R. 346; 1 De G. J. & S. 595. Reversing 2 N. R. 12.

4. The reservation of a right to have full payment of money actually due on an existing contract, should there be a failure to pay a smaller sum on a day certain, cannot be treated as a penalty. *Thompson* v. *Hudson*, 4 L. R., H. L., 1; 38 L. J., Ch., 431. Reversing 2 L. R., Ch., 255; 36 L. J., Ch., 388; 15 W. R. 697; 16 L. T., N. S., 254; 2 L. R., Eq., 612; 14 W. R. 957.

Therefore, where a certain sum of money is due, and the creditor enters into arrangements with his debtor to take a lesser sum provided that sum is secured in a certain way and paid at a certain day, but if any of the stipulations of the arrangement are not performed as agreed upon the creditor is to be entitled to recover the whole of the original debt, such remitter to his original rights does not constitute a penalty, and equity will not interfere to prevent its observance. *Ib.*

H. was indebted to T. and S. in three different sums of money, which were the subjects of suits in Chancery. In the first and third of these suits the sums had been ascertained, but no final decree had been made respecting them. In the second suit there had been a final decree. H. wished for time and facilities to be afforded him for payment of these debts. T. and S. consented, and deeds were executed by which it was arranged that H. should admit the amount of the debts claimed in the first and third suits, and should not use his power to appeal against the decree in the second suit; that he should give a first mortgage on his real estate as a security; and that he should pay certain amounts on certain days. On these conditions T. and S. were to accept smaller sums in satisfaction. The deeds contained provisoes which (in different forms of language) expressly reserved to T. and S. the right, if any of the stipulations in the deeds were violated, to enforce payment of the original amounts found and admitted to be due:—Held, that this reservation of the right to enforce existing debts on non-payment of the smaller and covenanted amounts, was not a penalty against which equity would grant relief. *Ib.*

5. Land was sold to a company incorporated by Act of Parliament for the purpose of making docks. The contract for sale provided that the purchase money was to be 4,000*l.*, of which the sum of 2,000*l.* was to be paid at once, and the remainder in three months. The contract contained a proviso that in case the balance of the purchase money, with interest, should not be entirely paid off by the 1st November 1869 (and in this respect time was to be of the essence of the contract), it should be lawful for the vendors, notwithstanding that a conveyance of the property might have been executed, to enter upon the property, and the same to have again and enjoy as in their former estate, without any obligation to repay to the company any money which they had already paid, which was to be absolutely forfeited to the vendors. The first instalment of the purchase money was paid, but no part of the balance was ever paid. The company failed, and was ordered to be wound up:—Held, that the above clause was merely in the nature of a penalty, and that the vendors had no right to recover possession of the land if the balance of the purchase money was paid. *Re Dagenham (Thames) Dock Co., Hulse's*

claim, 21 W. R. 898; 8 L. R., Ch., 1022; 43 L. J., Ch., 261.

1. N., in April 1875, contracted with the governors of a school to build and complete a school house by the 31st December following. The contract contained a variety of stipulations, with remedies for the breach of them, and concluded with a clause, that, in case the contract was not in all things duly performed by M., he should pay to the governors 1,000*l.* as liquidated damages. N. failed before the 31st December, and his trustee repudiated the contract:—Held, that this was a penalty and not liquidated damages. *Exp. Capper, Re Newman*, 46 L. J., Bky., 57; 4 L. R., Ch. D., 724; 25 W. R. 244; 35 L. T., N. S., 718. Reversing S. C. *sub nom. Exp. Odiham School (Governors), Re Newman*, 46 L. J., Bky., 6; 25 W. R. 100; 35 L. T., N. S., 558.

2. *Semble*, a penalty is something which the debtor is bound to pay, over and above his original liability, as a punishment. *Exp. Burden, Re Neil*, 16 L. R., Ch. D., 680; 29 W. R. 879.

3. A lease contained a covenant that a house, to be built immediately adjoining the house in which the lessor lived, should be built for a private family, under a penalty of 10*l.* yearly additional rent, if the lessor should convert his house to any public use:—Held, that the 10*l.* a year additional rent was a penalty, and not liquidated damages, and that the lessor was not restricted to suing for the additional rent, but was entitled to an injunction to restrain the tenant's converting the house into a public-house. *Bray* v. *Fogarty*, 4 Ir. R., Eq., 544

4. In a mortgage bond, given to secure the due payment by instalments of a sum due, a provision making the total sum due enforceable on any default, is not to be considered a penalty. *Wallingford* v. *Mutual Society*, 5 L. R., App. Cas., 685; 50 L. J., Q. B., 49; 43 L. T. 258; 29 W. R. 81.

5. In a mortgage of chattels, which was duly registered as a bill of sale, to secure the repayment of 400*l.* then advanced, and a further sum of 144*l.* for interest and expenses, by instalments payable every three months, and in default of payment of any one instalment the whole amount remaining unpaid to become immediately due, followed by a proviso that, in default of payment of the moneys secured, or any part thereof, or if the mortgagor should become a liquidating debtor or bankrupt, or upon the happening of certain other contingencies, the mortgagee might enter, sell, and repay himself the whole of the sums due to him upon the security of the mortgage. The mortgagor having become a liquidating debtor:—Held, that the provisions of this mortgage were not in the nature of a penalty, and that the mortgagee was entitled to possession of the property comprised in the mortgage deed. *Exp. Cochrane, Re Sendall*, 9 L. R., Ch. D., 698; 48 L. J., Bky., 31; 38 L. T. 820; 26 W. R. 818.

6. The plaintiff entered into a contract with the defendant, who was a builder, to sell him an estate for 70,000*l.*, which was to be expended by the defendant in building on the estate. The contract contained numerous provisions, and amongst other things that a deposit of 5,000*l.* should be paid by the defendant into the bankers to the joint account of the plaintiff and defendant, of which 500*l.* was to be paid on the execution of the contract, and the remainder within seven months. If the plaintiff could not make a good title the deposit of the 500*l.* was to be returned, and the plaintiff was to pay the defendant 5,000*l.* as liquidated damages. And if the defendant should commit a substantial breach of the contract, either in not proceeding with due diligence to carry out the works, or in failing to perform any of the provisions of the contract, then and in either of such events the deposit of 5,000*l.* should be forfeited, and if it had not been paid the defendant should forfeit and pay to the plaintiff 5,000*l.* by way of liquidated damages, and the agreement should be void and of no effect, and the plaintiff should regain possession of the estate; but credit was to be given to the defendant for all moneys actually expended; and it was provided that such breach should not be the consequence of a misconstruction of the meaning of any of the provisions of the contract. The defendant did not pay the 500*l.* deposit, and altogether failed in carrying out the contract, and the plaintiff brought an action to recover 5,000*l.* as liquidated damages:—Held, that the condition of forfeiture was not intended to apply to the payment of the deposit of 500*l.* which was to be paid on the execution of the contract, but to a substantial breach of any of the subsequent stipulations, and therefore the 5,000*l.* was not to be regarded as a penalty, but as liquidated damages, the payment of which could be enforced against the defendant. *Wallis* v. *Smith*, 21 L. R., Ch. D., 243; 52 L. J., Ch., 145; 47 L. T. 389; 31 W. R. 214.

Where a contract contains a condition for payment of a sum of money as liquidated damages for the breach of stipulations of varied importance, none of which is for payment of an ascertained sum of money, the general rule is, that the sum named is not to be treated as a penalty, but as liquidated damages. *Ib.*

But whether it would not be treated as a penalty if one of the stipulations was of very trivial importance, *quære*. *Ib.*

Where there is a condition for the forfeiture of a deposit for the breach of various stipulations, even though some of them may be very trivial, or for payment of a fixed sum of money, the forfeiture will be enforced and not treated as a penalty. *Ib.*

Astley v. *Weldon* (2 B. & P. 346), *Kemble* v. *Farren* (6 Bing. 141), *Atkyns* v. *Kinnier* (4 Ex. 776), *Magee* v. *Lavell* (9 L. R., C. P., 107), *Exp. Capper, Re Newman* (4 L. R., Ch. D., 724), and *Betts* v. *Burch* (4 H. & N. 506) commented on. *Ib.*

II. RELIEF IN EQUITY.

7. Where A. gave a bond to B. for 20*l.* not to disparage his trade, which bond was forfeited; equity would have relieved, if the penalty had been larger, as 100*l.* or upwards. *Tale* v. *Ryland*, 1 Ch. Ca. 183.

8. Where the penalty of a bond is only to secure the enjoyment of a collateral object, equity will grant an injunction against a suit for the recovery, and an issue *quantum damnificatus* to try the real damage. *Sloman* v. *Walter*, 1 Bro. C. C. 418.

1. A bond for performance of covenants to build a bridge, and the price of the bridge having been actually paid, an injunction granted to restrain an action on the bond, and an issue *quantum damnificatus* ordered, the sum mentioned in the bond being penalty. *Errington* v. *Aynesley*, 2 Bro. C. C. 341.

2. However equity may afford relief against a clause *nomine pœnæ*, it has never yet assisted in taking advantage of a penalty. *Doneraile* v. *Chartres*, Ridgw. P. C. 134.

Where a sum is forfeited *nomine pœnæ*, it shall be demanded on the precise day. *Ib.*

3. If a man agree not to do an act, and enter into a bond with a penalty to be forfeited on his doing it, the penalty is never to be considered as to the price for doing such act; but the Court will relieve by injunction until the actual damage sustained shall be ascertained by an issue. *Hardy* v. *Martin*, 1 Cox 26.

4. Bond by plaintiff to defendant to secure his faithful services as an agent; plaintiff also deposited 100*l.* in defendant's hands; plaintiff executed his commission imperfectly; Lord Chancellor would not decree the penalty of the bond, but left defendant to his *quantum damnificatus* at law. *Benson* v. *Gibson*, 3 Atk. 395.

5. If A. is bound to pay money at a day and place by penalty, though from some circumstance or other he is prevented, yet equity will only allow obligee to take principal and reasonable damages. *Anon.*, Cary 1.

The like favour is extended to purchase, etc., of lands. *Ib.*

Also if greater part of debt paid, and rest offered, relief is in equity against penalty. *Ib.*

6. Defendant found plaintiff naked, and going to bed with his wife drunk (as was suggested by plaintiff); defendant took up an axe, and under terror, plaintiff gave him a note for 500*l.*; this was in June: in August plaintiff gave him a bond and judgment, and in October he surrendered a copyhold as a further security. Plaintiff had told several persons that his debt to defendant was a bargain for grass. On a bill to set aside these securities, the Court refused to relieve further than against the penalties. *Goodman* v. *Scuse*, Gilb. Exch. Rep. 9; 2 Eq. Abr. 183.

7. Plaintiff was sued upon a bond at law, and pleaded *solvit ad diem*, and by his bill in equity he charged fraud and want of consideration. The Court relieved against the penalty, but decreed the principal, interest, and costs to be paid. *Duval* v. *Terry*, Show. P. C. 15.

8. A court of equity will relieve against the penalty for not performing an unreasonable contract. *Thompson* v. *Harcourt*, 1 Bro. P. C. 193.

9. Where defendant had plaintiff in execution, and refused to discharge him without payment of the penalty, defendant was decreed to refund all he had received, except principal, interest, and costs. *Friend* v. *Burgh*, Rep. *temp.* Finch 437.

10. Chancery will not suffer a penalty to be demanded, if the party will perform that for the non-performance of which the penalty is given. *Hele* v. *Hele*, 2 Ch. Ca. 88.

11. Sureties relievable against penalties in bond. *Anon.*, Cary 12.

12. Equity will not relieve against the terms of an agreement, though it may seem in nature of a penalty. *Small* v. *Fitzwilliams*, Pre. Ch. 102.

13. The Court will relieve against the breach of a condition precedent, where it is in nature of a penalty. *Wallis* v. *Crimes*, 1 Ch. Ca. 90.

14. A. articles to buy land, and pays part of the purchase-money; afterwards he enters into several orders of court to pay the residue by such a day, or, in default thereof, to give up the articles, and lose what he had before paid. Court will relieve, though these articles have not been complied with. *Vernon* v. *Stephens*. 2 P. W. 66.

15. Relief against forfeiture where compensation can be given, applies only to cases of contract, not to the provisions of a statute, or conditions in law. Where penalty is only designed to secure the money, then relief may be given against it. *Keating* v. *Sparrow*, 1 Ball. & B. 374.

16. Though in cases of non-payment of money the Court will relieve against penalty or forfeiture, yet when it is not a question of penalty or forfeiture, but a privilege is conferred upon payment of money at a stated period, the privilege is lost, if the money be not paid accordingly. *Davis* v. *Thomas*, 1 Russ. & M. 506; Taml. 416; 9 L. J., Ch., 232.

17. The practice of the courts of law, compelling a plaintiff on a bond not to take execution beyond his real debt, does not oust the jurisdiction of this Court in awarding an injunction; demurrer to a bill on that ground overruled. *Codd* v. *Wooden*, 3 Bro. C. C. 73.

18. A. files his bill against B., C., and D., to have certain promissory notes given up to be cancelled, alleging a case of fraudulent conspiracy against B., C., and D., by which they obtained the promissory notes. The charge of conspiracy was altogether negatived by the defendants' answers; but it was admitted by them that the promissory notes were obtained from A. in lieu of a statutory penalty which A. incurred by cheating B. at cards:—Held, that A. was entitled to have the notes delivered up to be cancelled. *Osbaldiston* v. *Simpson*, 13 Sim. 513; 7 Jur. 736.

It would be an extremely dangerous thing to allow parties to be the judges in their own cause, and to determine in their own favour what should be the amount of the penalty to be paid. *Ib.*

19. Plaintiff in a charter-party may sue for the whole penalty, though a part only remains due, but on offering to pay principal, interest, and costs, defendant at law may be relieved in equity. *Forward* v. *Duffield*, 3 Atk. 555.

A bill for relief upon a bond submitting to pay what is due; if the obligee will put in a bad answer, and insist on more than is really due, he shall lose his costs in equity, though entitled to his costs at law if he sue upon the bond. *Ib.*

20. Relief by injunction against the strict performance of a penalty. *Shearman* v. *MacGregor*, 1 W. R. 302; 11 Hare 106.

A bond was conditioned to pay a sum of money on a given day, or to perform an agreement keeping a life policy on foot. The plaintiff did not pay one of the premiums on the proper day, but, subsequently to action brought for the principal sum, revived the policy at the original policy premium. The Court held, that the fact of the plaintiff having

put himself into his original position as regarded the security of the policy, was not a sufficient ground for granting relief, but restrained the action on another ground, viz., that under the peculiar circumstances of the case appearing in the bill and affidavits, the plaintiff might have been under a mistake as to his liabilities in respect of a family arrangement. *Ib.*

1. Where parties mutually enter into various covenants, and further covenant that, on breach of any one covenant by either of the parties covenanting, the sum of 100*l.* should be paid as liquidated damages for breach of the covenant, it is in the discretion of the Court to restrain breach of covenant. *Coles* v. *Sims*, 2 W. R. 151; 23 L. J., Ch., 258.

2. The Court will interfere by injunction to restrain the breach of an agreement with a proviso for the payment of a penalty upon breach, unless such penalty is plainly intended by the parties to be liquidated damages. *Clark* v. *Watkins*, 1 N. R. 227.

3. A. mortgaged his property to D. to secure 700*l.*, agreed by D. to be taken in lieu of a judgment debt of 3,000*l.*, and the 700*l.* was to be payable by instalments at certain times, and if not punctually so paid, D. was to be remitted to his original rights, and to have the mortgage security also. The judgments were assigned, by a contemporaneous deed, to trustees for D., and on punctual payment of the 700*l.* for A. and B. A. had previously mortgaged his property to B. as a counter security, and for other debts. The instalments were not paid punctually, and the 3,000*l.* was therefore claimed in full:—Held, that though the Court would not interfere if the arrangement were between him and D. only, yet, as the rights of B. were involved, the condition in default of punctual payment should be treated as a penalty, and relieved against, and this equity could be enforced by A. as well as by B. *Carroll* v. *O'Connor*, 11 Ir. Eq. R. 200.

4. The assignee of a lease executes a bond to indemnify the original lessees against the covenants contained in the original lease; he afterwards quits the country; the house is left untenanted, and the original lessees are obliged to pay the rent reserved. The assignee having subsequently returned to England, makes a compromise with them for the sum then due in respect of his non-performance of the covenants, and shortly afterwards goes abroad. They demise the house to a person who continues in possession till the end of the term:—Held, that this mode of dealing with the premises does not give the assignee any title in equity to relief against the legal effect of his bond. *Anderson* v. *Bailey*, 1 Russ. 313.

5. Five shillings per week allowed by way of *nomine pœnæ* if either of the half-yearly payments of an annuity was in arrear forty-two days after it became due, the Court will direct it to stand as a security for legal interest when the principal sum is not regularly paid. *Aylet* v. *Dodd*, 2 Atk. 238.

See also BOND, X.

III. ELECTION TO PAY.

6. Where a covenant is not to do a particular act, and a penalty or forfeiture is annexed to the doing of that act, this penalty does not authorize the party to do the act; and before the act is done, the Court will restrain him by injunction; but if the act is done, the penalty must be paid, and the amount is unimportant. *French* v. *Macale*, 2 Dr. & War. 269; 1 Con. & L. 559; 4 Ir. Eq. R. 573.

7. If a man agree not to do an act, and enter into a bond, with a penalty to be forfeited on his doing it, the penalty is never to be considered as the price for doing such act; but the Court will relieve by injunction until damage sustained shall be ascertained by an issue. *Hardy* v. *Martin*, 1 Cox 26.

8. A court of equity will relieve against the penalty for not performing an unreasonable contract. *Thomson* v. *Harcourt*, 2 Bro. P. C. 193.

9. A proviso in articles for the purchase of an estate, that if either should break the agreement, he should pay 100*l.* to the other. Defendant, on being offered two years' purchase more, accepted it, notwithstanding his agreement. Lord Hardwicke decreed a specific performance of the articles. *Howard* v. *Hopkyns*, 2 Atk. 371.

The offering to pay the stipulated sum will not vacate the agreement, for it is no more than the common case of a penalty. *Ib.*

A penalty has never been held to release parties from their agreement; for though incurred, they must perform the agreement, notwithstanding. *Ib.*

10. A solicitor's clerk executed a bond to his employer; the condition, after reciting an agreement that the clerk should give a bond not to carry on the business of a solicitor within fifty miles of a given place, was, that if he carried on business within the specified distance, then, provided he paid to the solicitor 1,000*l.* as liquidated damages, the bond should be void. The clerk commenced business as a solicitor within the distance. On a bill filed by the solicitor:—Held, that he was entitled to an injunction restraining the clerk from practising within the specified distance. *Howard* v. *Woodward*, 10 Jur., N. S., 1123; 34 L. J., Ch., 47; 13 W. R. 132; 11 L. T., N. S., 414; 5 N. R. 8.

11. A. agreed to grant B. an underlease of premises, and he covenanted, that if his lessors should refuse to grant him a licence to underlet to B., or in case such licence should not be obtained before a certain day, he would pay B. 1,000*l.*, which sum it was agreed should be damages ascertained and fixed for not obtaining such licence. A. refused to apply for a licence to underlet, and such licence was not in fact granted by the day named. Upon a bill for specific performance:—Held, that the clause did not give A. the right to abstain from applying for the licence, and to pay the 1,000*l.* by way of penalty, and specific performance was decreed. *Long* v. *Bowring*, 10 Jur., N. S., 668; 12 W. R. 972; 10 L. T., N. S., 683.

12. On marriage, the two fathers agree to settle lands: one does so; the other gives a bond of 600*l.*, with 1,200*l.* penalty if he fail. He has not election afterward to forfeit the 600*l.* or settle; the settlement being the primary agreement, and the 600*l.* only a penalty or further security. *Chilliner* v. *Chilliner*, 2 Ves. 528.

13. A., in consideration of the intended marriage of his niece, entered into a bond, with a penalty conditioned to give by will or

otherwise, into or in trust for her or the issue of the intended marriage, so much in money or in valuable effects, as he should by his will give or bequeath to any one of his next of kin, or to any other person whosoever:—Held, that this condition was not to be satisfied by the penalty, but must be specifically performed. All voluntary assignments and transfers of personal property, and all conveyances of real estate purchased subsequently to the date of the bond, in which real estate or personal property the obligor retained a life interest, were declared to be in the nature of testamentary dispositions, to be considered in equity, for the purpose of giving effect to the true intent of the agreement in the bond, as if the said estates had been given or devised by the obligor's will. The persons entitled to the benefit of the bond were declared to be specialty creditors upon the obligor's estate, for satisfaction of their claims under the bond. *Logan* v. *Wienholt*, 1 Cl. & F. 611.

A bond conditioned to convey lands for money received is considered in equity as articles, and the condition shall be performed in specie. *Anon.*, Mos. 37.

See also TRADE, I. 5.

PENANG.

See COLONIES AND COLONIAL LAW, X. XXIX.

PENDENTE LITE.

— *Generally.* See LIS PENDENS.
— *Receiver.* See PRACTICE (RECEIVER).
— *Assignment.* See CHAMPERTY AND MAINTENANCE.
— *Administrator.* See EXECUTOR AND ADMINISTRATOR.
— *Plea of Former Suit or Decree.* See PRACTICE (PLEA).
— *Execution of Powers and Trusts.* See POWER—TRUSTS.

PENSION AND PAY.

— *Officer's Commission.* See ARMY AND NAVY, V.
— *Assignment of Pensions and Pay on Bankruptcy.* See BANKRUPTCY, XVII. XXVIII.—XXXI. v. 1.
— *As to Indian Superannuation Funds.* See COLONIES AND COLONIAL LAW, X. XVI. 1.

See also OFFICE.

I. RIGHT TO, 5609.
II. ASSIGNMENT OF, 5609.
1. *In General*, 5609.
2. *Military*, 5610.
3. *Indian*, 5610.

I. RIGHT TO.

1. Under the provisions of the Superannuation Act 1859, the question whether or not a pension shall be granted to a public servant is to be decided by the commissioners of the Treasury; and until they have decided to grant a pension no public servant can maintain an action in respect thereof. *Edmunds* v. *Att.-Gen.*, 47 L. J., Ch., 345; 26 W. R. 550; 38 L. T. 213.

2. The Superannuation Act 1859, s. 2, after prescribing a scale of superannuation allowances for civil servants according to length of service, provides that, if any question shall arise as to the claim of any civil servant for superannuation under this clause, "it shall be referred to the commissioners of the Treasury, whose decision shall be final." Where, therefore, a civil servant makes a claim for superannuation allowance to the commissioners of the Treasury, and their lordships decide upon the amount of the allowance to be made, such decision is final, and cannot afterwards be made the subject of litigation in any civil tribunal. *Cooper* v. *Reg.*, 14 L. R., Ch. D., 311; 49 L. J., Ch., 490; 42 L. T. 617; 28 W. R. 611.

3. To entitle the widow of an officer in the army to the pension from government, the marriage must have taken place before he retired from the service. *Perry* v. *Woods*, 3 Ves. 204.

II. ASSIGNMENT OF.

1. *In General*, 5609.
2. *Military*, 5610.
3. *Indian*, 5610.

1. In General.

4. Purchaser of pension granted by King Geo. 3, and which necessarily ceased on king's death, not entitled to pension which was granted by Geo. 4, merely in continuance of the former one. *Clay* v. *St. John*, 2 Sim. & S. 32; 2 L. J., Ch., 15.

5. A pension for past services may be alienated; but a pension for supporting the grantee in the performance of future duties is inalienable. *Davis* v. *Marlborough (Duke)*, 1 Swan. 74; 2 Wils. 130.

The estates, which, by 5 Ann, c. 3, are limited to the then Duke of M. for life, remainder to S. his duchess for life, remainder to the heirs male of the body of the duke, remainder to all and every of his daughters, in such manner as the titles are thereinbefore limited, in order that they may always "go along and be enjoyed with the titles and dignities," with a proviso restraining alienation to the prejudice of persons in the remainder, are not inalienable, and the rents and profits may be effectually aliened by the person in possession, as against himself. The pension granted by 5 Ann, c. 4, "for the support of the dignities" of the Duke of M., and his posterity, payable out of the revenues of the post-office, to such persons severally and successively to whom the same should come, by virtue of that Act, with a proviso, that the acquittance of every such person should be a sufficient discharge, is alienable. *Ib.*

Courts of equity may apply a peculiar principle to Acts restraining alienation, in the construction of which they agree with the courts of law. S. C. 2 Swan 133.

6. Pension to A. or his assigns, when assigned is a grant, not a chose in action. *M'Carthy* v. *Goold*, 1 Ball & B. 386.

Sequestrators directed to receive a pension to A. and his assigns, payable at the Treasury, in the hands of the assignee. *Ib.*

7. A question being raised whether a pension

granted by the Crown to one of the officers in the Custom House, upon the abolition of the office, was assignable:—Held, that there was sufficient doubt on the point to induce the Court to protect the fund till the title was disposed of; and for this purpose to restrain the receiver-general from paying over any part of the compensation which was then in his hands. *Tunstall* v. *Boothby*, 10 Sim. 542; 9 L. J., N. S., Ch., 294.

1. The Lords of the Treasury directed A. to be placed on the superannuated list of the customs, at a retiring allowance of 1,000*l.* per annum, payable quarterly by the receiver-general of customs. A. assigned the allowance to B. for a valuable consideration. The Court, in a suit by B. against A. and the receiver-general of customs, restrained the receiver-general from paying over to A., and A. from receiving from the receiver-general, moneys in the hands of the latter on account of the arrears of the allowance. *Hall* v. *Lack*, 7 Jur. 527.

2. E., a retired storekeeper of one of Her Majesty's dockyards, entitled to payment from the Treasury of a pension or superannuation allowance of 155*l.* a year, assigned such pension to the plaintiff to secure a loan of money. E. afterwards became insolvent, and included the debt due upon the plaintiff's security in his schedule. The Commissioner of the Insolvent Debtors' Court, by his order, made in presence of counsel for the plaintiff, recommended that 50*l.* a year, part of the insolvent's pension, should be paid by the paymaster-general to the provisional assignee of the Insolvent Debtors' Court, for the benefit of the creditors of the insolvent. The plaintiff declined to prove as creditor under the insolvency; but, having filed a bill, moved for an injunction to restrain E. from applying for, or receiving, or enabling any other person to receive, the balance of his pension left after the appropriation of the annual sum recommended by the Commissioner:—Ordered accordingly. *Lloyd* v. *Eagle*, 5 Jur., N. S., 187; 28 L. J., Ch., 389.

2. Military.

3. If a colonel in the army makes an assignment of the off-reckoning of any year for the clothing of that year, and has before anticipated such off-reckoning of that year for the clothing of the foregoing year, he shall be answerable in his own person, if the agreement be so worded as to charge him, and the off-reckonings of the following year are so far diverted by altering the establishment of the regiment as not to be applicable to make good the payments. *Tidcombe* v. *Boddington*, Pre. Ch. 143.

4. The difference received by an officer upon retiring on half-pay is assignable. *Price* v. *Lovett*, 20 L. J., N. S., Ch., 270; 15 Jur. 786.

5. The half-pay of an officer is not assignable or attachable, on principles of public policy, lest he should not be forthcoming when his services are wanted. *M'Carty* v. *Gould*, 1 Ball & B. 389.

6. An assignment of the half-pay of an officer in the army is bad in equity as well as at law. *Stone* v. *Liddordale*, 2 Anstr. 533.

7. An assignment by a retired military officer of his pension for valuable consideration is void under the 47 Geo. 3, c. 25, and the Court refused an injunction to restrain the officer from applying for or receiving the pension. *Lloyd* v. *Cheetham*, 3 Giff. 171; 7 Jur., N. S., 1272; 30 L. J., Ch., 640; 9 W. R. 924; 4 L. T., N. S., 576.

8. B., formerly an officer in the army, obtained a grant of a pension from the Crown, not for a term of years, or for the whole period of life, but "until further order," for wounds received in actual service in India in 1845. In 1853 B. assigned his pension to the plaintiff to secure payment of redeemable annuities granted to him by B. for valuable consideration. The indentures contained a power of attorney authorizing the plaintiff to receive the pension, which was payable quarterly; and they also contained covenants by the defendant to do all necessary acts to enable the plaintiff to receive the pension. The War Office, to avoid being affected by any charges on such pensions, refused to recognise any assignment, or to pay the pension, except the power of attorney were in the form used in and recognised by such office, and which was revocable by the grantor. The defendant executed such power of attorney, but subsequently, without notice to the plaintiff, revoked it, and proceeded to receive and appropriate the entire amount of the pension. The plaintiff filed a bill against B.; and on motion for that purpose the Court granted an injunction in 1858 to restrain him from receiving the pension, and from executing a power of attorney authorizing or permitting any person other than the plaintiff to receive it. No receiver was appointed, and no order for costs was made. *Knight* v. *Bulkeley*, 4 Jur., N. S., 527; 27 L. J., Ch., 592; 6 W. R. 610.

Subsequently the Court, on the application of the plaintiff, ordered B. to execute a proper power of attorney for the purpose of enabling the plaintiff to receive the pension; and made the injunction granted in 1858, perpetual against B. revoking the power, or doing any act whereby the plaintiff's right to receive the pension might be intercepted. S. C. 5 Jur., N. S., 817.

9. D., by his marriage settlement, agreed that if he then was, or should during the intended coverture, at one time and from one source, become entitled to any real or personal property of the value of 100*l.* or upwards for any estate or interest whatsoever, he and all necessary parties should execute and do such assurances and things as should be necessary for vesting the same in the trustees of the settlement. He was at the time of his marriage in receipt of half-pay (as lieutenant in the navy), which he subsequently commuted, under 34 & 35 Vict., c. 36, for 2,175*l.*:—Held, that the commutation money was not bound by the agreement in the settlement. *Churchill* v. *Denny*, 20 L. R., Eq., 534; 44 L. J., Ch., 578; 23 W. R. 825.

3. Indian.

10. The 47 Geo. 3, s. 2, c. 25, making void the assignment of military pensions, does not apply to a pension granted by the East India Company. *Heald* v. *Hay*, 3 Giff. 467; 8 Jur., N. S., 379; 31 L. J., Ch., 311; 10 W. R. 264; 5 L. T., N. S., 740.

11. The 46 Geo. 3, c. 69, and 47 Geo. 3, s. 2,

c. 25, do not apply to pensions granted by the government of India to military persons employed in India, for the purpose of the Indian Government. *Carew* v. *Cooper*, 4 Giff. 619; 12 W. R. 198; 3 N. R. 188. And see 12 W. R. 586; 10 Jur., N. S., 429.

A pension awarded by the Secretary of State for India, subsequently to the Act for the better government of India (21 & 22 Vict., c. 106), to an officer in Her Majesty's Indian army upon his retirement from service, and also an annuity granted by the Secretary of State for India to the same officer, in addition to his retiring pension, are assignable. S. C. 10 Jur., N. S., 11; 33 L. J., Ch., 289; 12 W. R. 767; 9 L. T., N. S., 641.

1. Property, including a pension payable by the Secretary of State for India, was mortgaged to the plaintiff, and subsequently to one of the defendants. Upon a bill for foreclosure the common decree was made, and it was also ordered that, in the event of the foreclosure becoming absolute, the mortgagor should execute a power of attorney enabling the mortgagee to receive the pension. *James* v. *Ellis*, 19 W. R. 319; 24 L. T., N. S., 12.

2. A debtor executed a deed of assignment of all his property, except a pension from the East India Company, to a creditor to secure a past debt:—Held, that as this pension could not pass to his trustee in bankruptcy, it formed no substantial exception from the assignment, and the assignment was therefore an act of bankruptcy. *Exp. Hawker, Re Keely*, 41 L. J., Bky., 34; 20 W. R. 322; 26 L. T., N. S., 54; 7 L. R., Ch., 214.

PER CAPITA OR PER STIRPES.

See DISTRIBUTION OF ESTATE—WILL.

PERFORMANCE.

— *Of Contract.* See CONTRACT, VII.—PENALTY—SPECIFIC PERFORMANCE.
— *Of Covenants to Settle Property.* See SETTLEMENT, VI.
— *Part.* See LANDLORD AND TENANT, I. v. SPECIFIC PERFORMANCE—SETTLEMENT, I. AND II.
— *Cy Près of Charitable Trusts.* See CHARITY, X.
— *Cy Près of Powers and under Rule against Perpetuities.* See PERPETUITY, VII.
— *Of Condition.* See CONDITION, XVIII.
— *Of Covenant.* See COVENANT.

PERJURY.

3. Explanation by a second answer does not take away the opportunity of indicting upon the former answer. *Edwards* v. *M'Leay*, 2 Ves. & B. 258.

4. That an indictment for perjury upon the answer has been found by the grand jury is not a ground for reviving an injunction. *Clapham* v. *White*, 8 Ves. 35.

5. Where a corporation aggregate are defendants, they are not liable to prosecution for perjury, though their answer be never so false. *Wych* v. *Meal*, 3 P. W. 310.

6. Suit in chancery for perjury committed there must be by Latin bill, and issue tried in K. B., and defendant shall not be sworn to his plea, nor examined on interrogatories, unless that Court had absolute authority in perjuries before 5 Eliz., c. 9, saved by 13 sec. *Anon.*, Dyer, 288 pl. 51.

7. Bill of perjury proceeded with in Chancery. *Woodcock* v. *Woodcock*, Cary 63.

8. Defendant in bill of perjury, after answer, ought to be examined upon interrogatories. *Philips* v. *Benson*, Cary 68.

9. Attachment discharged, and bill of perjury for procuring it indirectly. *Clegge* v. *Warberton*, Cary 72.

10. English bill for perjury. *Griffith* v. *Jenkin*, Cary 75.

11. *Quære*, whether an affidavit sworn before the petition was filed will support an indictment for perjury. *Rex* v. *Dudman*, 2 G. & J. 389

12. An application to take an answer off the file, in order to prosecute the defendant for perjury, granted as a matter of right, being in furtherance of public justice. *Stratford* v. *Greene*, 1 Ball & B. 294.

On application to produce on trial a record of Court, the Court has no jurisdiction to inquire whether there be probable ground for the prosecution, or what may be the motives of the prosecutor, it being only interested to see that the record be not defaced. *Ib.*

13. A defendant's answer will be taken off the file for the purposes of an indictment for perjury, when the preparatory steps have been taken, and the time of trial is near at hand. *Curtis* v. ——, 1 Hog. 132.

14. An affidavit will be taken off the file for the purposes of an indictment for perjury, when the preparatory steps have been taken, and the time of trial is near at hand. The affidavit to support the motion should not enter into the merits of the indictment. *Swift* v. *Quinlan*, 1 Hog. 132.

15. A testator bequeathed the residue of his estate to his wife A. G. for her life, and the legatee, describing herself as A. G., widow, filed a bill against the executors for the administration of the estate; but, it appearing that J. P., the first husband of the legatee, was living at the time the ceremony of marriage was performed between her and the testator; and at the time of filing the bill, she filed a supplemental bill, describing herself as A. P. *alias* A. G., by her next friend, against J. P., for the purpose of making her husband a party to the suit:—Held, that this was not such an alteration of the frame of the record as to render the evidence taken in the first cause inadmissible at the hearing of the two causes; and that the amended description of the plaintiff in the supplemental bill could not affect the liability of a witness examined in the original suit to be indicted for perjury, if he swore falsely. *Giles* v. *Giles*, 1 Keen 685.

16. *Semble*, where, under an Act of Parliament, an affidavit in a petition matter required by the Act may be sworn before the petition is filed, any indictment for perjury in such an affidavit can be sustained. *Clendinning* v. *O'Malley*, 1 Con. & L. 363; 2 Dr. & War. 210.

PERPETUATION OF TESTIMONY.

— *Taking Evidence de Bene Esse.* See PRACTICE (EVIDENCE).

I. GENERAL PRINCIPLES, 5612.
II. BILL FOR, WHEN PROPER, 5612.
III. TAKING EVIDENCE ON, 5613.
IV. PUBLICATION AND USER OF DEPOSITIONS, 5614.
V. PLEADING, 5615.
VI. DISMISSAL OF BILL FOR WANT OF PROSECUTION, 5615.
VII. HEARING AND COSTS, 5615.

I. GENERAL PRINCIPLES.

1. Distinction between examination to perpetuate and *de bene esse*. In a suit for the former purpose, after the examination, there is an end to the issue. *Morrison* v. *Arnold*, 19 Ves. 671.

2. Distinction between a bill to perpetuate testimony and a bill of discovery. The former is not a bill of discovery in the strict technical sense of the term. *Ellice* v. *Roupell*, 32 Beav. 299; 9 Jur., N. S., 530; 32 L. J., Ch., 563, 624; 11 W. R. 579; 8 L. T., N. S., 191; 2 N. R. 3. And see 32 Beav. 308.

A bill of discovery must be in aid of proceedings pending or about to be instituted, but the existence of such proceedings would be fatal to a bill to perpetuate testimony. *Ib.*

A bill to perpetuate testimony cannot, by amendment, be converted into a bill of discovery. *Ib.*

3. The plaintiffs filed a bill to perpetuate testimony as to the validity of a deed, which question, they alleged, could not at present be tried. After the defendants had, by answer, admitted the plaintiffs' right to perpetuate the testimony, the plaintiffs filed another bill, raising the question of the validity of the same deed. A motion by the defendants to stay proceedings in the suit to perpetuate testimony, on the ground of the existence of the second suit, was refused with costs. *Ellice* v. *Roupell*, 32 Beav. 318.

4. It was not intended by the 5 & 6 Vict., c. 69, to give a party seeking to perpetuate testimony rights stronger than those which would belong to him in an actual and present litigation. *Campbell* v. *Dalhousie* (*Earl*), 1 L. R., H. L. (Sc.), 462; 22 L. T., N. S., 879.

II. BILL FOR, WHEN PROPER.

5. A bill to examine witnesses *in perpetuam rei memoriam* is not proper, until the party has established his right at law. *Pawlet* v. *Ingres*, 1 Vern. 308.

6. Upon a bill to perpetuate the testimony of witnesses touching a right to a way, the plaintiff must set out the way exactly in his bill *per et trans*, as he ought to do in a declaration at law. But such a bill ought not to be brought for such trivial things as right of common, or for ways or watercourses, or at least not till after a recovery at law. *Gell* v. *Haynard*, 1 Vern. 312.

7. Bill lies to perpetuate the testimony of witnesses to prove a modus; but *quære* if it will lie to establish a modus. *Somerset* v. *Fothorby*, 1 Vern. 185.

8. A bill will not lie to perpetuate the testimony of witnesses to a lunatic's will in his lifetime, made before his lunacy. *Sackvill* v. *Aylesworth*, 1 Vern. 105.

9. Bill will not lie to perpetuate testimony, etc., before trial, unless affidavit be made of the witnesses being infirm and unable to travel. *Philips* v. *Carew*, 1 P. W. 117.

10. Where lands are devised by will, and there is no opportunity to prove and establish it at law, a bill to perpetuate testimony thereto will lie. *Anon.*, Pr. Reg. 74.

11. A man cannot bring a bill to examine witnesses *in perpetuam rei memoriam* to establish his title, until he has made it good by a verdict at law, if he is under no impediment of trying his title at law. *Parry* v. *Rogers*, 1 Vern. 441.

12. Devisee shall not examine witnesses *in perpetuam rei memoriam*, to prove a will against a purchaser without notice, till the will has been established by a verdict at law. *Bechinall* v. *Arnold*, 1 Vern. 354.

13. Court will not give leave to plaintiff to examine witnesses to perpetuate testimony, though in case of a purchase of reversion, where there can be no trial at law during the estate for life. *Hitchcock* v. *Sedgwick*, 2 Vern. 159.

14. A tenant in tail out of possession, cannot bring bill to perpetuate testimony. *Brandlyn* v. *Ord*, 1 Atk. 571.

15. A man who is in possession of a fishery, may bring a bill to examine his witnesses *in perpetuam rei memoriam*, and establish his right, though he has not recovered an affirmance of it at law. *Secus*, if he is not in possession. *Dorset* v. *Girdler*, Pre. Ch. 531.

16. Bill to perpetuate testimony of legitimacy of plaintiff, entitled to remainder in tail, after estate for life. Demurrer by seventh and eighth in remainder, after plaintiffs and other defendants, all infants, overruled; any interest, however slight, being sufficient. *Dursley* (*Lord*) v. *Berkeley*, 6 Ves. 251.

Next of kin of lunatic, however hopeless his condition, have no interest whatever in the property, and cannot, therefore, restrain bill to perpetuate testimony. So heir apparent cannot have a writ *de ventre inspic.* in life of his ancestor; but they may contract upon their expectations, and may perpetuate testimony with reference to interest so created. *Id.* 260.

Bill to perpetuate will not lie where defendant might immediately bar that right. *Id.* 262.

17. This Court will not take the least step against a purchaser for valuable consideration without notice, not even to perpetuate testimony against him. *Jerrard* v. *Saunders*, 2 Ves. J. 458.

18. Demurrer to bill to perpetuate the testimony of witnesses in aid of plaintiff's defence to an action, because the agreement relied on as a defence, and touching which the testimony of witnesses was sought to be perpetuated, was, as stated by the bill, corrupt and illegal, and because the subject matter of the bill was altogether unfit to be the subject of discussion in a court of equity, allowed at the rolls; overruled on appeal. *Longfield* v. *Aubrey*, 2 Moll. 426.

1. Landlord may file a bill to perpetuate evidence of a demand, made under the Tenantry Act, on his tenant to renew. *Keating* v. *Sparrow*, 1 Ball. & B. 372.

2. Demurrer will lie to bill to perpetuate, if it does not state that no action can be immediately brought. *Angell* v. *Angell*, 1 Sim. & S. 83; 1 L. J., Ch., 6.

3. *Quære*, whether equity has jurisdiction to entertain bill to perpetuate testimony to claims to a dignity. *Belfast (Earl)* v. *Chichester*, 2 Jac. & Walk. 439.

Issue in tail cannot file bill to perpetuate testimony, even in case of an entail that cannot be barred. *Ib.*

A dignity is entailed on A., who dies leaving issue two sons, B. and C. To bill filed in lifetime of B., by his eldest son, for perpetuating testimony of his father's marriage, demurrers by eldest son of C., who was dead, and attorney-general, were allowed. *Ib.*

4. *Semble*, this Court has jurisdiction to perpetuate testimony with a view to proceedings in foreign courts. *Morris* v. *Morris*, 2 Ph. 205; 16 L. J., N. S., Ch., 286; 11 Jur. 93.

5. A bill to perpetuate testimony cannot be filed but by a person who has some interest, present or future, and not by those who would be next of kin to a lunatic if he was to die immediately. *Smith* v. *Att.-Gen.*, Romilly's Notes of Cases, 54; 6 Ves. 256, 260.

6. To support a bill to perpetuate testimony, the plaintiff must have an interest; but the minuteness or remoteness of it is no objection, A mere contingency, however near and valuable (with the exception of the case of a wager), the expectation of issue in tail, heir apparent, or next of kin of a lunatic, is not sufficient; therefore a demurrer to a bill by tenant in tail in remainder and his issue, to perpetuate testimony of the validity of his marriage, allowed. *Allen* v. *Allen*, 15 Ves. 130.

7. A bill to perpetuate testimony relating to a matter which is the subject of an existing suit against the plaintiff is demurrable, although the plaintiff could not himself have made such matter the subject of present judicial investigation. *Spencer (Earl)* v. *Peek*, 3 L. R., Eq. 415; 15 W. R. 478.

See also V. *post.*

III. TAKING EVIDENCE.

8. Affidavit must be made of service on defendant of subpœna to examine witnesses *in perpetuam rei memoriam* before they can be so examined. *Hatcham* v. *Winchcombe*, Cary 34. S. P. *Porter* v. *Baker*, *Id.*

9. Commission to examine *in perpetuam rei memoriam* granted to examiner of court. *Barentine* v. *Harbert*, Cary 43.

10. Commission to examine *in perpetuam rei memoriam* granted. *Hearing* v. *Fisher*, Cary 110.

11. Commission to examine *in perpetuam rei memoriam*, on oath that witness is impotent and sick. *Bagshawe* v. ——, *Robins* v. *Foster*, Cary 35.

12. Leave given to plaintiff, before answer, to sue a commission in a suit to perpetuate testimony, the defendant having been attached, and still refusing to answer. *Lancaster* v. *Lancaster*, 6 Sim. 439.

13. Bill to perpetuate testimony of modus being amended, by adding essential party, after commission executed, but before publication, a new commission was granted. *Biddiford* v. *Partridge*, 3 Anstr. 646.

14. In a suit to perpetuate testimony, motion for a further examination of witnesses as to the facts lately discovered, refused on the ground that a demurrer to a supplemental bill for the same purpose had been allowed. *Knight* v. *Knight*, 1 Jac. & Walk. 165.

15. After a replication filed in a suit to perpetuate testimony, it is not necessary to obtain an order to examine witnesses. *Allen* v. *Hacket*, 11 Ir. Eq. R. 355.

16. The depositions of a witness who was examined *in perpetuam rei memoriam* were suppressed on a petition after his death, and the examiner discharged and committed for foul practice and irregularity in the taking of them, the plaintiff being suffered by the examiner to instruct him, and the witness being corrupted; and as he had been examined on a trial to the same points, the plaintiff might give evidence of what he swore. *Hosier* v. *Hart*, Mos. 321.

17. Commission to examine *in perpetuam rei memoriam* granted to examiner of Court. *Barentine* v. *Harbert*, Cary 43.

18. A commission to examine witnesses *de bene esse*, upon a bill to perpetuate testimony, though the defendant had not appeared, and was not in contempt. *Allen* v. *Annesley (Earl)*, 2 Jones 260.

19. Examination *de bene esse* granted to plaintiffs in a bill to perpetuate testimony after subpœna served, but before appearance of infant defendants, in contempt by the messenger's return that they had absconded and were not to be found, on affidavit of the materiality of the evidence and danger of its loss, and undertaking to proceed with all due diligence to issue, and examination in chief to be proved before publication of the depositions *de bene esse*. *Frere* v. *Green*, 19 Ves. 319.

20. Witnesses being old and infirm, and resident out of the jurisdiction, the Court, in a suit to perpetuate testimony, before appearance of some of the parties, made an order for their examination *de bene esse*. *Campbell* v. *Att.-Gen.*, 11 Jur., N. S., 922; 14 W. R. 45; 13 L. T., N. S., 356.

As to Evidence de bene esse and Commissions to examine generally.] See PRACTICE (EVIDENCE).

Discovery.] 21. The only discovery which a plaintiff in a bill to perpetuate testimony can require from a defendant is a sufficient admission of his title to examine such witnesses as they may think fit, on the various matters and issues stated in the bill. *Ellice* v. *Roupell*, 32 Beav. 308.

22. An appellant, on a bill to perpetuate testimony, under 5 & 6 Vict., c. 63, obtained from the Court of Chancery a *subpœna duces tecum*, directed to the respondents. The appellant, being unable to enforce this writ against the respondents who were resident in Scotland, applied to the Court of Session, under 22 Vict. c. 20, to compel them to search for and exhibit

the documents mentioned in the subpœna. The respondents stated as a reason for non-search and non-production of the documents, that they were locked up in the muniment room at a certain castle, and that though they were, as trustees of the late owner of the castle, in possession of the key of the muniment room, yet they could not search that room, because there was a dispute between them and the present owner of the castle as to the right of the possession of the documents:—Held, that the respondents could not be compelled to produce the documents. *Campbell* v. *Dalhousie* (*Earl*), 22 L. T., N. S., 879; 1 L. R., H. L. (Sc.), 462.

It was not intended by 5 & 6 Vict., c. 69 to give to the person who wished to perpetuate testimony, as against the person with whom he contemplated a future litigation, rights of any stronger character than those which would be possessed by him in a suit actually commenced; and it is of course that, when parties are in immediate litigation, they cannot investigate the title-deeds of the opponent. *Ib.*

IV. PUBLICATION AND USES OF DEPOSITIONS.

1. Commission having been issued, etc., to examine witnesses *in perpetuam rei memoriam* a year past, publication ordered. *Gravenor* v. *Brearton*, Cary 33.

2. Witnesses examined *in perpetuam rei memoriam*, one dead other sick, moved to use testimony, and granted. *Senhawes* v. *Senhawes*, Cary 88.

3. Publication of depositions of witnesses examined *in perpetuam rei memoriam*, cannot pass by a side bar rule; but there must be a special motion for the purpose. *Green* v. *Green*, 1 Hog. 312.

4. Depositions in *in perpetuam rei memoriam* not published in the life of the witness, except on incapacity to travel by sickness, etc.; such orders, except in the excepted cases, proceeding on affidavit of the death of the witness, some expressly declaring that the depositions of the other witnesses shall not be read. *Morrison* v. *Arnold*, 19 Ves. 670.

5. Publication of depositions of witness who is dead taken on bill to perpetuate may be moved for as of course. *Bourne* v. *Bligh*, 1 Price 307.

6. Publication ordered of the depositions of a deceased witness, examined on the behalf of the defendant, under the plaintiff's commission, on a bill to perpetuate testimony. *Abergavenny* (*Earl*) v. *Powell*, 1 Meriv. 434.

7. On a bill for examining witnesses *in perpetuam rei memoriam*:—Held, that publication of the depositions should not be allowed unless in a strong case. *Harris* v. *Cotterell*, 3 Meriv. 678.

8. The Court will not make an order for the publication of depositions taken in a suit, to perpetuate testimony, whilst the witnesses are alive. *Barnsdale* v. *Lowe*, 2 Russ. & M. 142.

9. Court will not order copies of depositions taken to perpetuate testimony of witnesses to be delivered out for the purpose of perfecting title to an estate, even where witnesses are dead. *Teale* v. *Teale*, 1 Sim. & S. 385.

10. It is no objection to the publication of depositions which have been taken in a suit to perpetuate testimony, that the proceedings for which they are required are in the court of a foreign country, or that other depositions taken in a similar suit in that country have already been published. *Morris* v. *Morris*, 2 Ph. 205; 16 L. J., N. S., Ch., 286; 11 Jur. 93.

11. In a suit to perpetuate the testimony of witnesses, liberty was given to the plaintiffs, under the 13 Geo. 2, c. 9, to pass publication of depositions of witnesses examined *de bene esse* in the cause. *Scanlan* v. *M'Coy*, Fl. & K. 366.

12. Depositions of witnesses examined under a bill to perpetuate testimony, in aid of an ejectment, and who were resident abroad and refused to come to this country, ordered to be published. *Biddulph* v. *Camoys* (*Lord*), 19 Beav. 467.

A similar application refused, as to a witness in England, who, on account of blindness and infirm state of health, was stated to be unable to leave home, and who had stated his age to be eighty-three. *Ib.*

A witness, examined under a bill to perpetuate testimony, was very old, and unable, through illness, to leave his home without danger; another was resident in Canada. Their depositions were ordered to be published and produced at the trial about to take place, and that either party might make such use of them "as by law they can." S. C. 20 Beav. 402.

13. Order to read on the trial of an issue, the depositions of a living witness taken in a suit to perpetuate testimony, the witness being too infirm to attend at the trial. *Watkins* v. *Atchison*, 10 Hare (App.) 46.

The defendant having obtained an order for the payment of his costs by the plaintiffs, which order recited that the testimony of the witness had been taken, the depositions of the witness must be regarded as having been completely taken, and are not therefore to be excluded on the ground of the want of a sufficient cross-examination. *Ib.*

On the examination and cross-examination of an aged and infirm witness labouring under deafness, the questions were put, and answers received, through the medium of the daughter of the witness; and the examiner certified that the state of the witness did not permit the examination to be proceeded with without danger to her life, and that much of the cross-examination and all the re-examination had been pretermitted. The defendant afterwards obtained an order for his costs, which recited that the testimony of the witness had been taken:—Held, that the defendant having concurred in the mode of examination adopted, could not afterwards object to the use of the testimony by impeaching its fidelity on that ground. *Ib.*

14. *Semble*, there has been no alteration in the rule, that, in suits to perpetuate testimony, the evidence given ought to be kept secret until the time for using it arrives. *Ellice* v. *Roupell*, 2 N. R. 3; 32 Beav. 299; 9 Jur., N. S., 530; 32 L. J., Ch., 563, 624; 11 W. R. 579; 8 L. T., N. S., 191.

15. Depositions in the custody of the Court, which were taken in a former suit to perpetuate testimony, were ordered to be published,

on the application of one of the parties to a subsequent suit, the other of whom was a stranger to the former suit, and the time for taking evidence in the second suit was extended in order to give both parties an opportunity of considering the information so obtained; the Court being of opinion that though the depositions might not themselves be evidence, they might be the means of supplying valuable information to both parties. *Vane* v. *Vane*, 45 L. J., Ch., 589; 24 W. R. 565. Varying 24 W. R. 453; 34 L. T., N. S., 477.

V. PLEADING.

1. Bill to perpetuate cannot pray other relief. *Anon.*, 2 Vent. 366.

2. In a bill to perpetuate testimony of a right of common and way, the plaintiffs claimed in right of their estates, or otherwise; this is too loose: a demurrer therefore allowed. *Cressett* v. *Mytton*, 3 Bro. C. C. 481. And see 1 Ves. J. 449.

3. Demurrer to bill to perpetuate, and that plaintiff could try *eo instanti*, allowed. *North* v. *Gray*, Dick. 14.

4. Demurrer will lie to bill to perpetuate, if it does not state that no action can be immediately brought. *Angell* v. *Angell*, 1 Sim. & S. 83; 1 L. J., Ch., 6.

5. Bill to perpetuate testimony merely, ought not to be brought to a hearing; but if it prays relief, the defendant may set it down for dismissal. *Vaughan* v. *Fitzgerald*, 1 Sch. & Lef. 316.

6. To a bill to perpetuate the testimony of witnesses with respect to the execution and attestation of a will of 1845, whereby a will of 1838, under which the defendant claimed, was stated to be revoked; the defendant pleaded that the plaintiff put the defendant by force out of a part of the lands, and that the remainder was in the occupation of tenants under leases or from year to year, who had not acknowledged the plaintiff's title or paid him rent due, and that the plaintiff would, by action at law against the tenants, forthwith try the title:—Held, on the authority of *Dew* v. *Clarke* (1 Sim. & S. 108), that the plea was good. *Lindesay* v. *Lindesay*, 12 Ir. Eq. R. 508.

7. The plaintiffs filed a bill to perpetuate testimony. The defendants put in a full answer, and replication having been filed, witnesses were examined. The plaintiffs afterwards amended their bill, and filed fresh interrogatories. The defendants pleaded to the amended bill that the plaintiffs, since filing the original bill, had instituted another suit, in which they made the several matters raised in issue by the amended bill the subject of judicial investigation:—Held, that the plea was bad; that although it might have been good if filed to the original bill, yet that the defendants, having answered the original bill, could not plead to the amended bill. The plea was ordered to stand for an answer, with liberty to the defendants to except. *Ellice* v. *Roupell*, 9 Jur., N. S., 530; 32 L. J., Ch., 563, 624; 11 W. R. 579; 8 L. T., N. S., 191; 32 Beav. 299; 2 N. R. 3.

The plaintiffs having excepted:—Held, that although a bill to perpetuate is, to a certain extent, a bill of discovery, yet it is so only to the extent of enabling the plaintiffs to obtain the relief asked by the bill, viz., the examination of witnesses as to the issues raised by the bill; and that the answer already put in being sufficient for that purpose, the plaintiffs could not require a further answer. *Ib.*

8. A bill to perpetuate testimony alleged that the plaintiff was in possession of lands, and if any proceedings were taken by the defendant to recover the land, the plaintiffs would be able by the testimony of creditable witnesses to prove their title, and disprove that of the defendant. The defendant put in a voluntary answer, whereby he deposed that it was not true that the plaintiff was in possession, but, on the contrary, that he (the defendant) was in possession. The plaintiff replied. Thereupon the defendant did not plead, but moved to dismiss the plaintiff's bill, on the ground that a plaintiff out of possession could not bring the bill without alleging that he could not immediately bring an ejectment:—Motion ordered to stand over, with liberty to either party to examine such witnesses as he might be advised to prove that he was in possession. *Brigstocke* v. *Roch*, *Wedgwood* v. *Roch*, 3 L. T., N. S., 401; 7 Jur., N. S., 63.

VI. DISMISSAL OF BILL FOR WANT OF PROSECUTION.

9. Bill to perpetuate testimony may be dismissed for want of prosecution any time before replication and examination. If cause is set down to be heard, the bill will be dismissed with costs, so as not to prejudice the perpetuating the testimony. *Anon.*, Ambl. 237; 2 Ves. 497.

10. A motion to dismiss a bill to perpetuate testimony for want of prosecution is irregular. The proper application is that the plaintiff may proceed within a given time, or may pay the defendant his costs. *Wright* v. *Tatham*, 2 Sim. 459. And see *Barham* v. *Longman*, *id.* n.

11. A bill to perpetuate testimony is not dismissed for want of prosecution, but the plaintiff is ordered to proceed forthwith, and complete his examination, or pay the defendant his costs. *Skrine* v. *Powell*, 10 L. J., N. S., Ch., 18.

12. A bill for a commission to examine witnesses abroad in aid of an action at law cannot be dismissed under the 93rd General Order. *Parr* v. *Howlin*, Sau. & Sc. 124.

An order for a commission to examine witnesses should specify the time within which it is to be executed, but where no time has been specified, the proper application is that the plaintiff should proceed within a given time, or pay the defendant his costs, or *semble*, that the defendant might apply to discharge the order for a commission, on the ground of unreasonable delay in proceeding upon it. *Ib.*

13. The Court will not, even before replication, dismiss a bill to perpetuate testimony for want of prosecution, but will order the plaintiff to reply, and examine his witnesses, and procure the examination to be completed by a

certain time, and in default thereof to pay to the defendant his costs of the suit. *Beavan* v. *Carpenter*, 11 Sim. 22.

VII. HEARING AND COSTS.

1. Bill to perpetuate by devisee and no relief prayed, defendant has costs, if he do not examine witnesses. *Blinkehorne* v. *Feast*, Dick. 153.

2. On a bill brought to prove a will *per testes*, and to perpetuate the testimony of witnesses, the defendant has no other remedy to have his costs than by moving for them. —— v. *Andrews*, Barnard. 333.

And though the defendant has cross-examined the plaintiff's witnesses, yet if he has examined no witnesses of his own, he shall be allowed his costs. *Ib.*

And the circumstance that the defendant has brought a cross bill makes no difference as to his right to costs in the original cause upon the return of the commission. *Ib.*

3. Where a devisee brings a bill merely *in perpetuam rei memoriam* and the heir-at-law only cross-examines the witnesses produced to confirm the will, he is entitled to his costs; but if he examines witnesses to encounter the will, he shall not have his costs. *Berney* v. *Eyre*, 3 Atk. 387.

4. Plaintiff having examined his witnesses under a bill to perpetuate, defendant moved for his costs. Order to show cause granted. *Bower* v. *Thomson*, 1 Fowl. 50.

5. Where a plaintiff in a bill to perpetuate the testimony of witnesses has examined, and thereby had the fruit of her bill, neither herself nor defendant is entitled to costs. *Coddrington* v. *England*, 2 Atk. 167.

When a multiplicity of actions has been brought where the custom might have been tried in one, it is such a vexation that the plaintiff in equity shall have the costs both in law and equity. *Ib.*

6. Where it appears reasonable, though not absolutely necessary, to perpetuate the testimony of witnesses to a will, the Court will, in the case of a purchaser, allow him his costs. *Mackrell* v. *Hunt*, 2 Madd. 37. n.

7. On a bill to perpetuate testimony, defendant entitled to costs of answering, there being no examination of witnesses. *Lecky* v. *Murray*, 1 Ball & B. 391.

8. Defendant to a bill to perpetuate testimony, entitled to his costs immediately after the commission executed, upon the allegation that he did not examine any witnesses. *Foulds* v. *Midgley*, 1 Ves. & B. 138.

9. A bill for perpetuating testimony only, ought not to be brought to a hearing; if it be, it will be dismissed with costs; but plaintiff has the benefit of the depositions at law, notwithstanding such dismissal. *Hall* v. *Hoddesdon*, 2 P. W. 162. *Anon.*, 2 Ves. 497; Ambl. 237.

10. Bill to perpetuate testimony merely ought not to be brought to a hearing; but, if it prays relief, the defendant may set it down for dismissal. *Vaughan* v. *Fitzgerald*, 1 Sch. & Lef. 316.

11. A bill for perpetuating testimony, if brought to a hearing, will be dismissed with costs. *Ellice* v. *Roupell*, 32 Beav. 308.

12. A defendant to a bill of discovery, and to perpetuate the testimony of witnesses, is entitled to his costs of the discovery, although he has examined witnesses in chief. *Shrine* v. *Powell*, 15 Sim. 81; 9 Jur. 1054.

13. A wealthy lunatic had made two wills before he was found lunatic. The Court, without giving any opinion whether a bill to perpetuate testimony as to their validity would lie, ordered that such costs as the Master should think proper of a bill to be filed with his approbation for that purpose should be paid out of the lunatic's estate. *Re Taylour*, 6 L. R., Ch., 416.

PERPETUITY.

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I. General Principles.

1. Perpetuity discountenanced in Chancery. *Anon.*, Cary 8.

2. An executory devise to arise within the compass of a reasonable time, is good; twenty, nay, thirty years have been thought a reasonable time, so as to be within the compass of a life or lives: for, let the lives be never so many, there must be a survivor, and it is but the length of the surviving life; the Court declined to go one step farther, for such limitations make an estate unalienable, every executory devise being a perpetuity as far as it goes, viz. an estate unalienable, though all mankind join in the conveyance. *Scatterwood* v. *Edge*, Salk. 229.—*Note:* Twisden, J., used to say "all the candles were lighted at once;" at this day it is clearly agreed, though formerly in many cases held otherwise, that a devise to an infant *en ventre sa mere*, is good though he be born after testator's death, and he shall take by way of executory devise. *Taylor* v. *Bydall*, 1 Freem. 243.

3. The trusts of term were limited to J. for life, then to E. for life, then to L. for life, then to the first and other sons of L. to be begotten on the body of M., with remainders, etc., remainders over; all limitations after that, to L. for life; the sons of L., not being born, are void. *Apprice* v. *Flower*, Poll. 27.

4. A., seised in fee, has two sons, B. and C., both unmarried, and devises his land to trustees in fee for 500 years in trust to pay 50*l.* per annum to his eldest son B. for life, with power of distress, and on several other trusts (some of which are remote), remainder to the first and every other son of B. in tail; remainder to C., the second son, for life, remainder to his first, etc., son in tail; remainder over. By the better opinion, this is a good executory devise to the first son of B. *Gore* v. *Gore*, 2 P. W. 28.

5. Executory devise, which may postpone the vesting beyond lives in being, and twenty-one years, etc., cannot be supported on possibility that the estate may vest sooner. *Griffith* v. *Vere*, 9 Ves. 134.

6. The rule, as to executory devise allowing any number of lives in being a reasonable time for gestation, and twenty-one years, is now the clear law. *Thellusson* v. *Woodford*, 4 Ves. 319. Affirmed 11 Ves. 112.

The number of contingencies for an executory devise not material, if they are to happen within the limits allowed by law. *Ib.*

Every executory devise is good that does not tend to a perpetuity; *i.e.*, that does not tend to make an estate unalienable beyond the period allowed by law as to legal estates. *Ib.*

7. A limitation, by way of executory devise, which is not to take effect until the determination of a life or lives in being, and a term of twenty-one years, as a term in gross, and without reference to the infancy of any person, is a valid limitation; *secus* if, to the term in gross of twenty-one years, be added the number of months equal to the longest or ordinary period of gestation. This being held to be the established rule, a decree of the Court below, declaring that a limitation by way of executory devise, which was not to vest until after the expiration of a term in gross of twenty years from the decease of the survivor of twenty-eight persons who were living at the testator's decease, and of whom seven only were to take interests under the devise, is a valid limitation, was affirmed accordingly. *Cadell* v. *Palmer*, 1 Cl. & J. 372. Affirming S. C. *nom. Bengough* v. *Edridge*, 1 Sim. 173; 5 L. J., Ch., 113.

8. One of a testator's sons was illegitimate, but mentioned in the will in every respect as the other sons:—Held, that his life must be considered in estimating a time for accumulation mentioned in the will. *Burt* v. *Sturt*, 1 W. R. 145.

9. A gift is too remote unless, according to the intention of the testator, some person must necessarily be in existence, with legal power to dispose of the property within the period limited by the rules of law. *Curtis* v. *Lukin*, 5 Beav. 147; 11 L. J., N. S., Ch., 360; 6 Jur. 721.

A gift must not only vest within the time limited by the rule against perpetuities, but the interests of the respective parties in the property must be capable of ascertainment within that period, otherwise the gift will be void. *Ib.*

10. Trusts and provisions contained in a will may be void for remoteness, although in the event the Court of Chancery would order trustees to administer the property in a similar manner to that pointed out in the will. *Turwin* v. *Newcome*, 3 Kay & K. 16; 3 Jur., N. S., 203. S. C. *nom. Turvin* v. *Newcome*, 5 W. R. 35.

11. There may be a particular clause in a will which on one construction appears to offend against the law relating to perpetuities; but if it is fairly capable of another construction which avoids that objection, the latter construction will be preferred, especially if it is found to be in accordance with the general intention of the will. *Martelli* v. *Holloway*, 5 L. R., H. L., 532; 42 L. J., Ch., 26.

12. In ascertaining whether a bequest falls within the rule against remoteness, the words of the testator are first to be taken, and their meaning determined; and it is then to be considered whether that meaning brings them within the operation of the rule. *Pearks* v *Moseley*, 5 L. R., App. Cas., 714; 50 L. J., Ch., 57; 43 L. T. 449; 29 W. R. 1.

13. The Court will not look out of a will to decide a question of remoteness; and therefore, where there was a general bequest to the children of a married woman for life, with a gift over on the death of all such children, the Court refused to take into consideration the fact of her having passed the age of child-bearing at the date of the will, and by reading the bequest as a gift to her children then living, to render the gift over valid. *Re Sayer*, 36 L. J., Ch., 350; 15 W. R. 617; 16 L. T., N. S.,

203; 6 L. R., Eq., 319. And see S. C. 18 L. T., N. S., 787. *See also Cooper* v. *Laroche*, 43 L. T., N. S., 794; 29 W. R. 438.

1. The meaning of the word "survive" in a limitation of property, is, that the person to survive shall be living at the time of the event which he is to survive; it does not mean living at any time whatever after the event referred to; consequently a gift over, if there should be no child, or remoter issue of A. who should survive the testator and A., and should live to attain twenty-one, is not void for remoteness. *Gee* v. *Liddell*, 35 Beav. 631, 658.

II. Foreign Property or Foreign Will.

2. Validity of a bequest in England of personal estate to be laid out in lands in Scotland according to limitations creating a perpetuity. *Fordyce* v. *Bridges*, 10 Beav. 90; 17 L. J., N. S., Ch., 81; 10 Jur. 1020.

3. The validity of a testamentary disposition of an English leasehold is governed by the law of England, and not by the law of the testator's domicil. *Freke* v. *Carbery* (*Lord*), 16 L. R., Eq., 461.

Where, therefore, a testator domiciled in Ireland by his will gave an English leasehold to trustees upon trusts for sale and investment, and directed the investments to be held upon such trusts as were thereby declared concerning his general personal estate, and the trusts declared of the general personal estate included trusts for accumulation extending beyond any of the periods allowed by the Thellusson Act (which does not apply to Ireland):—Held, that although the validity of the trusts of the general personal estate was not questioned, still the Thellusson Act applied to the English leasehold and the proceeds of the sale thereof, and that the trust for accumulation of the investments of the proceeds of sale in excess of the periods permitted by that Act was invalid. *Ib.*

III. Limitations after a Term of Years in Gross or on a Remote Event.

4. A limitation, by way of executory devise, which is not to take effect until after the determination of a life or lives in being, and a term of twenty-one years, as term in gross, and without reference to the infancy of any person, is a valid limitation; *secus* if, to the term in gross of twenty-one years, be added the number of months equal to the longest or ordinary period of gestation. This being held to be the established rule, a decree of the Court below, declaring that a limitation by way of executory devise, which was not to vest until after the expiration of a term in gross of twenty years from the decease of the survivor of twenty-eight persons who were living at the testator's decease, and of whom seven only were to take interests under the devise, is a valid limitation, was affirmed accordingly. *Cadell* v. *Palmer*, 1 Cl. & F. 372. Affirming S. C. *nom. Bengough* v. *Edridge*, 1 Sim. 173; 5 L. J., Ch., 113.

5. The testator directed the application of the surplus income of his estate for the maintenance of his children during their minority or apprenticeship, and the application of certain sums for their advancement, and, after his youngest child should have attained twenty-one, he directed his executors to divide any surplus in their hands every three years during his wife's life or widowhood, and, after her death or marriage, every year equally amongst his children or their heirs, instead of any one that might happen to be dead, until the expiration of fifty years from the time of his death; and that at the end of the said fifty years the executors should sell his remaining estate, and pay, discharge, or divide the money for the same amongst his children (naming them), or any of their heirs in their stead; if any of his said issue should die without lawful issue, such share or shares of those so dying to belong to the survivors or their lawful heirs equally:—Held, that the gift did not direct a substitution, once for all, of persons to take each child's share at a given time, not too remote, but contained a running direction to the trustees to pay the income, from time to time, during the whole period of fifty years to the children, or, in case of their deaths, to such of their lineal descendants as might from time to time come *in esse*; that the limitations of the property at the end of the term of fifty years were void for remoteness. *Speakman* v. *Speakman*, 8 Hare 180.

6. Bequest of personalty to A. for life, remainder to B., and in the event of B., or any heir of his, not being living, then between the brothers of testator equally: the remainder over on the death of B. in the lifetime of A., supported as not too remote against the claim of B.'s personal representative. The Court availing itself of slight expressions to effectuate the intention, the word "then" was construed as an adverb of time, not of contingency. *Baker* v. *Lucas*, 1 Moll. 481.

7. Gift by the testator to his wife, for her life, or until her second marriage, of the interest of his real and personal estate, which, whether arising from rents or public securities, was to be applied for the benefit of herself and children; and if she married again, he declared that her power and benefit under his will should cease; and when thirty years were expired, he ordered all his property, both freehold and leasehold, to be sold, and two-thirds to be divided among his children living at that period or to their heirs, and one-third to be invested for the benefit of his wife; and after her decease, he bequeathed such third to his children then living and to their heirs:—Held, that the gift at the end of thirty years was not liable to objection on the ground of remoteness; that there was no substitution of the legatee created by the gift to the children, "or to their heirs," but that the word "or" must be read "and;" and that the children of the testator living at the end of thirty years (who were also the same children as were living at the death of the widow) were entitled to the proceeds of the sale of the estate, and also to the intermediate rents after the death of the widow and before the expiration

of the thirty years. *Lachlan* v. *Reynolds*, 9 Hare 796.

1. A testatrix gave and devised her dwelling-house and premises to trustees, upon trust that they should, immediately after her funeral, cause the doors and windows of every room thereof (except the kitchen, middle attic, and hall) to be well and effectually bricked up from the outside, with the furniture therein, for a period of twenty years; and from and after that term, the testatrix devised the property to a devisee for life, with remainder to another person in fee. Although the will had been disputed in the Probate Court, probate was eventually granted:—Held, that the directions regarding the blockade must be treated as ineffectual, and that there was intestacy, as to the term of twenty years, in the property, which must be distributed as undisposed of real and personal estate. *Brown* v. *Burdett*, 21 L. R., Ch. D., 667; 52 L. J., Ch., 52; 47 L. T. 94.

2. A testator bequeathed leaseholds in Church Street, having sixty years unexpired, and as to which there was no obligation on the part of the lessor to renew, to A. for life, with remainder to the children she should leave, and in default to R. He bequeathed to trustees other leaseholds upon trust, to accumulate the rents until the leases of the Church Street property "should become nearly expired," and then to apply such part thereof as should be necessary in the renewal of the Church Street property "for the benefit of the respective persons to whom he had before by his will given the same," and the residue, after answering the purpose aforesaid, he gave to his residuary legatees. The testator died before the Thellusson Act came into operation:—Held, that the trust for accumulation and renewal was void for remoteness and uncertainty. *Curtis* v. *Lukin*, 5 Beav. 147; 11 L. J., N. S., Ch., 380; 6 Jur. 721.

3. A testator bequeathed five leasehold houses, having about fifty-four years to run, to his daughter for life, with remainder to her children; and after the expiration of any of the leases, he directed his trustees to convey to his daughter and her children one or more of the five freehold houses of equal annual value, or as near as could be, to the expired leasehold:—Held, that the decree was neither invalid for remoteness nor uncertainty. *Wood* v. *Drew*, 33 Beav. 610.

4. A testator, who died in 1811, was entitled to the reversion of an estate expectant on the death of his son, without issue living at his death. By his will, after reciting that he was entitled to the reversion on the death of his son without issue generally, he devised it to trustees to sell upon the death of his son, without issue generally, and divide the produce:—Held, that the trust was not void for remoteness. *Lewis* v. *Templer*, 33 Beav. 625; 12 W. R. 928; 10 L. T., N. S., 638.

IV. Validity of Limitations Dependent on Remote Limitations.

5. Devise to A. for ninety-nine years, if he should so long live; remainder to his first son, then unborn, for ninety-nine years, if he should so long live, and so on in tail male to such first son lawfully issuing for ever; and for want and in default of such issue of such first son, to the second and other sons successively for ninety-nine years only in case he should so long live, and that such eldest son, or the issue of such elder son, should have no greater estate than for ninety-nine years, determinable at his decease; and if there should be no issue male of A., at the time of his (A.'s) death, or in case there should be such issue male, at that time, and they should all die before twenty-one without issue male, then to B. for ninety-nine years, if he should so long live, etc.:—Held, that A. took under the will an estate for ninety-nine years in the freehold estates determinable with his life, and the same estate in the leasehold, if they should so long continue, and that upon his death, his first son would take an estate for ninety-nine years in the freehold, determinable with his life, and the remainder of the term in the leaseholds; but that the limitations to the second and other unborn sons of A. were void, as tending to perpetuity; and the limitations over to B., etc., after these void limitations were not accelerated, but were void also. *Beard* v. *Westcott*, T. & R. 25.

6. If the interest of an unborn child of a person in being, does not vest when such unborn child attains twenty-one, the gift is too remote and void, and the limitations over are void also. *Palmer* v. *Holford*, 4 Russ. 403. See also *Hayes* v. *Hayes*, *id.* 311; 6 L. J., Ch., 141.

7. A testator gave his real and personal estate to trustees on trust to pay the proceeds to his eldest grandson for life, with remainder to his children who should attain twenty-five, but if he should die without having any children, then to his other grandchildren. The eldest grandson died without issue:—Held, that although the gift to the children of the eldest grandson was void for remoteness, the subsequent limitation to the younger grandchildren was good. *Goring* v. *Howard*, 16 Sim. 395; 13 L. J., N. S., Ch., 105.

8. Bequest to A. for life, and afterwards to her children equally "to be vested" on such as should attain twenty-five, and "to be payable" as soon as might be, after that age should be attained, with powers of maintenance and advancement out of their "vested or expectant portions," with a gift over to B. if no child should attain twenty-five:—Held, first, that the gift to the children was too remote; and, secondly, on A.'s death, without having been married, that the gift to B. could not take effect as an alternative limitation to a person *in esse* at the date of the will. *Re Thatcher*, 26 Beav. 365.

9. Where a gift includes in one description persons capable and persons incapable by reason of remoteness, the entire gift is void, and the Court will not so remodel the will as to support such of the bequests as are not too remote, while it rejects the rest. *Kerr* or *Ker* v. *Dungannon* (*Lord*), Dr. & War. 509; 1 Con. & L. 335; 4 Ir. Eq. R. 382.

10. A power being given to appoint an estate among children. *Quære*, whether it is well executed by giving to a son for life, with remainder to his sons in tail. *Quære*, whether, where the first use is illegal, it shall defeat

the limitation over, or accelerate their coming into possession. *Robinson* v. *Hardcastle*, 2 Bro. C. C. 22.

1. A testator devised lands upon trust to pay the rents and profits to a tenant for life, and after her decease and until her youngest child should attain twenty-five, to pay the rents and profits for the maintenance of her children, and, on the youngest child attaining twenty-five, to sell and divide the proceeds among all the children of the tenant for life then living, and the issue of such as should be dead:—Held, that the trust for maintenance was separable from the rest, and was not bad for remoteness, whether the trust for sale was so or not. *Gooding* v. *Read*, 4 De G. M. & G. 510; 21 Beav. 478.

2. A gift to B. for life, remainder to his children to vest in them at twenty-five, with directions for advancement and maintenance, and accumulation in the meantime for the benefit of those children; the gift to the children being void for remoteness, the direction to accumulate, not being a substantive direction, but only a part of the original provision, will not be established up to the age of twenty-one, but is wholly gone. *Pickford* v. *Brown*, 2 Kay & J. 426; 2 Jur., N. S., 817; 25 L. J., Ch., 702; 4 W. R. 473.

See also VIII. IV. 5 *post.*—POWER, XVI.

V. Alternate Contingent Limitations.

3. If a limitation is made dependent on the happening of either of two events, one of which is too remote, but the other is not, it will take effect if the latter event happens. *Minter* v. *Wraith*, 13 Sim. 52.

4. Effect was given to a gift over in one of two alternatives which happened, though the other was too remote. *Cambridge* v. *Rous*, 25 Beav. 409.

Bequest to trustees for A. for life, and after her death, to divide between her children when they should attain twenty-seven, and in the event of A. not bearing any child at her death, then over. A. had no issue:—Held, that the gift over took effect. *Ib.*

5. Though a gift over may, as to one alternative, operate as an executory devise, it will not necessarily do so as to another; and if the second is that which in fact occurs, the gift may be treated as a good contingent remainder. *Doe* d. *Evers* v. *Challis*, 7 H. L. Ca. 531; 29 L. J., Ch., 121; 5 Jur., N. S., 825; 7 W. R. 622.

The invalidity of one alternative will not necessarily defeat the other. *Ib.*

Devise to E. for life, "and from and after her decease to such child or children as she may have, if a son or sons, who shall live to attain the age of twenty-three, and if a daughter or daughters, who shall live to attain the age of twenty-one, as tenants in common," etc., and in case of the death of any son under twenty-three, or daughter under twenty-one, the share to go to the survivors attaining those ages. And in case E. has only one son to attain twenty-three, or a daughter to attain twenty-one, to such son or daughter. "And also, in case E.'s children shall die under" the ages mentioned, "or if she has none," then to J. A. and S. for life, and afterwards to their sons and daughters, on attaining the above ages respectively. There were similar devises to J. A. and S., but in the devises to J. and S. nothing was said as to total absence of issue; in that to A., the words used were "and farther, in case A. shall die without issue." E. first, and A. afterwards, died without ever having had a child:—Held, that on the death of A. the gift over in favour of a daughter of J., who had attained twenty-one, took effect as a contingent remainder, because no prior estate was divested or displaced, and when the particular estate (the life estate of A.) determined the contingency on which the remainder was to take effect, had occurred. *Ib.*

Held also, that though the gift over on the death of E.'s sons under twenty-three was void for remoteness, the gift over on her death, without having had issue, was not thereby affected. *Ib.*

A. died without ever having had issue:—Held, that though in the devise to her the not having issue was not expressed, it was necessarily implied in the provision as to her dying without children who should attain twenty-three or twenty-one, and therefore, on her death without ever having had issue, the gift over took effect. *Ib.*

6. Where there are gifts over which are void for perpetuity, and there is a subsequent and independent clause on a gift over which is within the line of perpetuity, effect cannot be given to such clause, unless it will accord with previous valid limitations. *Monypenny* v. *Dering*, 2 De G. M. & G. 145; 17 Jur. 467; 22 L. J., Ch., 313. And see S. C. 15 Jur. 1050; 14 Jur. 1083.

A gift over, made in words, comprising only one event, will not be construed as made on two events, although in point of fact it may consist very reasonably of two branches, unless it is so expressed by the testator. *Ib.*

7. Bequest of personal property for A. for life, and after her decease to children when at the age of twenty-seven respectively; and in the event of her not leaving any child or children, or of the death of all under twenty-seven over; the limitation over too remote. *Cambridge* v. *Rous*, 8 Ves. 24.

8. A testatrix, by her will, devised her estates to a son, charged with 1,000*l.* payable to trustees, upon trust to pay the interest to her daughter for life, and, after her decease, upon trust to dispose thereof unto or amongst the child and children of her daughter, to be a vested interest or vested interests on their respectively attaining the age of thirty years; and the testatrix declared, that, if any child or children of her daughter should die under the age of thirty years without lawful issue, the share or shares of him, her, or them so dying, as well original as accruing by survivorship, should go to the survivors or survivor, in equal shares, if more than one, and become vested at such ages or times as his, her, or their original share or shares. The daughter had two children,—one, who died in her lifetime, aged twenty-seven years; and another, who survived her, and attained the age of thirty years:—

Held, that the word "vested" was used in the sense of "not subject to be divested," or "indefeasible;" and that the bequest of the 1,000*l.* after the decease of the daughter, to her child and children, was a valid bequest creating a vested interest in the children who survived her, and the representatives of the child who died in her lifetime; and that the gift over only was void for remoteness. *Taylor* v. *Frobisher*, 5 De G. & Sm. 191; 16 Jur. 283; 21 L. J., Ch., 605.

1. A testator devised his freehold estates in Worcestershire to his third son and his issue male, with remainder to his fourth son and his issue male, in strict settlement; and he devised his freehold estates in Cardiganshire to his fourth son and his issue male, with remainder to his fifth son and his issue male, in strict settlement. By a shifting clause it was provided that if his fourth son, or any issue male of his fourth son, should become actually entitled to the possession of his Worcestershire estates, and if his fifth son or any of his issue male should be then living, the limitations of his Cardiganshire estates in favour of his fourth son, or his issue male, should absolutely cease. He bequeathed his leasehold estates in Cardiganshire to trustees upon such trust as, regard being had to the difference in the tenure of the premises respectively, would best or most nearly correspond with the uses declared of the Cardiganshire freeholds. The third son died a bachelor in the lifetime of the fourth son, who thereupon entered into possession of the Worcestershire estates:—Held, that the shifting clause was divisible, and in the events which happened was not bad for remoteness. *Miles* v. *Harford*, 12 L. R., Ch. D., 691; 41 L. T. 378.

See also preceding subdivision.

VI. Application of Rule in Carrying out Executory Trusts.

2. A. devises land to the Drapers' Company in trust, to convey to B. for life, remainder to his first, etc., sons for their lives successively, and so to their male issues for their lives, remainder over. Though this be a vain attempt of a perpetuity, yet the trustees shall make as strict a settlement as may be; making all the persons in being but tenants for life; but the limitation to the son unborn must be in tail. *Humberston* v. *Humberston*, 2 Vern. 735; Pre. Ch. 455; Gilb. Eq. Rep. 128; 1 P. W. 332.

3. Trust of a term during the respective minorities of the respective tenants for life or in tail in possession, etc., to receive and lay out the rents, etc., in stock, to accumulate for such persons as should, upon the expiration of such minorities, or death of the minors, be tenants in possession, or entitled to the rents, and of the age of twenty-one, is too remote, and being void in its creation, is incapable of modification, so as to establish it in the extent to which it might have been originally carried. *Southampton* (*Lord*) v. *Hertford* (*Marquis*), 2 Ves. & B. 54.

4. Covenant in marriage settlement to settle leasehold estates in trust for such persons, and such or the like estates, ends, intents, and purposes, as far as the law would allow, as declared concerning real estates, limited to the first and other sons in tail male, with several remainders; the Court, in executing the covenant, declared that no person should be entitled to the absolute property unless he should attain twenty-one; or die under that age leaving issue male. *Newcastle* (*Duke*) v. *Lincoln* (*Countess*), 3 Ves. 387. But see the variations in this decree, *id.* 398. n., and 12 Ves. 218, on appeal.

5. Devise in trust for a son of the testator's nephew A., at the age of twenty-four; if he have no son, to a son of the testator's great-nephew B.; but if neither have a son, then to a son of the testator's great-niece's daughter, taking his name; whoever should take, not to be put in possession of any of the testator's effects until twenty-four, nor the executors to give up their trust till a proper entail be made to the heir male by him. This is an executory trust in tail for an only son of A., *in ventre* at the testator's death, and not void for uncertainty, nor too remote. *Blackburn* v. *Stables*, 2 Ves. & B. 367.

6. Lord Le Despencer, being seized in fee of an ancient barony, conveyed real estates to trustees to the use of himself for life, remainer to the use of his eldest son for life, and then on trust to be settled, so far as the law would permit, so as to go along with the title, and so that during every suspension or abeyance of the same, within the limits prescribed by law for strict settlement, the rents should be equally divided among the co-heirs *per stirpes* of the person or persons by whose death or deaths without issue male the abeyance was occasioned, as by three counsel, of which the solicitor or attorney-general should be one, should be advised and directed. It was contended that the general intention of the settlor being to create a perpetuity, the defect was not cured by the saving clause above stated; but the Court having suggested one way in which the intention of the settlor might be carried out within the legal limits, referred it to the Master to approve of a settlement. *Bankes* v. *Le Despencer*, 10 Sim. 576; 9 L. J., N. S., Ch., 185; 4 Jur. 601.

7. A settlement made by the third Earl of Harrington declared the manner in which a mansion-house and certain estates in the county of Derby should descend. A will of the settlor, made many years afterwards, gave personal chattels "in trust for the person or persons who for the time being shall, under the settlement of my mansion-house and estates, be in the actual possession of the mansion-house and estates, to the end and intent that all and singular such [personal chattels] may be deemed and considered as heir-looms, to go along and for ever be used and enjoyed with the same mansion-house and estate (so far as the rules of law or equity will permit), but so nevertheless as that the same chattels personal shall not, as to the effect or purpose of transmission, vest absolutely in any person or persons who by virtue of any settlement shall or may become seised of or entitled to the mansion-house and estates for an estate of inheritance, either in possession or reversion,

or otherwise, unless such person shall attain the age of twenty-one, or dying under that age, shall leave issue inheritable under the limitations in any settlement thereof":—Held, that this was not an executory devise. *Harrington (Countess)* v. *Harrington (Earl)*, 5 L. R., H. L. 87; 40 L. J., Ch., 716.

Held, also, that the proviso that no tenant in tail should take absolutely unless he attained twenty-one, was a condition inseparably annexed to the gift, so that any tenant in tail must take subject to it, and if the proviso was void the whole gift was void. *Ib.*

1. Testator gave his freehold and copyhold estates and his personal estate to certain persons (whom he appointed his executors), in trust out of his personal estate, and by sale or mortgage of his freehold or copyhold estates, to raise money sufficient to pay his debts, funeral expenses, and legacies, and out of the rents and interests of so much of his real and personal estate as should not be sold or disposed of for those purposes, to pay certain annuities and such sums as his trustee should think sufficient for the maintenance of his son John and his children (if he should have any), and to accumulate the residue of the rents and interests during the life of John, and after John's decease to stand seised of his real estates in trust for John's first son, and the heirs of the body of such first son successively as they should be in priority of birth, and for the several and respective heirs of the body and bodies of every such son, and, for default of such issue, for A. for life, with remainder to his sons in tail, with remainder to B. and his sons, and to C. and D. and their sons, in like manner, with remainder to his own right heirs for ever; and he declared that his trustees and executors should stand possessed of his personal estate after John's death, in trust for such person and persons, in the same order and succession and for such and the same estates and interest, as were thereby declared concerning his real estates, so far as the nature of the property, the rules of law and equity, the deaths of parties, and other contingencies would admit of. The testator died in 1780; his son John was his heir-at-law and customary heir. John, and A., B., C., D., died without issue:—Held, that the trusts subsequent to the trust for the first son of John were not void for remoteness, and that the ultimate trust of the personal estate, as well as of the freehold and copyhold estates, vested on the testator's death in his son John as his heir-at-law at his death. *Boydell* v. *Golightly*, 14 Sim. 227; 9 Jur. 2.

2. Construction of a trust for division amongst the children of the brothers so long as the law would allow—gift of real and personal estate to testator's seven brothers for life, and after death of survivors in trust to apply yearly income to such of their children as should appear to them to stand in need of the same, and after the law admitted of no further division, then to convey to the eldest son of his brother B. then living:—Held, that the trust for division ceased twenty-one years after the decease of the surviving brother. *Pownall* v. *Graham*, 33 Beav. 242.

3. A testatrix directed her trustees to settle her property, but in such a way that some of the limitations would be void for remoteness:—Held, that in carrying the directions into effect, the Court would modify the limitations, so as to make them consistent with the rules of law and equity. *Lyddon* v. *Ellison*, 19 Beav. 565; 18 Jur. 1066.

4. A testator devised his freehold estates in Worcestershire to his third son and his issue male, with remainder to his fourth son and his issue male, in strict settlement; and he devised his freehold estates in Cardiganshire to his fourth son and his issue male, with remainder to his fifth son and his issue male, in strict settlement. By a shifting clause it was provided that if his fourth son, or any issue male of his fourth son, should become actually entitled to the possession of his Worcestershire estates, and if his fifth son or any of his issue male should be then living, the limitations of his Cardiganshire estates in favour of his fourth son, or his issue male, should absolutely cease. He bequeathed his leasehold estates in Cardiganshire to trustees upon such trusts as, regard being had to the difference in the tenure of the premises respectively, would best or most nearly correspond with the uses declared of the Cardiganshire freeholds. The third son died a bachelor in the lifetime of the fourth son, who thereupon entered into possession of the Worcestershire estates:—Held, that the fifth son was entitled to the rents and profits of the Cardiganshire leaseholds, because they were given upon an executory trust; and, assuming the shifting clause, if applied verbatim to the leaseholds, to be bad for remoteness, it ought to be so modified as to render it free from that objection. *Miles* v. *Harford*, 12 L. R., Ch. D., 691; 41 L. T. 378.

Held, also, that the shifting clause was divisible, and in the events which happened was not bad for remoteness. *Ib.*

See also VII. & VIII. VI. *post.*

As to Modifying Executory Trusts generally.] See Trusts (Executory).

VII. Cy Près Doctrine.

5. A. devises lands to the Drapers' Company, in trust to convey to B. for life, remainder to his first, etc., sons for their lives successively, and so to their issues male for their lives, remainder over. Though this be a vain attempt of a perpetuity, yet the trustees shall make a strict settlement as may be, making all the persons in being but tenants for life; but the limitation to the son unborn must be in tail. *Humberston* v. *Humberston*, 2 Vern. 738; Pre. Ch. 455; Gilb. Eq. Rep. 128; 1 P. W. 332.

6. Though the law will not admit a perpetuity, yet the intent of the party, so far as is consistent with its rules, ought to be observed. *Smith* v. *Packhurst*, 3 Atk. 136; 2 Stra. 1105.

7. Devise to A., B., and C., etc., share and share alike, for their lives, and so to be continued from issue to issue for life; but if any of them die, leaving no issue, their shares to go to the survivors for their lives, and the

issue of such of them as then shall be dead, and for default of any issue then over:—Held, that A., B., C., etc., take estate tail with cross-remainders. *Mortimer* v. *West*, 2 Sim. 274.

The case of *Humberston* v. *Humberston* (1 P. W. 332) is not applicable, as in this case the trust is not executory, but the devisees take by direct devise to themselves. *Id.* 282.

1. Devise to A., the daughter of the testator, for life, and after her decease to all and every the child or children of A., male or female, begotten or to be begotten, and their assigns, for their respective lives, and, after the decease, and respective deceases, of such child or children of A., to all and every the child or children of all and every such child or children of A., male or female, to be begotten, and the heirs of his, her, and their respective body and bodies, as tenants in common; and in case of the death of any of the said children of such child or children of A., and failure of issue of his, her, or their body or bodies respectively, then as well the original as the accrued share of such of them so dying without issue to go to the survivors or survivor, others or other of them, as tenants in common, if more than one; and for default of such issue over. A. had three children born in the lifetime of the testator and living at his decease, and another was born after the testator's death; one of the three born in his lifetime died during the life of A., without issue:—Held, that the children of A. took as tenants in common, and not as joint-tenants; that, inasmuch as the children of the afterborn child of A. could not take as purchasers, the devise would be supported according to the rule of *cy près* or approximation, by giving an estate tail to the afterborn child of A.; that the rule of *cy près*, being an arbitrary principle of construction, introduced to effect the intention of a testator in the exigency of a particular case, was not to be applied, except when the necessity of the case required it, and that therefore, although the devise was to the children of A., as a class, the children of A., born in the testator's lifetime, would take estates for life, and the estates devised to the children of the afterborn child would alone be altered; that cross-remainders were to be implied between the children of A., and, therefore, that the three children of A. who survived or left issue took according to their respective estates the share of the child of A. who died without issue, and that the inequality among the devisees, some of them being tenants in tail, and other tenants for life with remainder to their issue in tail, was no objection to the implication of cross-remainders among them. *Vanderplank* v. *King*, 3 Hare 1; 12 L. J., N. S., Ch., 497; 7 Jur. 548.

2. Under a power to devise among children, the testatrix gives to A., one of the children, for life; remainder to trustees to preserve contingent remainders; remainder to first and other sons, etc.; remainder to B., another son in the same way: *quære*, whether, the excess being void, the power is null, and the heir-at-law shall take, or the sons should take successive life estates as good under the power, or whether, to maintain the general intent, the sons shall take estates tail. *Griffith* v. *Harrison*, 3 Bro. C. C. 410.

3. Under a power to appoint to children an appointment to a child for life with remainder to her children is not a valid appointment, but the excess is void. But the whole shall not be considered as unappointed, but be appointed *cy près*. *Pitt* v. *Jackson*, 2 Bro. C. C. 51. *See also Re Dennehey*, 17 Ir. Ch. R. 97.

4. The doctrine of *cy près* is applicable to the construction of a will made in exercise of a power. *Stackpoole* v. *Stackpoole*, 2 Con. & L. 506; 4 Dr. & War. 320; 6 Ir. Eq. R. 18.

5. By articles, the wife's fortune, and an equal sum advanced by the husband, were agreed to be settled for the husband for their joint lives, and if he should die first leaving issue by her, for her life; after her decease as to the capital in such manner as he should appoint; in default of appointment to be divided equally among the issue at twenty-one, with maintenance and survivorship after marriage. In pursuance of the articles, an estate purchased with the fund was settled upon the husband for the joint lives of him and his wife; remainders to trustees to preserve, etc.; remainder in case of his death first, without issue, to certain uses; remainder, in case of his death first, leaving any child or children, to the wife for life; remainder to the child or children in such shares as the husband should appoint; for want of appointment, equally in tail, with cross-remainders; remainder to the heirs of the husband. Children only are the objects; and an appointment to a child for life, remainder to his children as he shall appoint, is an excess of power; and the doctrine of *cy près*, by giving the child an estate tail, is not applicable; but the appointment is void for the excess only; and what is ill appointed, goes as in default of appointment. *Bristow* v. *Warde*, 2 Ves. J. 336.

6. J. M., by his will, devised the Maytham Hall estate, being of gavelkind tenure, to trustees, upon trust to sell a competent part for the payment of debts, and subject thereto upon trust for P. M. for life, and after his decease for the first son P. M. for life, and after his decease for the first son of such first son, and the heirs male of his body, and in default of such issue for every other son of P. M. successively for the like interests and limitations, and in default of issue of the body of P. M., or in case of his not leaving any at his decease, for T. G. M., the eldest son of T. M., for life, and after his decease for the first son of T. G. M., and the heirs male of his body; and in default of issue of the body of the said T. G. M. for every other son of T. M. successively, for the like estates and interests, and on failure of all such issue of the body of T. M. upon trust for him and his heirs and assigns for ever. P. M. never had any children:—Held, that P. M. took an estate for life, with remainder to his first unborn son if such son had been born, and that all the remainders over were void; held, also, that effect was to be given to the gift over to T. M. and his sons, in default of issue of the body of D. M., etc., as an independent claim, and that it was subsequently valid. *Moneypenny* v. *Dering*, 2 De G. M. & G. 145; 17 Jur. 457; 22 L. J., Ch., 313. And see S. C. 15 Jur. 1050; 14 Jur. 1083; 7 Hare 568.

Although by the doctrine of *cy près*, or by implication, as applied to the construction of a will, an estate may be carried otherwise than

or otherwise, unless such person shall attain the age of twenty-one, or dying under that age, shall leave issue inheritable under the limitations in any settlement thereof":—Held, that this was not an executory devise. *Harrington (Countess)* v. *Harrington (Earl)*, 5 L. R., H. L. 87; 40 L. J., Ch., 716.

Held, also, that the proviso that no tenant in tail should take absolutely unless he attained twenty-one, was a condition inseparably annexed to the gift, so that any tenant in tail must take subject to it, and if the proviso was void the whole gift was void. *Ib.*

1. Testator gave his freehold and copyhold estates and his personal estate to certain persons (whom he appointed his executors), in trust out of his personal estate, and by sale or mortgage of his freehold or copyhold estates, to raise money sufficient to pay his debts, funeral expenses, and legacies, and out of the rents and interests of so much of his real and personal estate as should not be sold or disposed of for those purposes, to pay certain annuities and such sums as his trustee should think sufficient for the maintenance of his son John and his children (if he should have any), and to accumulate the residue of the rents and interests during the life of John, and after John's decease to stand seised of his real estates in trust for John's first son, and the heirs of the body of such first son successively as they should be in priority of birth, and for the several and respective heirs of the body and bodies of every such son, and, for default of such issue, for A. for life, with remainder to his sons in tail, with remainder to B. and his sons, and to C. and D. and their sons, in like manner, with remainder to his own right heirs for ever; and he declared that his trustees and executors should stand possessed of his personal estate after John's death, in trust for such person and persons, in the same order and succession and for such and the same estates and interest, as were thereby declared concerning his real estates, so far as the nature of the property, the rules of law and equity, the deaths of parties, and other contingencies would admit of. The testator died in 1780; his son John was his heir-at-law and customary heir. John, and A., B., C., D., died without issue:—Held, that the trusts subsequent to the trust for the first son of John were not void for remoteness, and that the ultimate trust of the personal estate, as well as of the freehold and copyhold estates, vested on the testator's death in his son John as his heir-at-law at his death. *Boydell* v. *Golightly*, 14 Sim. 227; 9 Jur. 2.

2. Construction of a trust for division amongst the children of the brothers so long as the law would allow—gift of real and personal estate to testator's seven brothers for life, and after death of survivors in trust to apply yearly income to such of their children as should appear to them to stand in need of the same, and after the law admitted of no further division, then to convey to the eldest son of his brother B. then living:—Held, that the trust for division ceased twenty-one years after the decease of the surviving brother. *Pownall* v. *Graham*, 33 Beav. 242.

3. A testatrix directed her trustees to settle her property, but in such a way that some of the limitations would be void for remoteness:—Held, that in carrying the directions into effect, the Court would modify the limitations, so as to make them consistent with the rules of law and equity. *Lyddon* v. *Ellison*, 19 Beav. 565; 18 Jur. 1066.

4. A testator devised his freehold estates in Worcestershire to his third son and his issue male, with remainder to his fourth son and his issue male, in strict settlement; and he devised his freehold estates in Cardiganshire to his fourth son and his issue male, with remainder to his fifth son and his issue male, in strict settlement. By a shifting clause it was provided that if his fourth son, or any issue male of his fourth son, should become actually entitled to the possession of his Worcestershire estates, and if his fifth son or any of his issue male should be then living, the limitations of his Cardiganshire estates in favour of his fourth son, or his issue male, should absolutely cease. He bequeathed his leasehold estates in Cardiganshire to trustees upon such trusts as, regard being had to the difference in the tenure of the premises respectively, would best or most nearly correspond with the uses declared of the Cardiganshire freeholds. The third son died a bachelor in the lifetime of the fourth son, who thereupon entered into possession of the Worcestershire estates:—Held, that the fifth son was entitled to the rents and profits of the Cardiganshire leaseholds, because they were given upon an executory trust; and, assuming the shifting clause, if applied verbatim to the leaseholds, to be bad for remoteness, it ought to be so modified as to render it free from that objection. *Miles* v. *Harford*, 12 L. R., Ch. D., 691; 41 L. T. 378.

Held, also, that the shifting clause was divisible, and in the events which happened was not bad for remoteness. *Ib.*

See also VII. & VIII. VI. *post.*

As to Modifying Executory Trusts generally.] See Trusts (Executory).

VII. Cy Près Doctrine.

5. A. devises lands to the Drapers' Company, in trust to convey to B. for life, remainder to his first, etc., sons for their lives successively, and so to their issues male for their lives, remainder over. Though this be a vain attempt of a perpetuity, yet the trustees shall make a strict settlement as may be, making all the persons in being but tenants for life; but the limitation to the son unborn must be in tail. *Humberston* v. *Humberston*, 2 Vern. 738; Pre. Ch. 455; Gilb. Eq. Rep. 128; 1 P. W. 332.

6. Though the law will not admit a perpetuity, yet the intent of the party, so far as is consistent with its rules, ought to be observed. *Smith* v. *Packhurst*, 3 Atk. 136; 2 Stra. 1105.

7. Devise to A., B., and C., etc., share and share alike, for their lives, and so to be continued from issue to issue for life; but if any of them die, leaving no issue, their shares to go to the survivors for their lives, and the

issue of such of them as then shall be dead, and for default of any issue then over:—Held, that A., B., C., etc., take estate tail with cross-remainders. *Mortimer* v. *West*, 2 Sim. 274.

The case of *Humberston* v. *Humberston* (1 P. W. 332) is not applicable, as in this case the trust is not executory, but the devisees take by direct devise to themselves. *Id.* 282.

1. Devise to A., the daughter of the testator, for life, and after her decease to all and every the child or children of A., male or female, begotten or to be begotten, and their assigns, for their respective lives, and, after the decease, and respective deceases, of such child or children of A., to all and every the child or children of all and every such child or children of A., male or female, to be begotten, and the heirs of his, her, and their respective body and bodies, as tenants in common; and in case of the death of any of the said children of such child or children of A., and failure of issue of his, her, or their body or bodies respectively, then as well the original as the accrued share of such of them so dying without issue to go to the survivors or survivor, others or other of them, as tenants in common, if more than one; and for default of such issue over. A. had three children born in the lifetime of the testator and living at his decease, and another was born after the testator's death; one of the three born in his lifetime died during the life of A., without issue:—Held, that the children of A. took as tenants in common, and not as joint-tenants; that, inasmuch as the children of the afterborn child of A. could not take as purchasers, the devise would be supported according to the rule of *cy près* or approximation, by giving an estate tail to the afterborn child of A.; that the rule of *cy près*, being an arbitrary principle of construction, introduced to effect the intention of a testator in the exigency of a particular case, was not to be applied, except when the necessity of the case required it, and that therefore, although the devise was to the children of A., as a class, the children of A., born in the testator's lifetime, would take estates for life, and the estates devised to the children of the afterborn child would alone be altered; that cross-remainders were to be implied between the children of A., and, therefore, that the three children of A. who survived or left issue took according to their respective estates the share of the child of A. who died without issue, and that the inequality among the devisees, some of them being tenants in tail, and other tenants for life with remainder to their issue in tail, was no objection to the implication of cross-remainders among them. *Vanderplank* v. *King*, 3 Hare 1; 12 L. J., N. S., Ch., 497; 7 Jur. 548.

2. Under a power to devise among children, the testatrix gives to A., one of the children, for life; remainder to trustees to preserve contingent remainders; remainder to first and other sons, etc.; remainder to B., another son in the same way: *quære*, whether, the excess being void, the power is null, and the heir-at-law shall take, or the sons should take successive life estates as good under the power, or whether, to maintain the general intent, the sons shall take estates tail. *Griffith* v. *Harrison*, 3 Bro. C. C. 410.

3. Under a power to appoint to children an appointment to a child for life with remainder to her children is not a valid appointment, but the excess is void. But the whole shall not be considered as unappointed, but be appointed *cy près*. *Pitt* v. *Jackson*, 2 Bro. C. C. 51. *See also Re Dennehey*, 17 Ir. Ch. R. 97.

4. The doctrine of *cy près* is applicable to the construction of a will made in exercise of a power. *Stackpoole* v. *Stackpoole*, 2 Con. & L. 506; 4 Dr. & War. 320; 6 Ir. Eq. R. 18.

5. By articles, the wife's fortune, and an equal sum advanced by the husband, were agreed to be settled for the husband for their joint lives, and if he should die first leaving issue by her, for her life; after her decease as to the capital in such manner as he should appoint; in default of appointment to be divided equally among the issue at twenty-one, with maintenance and survivorship after marriage. In pursuance of the articles, an estate purchased with the fund was settled upon the husband for the joint lives of him and his wife; remainders to trustees to preserve, etc.; remainder in case of his death first, without issue, to certain uses; remainder, in case of his death first, leaving any child or children, to the wife for life; remainder to the child or children in such shares as the husband should appoint; for want of appointment, equally in tail, with cross-remainders; remainder to the heirs of the husband. Children only are the objects; and an appointment to a child for life, remainder to his children as he shall appoint, is an excess of power; and the doctrine of *cy près*, by giving the child an estate tail, is not applicable; but the appointment is void for the excess only; and what is ill appointed, goes as in default of appointment. *Brixton* v. *Warde*, 2 Ves. J. 336.

6. J. M., by his will, devised the Maytham Hall estate, being of gavelkind tenure, to trustees, upon trust to sell a competent part for the payment of debts, and subject thereto upon trust for P. M. for life, and after his decease for the first son P. M. for life, and after his decease for the first son of such first son, and the heirs male of his body, and in default of such issue for every other son of P. M. successively for the like interests and limitations, and in default of issue of the body of P. M., or in case of his not leaving any at his decease, for T. G. M., the eldest son of T. M., for life, and after his decease for the first son of T. G. M., and the heirs male of his body; and in default of issue of the body of the said T. G. M. for every other son of T. M. successively, for the like estates and interests, and on failure of all such issue of the body of T. M. upon trust for him and his heirs and assigns for ever. P. M. never had any children:—Held, that P. M. took an estate for life, with remainder to his first unborn son if such son had been born, and that all the remainders over were void; held, also, that effect was to be given to the gift over to T. M. and his sons, in default of issue of the body of D. M., etc., as an independent claim, and that it was subsequently valid. *Moneypenny* v. *Dering*, 2 De G. M. & G. 145; 17 Jur. 457; 22 L. J., Ch., 313. And see S. C. 15 Jur. 1050; 14 Jur. 1083; 7 Hare 568.

Although by the doctrine of *cy près*, or by implication, as applied to the construction of a will, an estate may be carried otherwise than

in the exact form and manner indicated by the testator, yet it must always be in favour of a class or part of a class of persons intended to be provided for by the testator. *Ib.*

Where an estate is so limited to A. as should generally raise by implication an estate tail, but there are added limitations to the children of A. which are void for remoteness, it is not a general rule to reject these limitations as unimportant, and to give to A. an estate tail, although cases may arise in which this would be done in favour of the clear intention of the testator. *Ib.*

The cases of *Pitt* v. *Jackson* (2 Bro. C. C. 51), and *Nicholl* v. *Nicholl* (2 W. Bl. 1159), observed on. *Ib.*

1. A settlement was made, in pursuance of articles previous to the marriage, to convey to the use of the husband for life, remainder to the wife for life, remainder upon trust to convey unto and amongst all or any of the children, in such parts and proportions, etc., as the husband and wife, or the survivor, should, by deed or writing, with or without power of revocation, or by will, appoint, and in default of appointment, to the first and other sons in tail male; remainder, subject to trusts that failed, to the heirs of the husband. A joint appointment by deed, subject to a proviso for revocation and reappointment by the husband and wife, and the survivor, was held well revoked by the wife surviving; and by the same deed a reappointment to the daughter and two sons successively for life, with remainders in tail to the grandchildren, and the ultimate remainder to the daughter in fee, was held void for the excess beyond the power, viz., the estates to the grandchildren, and the ultimate limitation upon them to the daughter, and the principle of *cy près* is not applicable: all beyond the life estate of the children, therefore, shall go as in default of appointment. *Brudenell* v. *Elwes*, 7 Ves. 382.

2. The doctrine of *cy près* does not apply to personal estate; therefore, where, under a power to appoint personal estate to children or issue, an appointment is made to a son for life, then among all his children; if none, to him, his executors, etc., the limitation to his children being void because not retained within the legal bounds, cannot be made good *cy près*. *Routledge* v. *Dorril*, 2 Ves. J. 357.

3. The doctrine of *cy près* is not to be extended. *Hale* v. *Pew*, 25 Beav. 335.

The *cy près* doctrine is inapplicable when the limitation to unborn children gives them a fee. *Ib.*

4. Intention to give life estates to persons not born in the lifetime of the testator aided, so far as the law will allow, by the *cy près* doctrine. *East* v. *Twyford*, 9 Hare 729.

5. The *cy près* doctrine of construction considered and explained in *Hampton* v. *Holman*, 5 L. R., Ch. D., 183; 46 L. J., Ch., 248; 25 W. R. 459; 36 L. T., N. S., 287.

A father gave freehold, copyhold, and leasehold estates for his daughter for life, and should she live to become marriageable, leaving a child or children, for the support and maintenance of such child, if there was only one, and if more than one in fair and equal proportions, "for and during the term of their natural lives, and in like manner to their children and children's children, each family having among them the father's or mother's share," with a gift over on the death under twenty-one or before marriage of his daughter: —Held, that the daughter took an estate for life only, and not an estate tail. The limitations after the daughter's life estate were not at all void, but her children (if she left any) would take life estates. *Ib.*

6. Devise in trust for A. for life, with remainder in trust for B., C., and D. and the survivor for their lives, and for the issue of them respectively for their lives, for ever, as tenants in common with a gift over on their death without issue, or in case of the death of all their issue; and a direction that the before stated entails to B., C., and D., and their respective issues were to be equally divided amongst the daughters as well as the sons of them and their issue:—Held, that B., C., and D. took equitable estates in remainder for their lives and the life of the survivor with cross-remainders between them, and that on the death of the survivor, all the children of B., C., and D. took equitable estates as tenants in common in tail with cross-remainders between them in tail. The doctrine of *cy près* established by *Humberston* v. *Humberston* (1 P. W. 332) is applicable to such a devise, and not merely to a will of an executory character. *Parfitt* v. *Hember*, 4 L. R., Eq., 443.

7. Under a power to appoint to children, an appointment to a child for life, remainder to his children, who are incapable of taking, may give the child an estate tail. *Line* v. *Hall*, 22 W. R. 124; 29 L. T., N. S., 568.

A father having power to appoint an estate to any one or more of his children by will, gave it with other property, of which he was owner in fee, to trustees for a term of 1,000 years, to raise portions for grandchildren (not objects of the power), with the usual proviso for cesser in case the term should be incapable of taking effect, with remainder after the expiration of the term, and in the meantime subject thereto, to one of his sons (an object of the power) for life remainder to his issue in tail. The objects of the term were not satisfied: — Held, that the will operated as an execution of the power, and that the son took under the *cy près* doctrine an estate tail. S. C. 43 L. J., Ch., 107.

VIII. Application of Rule to Particular Cases.

I. *In General*, 5625.
II. *Charities or Public Institutions, Gifts to*, 5626.
III. *Covenants*, 5627.
IV. *Gifts to a Class*, 5629.
V. *Gifts to Unborn Tenants for Life and Gifts Over*, 5639.
VI. *Gifts to Persons Answering a Particular Description and Settlement of Heirlooms*, 5641.
VII. *Powers*, 5644.
VIII. *Terms Precedent to Estate Tail*, 5646.
IX. *Terms Concurrent with Estate Tail*, 5647.

X. *Terms or Limitations Subsequent to Estate Tail*, 5648.
XI. *Remainders*, 5648.
XII. *Successive Life Interests*, 5649.
XIII. *Tombs. Gifts for*, 5649.
XIV. *Limitations after Failure of Issue or Heirs.* See WILL.

I. IN GENERAL.

1. Bond by tenant in tail not to suffer a recovery void, as tending to perpetuity. *Anon.*, Moore 809; 1 Eq. Abr. 87; pl. 7.

2. Trust by deed creating estates tail, after any contract for alienation to raise a sum of money for the persons next in the course of limitation, declared void, as tending to a perpetuity, and inconsistent with the rights of the tenants in tail. *Mainwaring* v. *Baxter*, 5 Ves. 458.

3. Term of years cannot be limited so as to create a perpetuity. *Fletcher's case*, 1 Eq. Abr. 193.

4. Limitation of a fee upon a fee, on a contingency to happen within a reasonable compass of time, no perpetuity. *Loyd* v. *Carew*, Pre. Ch. 72.

5. Contingent limitation of a term for years adjudged to be good; the contingency being to happen within the space of twenty-one years. *Massenburgh* v. *Ash*, 1 Vern. 234, 304; 2 Ch. Rep. 275.

6. An executory devise to a person unborn, when he shall attain the age of twenty-one years, is good: and there is no danger of a perpetuity. *Stephens* v. *Stephens*, Forrest. 228.

7. If the interest of an unborn child of a person in being, does not vest when such unborn child attains twenty-one, the gift is too remote and void, and the limitations over are void also. *Palmer* v. *Holford*, 4 Russ. 403. See also *Hayes* v. *Hayes*, *id.* 311; 6 L. J., Ch., 141.

8. A., possessed of a term, devised it to his wife for life, remainder to his first son for life, and if he die without issue, to his second son, etc. The remainder to the second son was held void. *Love* v. *Windham*, 1 Lev. 290; 2 Ch. Rep. 14.

9. A., having issue several sons, the eldest *non compos*, created a term for years, and by another deed declared the trusts thereof to his second son, and the heirs male of his body, remainders to his other sons, provided that if his eldest son died without issue, or not leaving his wife *enceinte* with child, living the second son, then the said term to remain to the third son, and the heirs male of his body, with like limitations to the other sons: the eldest son died without issue, living the second; this limitation to the third son was held good by Lord Nottingham, *contra* the opinion of the three chief justices who assisted him. *Norfolk's* (*Duke*) *case*, 3 Ch. Ca. 1. This decree was reversed by North, C. S. *Vide* 1 Vern. 163; but upon appeal to the lords, Lord North's decree was reversed, and Lord Nottingham's established. *Note*, executory devises and limitations of the trust of a term are governed alike.

10. A testatrix gave and devised her dwelling-house and premises to trustees, upon trust that they should, immediately after her funeral, cause the doors and windows of every room thereof (except the kitchen, middle attic, and hall) to be well and effectually bricked up from the outside, with the furniture therein, for a period of twenty years; and from and after that term, the testatrix devised the property to a devisee for life, with remainder to another person in fee. Although the will had been disputed in the Probate Court, probate was eventually granted:—Held, that the directions regarding the blockade must be treated as ineffectual, and that there was intestacy, as to the term of twenty years, in the property, which must be distributed as undisposed of real and personal estate. *Brown* v. *Burdett*, 21 L. R., Ch. D., 667; 52 L. J., Ch., 52; 47 L. T. 94.

11. A testator, in 1641, devised real estates at Abbotts Langley to or for the benefit of Sydney College, Cambridge, and Trinity College, Oxford, "for the only use, education in piety and learning of four of the descendants of my brothers and sisters, and three of the descendants of the brother and sister of my first wife, and three of the descendants of the brothers and sisters of my second wife; and in default of such to their next poor kindred, for the first by the father's side, for the second by the mother's side, and the lease of the said Langley to be at one-third part under true value, to my wives' kindred ever, viz., brothers and sisters there and at Harrow." G. was a descendant of a brother or sister of a wife of the testator, and a lessee of part of the property demised to Trinity College, Oxford. He claimed to be entitled, by virtue of the direction as to leasing contained in the will, to a perpetual right of renewal of his lease for ever, on the same terms as were therein contained:—Held, that the direction as to the leasing was void in law as tending to create a perpetuity; and that the colleges took the property devised to them for charitable purposes discharged therefrom. *Att.-Gen.* v. *Greenhill*, 12 W. R. 188; 9 L. T., N. S., 500; 3 N. R. 236.

The lessee was the sole defendant on the record; Sydney College, Cambridge, not being a party to the suit:—Held, that G. sufficiently represented the descendants of the brothers and sisters of the testator and his wives. *Ib.*

Held, also, that as the Court decided in favour of the colleges, the absence of one of them from the record was immaterial. *Ib.*

12. S. B. gave all his property, real and personal, to trustees to sell, and directed the proceeds and all his moneys to be invested for the benefit of his three daughters for their respective lives for their separate use, the interest to be paid to each, and on the decease of each one of them the principal from which the parent's share was derived to go to the children at twenty-one, with remainder to their children at twenty-one:—Held, that the three daughters did not take absolute interests, and that the gift over was void for remoteness. *Whitehead* v. *Bennett*, 1 W. R. 406; 1 Eq. Rep. 561; 22 L. J., Ch., 1020.

13. W. S., by his will, directed the interest of the residue of his estate to be paid to his children during their respective lives; and, after their decease, to be divided equally between all his surviving grandchildren who should be then living, share and share alike,

until the youngest should attain twenty-one years, when he directed the whole to be turned into money, and to be divided equally between all such of his said grandchildren, and the children and child of any such grandchild as might then be dead, leaving lawful issue, such children or child to take only his or their parent's share; and if there should be only one such grandchild who might live to attain the age of twenty-one, then upon trust for such grandchild, his or her heirs, executors, etc.:—Held, that the bequest was confined to the children of the grandchildren who should be living at the death of all the testator's children; and that the children of a grandchild who died in the lifetime of some of the testator's children, did not take any interest under his will. *Quære*, if the bequest was not void for remoteness. *Smith* v. *Farr*, 3 Y. & Coll. 328; 8 L. J., N. S., Exch., Eq., 46.

1. Real and personal property was devised and bequeathed to trustees on trust to pay a moiety of the income to J. for her life, and the other moiety of the income to E. for her life; and on the death of "either" the property was to be held in trust for all the children of "each" who should be living at her decease when and as they should respectively attain the age of twenty-three years or, being daughters, should marry under that age, in equal shares:—Held, that on the death of J., who died first, her children took the moiety held in trust for her of the property in exclusion of the children of E. *England* v. *England*, 17 W. R. 719; 20 L. T., N. S., 648.

Held, also, that the gifts to the children of J. and E. were not void on the ground of remoteness. *Ib.*

2. Under a gift by a testator to his daughter for her life, with remainder to her children, with remainder, in the event of any such children dying under twenty-one, to their children who should survive his daughter and attain twenty-one; and after several intermediate limitations, with a limitation over, provided there should be no child of his daughter, or, being such, they should not attain twenty-one, or leave issue who should attain twenty-one:—Held, that the limitation over was intended to take effect only on failure of grandchildren who should survive the testator's daughter, and not attain twenty-one, and was, therefore, not too remote. *Trickey* v. *Trickey*, 3 Myl. & K. 560.

3. A testator directed that the annual interest only of the residue of his property, of whatever kind, should be divided into as many equal parts as there might be children of A., share and share alike, as each of the children should come of age, and that in case any one of the children should die without any children, then and in that case his or her share of the annual interest should devolve to the surviving children, share and share alike, and so on successively, until the whole amount of the interest of the residue should come into the hands of the grandchildren and great grandchildren of A.:—Held, that the children took immediate interests for life, and that there was no intestacy by reason either of incomplete disposition or of uncertainty or remoteness. *Wetherell* v. *Wetherell*, 1 De G. J. & S. 134; 9 Jur., N. S., 368; 32 L. J., Ch., 476; 11 W. R. 274; 8 L. T., N. S., 39.

Restraint on Alienation.] 4. A clause restraining anticipation in a gift to a class which may contain unborn persons is invalid. *Re Michael*, 46 L. J., Ch., 651.

5. Testator gave a sum of money for the separate use of his daughter, a feme sole, and declared that she should not be at liberty to sell or dispose of it, and if she attempted so to do, that such sale should be void. The daughter afterwards married:—Held, that the restraint on alienation was void, there being no gift over. *Newton* v. *Reid*, 4 Sim. 141.

6. Under several bequests to living persons for life, with remainder to their children born and unborn, with a general proviso that the shares of females shall be for their separate inalienable use:—Held, that the restriction against anticipation applied only to the tenants for life, in consequence of a direction for payment to the children and a proviso that their receipts should be good discharges. *Armitage* v. *Coates*, 35 Beav. 1.

7. Bequest of a fund in trust for A. for life, and after her death in trust for her children living at her death, and the issue then living of any child then dead, in equal shares, the issue to take their parent's share; any legatees, being females, to take their sole and separate use without power of anticipation. A. survived the testator, and died leaving two married daughters who were born in the testator's lifetime:—Held, reluctantly following previous decisions, that the restraint on anticipation was void as infringing the rule against perpetuities, and that the daughters were accordingly entitled to have the fund paid to them in moieties, on their separate receipts, discharged from such restraint. *Re Ridley*, *Buckton* v. *Hay*, 11 L. R., Ch. D., 645; 48 L. J., Ch., 563; 27 W. R. 527.

See Further as to Restraints on Alienation.] POWER, XVI. III.

II. CHARITIES OR PUBLIC INSTITUTIONS. GIFTS TO.

8. Bequest to the corporation of R. on certain trusts for the benefit of the poor of the town of R., with a proviso that, if the corporation of R. should, for one whole year, neglect to observe the directions of the will, the gift should be utterly void, and the property be transferred to the corporation of L., in trust for a hospital in the town of L. After the corporation of R. had acted in disregard of the directions of the will, with the knowledge of the corporation of L. and the hospital, for more than twenty years, a suit was instituted on behalf of the hospital, claiming the property under the proviso:—Held, first, that a contingent limitation over, of property, from one charity to another, is not within the principle of the rule against perpetuities; and, therefore, that the limitation in question was no infringement of that rule. Secondly, that the limitation might well take effect, notwithstanding the rule, that a charitable purpose shall not be disappointed by the neglect of the trustee; the testator in this case having expressly made the gift over to depend upon the conduct of the trustee. *Christ's Hospital* v. *Grainger*, 1 Macn. & G. 460; 1 H. & Tw.

533; 19 L. J., N. S., Ch., 33; 14 Jur. 339. Affirming 16 Sim. 83; 12 Jur. 276.

1. Devise to a corporation and other trustees upon trust to distribute the rents and profits annually, on a certain day, amongst certain families, according to their circumstances, as in the opinion of the trustees they might need such assistance, whose names were thereinafter mentioned, viz. (naming twenty-four persons):—Held, not void as tending to create a perpetuity. *Liley* v. *Hey*, 1 Hare 580; 11 L. J., N. S., Ch., 415; 6 Jur. 756.

2. A devise to a man and the heirs of his body, and if he shall go about to alien his estate shall cease, and the lands go over to a charity; the devise over is void, it tending to create perpetuity. *Pewterers Co.* v. *Christ's Hospital (Governors)*, 1 Vern. 161.

3. Testator, by a codicil to his will, reciting that certain lands produced a clear yearly rent of 237*l.*, devised them to trustees in trust for charitable purposes; he then directed that, in the event of there being an increase of the rents of the said lands by any new letting, the surplus so to arise should go to the only use and behalf of the person or persons of the S. and C. families, who, for the time being, should be lords or ladies of the manor of D.; and in case the said families did not protect the said charities, or if the said families should become extinct, then and in either of such cases, the trustees were to apply the said surplus rents, in addition to the provision already made, for the charity:—Held, that the gift of the surplus rents to the members of the S. and C. families was a good equitable devise in fee, and that the gift over to the trustees of the charity was bad for remoteness. *Commissioners of Charitable Donations* v. *Clifford*, 1 Dr. & War. 245.

4. Where funds, directed to charitable purposes, were to be provided for by accumulation, but no period prescribed, although it must necessarily have exceeded the legal period:—Held, that the direction was void, and that ulterior dispositions, therefore, failed; but, a clear intention being manifested to devote the property directed to accumulate to charitable purposes, a reference ordered, the Master *cy près* to settle a scheme. *Martin* v. *Margham*, 14 Sim. 230. S. C. *nom. Martin* v. *Maugham*, 13 L. J., N. S., Ch., 392; 8 Jur. 609.

5. The Penzance Public Library was established and kept on foot by the subscriptions of certain inhabitants of Penzance for the purpose of purchasing and preserving books for the use of such subscribers. The subscribers were elected by ballot, and the management of the library conducted, according to printed rules, by officers chosen by the subscribers from amongst themselves. By one of these rules it was provided that the property in the books, and everything else belonging to the library, should be altogether vested in the officers for the time being, who should be trustees for the subscribers; and another rule provided, that the institution should not be broken up so long as ten members remained:—Held, that a devise of freeholds to the trustees for the time being of the Penzance Public Library, to hold to them and their successors for ever, for the use, benefit, maintenance, and support of the library, was void, as tending to a perpetuity. *Carne* v. *Long*, 2 De G. F. & J. 75; 6 Jur., N. S., 639; 29 L. J., Ch., 503; 8 W. R. 570. Varying 4 Jur., N. S., 474; 27 L. J., Ch., 580. And see *Thompson* v. *Shakespeare*, 1 De G. F. & J. 399.

6. A gift to a building fund of a mechanics' institution established and maintained by subscriptions of its members to provide them with a library, reading-room, lectures, and the like, and capable of dissolution only by nine-tenths of the members present at a general meeting, is a gift tending to perpetuity and void. *Re Dutton, Exp. Peake*, 48 L. J., Exch., 350.

7. A testator gave 500*l.* to trustees to apply the income in aid of the Ringwood Friendly Society, a society whose funds were raised by the subscriptions of its members, and were applicable for their benefit in case of sickness, lameness, or old age. Some time after his death the society was dissolved:—Held, that the society was not a charitable institution, and that the gift was invalid as aiming to create a perpetuity, and was not, on the dissolution of the society, applicable *cy près*. *Re Clarke*, 45 L. J., Ch., 194; 24 W. R. 233; 1 L. R., Ch. D., 497.

8. A gift "of the upper storey of four specific houses or shops, to be occupied by the several members and descendants of K. T. C. and L. K. W., as already proposed," *i.e.*, as the context showed, as a family house for the use of two separate families, is void for uncertainty, and as denoting an intention to create a perpetuity. *Yeap Cheah Neo* v. *Ong Cheng Neo*, 6 L. R., P. C., 381.

A devise of "two plantations, in which the graves of the family are placed, to be reserved as the family burying-place, and not to be mortgaged or sold," is void as a devise in perpetuity. *Ib.*

A direction that "a house for performing religious ceremonies to my late husband and myself be erected" is void; such a devise being in perpetuity, and not for a charitable use. *Ib.*

9. When there is a clear intention to give to charitable purposes, and the gift is immediate, there is no resulting trust for the next-of-kin, although the particular application of the fund directed by the will would not of necessity take effect within any assignable limit of time, and could never take effect at all except upon the occurrence of uncertain and contingent events. But if the gift to charity is conditional and the condition is so remote and indefinite as to transgress the rules of law against perpetuities, the gift fails *ab initio*. *Chamberlayne* v. *Brockett*, 21 W. R. 299.

Personal estate effectually given to charity is taken out of the scope of the rules of law against perpetuities. *Ib.*

See also XIII. *infra*.

III. COVENANTS.

10. A. conveyed land to B., reserving the minerals, and covenanted that in case he, his heirs or assigns, should at any time sell the minerals under the adjoining land, he, his heirs or assigns, would offer to B., his heirs or assigns, the reserved minerals at the same

price per acre:—Held, that the covenant was not obnoxious to the rules against perpetuities, and the offer must be made in writing. *Birmingham Canal Co.* v. *Cartwright*, 11 L. R., Ch. D., 421; 48 L. J., Ch., 552; 27 W. R. 597; 40 L. T. 784.

1. By a deed which recited that the plaintiff company were seised in fee of certain land not required for the purposes of their railway, the company conveyed the land to G. P. in fee, and G. P. covenanted that he, his heirs, and assigns would at any time thereafter, whenever the land might be required for the railway, and whenever thereunto requested by the company on a six months' notice, reconvey on receiving the same sum as that paid by G. P. Fourteen years afterwards the defendant purchased the lands from G. P.'s heir, with notice of the above covenant. The company then gave notice to the defendant to reconvey, and on his refusing brought an action against him for specific performance:—Held, by Kay, J., that an executory interest in property to arise on a future event which may not happen within the limits of the rule against perpetuities is void, though it be limited to an ascertained person who can release it at any time. The dictum in *Gilbertson* v. *Richards* (4 H. & N. 277, 297) and the decision in *Birmingham Canal Co.* v. *Cartwright* (11 L. R., Ch. D., 421) dissented from. But held, by Kay, J., that in the present case the covenant did not create any estate or interest in land, and therefore was not obnoxious to the rule against perpetuities, and that specific performance must be decreed, the covenant being binding on an alienee with notice on the principle of *Tulk* v. *Moxhay* (2 Ph. 774). But held, by the Court of Appeal, that as the covenant gave to the company an executory interest in land to arise on an event which might occur after the period allowed by the rules as to remoteness, it was invalid on the ground of remoteness. *Birmingham Canal Co.* v. *Cartwright* (11 L. R., Ch. D., 421) overruled. The doctrine of *Tulk* v. *Moxhay* (2 Ph. 774) only applies to restrictive covenants and not to covenants to do acts relating to the land. *London & South-Western Railway Co.* v. *Gomm*, 20 L. R., Ch. D., 562; 51 L. J., Ch., 530; 46 L. T. 449; 30 W. R. 620. Reversing 45 L. T. 505.

2. Insertion of covenant for renewal of lease in renewed lease enforced, though tending to perpetuity. *Bridges* v. *Hitchcock*, 5 Bro. P. C. 6.

3. By a deed dated 1529, conveying lands to a municipal corporation for charitable purposes, the corporation covenanted that when a term of ninety-nine years in a farm, part of the hereditaments granted, should expire, if any of the heirs of the body of a person named in the grant, becoming of consanguinity and kindred of the grantor, should come, claim, and make lawful request of the corporation to have a new grant and lease to him or her, to be made within one year next after it should fortune the same farm to be void and come into the hands of the corporation, that then and as often as any such chance should fall, the corporation, upon such request to them so made, should make or cause to be made a new lease and grant of the form to such heir, so making request, for thirty-one years, and no more nor less, reserving to them and their successors twenty marks of annual rent during the term. The corporation from time to time granted renewed leases under this covenant, the last lease being granted in 1815. In 1723 a decree was made ordering the corporation to grant a fresh lease according to the covenant; in 1732 a decree was made for carrying out the former decree, with a variation arising from subsequent circumstances, but on neither occasion was the question of remoteness raised, nor was the attorney-general a party to the proceedings, the suits not being hostile as against the corporation, who did not dispute the right to renewal:—Held, that the covenant did not create a right in the nature of an estate tail, but was intended to confer a right on the persons who at the expiration of each lease should for the time being answer the description of heirs of the body of W., and that it was therefore void as tending to a perpetuity. *Hope* v. *Gloucester (Corporation)*, 2 Jur., N. S., 27; 25 L. J., Ch., 145; 7 De G. M. & G. 647. And see *Pollock* v. *Booth*, 9 Ir. R., Eq., 229, 607.

Held, also, that as the question of perpetuity was not raised in, nor was the attorney-general a party to, the old suits for granting fresh leases, the decrees in those suits did not establish the validity of the covenant as against the charity. *Ib.*

Although presumptions are made in support of long possession and ancient usage, no such presumption could be made as would establish such a right to renewal as was provided for by the covenant in question, *semble*. *Ib.*

4. A deed contained a covenant for quiet enjoyment, free from quit-rent and crown-rent; and, by a contemporaneous deed of indemnity, lands were conveyed to a trustee and his heirs, upon trust to permit and suffer the vendors and their heirs to take the rents and profits, until the purchaser and his heirs, or any person deriving title under him, should be molested, disturbed, or damnified, by reason of certain judgments and incumbrances, or any judgment or incumbrance affecting the lands, or any of them, or until some suit at law or in equity should be commenced or proceeded on against the purchaser, his heirs or assigns, or the purchased lands and premises or any part thereof, from the recovery of or on account of the said or any other incumbrance or incumbrances; and immediately after any such disturbance, molestation, or injury, out of the rents and profits of the indemnity lands, by sale, demise, or mortgage of a competent part, to raise and levy from time to time such sums as might be sufficient to pay off and discharge the incumbrances affecting, or that might affect the lands. In 1827 quit-rent and crown-rent were claimed and paid out of the purchased lands. In 1828 the indemnity lands were mortgaged by persons claiming under the vendors. In 1839 a report, finding that there were no incumbrances except those named in the report on the indemnity lands, was made, and confirmed by a decree in a suit in which the sums then paid for quit-rent and crown-rent might have been, but were not claimed. In 1858 an order was made, giving leave to the owner of the purchased lands to go before the Master and file a charge in respect of his demand for

quit-rent and crown-rent accrued since the date of the report and decree:—Held, first, that the claimant was not precluded by the finding in the report and decree from proving his demand. *Massy* v. *O'Dell*, 10 Ir. Ch. R. 22.

Held, secondly, that the demand was not barred by the Statute of Limitations. *Ib.*

Held, thirdly, that the trust in the indemnity deed to indemnify the purchaser was not void for remoteness. *Ib.*

1. A deed of conveyance contained an agreement that certain land, described in the deed, should "never be hereafter sold, but should be left for the common benefit of both parties and their successors." In a suit brought to compel the removal of a house alleged to have been built on the land in contravention of the agreement:—Held, that the agreement was one the performance of which might be enforced in equity, because on the true construction of its terms it amounted, not to a perpetual restriction of sale, but to an agreement on the part of the grantor to leave the land in the state in which it was at the time of the conveyance; and because the agreement contemplated, not an uncertain and indefinite use of the land by the parties, but that the land should be left open for the advantage of the parties as adjoining proprietors. *McLean* v. *McKay*, 29 L. T., N. S., 352; 21 W. R. 798.

IV. GIFTS TO A CLASS.

1. *In General*, 5629.
2. *When Ascertained at Death of Testator*, 5633.
3. *Where Interests of Donees are Vested*, 5634.
4. *Where Gift over by Way of Substitution*, 5636.
5. *Severance of Valid from Remote Shares*, 5637.
6. *Gift to an Individual and a Class*, 5639.

1. In General.

2. A gift to the children born or to be born of persons living, to vest at twenty-three, is void for remoteness; where, in a bequest to a class, the gift as to some is void for remoteness, it will be bad as to the whole class. *Cromek* v. *Lumb*, 3 Y. & Coll. 565.

3. A testator, during the lives of the children which M. G., his daughter (who was living), "had or should have," devised the rents of an estate on trust for them, for their lives, with a substituted gift to the issue of any child dying leaving issue during that period, and a gift over to the survivors of the children, on the death of any without leaving issue. The Court, considering that, by the terms of the gift, children born after the testator's death would be included:—Held, that the substituted gift to the issue of the grandchildren was void. *Gooch* v. *Gooch*, 14 Beav. 565; 21 L. J., N. S., Ch., 238; 15 Jur. 1165; 1 W. R. 397. Affirmed 3 De G. M. & G. 366; 22 L. J., Ch., 1069.

Devise in trust, after the decease of the testator's surviving grandchildren (children of a living daughter), to settle an estate on the eldest living grandson of his daughter in fee, and to sell the other real estate, and divide the produce between all the grandchildren of the daughter except the eldest. The Court, considering that this would include unborn great-grandchildren of the testator, decided that both the gifts to the great-grandchildren were void. *Ib.*

4. A devise, after a life estate to testator's son A., in these words, "to all and every my grandchildren, the children of my said son A., and three daughters, B., C., and D., who shall attain the age of twenty-four years":—Held, void for remoteness, although there were no grandchildren not born in the testator's lifetime. *Newman* v. *Newman*, 10 Sim. 51; 8 L. J., N. S., Ch., 354.

5. Where a testator, after giving certain sums in certain shares among the six children of A., naming them, to be vested and payable at twenty-five, with certain provisions for their maintenance until then, afterwards gives another sum of 6,000*l.*, subject to certain life interests, to all the children then born or hereafter to be born, to be vested and payable at twenty-five, and with the like trust for maintenance, and subject to the like provisions and conditions, as the legacies before given to the children then born and named:—Held, that the legacy of 6,000*l.* was void for remoteness as to all the children, both those then born and also the unborn. *Comport* v. *Austen*, 12 Sim. 218.

6. Testator bequeathed his residuary estate to trustees, in trust to pay the income of one-third part to his daughter Sarah, for life, and upon her death, to stand possessed of that third in trust for her child or children, and to be transferred to them on their attaining twenty-five; but in case his daughter should have but one child her surviving, then the whole of the one-third part to go to such only child on his attaining twenty-five, and be transmissible to his executors, and in case his daughter should leave no child her surviving, or in case she should leave a child who should not attain twenty-five, then over:—Held, that the children were not intended to take vested interests until they attained twenty-five, and that therefore the bequest to them was void for remoteness. *Judd* v. *Judd*, 3 Sim. 525. S. C. *nom. Judd* v. *Hobbs*, 8 L. J., Ch., 119.

7. On a bequest of ——*l.* amongst such children of the testator's daughter as should be living at the time the eldest child should attain twenty-four, and the issue of such as should be then dead, to be equally divided *per stirpes*, and not *per capita*, but without interest in the meantime; the daughter, at the testator's death, had three children, of the respective ages of thirteen, twelve, and nine:—Held, that the intention being that only those children of his daughter should take who should be alive when the eldest child for the time being should attain twenty-four the bequest was void for remoteness. *Dodd* v. *Wake*, 8 Sim. 615.

8. Bequest of residue after decease of testator's widow, to be divided equally amongst children, the son's shares to be paid immediately, and as to the daughters' to be invested for them for life, with remainder between all their children, to become vested at twenty-five, remainder over, in case of either of his daughters having no child attaining twenty-five, to

the children of the others who should attain that age:—Held, that such gift over was too remote and void, and that the bequest to the daughters in the first instance being absolute, and the conditional limitation not being such as would legally take effect, the absolute interest remained according to the original gift. *Ring* v. *Hardwick*, 2 Beav. 352; 4 Jur. 2.

1. Bequest in trust for all the children (then unborn) of A., to be vested at twenty-five for sons, and at that age or marriage for daughters, with a subsequent direction that, if only one child, the whole should be paid to that child at twenty-five, or marriage with consent, if a daughter:—Held, that the vesting, and not the payment only, was postponed till twenty-five or marriage, and that the bequest was void for remoteness. *Griffith* v. *Blunt*, 4 Beav. 248; 10 L. J., N. S., Ch., 372.

2. A testator bequeathed personal property to his trustees and executors, upon trust to pay the dividends to his daughter, during her life, to her separate use, and after her decease to pay the principal unto all and every her children, who should live to attain twenty-three years of age, share and share alike, with benefit of survivorship in case any of them died under that age; with limitations over in case there should be no child or children, or being such, all of them should die under twenty-three years without lawful issue. The daughter had a child who died under age in the daughter's lifetime:—Held, that the bequests to the children, and the subsequent limitations, were too remote. *Bull* v. *Pritchard*, 1 Russ. 213.

3. In a devise of real estate, upon trust for the daughter of the testator for her life, from and after her decease to convey such estate unto and equally between and among all and every the child and children of the daughter who should live to attain the age of twenty-three years, and to his, her, and their heirs and assigns for ever; and in case there should be no such child or children, or, being such, all of them should die under twenty-three without issue, then over, with power to apply for maintenance the interest of such child's share, notwithstanding such child's share should not be then absolutely vested:—Held, that the limitation to the children of the daughter, and the limitations over, in default of such children, are void for remoteness. *Bull* v. *Pritchard*, 5 Hare 567; 16 L. J., N. S., Ch., 136; 11 Jur. 34.

4. A testatrix gave the interest of her residuary estate to her four sisters during their lives, and directed that, on their deaths, the interest of their respective shares should, at the discretion of her executor, be applied to the maintenance and education, or accumulated for the benefit of the children of each of them so dying, until such children should respectively attain the age of twenty-two years, when they were to be entitled to their mother's share of the principal; with limitations over, in the event of the death of any of them under that age:—Held, that the children of the sisters were not to take a vested interest till they attained twenty-two. And that all the gifts subsequent to the life estates given to the sisters, were void as being too remote. *Vandru* v. *Geddes*, 1 Russ. & M. 203; Taml. 361; 8 L. J., Ch., 63.

5. Bequest of personal property to A. for life, and after her decease to children when at age of twenty-seven respectively; and in the event of her not leaving any child or children, or of the death of all under twenty-seven, over:—Held, that the limitation over was too remote. *Cambridge* v. *Rous*, 8 Ves. 24.

6. A gift of residuary estate in trust for such child or children of A., as being a son or sons should live to attain the age of twenty-five years, or being a daughter or daughters should live to attain that age, or marry, equally to be divided between them, if more than one; but if but one, then the whole to that one, their, his, or her heirs, executors, administrators, or assigns, according to the nature and quality thereof; provided that if any of them should die under such age or time as aforesaid, leaving issue him or her surviving, such issue should take the same share as his, her, or their parents, attaining such age as aforesaid, would have done; with provision for applying the income of the share of every such child, or his or her issue, or a sufficient part thereof, in their maintenance and education, and for an application of a reasonable part of the expectant share of any such child or their issue, to his, her, or their advancement, notwithstanding their minority:—Held, to be void for remoteness. *Boreham* v. *Bignall*, 8 Hare 131; 19 L. J., N. S., Ch., 461; 14 Jur. 265.

7. Testator bequeathed his residuary estate to trustees, in trust, as to one-third for his daughter for life, and, after her decease, in trust for her children, and to be paid to them on attaining twenty-five; but, if his daughter should leave but one child her surviving, then the whole third to go to and become the property of such only child upon its attaining twenty-five, and be transmissible to its executors, but, in case his daughter should leave no child her surviving, or in case she should leave a child who should not attain twenty-five, then over:—Held, that the bequest to the children was void for remoteness. *Hunter* v. *Judd*, 4 Sim. 455.

8. Testator bequeathed his residuary estate to trustees, in trust for his wife for life, and, after her decease, "to preserve the then remaining part of my estate for the grandchildren of my brother C., to be by them received in equal proportions when they shall severally attain the age of twenty-five years, and when the youngest shall have attained the age of twenty-five years, and he or she shall have received their final dividend or share of my estate, the trust shall cease." Testator left his widow and mother surviving. Eight grandchildren of the brother were in existence at the widow's death, and several were born afterwards:—Held, that the bequest was not void for remoteness; but that those only of the grandchildren who were in existence at the widow's decease, were entitled to share in the testator's residuary estate. *Kevorn* v. *Williams*, 5 Sim. 171.

9. A testatrix, having a son and two daughters, gave 6,000*l.* 3 per cent. stock to her son for life, remainder as to one moiety of it to his eldest male child living at her decease, and as to the other moiety to his other children; she also gave 6,000*l.* like stock to her daughters for their respective lives in equal shares, remainder to their children; and she further

gave a sum of bank stock to her three children in equal shares during their lives, and the share of each was at his or her death to revert to their issue in equal shares. Subsequently she made a codicil, in which she desired that her grandchildren's shares of those two stocks should be settled upon them for their lives, and afterwards upon their children:—Held, that by the operation of the codicil, the moiety of 3,000*l.* 3 per cent. stock which, by the will, was given absolutely to the eldest male child of the testatrix's son living at her death, was well limited to that male child for life, with remainder to his children; that as to all the other bequests, the attempt to extend the limitations to great-grandchildren was ineffectual; and that the absolute interests given by the will to the grandchildren were not destroyed or restricted by the codicil. *Arnold* v. *Congreve*, 1 Russ. & M. 209; Taml. 347; 8 L. J., Ch., 88.

1. A testator, after devising and bequeathing all his real and personal estates to trustees, on trust from time to time to receive the rents and profits, and therewith to pay various legacies and annuities, directed that they should invest the surplus rents and profits at interest, and suffer the same to accumulate; and he declared that they should stand seised of his said trust estate and the accumulations, upon trust that, when and as soon as any son of either of his nephews A. and B. should have attained the age of twenty-five years, a valuation of his said trust estate should be made, and that the same should then be divided into as many equal lots as there should be sons of his said nephews then living, and thenceforth separate accounts should be kept of the respective portions; and that each of his said nephews' sons, when and as they should respectively arrive at the age of twenty-five years, should choose one of such portions as the share to be allotted to him and his children; and that thenceforth the said portion or share should be held by trustees, upon trust for the person so selecting the same for his life, and after his decease upon trust as to one equal moiety for his eldest son and his heirs, executors, etc.; and as to the other moiety for the rest of his children and their heirs, executors, etc., in equal proportions, and if but one child both moieties for such child absolutely; but if any or either of his said nephews' sons should die under their respective ages of twenty-five years, or having attained that age should afterwards die without leaving issue, the share or shares intended for the person or persons so dying should go to the others and other of the said nephews' sons; and if all but one should die without leaving issue, the trustees should stand seised and possessed of the whole trust estate, in trust for such one surviving nephew's son for his life, and for his children and child as aforesaid; but if all the testator's said nephew's sons should depart this life without leaving issue, then upon trust for such person as should at that time be the testator's heir. At the time of the testator's death A. and B. had several sons living, and B. had another son born afterwards:—Held, upon the construction of the will, that the trusts for accumulation and division of the property comprised all the sons of the nephews who should be living when the first of them should attain twenty-five; and as the son who should first attain that age might not be born until after the testator's death, the gifts were too remote, and therefore void; and the testator's real estates upon his death became vested in his heir. *Boughton* v. *Boughton*, 1 H. L. Ca. 406. Affirming, with a variation, S. C. *nom. Boughton* v. *James*, 1 Colly. 26; 8 Jur. 329.

2. Bequest to A. for life, with remainder to such of his children as should live to attain twenty-five, equally, with an imperative direction, that the interest thereof, while any person presumptively entitled should be under twenty-five, should be applied for his maintenance and a discretionary power of advancement:—Held, void for remoteness. *Southern* v. *Wollaston*, 16 Beav. 166.

The marginal note of *Bute* (*Marquis*) v. *Harman* (9 Beav. 320), is incorrect, the bequest having been held void for remoteness. *Ib.*

3. A gift of a legacy to A. for life, and afterwards to pay and divide it amongst all his children who shall attain the age of twenty-five, is not too remote, if, by the death of A. at such a time before the testator, all the children must necessarily attain twenty-five within twenty-one years after the testator's death. *Southern* v. *Wollaston*, 16 Beav. 276; 22 L. J., Ch., 664; 1 W. R. 86.

4. A testator devised his real estate to his executors upon trust to pay the rents for the support of his wife and his present or future grandchildren during the life of his wife, and upon her decease upon trust to convey the property to his present or future grandchildren as they should attain the age of twenty-five, to hold the same unto his said grandchildren, their heirs and assigns for ever, as tenants in common:—Held, that the devise was void for remoteness. *Blagrove* v. *Hancock*, 16 Sim. 371; 18 L. J., N. S., Ch., 20; 12 Jur. 1081.

5. The doctrine laid down in *Leake* v. *Robinson* (2 Meriv. 363), as to remoteness, applies to real as well as to personal estate. *Walker* v. *Mower*, 16 Beav. 365.

Devise and bequest of real and personal estate to trustees for A. for life, and afterwards "to convey and assure" equally between all A.'s children, on their respectively attaining twenty-one, with a gift over on A.'s death without "leaving any child." There was one child who survived A., and died an infant:—Held, that such child did not take a vested interest; and, secondly, that the gift over did not take effect. *Ib.*

6. A testator devised his estates to trustees, in trust, after C.'s decease, "in case she should leave only one child which should survive her," to pay 200*l.* a year for his maintenance until he should attain twenty-five; and from and after such only child should attain that age, to raise 10,000*l.*, and pay the same to him at that age. Or, in case C. should, at her decease, have two or more children, then to raise an annuity for their maintenance, until they should respectively attain twenty-five, and when they respectively attained that age, to pay each an equal share of the 10,000*l.* The plaintiff was *en ventre sa mere* at the testator's death, and was the only child of C. who survived her:—Held, that the bequest of the 10,000*l.* was too remote. *Merlin* v. *Blagrave*, 25 Beav. 125.

1. Bequest of personal estate to A. for life, remainder to the children of A. equally, and in default of issue of A., upon trust to sell and divide equally amongst B. and C. and all their children "then" living, share and share alike:—Held, that the gift was not too remote, and that B. and C. and their children living at the death of A. alone took the personal estate as tenants in common absolutely. *Cormack* v. *Copous*, 17 Beav. 397.

B. died before A., but, nevertheless, she was held to take a share. *Ib.*

2. Gift of an annuity to testator's wife, with a declaration that the same was intended and should be taken in full satisfaction of all and all manner of claims and demands whatsoever which she at any time might or could have, or which, without provision or declaration, she could or might have at the time of testator's decease, of, into, or out of any part of his real or personal estate under any settlement, or on account of any dower or thirds which she might, could, or would in any manner have or demand out of, or in respect of, any part of his estate or effects in any manner howsoever. In the events which happened, part of the testator's estate was undisposed of by reason of the absence of a gift over upon the termination of a life interest therein:—Held, that the widow, having enjoyed the annuity, was, by the declaration annexed to the gift of the annuity, excluded from a distributive share in the part of the property undisposed of. Gift of all testator's freehold, leasehold, and copyhold estates, and all his personal estate, to trustees and their heirs, etc., upon trust to pay to his wife the sum of 1,200*l.* per annum by equal quarterly payments during her life, with a direction that from her decease the said sum of 1,200*l.* per annum so to be paid unto her as aforesaid should go to and be equally divided amongst all his children then living share and share alike:—Held, not a perpetual annuity, but to inure in shares for the respective lives of the children only, after the wife's death. Gift of residue unto and amongst all and every testator's child and children living at his decease, share and share alike, for life; and in case any of them being daughters should marry, and should happen to depart this life in the lifetime of her or their husbands, then the testator directed that the part or share, parts or shares, of her or them so dying should go to or be paid to her or their respective husband or husbands for his or their life or lives, and from and after his or their decease should be equally divided unto and amongst all and every child and children of his said daughter and daughters then living share and share alike; and in default of any such child or children, then he directed such part or share, or parts or shares, should go in a certain manner:—Held, that inasmuch as the daughters might marry husbands not born at the testator's death, the gift over to the children of the daughters after the life interests of their husbands was void for remoteness. *Lett* v. *Randall*, 3 W. R. 564; 1 Jur., N. S., 747; 24 L. J., Ch., 708.

3. A gift, by will, of real and personal estate to trustees, upon trust, to pay half the income to E. for life, and after her death to her child or children equally; the shares of sons to be vested in them on attaining twenty-five, and of daughters on attaining that age or day of marriage, which should first happen; and in the meantime to be applied for their maintenance, with survivorship in case of the death of any child before twenty-five or marriage respectively, with a similar gift to S. and her children of the other money, and a gift over in case of the death of either E. or S. without leaving issue, or leaving such and they should all die under twenty-five:—Held, that the limitations to the children of E. and S. were void for remoteness. *Pickford* v. *Brown*, 2 Kay & J. 426; 2 Jur., N. S., 781; 25 L. J., Ch., 702; 4 W. R. 473.

Held, also, that the direction for maintenance was altogether void. *Ib.*

4. Devise in trust for A. for life, and, after her decease, to apply the rents for the benefit of her children, until the youngest attained twenty-five; and, as soon as the youngest should have attained twenty-five, to sell and "pay and divide" the produce equally "among such of the children of A. as should be then living, and issue of such, if any, of her children as might be then dead," such issue to take their parents' share only:—Held, that the gift of the income was valid, but that the gift of the corpus was void for remoteness. *Read* v. *Gooding*, 21 Beav. 478; 4 De G. M. & G. 510.

5. Bequest to a living person for life, and afterwards to his children, followed by a declaration that these interests should be considered a vested interest at the age of twenty-five, and a gift over to the issue of any dying under twenty-five:—Held, too remote. *Rowland* v. *Tawney*, 26 Beav. 57.

6. Limitations of a term to trustees, upon trust to raise portions for the children of A. surviving A. and B., "to vest in and to be paid and payable to" them at their ages of twenty-four, with maintenance, etc., meanwhile, out of the expectant or presumptive shares, and a gift over on the death of all before their share should become vested:—Held, void for remoteness. *Re Blakemore*, 20 Beav. 214.

7. A testator bequeathed the income of his residuary estate between his three children, and when any child died, his part to be equally divided amongst the testator's surviving grandchildren; and likewise, if any of his grandchildren died, their part to be divided amongst the survivors of his other grandchildren:—Held, that the gift over, upon the death of a grandchild, to the surviving grandchildren, was void for remoteness. *Courtier* v. *Oram*, 21 Beav. 91.

8. A testatrix appointed a trust fund to two trustees, in trust to pay the dividends to A. for life, and after his decease she gave the dividends to two others, B. and C., for life; and after the decease of the survivor, she gave, bequeathed, willed, and directed the principal to be divided into two parts, and one of them to be "transferred or paid" to the children of those two persons respectively at the age of twenty-five years:—Held, that the gift to the children was void for remoteness. *Chance* v. *Chance*, 16 Beav. 572.

9. Trust funds are settled, subject to life interests, in the husband and wife, as portions for the children of the marriage, to be vested interests in them at twenty-five if sons, or at twenty-five or marriage if daughters; and to

be payable at the same times if after the death of tenants for life; and if not, then immediately on the death of tenants for life. Survivorship between the children in case of their death before twenty-five, or twenty-five or marriage respectively. Maintenance to be given out of the annual income of shares before they should become payable:—Held, that the shares did not vest till twenty-five, and the gift therefore too remote. *Re Morse's Settlement*, 4 W. R. 148; 25 L. J., Ch., 192; 2 Jur., N. S., 6; 21 Beav. 174.

1. Gift of residue of real and personal estate to A. for life, and after her decease, in trust for all her sons and daughters who should attain twenty-two equally, with a power to apply the "annual income or fund" for their maintenance or "benefit" during their "minority": —Held, void for remoteness. *Thomas* v. *Wilberforce*, 31 Beav. 299.

2. Gift to trustees upon trust to permit A. to take the rents and profits for life, and after his decease in trust for all and every the children or child of A. who should live to attain twenty-five, but not otherwise; with a direction to the trustees to apply the annual income of the trust estates and premises for the use and benefit of the children of A. until they should severally attain the age of twenty-five:—Held, void for remoteness. *Cam* v. *Salmon*, 5 W. R. 31.

3. A testator gave his residuary real and personal estate to his daughter for life, and after her death he directed it to be paid to her surviving children as soon as they should arrive or come to the age of twenty-two respectively, with a direction that the share of the child or children dying under twenty-two should go to the other child or children who should attain twenty-two; and directed that only the interest of the share of the child or children who died under the age of twenty-two should be paid to them respectively:—Held, (affirming 11 Jur., N. S., 791), that the gift was contingent upon the children attaining twenty-two, and therefore void for remoteness. *Re Bulley*, 11 Jur., N. S., 847; 13 L. T., N. S., 264.

4. A testatrix gave property to three persons successively for life, one of whom was unborn at her death, and after the decease of the survivor to all the children of S., the first tenant for life, in equal shares, and the child or children of such of the children of S. as should be then dead, with an absolute gift over in case there should be no child or grandchild of S. then living:—Held, that the limitation over to the children and grandchildren of S. being a gift to a class to be ascertained at the death of a person not in being at the decease of the testatrix was void for remoteness. *Stuart* v. *Cockerell*, 39 L. J., Ch., 729; 5 L. R., Ch., 713; 18 W. R. 1057; 23 L. T., N. S., 442. Affirming 7 L. R., Eq., 363; 38 L. J., Ch., 473; 20 L. T., N. S., 513.

5. A testator gave the residue of his property to A. for life, with remainder to her children as she should appoint, and, subject thereto, in trust for all the children of A. who should attain twenty-three or marry under; the will contained provisoes giving a discretionary power to the trustees to apply all or any part of the income of any share for maintenance and education during minority, and directing that the surplus income should be accumulated, such accumulation to be added to the principal of the share whence the same should have arisen, with a further discretionary power to apply the accumulated fund or any part thereof also for maintenance and education: —Held, that the gift to the children of A., in default of appointment, was void for remoteness. *Bowyer* v. *West*, 19 W. R. 598; 24 L. T., N. S., 414.

6. A testator devised his real estate to trustees in fee for T. for life, with remainder to the trustees to preserve contingent remainders, with remainder to the first and other sons of T. in tail male with other remainders over, with a proviso that the real estate should not vest in any person thereby made tenant for life or in tail until he should have attained twenty-five, and the rents and profits were in the meantime to form part of the personal estate:—Held, that the direction in reference to vesting amounted to a limitation void for remoteness, and that the direction was not modified by a provision for maintenance in the meanwhile. *Lushington* v. *Penrice*, 16 W. R. 836; 18 L. T., N. S., 597.

7. A bequest of personalty to A. for life, with remainder to his issue male and the survivors for their lives, with remainder to the issue female of A. and the survivors for their lives, with remainder "to the executors, administrators, and assigns of the survivor of A., or such issue, male or female, who shall happen to be such survivor," is a bequest to a class, which is necessarily ascertainable within the limits prescribed by the rule against perpetuities, confers an absolute contingent interest in such one of that class as may be the survivor, and is not void for remoteness. *Avern* v. *Lloyd*, 37 L. J., Ch., 489; 5 L. R., Eq., 383; 16 W. R. 669; 18 L. T., N. S., 282.

8. A gift to such of four persons as should survive twelve months after the death of persons in being, and the issue then living who should attain twenty-one or marry of any of the four persons who should have died, is void altogether, as being a gift to a class the members of which were not ascertainable within twenty-one years after the death of persons in being. *Bentinck* v. *Portland* (*Duke*), 47 L. J., Ch., 235; 7 L. R., Ch. D., 693; 38 L. T., N. S., 58; 26 W. R. 278.

2. When Ascertained at Death of Testator.

9. Testator gave the residue of his personal estate unto and among all and every the children, sons and daughters, of his daughter Elizabeth, in equal shares and proportions, as and when they should attain their respective ages of twenty-two years:—Held, that the children of the testator's daughter living at the testator's death were the only objects of the bequest, and that it was not void for remoteness. *Elliott* v. *Elliott*, 12 Sim. 276; 10 L. J., N. S., Ch., 239.

10. In considering the validity of limitations, the state of the family at the death of the testator (and not at the date of his will) is to be regarded; and therefore if a gift be to such of the children of a particular parent as shall attain a greater age than twenty-one years, and the parent die in the lifetime of the

testator, and the class be ascertained at the testator's death, the gift is valid. A limitation to the unborn children of the testator's children for their lives was not void for remoteness only, because it was a gift to persons who might be unborn at the death of the testator. *Williams* v. *Teale*, 6 Hare 239.

1. Gift to trustees for E. W. for life, and after his decease to assign, etc., to all his children who should be living at his decease, and who should be or live to attain twenty-five, and to apply the income in the meantime for their maintenance. E. W. died in 1837, leaving eleven children; the testator died in 1845. Four only of the children of E. W. survived; the youngest attained twenty-five in 1848:—Held (following *Williams* v. *Teale*, 6 Hare 239), that the gift was not void for remoteness. *Southern* v. *Wollaston*, 22 L. J., Ch., 664; 16 Beav. 276.

Gift to A. for life, and after his death to all his children who should be living at his death, and who should attain the age of twenty-five years; with a direction to apply the whole income in maintenance:—Held, that the gift was not void for remoteness, the tenant for life having died in the lifetime of the testator. S. C. 1 W. R. 86.

2. Testator gave his real and personal property upon trust for the children of his daughters who should live to attain twenty-five. At his death one of his daughters had a child who had attained twenty-five:—Held, that this gift was not void for remoteness, but was a valid gift to such of the children living at the testator's death as should attain twenty-five. *Pichon* v. *Matthews*, 10 L. R., Ch. D., 264; 48 L. J., Ch., 150; 39 L. T. 531.

3. Gift by will of "a sum of 500*l.* a-piece to each child that may be born to either of the children of either of my brothers lawfully begotten":—Held, that a grandchild of one of the testator's brothers, born a little more than seven months after the death of the testator, was entitled to a legacy of 500*l.*, the gift not being too remote. *Storrs* v. *Benbow*, 17 Jur. 821; 22 L. J., Ch., 823; 3 De G. M. & G. 390; 1 W. R. 115, 134, 420.

Distinction, on the question of remoteness, between such a gift and a gift of a sum in gross to be divided amongst a class. *Ib.*

See also 5 *infra.*

3. Where Interests of Donees are Vested.

4. A testator having bequeathed a yearly sum to a person for life, gave the annuity, upon the death of the annuitant, to the eldest surviving son of A., and failing the male issue of A., to the daughters of A. living at the demise of such male issue; at the death of the annuitant, A. had no son living, but had two daughters:—Held, that the gift to the daughters of A. was not too remote, and that they were entitled to the annuity. The same testator gave the residue to his widow during her life, and at her demise to the eldest surviving son of A., upon his attaining twenty-five (the trustees being directed to apply the interest to his use till he attained that age), or failing such male issue, to the daughters of A. living at the demise of the last of such male issue: the only son of A. died under twenty-five in the lifetime of the widow, leaving two daughters of A. him surviving:—Held, that if there had been any son of A. living at the death of the widow, he would have taken a vested interest in the residue, though he had not then attained the age of twenty-five. That the gift over of the residue to the daughters of A., was not too remote, and that in the events which happened they, upon the death of the widow, became entitled to the residue. *Murray* v. *Addenbrook*, 4 Russ. 407; 8 L. J., Ch., 79.

5. Testator gave his real and residuary personal estate in trust to pay an annuity to his nephew, and, subject thereto, in trust for his daughter for life, remainder in trust to pay the income for the maintenance of all and every such child or children as she might leave at her decease during his, her, or their minority; and when the youngest should have attained twenty-five, to pay, assign, and transfer the income, together with the principal, to the children, the same to be divided equally between them, share and share alike; but if any of them should die leaving a child or children who should attain twenty-one, then to pay and assign the share of such child to such his or their child or children; and the testator then expressed his further will to be, that his trustees should immediately after his nephew's decease, convey, release, and assign all his freehold and leasehold estates unto the heir or heirs, who should be legally entitled thereto; and in case his daughter should leave no child or children, or they should die under age and unmarried, then in trust to pay and assign the income, together with the whole residue, unto and equally between his next-of-kin. The daughter left five children living at her death, all of whom attained twenty-five:—Held, that the trust for them was not void for remoteness, but that they took vested interests in the trust property on their mother's death. *Milroy* v. *Milroy*, 14 Sim. 48; 13 L. J., N. S., Ch., 266; 8 Jur. 284.

6. Bequest to A. for life, with remainder to her children who should attain twenty-five, with a clause for maintenance during minority and for accumulation of surplus income:—Held, that the gift to the children was not void for remoteness. *Bute* (*Marquis*) v. *Harman*, 9 Beav. 320.

7. Bequest to A. for life, with remainder to such of his children as should live to attain twenty-five, equally, with an imperative direction, that the interest thereof, while any person presumptively entitled should be under twenty-five, should be applied for his maintenance and a discretionary power of advancement:—Held, void for remoteness. *Southern* v. *Wollaston*, 16 Beav. 166; 22 L. J., Ch., 664; 1 W. R. 86.

The marginal note of *Bute* (*Marquis*) v. *Harman* (9 Beav. 320) is incorrect, the bequest having been held void for remoteness. *Ib.*

8. A bequest to trustees of the testator's residuary estate, with a direction to apply so much of the interest, dividends, and profits as may be necessary for the maintenance and education of the children of the testator's daughters, until they should respectively attain the age of twenty-four, and then to divide the principal equally between them, with a gift over in case any of them should die under

twenty-four without leaving issue, is not void, as too remote, but gives a present vested interest with an executory bequest over in case of death under twenty-four without leaving issue. *Bland* v. *Williams*, 3 Myl. & K. 411; 3 L. J., N. S., Ch., 218.

1. A gift of personalty to trustees for A. for life, and after his death in trust for the children of A., "as they severally attained twenty-five years," the income to be applied during their respective minorities by their guardian for their maintenance, etc., with a gift over, in case no child of A. should live to attain twenty-five:—Held, to be vested, and not too remote. *Davies* v. *Fisher*, 5 Beav. 201; 11 L. J., N. S., Ch., 338; 6 Jur. 248.

2. Bequest of a residue for life to A., who had no child, and at his death leaving a son 5,000*l.* to be deposited in the hands of trustees to accumulate for such son for his use on his attaining the age of thirty years, and the rest to be equally shared between him and the other children; the general division to take place as each respectively attained the age of twenty-four years:—Held, not void in any part, as the 5,000*l.* vested at the time of the severance and the shares of the residue must be taken to vest at the same time. *Grest* v. *Grest*, 5 Beav. 123.

3. Testator gave his real and personal estates to trustees, and directed them to invest his personal estate in the purchase of land, and to pay the rents, subject to certain annuities, to his son for life, and in case his son should die leaving behind him no legitimate issue then he directed the trustees to pay the rents to his, the testator's, widow for life; but in case his son should die leaving behind him legitimate issue, then, at the end of six months after the eldest male child then living of his son should have attained twenty-five, or, in default of male issue, the eldest female child then living of his son should have attained twenty-one, to convey all the estates to the eldest male child, or in default of male issue to the eldest female child, and to his or her heirs of his or her body lawfully begotten, absolutely for ever. The testator then (in case his son should die during the minority of such eldest male or female child) provided for their maintenance, and then declared that, in case his son should not die during such minority, his estates should continue on the trusts aforesaid until six months after his son's death, and then pass to his son's eldest male or female child in manner before expressed; and in case his son should die leaving no legitimate issue, then after the death of the testator's wife the estates to be conveyed to other persons. The testator's son married, and had a son born after the testator's death. The Court, holding the trust for the grandson not to be void for remoteness, and the grandson having survived his father and attained twenty-one (but being under twenty-five), and all the annuitants being dead, ordered the estates to be conveyed to him. *Jackson* v. *Marjoribanks*, 12 Sim. 93; 5 Jur. 885.

4. Where there is a gift to trustees within three months after the testator's decease, in case any child or children of his son should be then living, to invest a sum of money in trust for such children, equally, who should attain twenty-one, the dividends to be payable to and become vested in the meantime, with absolute discretion in the trustees as to maintenance, it is not a condition precedent; the limitation is not too remote, and there must be an investment and accumulation for the benefit of the children of the son, the dividends going with the capital. *Edmunds* v. *Waugh*, 6 W. R. 589; 4 Drew. 275.

5. Gift by will to daughters for life, and afterwards to "pay and divide" amongst their issue (children) then living, at twenty-five, the whole interest being given in the meantime for their maintenance during minority:—Held, that the gift to the children was not too remote. *Tatham* v. *Vernon*, 29 Beav. 604.

6. A testator declared that the bequest to one daughter C. should be enjoyed by her for life, and then be put in trust for the benefit of the children she might leave, and to be divided at twenty-five. And he in like manner directed the bequest of his second daughter M. should be paid to her for life, and after her death "may be continued in trust, and may be divided equally between her children after they have attained the age of twenty-five":—Held, that the bequest to the children of M. was not remote, and they took vested interests at their birth. *Saumarez* v. *Saumarez*, 34 Beav. 432.

7. A testator, by will, made in 1821, bequeathed the residue of his personal estate and effects to trustees, upon trust to accumulate until the principal, with the accumulations, should amount to 3,000*l.* or thereabouts; and when and so soon as such principal and accumulations should amount to 3,000*l.* or thereabouts, then he directed them to invest the same, and distribute the interest among certain persons for life; and after the decease of the survivor, to distribute the principal amongst the issue of such persons:—Held, that the gift of the fund was not void for remoteness, as, although the sum named might not be accumulated within the period allowed by law, there would be no suspension of vesting; the residue and accumulations, whatever the amount might be, would vest immediately on the death of the survivor of the tenants for life. *Oddie* v. *Brown*, 5 Jur., N. S., 635; 28 L. J., Ch., 54; 4 De G. & J. 179. Reversing 4 Jur., N. S., 605; 6 W. R. 531.

8. By a will, stock was, after the death of a tenant for life, to be divided and paid amongst the children of such tenant for life; if more than one, equally, on attaining twenty-four; and if but one, the whole to be paid to such one child on attaining twenty-four, and in the meantime the interest and dividends to be applied for the use and benefit of such children or child, as the case might be:—Held, that the gift was not void for remoteness, the children taking vested interests as they came *in esse*. *Bell* v. *Cade*, 2 John. & H. 122; 10 W. R. 38; 5 L. T., N. S., 523; 31 L. J., Ch., 383.

9. A bequest to trustees of a testator's leaseholds and personal estate, upon trust for his granddaughter for life, and after her death upon trust for all and every the child and children of his said granddaughter, until they attained the age of twenty-five years, or died leaving issue; and then upon trust for such child and children so attaining the age of twenty-five years or dying leaving issue, with a gift over in case they should all die under twenty-five without leaving issue, is not void for remoteness as to the children, but gives

them an immediate vested interest. *Hardcastle* v. *Hardcastle*, 1 N. R. 83.

1. A testator directed his trustees to raise 15,000*l*., and after the determination of certain prior life interests given to T. and his widow to divide and transfer one-fifth of the fund to and amongst the children of T. equally as and when they should attain the age of twenty-five, applying from time to time the income of the presumptive share of each child, or so much as the trustees for the time being might think fit for his and her maintenance and education until such share should become payable as aforesaid; but if T. should leave no children him surviving, or if he should, and they should all die before attaining the age of twenty-one, then to pay and transfer the fifth part to the other persons therein referred to:—Held, that the children of T. took vested interests, and consequently that the gift to them was not void for remoteness. *Fox* v. *Fox*, 19 L. R., Eq., 286; 23 W. R. 314.

4. Where Gift over by Way of Substitution.

2. Bequest of personal estate, in trust, when and as the child and children of A. should severally attain the age of twenty-one, to pay and divide the same equally between them and the children of such of them (if any) as might depart this life under the age of twenty-one, but so, nevertheless, that children of any deceased child, on attaining twenty-one, should take between them such share only as the parent would have taken if living:—Held, not too remote. *Packer* v. *Scott*, 33 Beav. 511.

3. A testator gave his residuary real and personal estate upon trust for his wife for life, and after her death upon trusts for the testator's issue, with executory trusts for his sister and her issue; and in default of such issue of himself and his said sister, "or upon their total extinction under twenty-one years old," he bequeathed the said residuary estate unto his first cousins by their mother's side, and the issue of such of them as might happen to be dead *per stirpes*, and to their heirs, executors, administrators, and assigns for ever as tenants in common, and not as joint tenants:—Held, first, that the gift to the cousins was not too remote. Secondly, that it was not a gift to a class to be ascertained at a future period, but that the first cousins *ex parte maternâ* living at the testator's death took vested interests liable to be divested to the extent required to let in other first cousins born before the period of distribution. Thirdly, that the shares of first cousins who died before the period of distribution leaving no issue were not divested, but went to their real and personal representatives. Fourthly, that the share to a first cousin who died before the period of distribution leaving children went to those children. *Baldwin* v. *Rogers*, 3 De G. M. & G. 649; 17 Jur. 267; 22 L. J., Ch., 665.

4. A testator by his will devised real estate to trustees in trust to receive the rents during the life or lives of the survivor of all the children which M. G. had or should have, and after certain deductions, to apply them in the upport of M. G. and in the maintenance and education of all her children which she should from time to time have living, in equal shares between her and them. The will then contained further trusts providing that after all the children of M. G. mentioned in the above devise, and the youngest of them, attained twenty-one, the rents should be divided among the said children and the issue of any one of them that should happen to die leaving issue, equally, and the survivors and survivor of them until the death of the longest liver of the children, and after the death of the longest liver, then to convey the estates to the eldest living grandson of M. G.:—Held, that a trust was created for the benefit of the children of M. G., who were in a state of minority; that it included children born after the death of the testator, and was for all children who might be alive from time to time until the period when the younger of the living children of M. G. should attain twenty-one:—Held, also, that the further trust, substituting the issue for the parent, and the ultimate trust to convey the estates, were void for remoteness. *Gooch* v. *Gooch*, 3 De G. M. & G. 366; 22 L. J., Ch., 1089. Affirming 21 L. J., Ch., 238; 15 Jur. 1165; 14 Beav. 565; 1 W. R. 397.

5. A testator directed his trustees, after the death of the longest liver of his son, his daughter, and any widow whom the son might leave, to sell his real estate and to stand possessed of the proceeds and of the rents and profits until sale, upon trust to pay and apply them "unto and equally amongst all and every the child and children of my son W. and daughter M. share and share alike, and the lawful issue of such of them as may be then dead leaving issue, such issue to be entitled to no more than their parent or respective parents would have been if living." He directed that if his daughter's son then living should die without leaving issue, or, leaving issue, all of them should die under age and unmarried, the trustees should pay the share which would have been payable to him under the above trusts to the children of J.; and that if the testator's son died without leaving issue, or all of them died under age and unmarried, the trustees should pay the share which would have been payable to them under the trusts aforesaid, to the children of J. and M. The heir-at-law claimed the corpus as undisposed of, on the ground that the disposition of the proceeds of sale was void for remoteness as being a gift to a class not ascertainable till at or after the death of the son's widow, who might be a person unborn at the testator's death:—Held, that the gift was not a gift to such children of the son and daughter as should be living at the period of distribution and the issue of such of them as should be then dead, but a gift to all the children of the son and daughter, with a gift over by way of substitution of the shares of such of them as might die before the period of distribution leaving issue—that when the gift over of any share was void for remoteness the original gift remained unaffected—and that the heir-at-law had no title. *Re Goodier*, *Goodier* v. *Johnson*, 18 L. R., Ch. D., 441; 45 L. T. 515; 51 L. J., Ch., 369; 30 W. R. 449.

6. A bequest of the residue after the death of the testator's wife to the testator's children then living, and such issue then living of any children then deceased as should attain the age of twenty-three as tenants in common

according to the stocks and not to the individual objects, and so that the issue of deceased children might take by way of substitution the shares of their respective parents, is void for remoteness. *Smith* v. *Smith*, 5 L. R., Ch., 342; 18 W. R. 742.

5. Severance of Valid from Remote Shares.

1. Where there is a gift to a class, some of whom are within the rule against perpetuities, and some not, but the class itself and the shares of each cannot be ascertained within the legal limits as to time, the whole gift is void. But where the individual shares of the members of the class can be ascertained within the proper periods, the gift is valid as to those within the rule against perpetuities, though invalid as to the rest. *Wilkinson* v. *Duncan*, 30 Beav. 111; 9 W. R. 915; 7 Jur., N. S., 1182; 5 L. T., N. S., 161; 30 L. J., Ch., 938.

If a stated sum is given to each member of a class, wholly independent of the same, or a similar gift to every other member of a class, and cannot be affected whether the others receive their legacies or not, the gift as to those who are within the limits allowed by law. *Ib.*

Property was bequeathed by an uncle in trust to his nephew A. for life, with power to him to appoint it amongst his children. A. directed the trustees "to pay 2,000*l.* to each of his daughters, as and when they should respectively attain twenty-four," and to pay the residue "between his sons equally, as and when they should respectively attain twenty-four":—Held, that the bequests were valid as to such of A.'s daughters as were three years of age at his death, but void for remoteness as to the rest. *Ib.*

2. A testator directed his executors to pay "the sum of 500*l.* apiece to each child that may be born to either of the children of either of my brothers lawfully begotten":—Held, that the child of a niece born within eight months after the testator's death was entitled to the legacy, and that the gift was not as to such child void for remoteness. *Storrs* v. *Benbow*, 3 De G. M. & G. 390; 17 Jur. 821; 22 L. J., Ch., 823; 1 W. R. 115, 134, 420.

Distinction on a question of remoteness, between the gift of a sum in gross to be distributed among a class, and the gift of distinct legacies to a number of persons. *Ib.*

3. A testatrix having a son and two daughters, gave 6,000*l.* 3 per cent. stock to her son for life, remainder as in one moiety of it to his eldest male child living at her decease, and as to the other moiety to his other children. She also gave 6,000*l.* like stock to her daughters for their respective lives in equal shares, remainder to their children, and she farther gave a sum of bank stock to her three children, in equal shares during their lives, and the share of each was at his or her death to revert to their issue in equal shares. Subsequently she made a codicil, in which she desired that her grandchildren's shares of these two stocks should be settled upon them for their lives and afterwards upon their children:—Held, that by the operation of the codicil the moiety of 3,000*l.* 3 per cent. stock, which by the will was given absolutely to the eldest male child of the testatrix's son living at her death, was well limited to that male child for life, with remainder to his children; that as to all the other bequests the attempt to extend the limitations to great-grandchildren was ineffectual, and that the absolute interests given by the will to the grandchildren were not destroyed or restricted by the codicil. *Arnold* v. *Congreve*, 1 Russ. & M. 209; Taml. 347; 8 L. J., Ch., 88.

4. A power of appointing lands amongst all the children of B. "begotten and to be begotten, and their issue," and in default of appointment amongst the children equally; B. had six children, all living at the time of the power being created, and by will directed that the share which every child of B., begotten, etc., was entitled to, in default of appointment, should be held in trust for that child for life, and after its death for its children:—Held, valid, and not void for remoteness. *Griffith* v. *Pownall*, 13 Sim. 393.

5. After a devise to A. for life, with remainder to all and every the child and children of A. for their lives, in equal shares, a devise over, after the decease of any or either of such child or children, of the part or share of him, her, or they so dying, unto his, her, or their child or children, begotten or to be begotten, and to his, her, or their heirs for ever, as tenants in common, is good as to the children of such children of A. as were living at the death of the testator, for the gift to them must take effect, if at all, within the limits allowed by law; and the gift to every member of the class of children is single and independent of the gift to every other member of the same class, and cannot be affected by the result of the gift as to such other members. *Cattlin* v. *Brown*, 11 Hare 372; 1 W. R. 533; 1 Eq. Rep. 550.

6. A testator bequeathed a fund to trustees upon trust for his widow for life, and at her decease upon trust for the present and future children of A. who should be living at the decease of the widow, to be divided between them as tenants in common; and he declared that, as to the children of A. who should be daughters, their respective shares should be held by his trustees upon trust for each daughter respectively for life, and at her decease upon trust for her children absolutely:—Held, that the limitation in favour of the children of a daughter of A. was not void for remoteness in the case of a daughter living at the testator's death. *Wilson* v. *Wilson*, 4 Jur., N. S., 1076; 28 L. J., Ch., 95.

7. A testator gave an annuity of 200*l.* a year to T. N. for life, and after his death to his children then living, for life, in equal shares; and, at the decease of any of them, his share of the capital producing the annuity was to be divided amongst his children:—Held, notwithstanding there were children of T. N. living in the testator's lifetime, and the gift to the children as tenants in common, that the bequest to all of the grandchildren of T. N. was void for remoteness. *Greenwood* v. *Roberts*, 15 Beav. 92; 21 L. J., N. S., Ch., 262.

A testator directed his trustees to set apart sufficient stock to produce 700*l.* a-year, and pay, among others, an annuity of 200*l.* a-year to his brother Thomas for life, and after his

decease to continue it amongst his brother's children then living in equal shares, during their lives, and, at the decease of any of them, the stock from which the 200*l.* a-year arose was to be sold, and the produce divided equally amongst the children of him or her so dying as they should severally attain twenty-one, with interest in the meantime to be applied for their benefit, and he said, "I give them vested interests therein;" and if any of his brother's children should, at his decease, be dead and have left issue, such issue should be entitled amongst them to the money they would eventually have been entitled to had their parent outlived his brother. If any of the parties anticipated the payment, or sold his interest before due, it was declared to be forfeited and applied as if such parties had died before the legacy fell due. The testator then appointed his trustees, executors, and residuary legatees. 23,333*l.* 6*s.* 8*d.* was set aside to answer the 700*l.* a-year. The testator's brother Thomas died, leaving six children, of whom Richard was one, living at the date of the will, and he after the decease of his father, until his death, received an annuity of 33*l.* 6*s.* 8*d.*, being one-sixth of the 200*l.* a-year. Richard died, leaving three children surviving, one of whom was born in the lifetime of the original testator:—Held, that the children of Richard were not entitled to the money representing the annuity to which he was entitled, but that it fell into the testator's residuary estate. *Ib.*

1. A testator bequeathed a legacy to his son, and after his decease and on the youngest of the son's sons attaining twenty-one, to divide it equally between the son's sons and the issue of deceased son's sons who should attain twenty-one, the issue to take the share which their father would have taken if living. Whether the gift after the son's death is wholly void, or only as to the share of the issue, *quære*. *Salmon* v. *Salmon*, 29 Beav. 27.

2. A testator gave his residuary estate to his daughter for life, and afterwards to her two sons, Henry and Charles, and all other her children thereafter to be born, and the issue of his grandchildren, who, being a son, should attain twenty-one, or, being a daughter, should attain that age or marry with consent, equally to be divided, such issue to take a parent's share:—Held, void for remoteness. *Webster* v. *Boddington*, 26 Beav. 128.

3. A devise to A. for life, with remainder to the children of A. for their lives, in equal shares, with a devise over, after the decease of any of such children, of the share of him, her, or them so dying, unto his, her, or their child or children, and to his, her, or their heirs, as tenants in common:—Held, that the devise over was good as to the children of such children of A. as were living at the death of the testator, for the gift to them must take effect, if at all, within the limits allowed by law; and the gift to every member of the class of children is independent of the gift to every other member of the same class, and cannot be affected by the result of the gift to such other member. *Knapping* v. *Tomlinson*, 10 Jur., N. S., 626; 34 L. J., Ch., 3; 12 W. R. 784; 10 L. T., N. S., 558.

4. Where there is a gift to a class, some of the objects of which are too remote, and some not, effect cannot be given to the latter separated from the former, but the whole gift is void. *Seaman* v. *Wood*, 22 Beav. 591.

The produce of real and personal estate was bequeathed upon trust for A. for life, and after his death, upon trust "to pay or transfer" it unto such children of A. as should attain the age of twenty-one, and also such children of any son of A. who should die under twenty-one, as should attain that age equally, but the children of any deceased son collectively to take their parents' share equally, with certain gifts over:—Held, that the whole of the limitations subsequent to the life estate were void for remoteness. *Ib.*

5. A husband gave his real and personal estate to trustees for his wife during widowhood, and after her death or second marriage for his children who might be living at such death or second marriage, and the issue of any child who might have previously died, such issue to take the share of her or his deceased parent in equal shares, the shares of such of his children or grandchildren as should be a son or sons to become vested in and payable to them as and when he or they should respectively attain the age of twenty-four, and the shares of his daughters, or the female issue of any deceased child, to be settled as therein mentioned:—Held, that the whole of the gifts after the life interest of the widow were void for remoteness. *Hale* v. *Hale*, 3 L. R., Ch. D., 643; 24 W. R. 1065; 35 L. T., N. S., 933.

6. Where there is a time fixed at which a fund is to be divided into separate shares, each share stands separate, and the gift of any share will take effect if the disposition of that particular share does not violate the rule against perpetuities, and will not be made void by the invalid gift of a portion of another share to the donee of the first mentioned share. But where there is a gift to a class, and the total amount to be taken by any member of the class cannot be ascertained within the period fixed by law, the whole gift is void. *Bentinck* v. *Portland* (*Duke*), 7 L. R., Ch. D., 693; 47 L. J., Ch., 235; 38 L. T., N. S., 58; 26 W. R. 278.

An aunt made a bequest in trust for such of her four nephews and nieces as should be living at the expiration of twelve months after the death of their mother, and the issue then living, who should attain the age of twenty-one years, of any of the nephews and nieces who should have died before the expiration of twelve months:—Held, on the construction of the will, that there was no period of distribution fixed except by the gift to the class; and, that as the members of the class might not ascertained until the expiration of more than twenty-one years from the death of the mother, the whole bequest failed. *Ib.*

7. A bequest of the residue after the death of the testator's wife to the testator's children then living, and such issue then living of any children then deceased as should attain the age of twenty-three as tenants in common according to the stocks and not to the individual objects, and so that the issue of deceased children might take by way of substitution the shares of their respective parents, is void for remoteness. *Smith* v. *Smith*, 5 L. R., Ch., 342; 18 W. R. 742.

1. Gift on trust for A. for life, and after her death for all her children who should attain twenty-one, and the issue of such of them as should die under that age leaving issue, "which issue shall afterwards attain the age of twenty-one years, or die under that age, leaving issue at his, her, or their decease or respective deceases, as tenants in common if more than one, but such issue to take only the share or shares which his, her, or their parent or parents respectively would have taken if living." None of the children of A. died under twenty-one leaving issue:—Held, that the whole gift was not void as infringing the rule against perpetuities, but that it might be severed, and the shares only would be void as to which the specified event happened. *Re Moseley*, 11 L. R., Eq., 499; 40 L. J., Ch., 275; 24 L. T., N. S., 260; 19 W. R. 431.

2. In ascertaining whether a bequest falls within the rule against remoteness, the words of the testator are first to be taken, and their meaning determined; and it is then to be considered whether that meaning brings them within the operation of the rule. *Pearks* v. *Moseley*, 5 L. R., App. Cas., 714; 50 L. J., Ch., 57; 43 L. T. 449; 20 W. R. 1. Affirming S. C. *nom. Re Moseley's Trusts*, 11 L. R., Ch. D., 555; 27 W. R. 896; 41 L. T. 9.

The vice of remoteness affects a class as a whole, if it may affect an unascertained number of its members. *Ib.*

Per the Lord Chancellor (Lord Selborne):—In a devise to a class, if all the shares would necessarily be ascertained within due limits of time, it would be immaterial that in a later part of the will there were found, as to some particular shares, superadded conditions which might or might not be void by reason of remoteness. *Ib.*

A will contained a bequest of a particular sum of 3,000*l.* to the testator's daughter and her husband for life, and after their deaths "My will is that the sum of 3,000*l.*, the securities for the same and the produce thereof, shall be in trust for all the children of my said daughter who shall attain the age of twenty-one years, and the lawful issue of such of them as shall die under that age, leaving lawful issue at his, her, or their decease or respective deceases, which issue shall afterwards attain the age of twenty-one years, or die under that age leaving issue at his, her, or their decease or deceases respectively, as tenants in common if more than one, but such issue to take only the share or shares which his, her, or their parent or parents respectively would have taken if living." A life interest in another sum of 3,000*l.* was given to the son with exactly the same trusts for his issue; in default, over:—Held, that the bequest was void for remoteness. *Ib.*

Held, also, that the bequest being to a class, the parts of it could not be severed, so as to treat one portion as good, though the other was void. *Ib.*

Hale v. *Hale* (3 L. R., Ch. D., 643) approved. *Ib.*

3. By a deed-poll S. declared that his trustees should hold the money to be received on certain policies on his life upon trust after the death or second marriage of his wife, to pay the fund between "all and every the child or children of S. by his wife equally to be divided if more than one . . . the share or shares of such of them as shall be a son or sons to belong to and be an interest vested and payable to him or them at his or their respective ages of twenty-five, and the share or shares of . . . . daughter or daughters to become vested but not payable upon her or their attaining twenty-one or day of marriage." The income of shares not vested was to be applied in maintenance of the children presumptively entitled thereto:—Held, that the gift was to a class, and that the invalidity of the gift to the sons made the whole gift void. *Re Stark*, 21 W. R. 165.

6. Gift to an Individual and a Class.

4. Testator gave annuities to his widow and son, and directed the surplus of his personal estate, and the rents of his real estate, to be invested in stock, and the dividends to be accumulated, and to be and remain assets for improvement, in the hands of his executors, until the time and times should arrive when distribution should be made, as thereby directed. The testator then directed his real estates to be sold after the decease of the survivor of his wife and son, and the proceeds to be invested in stock, and the dividends to be accumulated, to be and remain assets for improvement in the hands of his executors, for the benefit of his grandchildren and his nephew T. O., and to be distributed as they should become of the age of twenty-five years. The testator had two grandchildren born in his lifetime, both of whom died infants, one in his lifetime and the other after his death. Another grandchild was born after the testator's death, who was an infant when the bill was filed. T. O. survived the testator and attained twenty-five:—Held, that the bequest was void for remoteness. *Porter* v. *Fox*, 6 Sim. 485.

5. Freehold and leasehold estates were devised upon trust, after certain trusts that failed, to receive the rents and pay them for the benefit of the testator's daughter's son R., and all other sons she should leave, until he and they should attain the age of twenty-five years; and on attaining that age, in trust for the heirs, executors, administrators, and assigns of the said R., and all other such sons as the daughter should leave who should attain the age of twenty-five years; but if the daughter should leave no sons, or they should die without attaining that age, then in trust for other objects:—Held, that the gift to R. and the other sons of the testator's daughter was well vested in them, though liable to be divested in case of death under the age of twenty-five. *James* v. *Wynford* (*Lord*), 1 Sm. & G. 40; 17 Jur. 17; 22 L. J., Ch., 450; 1 W. R. 61.

Observations on *Porter* v. *Fox* (6 Sim. 485) how far it is consistent with *Leake* v. *Robinson* (2 Meriv. 203). *Ib.*

V. GIFTS TO UNBORN TENANTS FOR LIFE AND GIFTS OVER.

6. A limitation to an unborn child for life is not good, unless the remainder vests in inte-

rest at the same time. A testatrix after expressing her desire that certain stock should remain in the 3 per cents. for ever, bequeathed the dividends to her seven children for their lives, with survivorship among them, and directed that after the decease of all of them, their children should succeed to the annuity of their deceased parent, and that after the decease of the seven children's children, the dividends of the stock should devolve in annuities upon the lawful heirs of the testatrix:—Held, that all the gifts were void except the life interest given to the seven children. *Hayes* v. *Hayes*, 4 Russ. 311; 6 L. J., Ch., 141.

1. A testator gave a fund to his four brothers and sisters for life, with remainder to their children for life, with benefit of survivorship, "and from and immediately after the decease of the survivor of the said children of my said brothers and sisters," then over:—Held, that the gift over was void, and the corpus (subject to the prior gifts to the testator's brothers and sisters, and their children) belonged to the next-of-kin. *Cooke* v. *Bowler*, 2 Keen 54; 5 L. J., N. S., Ch., 250.

2. A bequest of personal estate to unborn issue as tenants for life, and to the executors, administrators, and assigns of the survivor of the unborn issue, gives an absolute interest to the survivor, and is not too remote. *Avern* v. *Lloyd*, 5 L. R., Eq., 383; 37 L. J., Ch., 489; 16 W. R. 669; 18 L. T., N. S., 282.

3. After a gift to an unborn person for life, there may be a good gift over if it vests within lives in being and twenty-one years. *Stuart* v. *Cockerell*, 7 L. R., Eq., 363; 38 L. J., Ch., 473; 20 L. T., N. S., 513. Affirmed 39 L. J., Ch., 729; 5 L. R., Ch., 713; 18 W. R. 1057; 23 L. T., N. S., 442.

Gift after the death of an unborn tenant for life to all the children of A., a living person, share and share alike, and the child or children of such of the said children as shall be then dead, according to the Statute of Distributions; but in case there shall be no child or grandchildren of A. then living, then over. This is not an original gift to the children of A. vesting at birth, with a mere invalid substitutionary gift to their children, but is an original gift to children and grandchildren living at the decease of the unborn tenant for life, and therefore too remote, and void. *Ib.*

4. A father devised his freehold and copyhold estates to trustees, upon trust to pay the income to his unmarried daughter during her life, and after her decease, if she should marry and have children, to her children during their lives, and in like manner to their children, each family taking among them their father's or mother's shares. On a petition by the daughter, who was unmarried:—Held, that the limitation to her unborn children was not void for remoteness. *Hampton* v. *Holman*, 46 L. J., Ch., 248; 25 W. R. 459; 36 L. T., N. S., 287; 5 L. R., Ch. D., 183.

5. A testator, after directing his trustees to receive the rents of his estates and to pay them in the support of his daughter M. G., and in the maintenance of all her children which she should from time to time have living, in equal shares, afterwards directed that from and immediately after the youngest of his grandchildren should have attained twenty-one, the rents should be paid to and amongst his said grandchildren, and the issue of any of them that should die leaving issue; and after the decease of the longest liver of his grandchildren, he directed his trustees to convey or dispose of his estates amongst the grandchildren of his daughter:—Held, that the gift included all children of M. G. who should be born at any time until some child should attain the age of twenty-one:—Held, that the children of M. G. took life estates as tenants in common, but without any benefit of survivorship; and that all the other trusts were void for remoteness. *Gooch* v. *Gooch*, 1 W. R. 191; 14 Beav. 565; 15 Jur. 1165; 21 L. J., Ch., 238. Affirmed 22 L. J., Ch., 1089; 3 De G. M. & G. 366.

6. A testatrix bequeathed stock to trustees in trust for her brother R.-G. for life, and after his decease in trust for his son J. R.-G., for life, and after the decease of both of them, upon trust for any immediate or direct descendants of her said brother or nephew, who should bear the name of R.-G., for life, and from and after his or her decease, or in case of failure of any such immediate or direct descendants of her said brother or nephew, who should bear that name, upon trust for certain charities, with a condition of forfeiture on abandoning the name of R.-G. Both R.-G. and his son J. R.-G. survived the testatrix, and J. R.-G. survived R.-G., but died without ever having had any issue. At the death of J. R.-G. the only descendant of R.-G., who bore the name of R.-G., was a descendant in the female line, C. G. R.-G., and he had assumed the name of R.-G. by royal licence after the death of R.-G.:—Held, that the gift to descendants was not confined to those whose family name or birth name was R.-G., but included descendants who assumed that name. That the gift to descendants was void for remoteness, and that the gift, as well to the charities as to the descendant who had assumed the name of R.-G., failed. *Re Roberts*, *Repington* v. *Roberts*, 45 L. T. 450; 19 L. R., Ch. D., 520. Affirming, on this point, 50 L. J., Ch., 265; 44 L. T. 300.

But held, that the intention of the testatrix was not that the descendants described should take singly and successively, but as a class for life, that C. G. R.-G. being the only member of the class, took the whole for life, and that the gift over to the charities was not void for remoteness, but took effect on the death of C. G. R.-G. *Ib.* Reversing on this point 50 L. J., Ch., 265; 44 L. T. 300.

7. A testator gave to A. an annuity of 50*l.* per annum for her life, and after her decease to the children she might have, born in wedlock, equally to be divided between them during their lives, and, after the decease of the survivor, to go to his nephew and his two nieces equally between them. A. having died without issue:—Held, that the gift to the nephew and nieces was not void for remoteness, and that they took the capital from whence the annuity proceeded absolutely, in equal shares, as tenants in common. *Evans* v. *Walker*, 3 L. R., Ch. D., 211; 25 W. R. 7.

8. A testator, by will in 1819, devised freehold and copyhold estates to trustees, after the death of all his three children except one, in case there should be no issue of such deceased children, or being such, they should all die, to

pay the rents to such one only child for life, and after the death of such surviving child, in the event aforesaid, leaving lawful issue, then to pay and divide the rents unto and among the children of such surviving child so dying, if more than one; and in case there should be but one child of such surviving child living at his or her death, or in case there should be more than one, and they should all except one depart this life, then, so soon as such event should happen, absolutely to convey the estates in fee to such only or surviving child of the survivor of his children so dying, on his or her attaining twenty-one, and in the meantime to apply the rents for his or her benefit:—Held, that this was a gift to the surviving children of the testator's surviving child for life, in equal shares as tenants in common, with remainder to the survivor of those children in fee; and that the remainder in fee was void for remoteness, and passed as undisposed of to the heir-at-law. *Garland* v. *Brown*, 10 L. T., N. S., 292.

1. A testatrix by will, dated in 1845, limited to a daughter an exclusive power of appointment by will amongst her children. The daughter, by her will, dated in 1874, in exercise of the power, appointed the fund amongst the objects of the power in certain shares, giving to two of her daughters life interests only, and declared that if either during her life or after her death any son or daughter of hers should marry a person who did not profess the Jewish religion, or was not born a Jew though converted to Judaism, or should forsake the Jewish and adopt the Christian or any other religion, then such son or daughter should forfeit all share in the fund, and in case of forfeiture the forfeited share was to accrue and go over to the other or others of the children living at the time of the forfeiture. Julius, a son of the appointor, married a Christian in his mother's lifetime, but without her consent. The plaintiff, one of the two daughters of the appointor, to whom a life interest only was appointed, became a Christian after the mother's death. Both Julius and the plaintiff were born after the death of the creator of the power:—Held, first, the forfeiture clause was not void as against public policy: secondly, that it was effectual as to the shares of children marrying Christians or becoming Christians during the lifetime of the appointor, and therefore that the share of Julius was forfeited: thirdly, that the forfeiture clause must be read in conjunction with the gift over, and therefore that so far as it affected, after the death of the appointor, the share of a child born after the death of the creator of the power, it was void for remoteness, whether such share was appointed for life only or absolutely, and consequently that the plaintiff had not forfeited her share. *Hodgson* v. *Halford*, 11 L. R., Ch. D., 959; 48 L. J., Ch., 548; 27 W. R. 545.

VI. GIFTS TO PERSONS ANSWERING A PARTICULAR DESCRIPTION AND SETTLEMENT OF HEIRLOOMS.

2. A. devises an advowson to the first or other son of B. that should be bred a clergyman, and be in holy orders, in fee; but in case B. should have no such son, then to C. in fee. Both devises are void, as depending on too remote a contingency; therefore, though B. dies without having a son, the heir-at-law of the the devisor, and not C., is entitled. *Proctor* v. *Bath and Wells (Bishop)*, 2 H. Bl. 358.

3. A., having issue several sons, the eldest *non compos*, created a term for years, and by another deed declared the trust thereof to his second son, and the heirs male of his body, remainders to his other sons, provided that if his eldest son died without issue, or not leaving his wife *enceinte* with child, living the second son, then the said term to remain to the third son, and the heirs male of his body, with like limitations to the other sons: the eldest son died without issue, living the second; this limitation to the third son was held good by Lord Nottingham, *contra* the opinion of the three chief justices who assisted him. *Duke of Norfolk's case*, 3 Ch. Ca. 1. This decree was reversed by North, C. S. (see 1 Vern. 163); but upon appeal to the Lords, Lord North's decree was reversed, and Lord Nottingham's established. Note, executory devises and limitations of the trust of a term are governed alike. And see *Massenburgh* v. *Ash*, 1 Vern. 235.

4. Testator gave 1,000*l.* to M. and the issue of her body, and in default of such issue he gave the said 1,000*l.* to be equally divided between the daughters then living of J. and E. his wife. This devise takes in daughters of J. and E. born after the testator's death, and therefore the limitation is too remote. *Jee* v. *Audley*, 1 Cox 324.

5. Where a testator by will gave his personalty in trust to pay the dividends to the children and grandchildren of A., who should not from time to time be entitled under a previous devise to the rents of the freeholds, but by a codicil directed that the children of B. and C. living at the death of A. should "take their shares" of the personalty with the representatives of A.:—Held, upon the will and codicil taken together, that the children and grandchildren intended were all those who should be living at the death of A., and that the bequest was not too remote. *Harvey* v. *Harvey*, 5 Beav. 131. And see 4 *id.* 215.

6. A testator, being entitled to leasehold premises for terms of years, bequeathed them to trustees, on trust to permit his grandson B. to take the profits thereof during his life, and after his decease to permit such person who, for the time being, would take by descent as heir male of the body of the said B., his grandson, to take the profits thereof until some such person should attain the age of twenty-one years, and then to convey the same to such person so attaining that age, his executors, administrators, and assigns; but if no such person should live to attain the age of twenty-one, then in trust to permit such person and persons successively who for the time being would take by descent as heirs male of the body of the testator's son, father of B., to take the profits of the same leasehold premises until one of them should attain the age of twenty-one, and then to convey the same to such heir male first attaining that age, his executors, administrators, and assigns. At the death of B., the grandson, his son and heir A. had attained the age of twenty-one, and entered into possession of the leasehold premises. Upon a bill filed against him by the next-of-kin of the testator

—Held, that A. had not a good title to the leaseholds; that the bequest to the heir male of the grandson attaining twenty-one was void for remoteness, and therefore that the next-of-kin of the testator at his death became entitled to their distributive shares of the property on the death of the grandson. *Dungannon (Lord)* v. *Smith*, 12 Cl. & F. 546; 10 Jur. 721. Affirming S. C. *nom. Smith* v. *Dungannon (Lord)*, Fl. & K. 638; 1 Dr. & War. 543. n.; 5 Ir. Eq. R. 84.

1. A testator bequeathed leaseholds to trustees, in trust to apply the rents for the maintenance of his grandson, A. T., until he should attain twenty-one; and then to permit A. T. to take the rents and profits for his life; and from and after his decease to permit the person who for the time being would take by descent as heir male of the body of the said A. T., to take the rents and profits thereof until some such person should attain the age of twenty-one years, and then to convey the same to such person on attaining the age of twenty-one years. *Semble*, that all the limitations after that to A. T. for his life, were void for remoteness. *Ker* or *Kerr* v. *Dungannon (Lord)*, 1 Dr. & War. 509; 1 Con. & L. 335; 4 Ir. Eq. R. 343.

When the first limitation is void, all those following it are void also. *Ib.*

2. Testator devised his reversion in fee expectant on his decease without issue male in his mansion-house and estates at D. to his brother for life, with remainder to his first and other sons in tail male, with divers remainders over, and he bequeathed his plate, pictures, etc., in and about his mansion-house at D. to trustees in trust to permit the same to be used and enjoyed by the person or persons who for the time being should be entitled to the possession of his mansion-house under the settlement on his marriage or the limitations contained in his will, until a tenant in tail of the age of twenty-one years should be in possession of his mansion-house, and then the plate, pictures, etc., were to go and belong to such tenant in tail, and he gave the residue of his personal estate to the person who at his decease would be beneficially entitled in possession to his mansion-house. The testator's brother had a son born at the date of the will, and both he and his son survived the testator: —Held, that the trust declared of the plate, pictures, etc., was void for remoteness, so far as it intended to take effect after the death of the brother. *Ibbetson* v. *Ibbetson*, 5 Myl. & C. 26; 10 L. J., N. S., Ch., 49. Affirming 10 Sim. 495; 4 Jur. 408.

3. Plaintiff's father, upon marriage of daughters, demises estate to trustees upon trusts, for raising certain sums, which are settled upon daughters and their children, and by will, after charging estate with other sums to be settled upon same trusts with portions for sons, and with further sum in discharge of mortgage of another estate, he devises it to other trustees upon trust, from time to time to receive rents, etc., and to invest same in purchase of stock, so as to accumulate and form a fund for payment of aforesaid charges; and after same should have been raised and paid, upon trust to pay net rents, etc., unto or for benefit of such person of his own name, etc., as for time being should succeed to and be vested with his title and dignity of baronet, to end that his said estate might be continued in his name, etc., and be enjoyed and go along with his title, so long as rules of law and equity would permit; but if upon failure of issue male of his body there should not be any person who should be entitled to enjoy his title, upon trust to stand seised of estate, for benefit of person or persons who should be his right heir or heirs at law, and to convey and assure same accordingly:—Held, that trust for accumulation was good, and that plaintiff, succeeding baronet, took vested estate for life. *Bacon* v. *Proctor*, T. & R. 31.

4. Gift upon trust to wife for life, and then to use of son for life, and after death of survivor upon trust for such persons as should, from time to time, be Lord V., etc.:—Held, not an executory trust, but a direct gift to each Lord V. successively, and that all living at testator's death who might become Lord V. took a vested interest. *Deerhurst* v. *St. Albans*, 5 Madd. 232.

5. V., by his will, bequeathed to trustees all his household goods, furniture, pictures, books, linen, etc., upon trust, to permit his wife to have the use of them during her life, and upon her death, to permit his son, A. B., to have the use of the same goods, etc., for his life; and upon the decease of the survivor of his wife and son, should be possessed, etc., in trust for such persons as should from time to time be Lord V., it being his will, that the goods, etc., after the decease of his wife, should from time to time go and be held and enjoyed with the title of the family, as far as the rules of law and equity would permit: —Held, that the limitation over was void, as being too remote, and that the estate vested absolutely in the eldest son of A. B., grandson of the testator, who was living at the date of his death. *Tollemache* v. *Coventry (Earl)*, 8 Bli. N. S. 547; 2 Cl. & F. 611.

6. Although the words in a will "as far as the rules of law or equity will permit" will not correct a gift which in terms infringes the rule against perpetuity, they may be fairly referred to when a construction warranted by the words used is impugned on the ground of inconsistency with the intention of the testator. *Harrington (Countess)* v. *Harrington (Earl)*, 3 L. R., Ch., 564; 37 L. J., Ch., 593; 16 W. R. 742; 19 L. T., N. S., 38.

7. G. devised freeholds for the use of his nephew for life, with remainder to the use of his first and other sons in tale male, with successive remainders over for life, and remainders to the first and other sons of the successive tenants for life in tail male; and he bequeathed his residuary personal estate upon such trusts as were thereby declared concerning the devised freehold hereditaments, "or as near thereto as the rules of law and equity would permit; provided, nevertheless, that such residuary personal estate should not vest absolutely in any tenant in tail, unless such person should attain the age of twenty-one years":—Held, that the proviso merely narrowed the class who would have taken under the previous words of gift, and did not extend such class to tenants in tail by descent; and, therefore, the personalty vested only in tenants in tail by purchase, and the gift was not void for remoteness. *Christie* v. *Gosling*, 1 L. R., H. L., 279; 35 L. J., Ch., 667; 15 L. T., N. S.,

40. Affirming S. C. *nom. Gosling* v. *Gosling*, 1 De G. J. & S. 1; 9 Jur., N. S., 109; 32 L. J., Ch., 233; 7 L. T., N. S., 579; 1 N. R. 36; 11 W. R. 97. Reversing 10 W. R. 785; 7 L. T., N. S., 490; 32 Beav. 58; 8 Jur., N. S., 1048.

Held, also, that the words "as near as the rules of law and equity will permit," would not by their own force have controlled the construction. *Ib.*

1. The phrase "estate tail in possession" does not necessarily mean actual possession, but may be construed as meaning entitled to a vested estate tail in the property, though it may be vested in remainder and the party entitled may not be in actual possession, a previous life estate existing at the time. *Martelli* v. *Holloway*, 5 L. R., H. L., 532.

There may be a particular clause in a will which on one construction appears to offend against the law relating to perpetuities, but, if it is fairly capable of another construction which avoids that objection, the latter construction will be preferred, especially if it is found to be in accordance with the general intention of the will. *Ib.*

A father devised and bequeathed real and personal estates in trust for the eldest son then living of his the testator's daughter C. for life, remainder to his first and other sons in tail, with like remainder to the other sons of C., with divers remainders over, and an ultimate remainder to his right heirs and next-of-kin. The will then provided that such person or persons as should thereunder be entitled to an estate tail in possession in the real estate should not be absolutely entitled to the leasehold and personal estates until he, she, or they respectively should attain the age of twenty-one, and that the leasehold and personal estates should absolutely belong only to such person or persons as should first attain the age of twenty-one, and become entitled to an estate tail in possession in his real estate under the trusts therein aforesaid, and in the meantime the leasehold and personal estates should remain subject to the trusts thereinbefore declared:—Held, that the words "in possession" in the proviso in the will did not mean the actual receipt of the rents and profits of the real estate, and that the proviso included only tenants in tail by purchase and was valid, and that the tenant in tail entitled by purchase who first attained the age of twenty-one, although in the lifetime of the tenant for life, was absolutely entitled (subject to his father's life interest) to the leasehold and personal estates. S. C. 42 L. J., Ch., 26.

2. A testator devised real estate unto and to the use of trustees, their heirs, and assigns, upon trust to permit his wife to receive the rents during her life; and, after her decease, subject to certain trusts for accumulating the rents in the meantime so long as the same could legally operate, to stand possessed of the said real estate in trust for the youngest grandson of A. who should be living at the decease of his wife, and should then have attained, or should live to attain, the age of twenty-five years, for life; and, after his decease, upon trust for his first and other sons in tail male. The widow of the testator died in 1879. At that time the youngest grandson of A. had attained twenty-one, but had not attained twenty-five:—Held, that there being no words in the will which would have the effect of vesting the property in the youngest grandson before he attained twenty-five, this gift was void for remoteness. *Patching* v. *Barnett*, 51 L. J., Ch., 74; 45 L. T. 292. Affirming 49 L. J., Ch., 665; 43 L. T. 50; 28 W. R. 836.

3. The testatrix, Miss R., had a brother, a widower advanced in life, who had assumed the name of R. G., and had two children, one a bachelor of unsound mind, the other a daughter. By her will she bequeathed a fund to trustees in trust to pay the income to her brother for life, then to his son for life, and from and after the decease of both of them, upon trust to pay the income "for life unto any immediate or direct descendants of my said brother or nephew who shall bear the name of R. G. only, and from and after his or her decease, or in case of failure of any such immediate or direct descendants of my said brother or nephew who shall bear the name of R. G. only," upon trust for certain specified charitable societies. There was a clause for determining the interests of any descendants who, after becoming entitled to the receipt of the income, should abandon the name of R. G. Before the death of the nephew, a son born after the death of the testatrix, of the daughter of the testatrix's brother, assumed by royal licence the name of R. G., and at the decease of the survivor of the brother and nephew there was no other descendant of either of them who bore that name:—Held, that the gift was not, as in *Leigh* v. *Leigh* (15 Ves. 92), confined to persons entitled to the name of R. G. by birth, and that the brother's grandson, as he bore the name of R. G. at the determination of the life interests, was entitled for life, and that on his decease the gift to the charities would take effect. *Re Roberts*, *Rovington* v. *Roberts-Gawen*, 19 L. R., Ch. D., 520; 45 L. T. 450.

Held, by Hall, V.-Ch. (50 L. J., Ch., 265; 44 L. T. 300), that the trusts subsequent to the life interests of the brother and nephew were void for remoteness, and that on the determination of those interests the fund fell into the residue. But held, on appeal, that the limitations after the life interests were not void for remoteness. *Ib.*

Held, that the limitation to descendants was a gift for life to descendants living at the determination of the life interests and bearing the name of R. G. as joint tenants. *Ib.*

4. A testator bequeathed to his executors and trustees all his personal estate (except such goods as were by his will especially bequeathed, and also except his leasehold estates, which he declared it to be his intention to exonerate from the payment of his debts and legacies), upon trust, in the first place, to pay his debts, funeral and testamentary expenses, and legacies; and in case there should be any residue of his personal estate (except as aforesaid), he gave the same to his son R. And after giving certain specific legacies, the testator gave all his freehold hereditaments to the same trustees, upon trust for his said son R. for life, with remainder to his grandson W. for life, with divers remainders over in tail. And the testator gave all his leasehold estates to the same trustees, in trust to permit the

clear rents thereof to be received, taken, and enjoyed by the person for the time being entitled to the freeholds, until such person should by good assurance become seised of the freeholds in fee simple in possession; and then in trust to convey and assign the leaseholds to him:—Held, that the limitations of the leaseholds beyond the life estates of R. and W. were void for remoteness; and that the interest thus improperly attempted to be given did not belong absolutely to W. as the last tenant for life, nor did it pass by the residuary bequest to R., because the exception of the leaseholds out of the residuary gift was not simply for the purpose of making a separate bequest of them, but also to exonerate them from payment of the debts and legacies; and therefore held, that, beyond W.'s life estate, the leaseholds were undisposed of by the will, and belonged to the next-of-kin of the testator. *Wainman* v. *Field*, 1 Kay 507.

1. Testator gave his real and personal property in trust for all his children who might be living at his decease, for their lives; and in case any of the daughters should marry, he gave their shares or share upon certain trusts for their husbands and children after them, and in default of any such child or children he gave such shares equally among his surviving children:—Held, that the gift over of the shares applied only to the shares of daughters marrying, and that the share of one who died a spinster was undisposed of after death. *Lett* v. *Randall*, 10 Sim. 112.

VII. POWERS.

1. *Creation of Powers of Appointment*, 5644.
2. *Creation of Powers of Sale, Leasing, or Management*, 5645.
3. *Execution of*. See IV. *supra*—POWER, XVI.

1. Creation of Powers of Appointment.

2. Settlement on husband and wife for lives, remainder to sons in tail male, remainder to daughters in tail, remainder to survivor of husband and wife in fee, with power to wife if husband survived, and all the children of marriage died without issue, to charge estate with 5,000*l.*:—Held, that power is too remote and void. *Bristow* v. *Boothby*, 2 Sim. & S. 465; 4 L. J., Ch., 87.

3. Real estate was devised, in 1878, to the son-in-law of the testator for his life, remainder to his daughter, the wife of such son-in-law, for her life, remainder to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail, with cross-remainders between them; and, in default of such issue of his daughters, to such person or persons as she should, by deed or will, appoint. In 1841 the daughter, the donee of the power, executed a deed-poll of appointment, which, reciting the limitations of the estate by the will, that she had not any issue of her body, and that she was desirous of exercising the power subject to the life interest of her husband and herself, as thereinafter mentioned, "and there being a failure of issue of her," the said donee of the power, the estate should go, remain, and be unto and to the use of the plaintiff, his heirs and assigns for ever:—Held, that this was a good appointment of the estate under the power; that the words "and there being a failure of issue of," etc., must be read either parenthetically, or as applying to the time of the death of the survivor of the donee of the power and her husband; that the construction that the donee might have intended to appoint, or to reserve a power to appoint, to the female descendants of sons, or to give such descendants the chance of taking by descent, would be merely conjectural, and, moreover, was excluded by the express language of the will creating the power, which made no provisions for female descendants of male issue, and was rebutted by the great age of the donee, who was then without any issue; that the title of the plaintiff under the appointment was one which the Court, in a suit for specific performance, would compel the purchaser to take. *Eno* v. *Eno*, 6 Hare 171; 16 L. J., N. S., Ch., 358; 11 Jur. 746.

4. By a marriage settlement, the trustees were directed, after the decease of the survivor of the husband and wife, to convey, assign, and deliver the settled property to such children or child of the marriage, or the lawful issue of such, who should or might be living at the decease of the survivor, and who should attain twenty-one, to whom the husband and wife should jointly appoint, or to whom the survivor of them should appoint; and in default of appointment, to permit the property to be held and enjoyed by and equally between all the children of the marriage and the survivors of them, and the lawful issue of such children or child so surviving the husband and wife, and attaining twenty-one, such issue representing and taking the share that the parent would have taken, if living:—Held, that the words in the clause creating the power, "who shall or may be living at the decease of the survivor," referred to the children of the marriage, and not to their issue; and therefore that clause exceeded the limits prescribed by law, and consequently that an appointment made to the son of a daughter of the marriage was void. *Thomas* v. *Thomas*, 14 Sim. 234.

5. Residue of testator's real and personal estate was given to J. upon trust to divide it in moieties, and to pay the income of one moiety to J. for life, with a direction out of such moiety to set apart a sum of 5,000*l.* to be held by trustees upon trust for X. or such of his children as to J. or other the testators should seem meet; and when X. and all his children should be dead, then the above sum to be subject to the same trusts as declared of the other moiety of the residue. The testator appointed J. his sole executor, and his will contained a power to appoint new trustees. J. being anxious to appoint 3,000*l.* part of the 5,000*l.* absolutely in favour of X.:—Held, that the power to advance the 5,000*l.* was not void for remoteness; that the power might properly be divided into two distinct powers—one vested in J., the other in the succeeding trustees, in default of J.'s exercising the power; that J. had clearly the right to exercise the power, whether the succeeding trustees had or not. *Attenborough* v. *Attenborough*, 1 Kay & J. 296.

1. A power of appointment is badly created, where it is possible that the exact composition of the class of persons among whom appointment is to be made may not be ascertained till after the period fixed by the rule against perpetuities, even though the extreme limits of the class must be ascertained within that period. E. B. by her will, after giving certain annuities out of the rental of a wharf, and directing the surplus rental to be accumulated for the purpose of paying off two mortgages upon the wharf, directed her executors that after payment of the annuities and discharge of the mortgages, they were to sell the wharf and divide the proceeds among such of her grandchildren as might then be surviving, and in such proportions as C. H. might by her will appoint:—Held, that, since the annuities and mortgages might not be finally paid off until after the period fixed by the rule against perpetuities, and the class of grandchildren among whom C. H. was to appoint would not be ascertained till that event had happened, the power of appointment was badly created, though all the grandchildren must be born within the prescribed period. *Re Blight, Blight* v. *Hartnoll*, 45 L. T. 524; 19 L. R., Ch. D., 294; 51 L. J., Ch., 162; 30 W. R. 513.

2. A power to appoint is not bad because it may be so exercised as to render the appointment void as being too remote. *Slark* v. *Dakyns*, 10 L. R., Ch., 35; 44 L. J., Ch., 205; 31 L. T., N. S., 712.

See also XII. *infra*.

2. Creation of Powers of Sale, Leasing, and Management.

3. Leasehold estates bequeathed in trust, to pay the rents and profits to the persons for the time being entitled under the limitations of real estate devised in strict settlement, with power to trustees at any time, with consent of the persons so entitled, or if minors at their own discretion, to sell and invest the produce in real estate to the same uses. The leasehold estates vest absolutely in the tenant in tail upon his birth, and the power is void. *Ware* v. *Polhill*, 11 Ves. 257. See also *Powis* v. *Capron*, 4 Sim. 138. n.

4. A power of sale is not void, although the exercise of it is not expressly confined within the limit of perpetuity. *Biddle* v. *Perkins*, 4 Sim. 135.

5. Testator devised his estates to trustees in trust for his brothers first, and other sons successively, in fee; but so that the estate and interest of each of them should cease in favour of his next brother on his dying under twenty-one, and without leaving issue living at his death; and if all of them should die under that age, and without leaving issue living at their deaths, in trust for the person who should then be his heir absolutely. And he empowered the trustees of his will for the time being to sell the estate at any time after his decease, and at their sole discretion:—Held, that the power of sale was valid. *Nelson* v. *Callow*, 15 Sim. 353.

6. A power of sale, to be exercised during the continuance of successive estates tail, is good. *Waring* v. *Coventry*, 1 Myl. & K. 249.

7. Whatever objections may exist to an indefinite power of sale, on the ground of its tending to a perpetuity, such objections will not prevent the valid exercise of the power during the continuance of limitations, which are within the prescribed legal limits, *semble*. *Wood* v. *White*, 4 Myl. & C. 460; 8 L. J., N. S., Ch., 209; 3 Jur. 117; 2 Keen 664; 7 L. J., N. S., Ch., 203.

8. Trusts for sale on failure of a series of prior limitations:—Held, on the context, to be too remote. *Hale* v. *Pew*, 25 Beav. 335.

9. An estate was devised to trustees for different persons in fifth shares, some of which shares were given to living persons absolutely, and the others to living persons for life, with remainder to their children in fee. An unlimited power of sale over the whole estate was given to trustees:—Held, that this power of sale was valid, and could be exercised over the whole estate, so long as any of the trusts of any of the shares remained to be performed. *Taite* v. *Swinstead*, 26 Beav. 525; 5 Jur., N. S., 1019.

10. A father, on the marriage of his daughter, in 1806, settled real estate upon trusts for her separate use for life, with remainder, in case she survived her husband (which event happened), to her children, as tenants in common in tail, and limited the reversion to himself in fee. The settlement contained a collateral power of sale, not in terms restricted as to time. In 1850, the daughter's issue being spent, and she being a widow, and more than seventy, the trustees executed a deed purporting to be made in exercise of the power, and to be a conveyance of the fee simple:—Held, first, that the power was valid, and subsisting at the date of the deed of 1850. *Lantsbery* v. *Collier*, 2 Kay & J. 709; 25 L. J., Ch., 672; 4 W. R. 826.

Held, secondly, that it was well exercised by that deed, although, under the trusts of the settlement, the effect of its exercise was to change the devolution of the property, passing it, in the events which had happened, to the daughter absolutely. *Ib.*

Observations on *Ware* v. *Polhill* (11 Ves. 257), and review of the authorities respecting collateral powers of sale, not in terms restricted as to time. The Court looks to the whole intent and purpose of the settlement, and, whether the reversion or remainder in fee simple be limited after estates tail or after estates for life, will hold the power to be valid and subsisting until the estates tail (if any) are barred, or the fee simple vested in possession; in either of which events the purpose of the settlement is spent, and the power ceases. *Ib.*

11. A testator directed his trustees, after the death of the longest liver of his son, his daughter, and any widow whom the son might leave, to sell his real estate and to stand possessed of the proceeds and of the rents and profits until sale, upon trust to pay and apply them "unto and equally amongst all and every the child and children of my son W. and daughter M., share and share alike, and the lawful issue of such of them as may be then dead leaving issue, such issue to be entitled to no more than their parent or respective parents would have been if living." He directed that if his daughter's son then

living should die without leaving issue, or, leaving issue, all of them should die under age and unmarried, the trustees should pay the share which would have been payable to him under the above trusts to the children of J.; and that if the testator's son died without leaving issue, or all of them died under age and unmarried, the trustees should pay the share which would have been payable to them under the trusts aforesaid, to the children of J. and M. The heir-at-law claimed the corpus as undisposed of, on the ground that the disposition of the proceeds of sale was void for remoteness as being a gift to a class not ascertainable till at or after the death of the son's widow, who might be a person unborn at the testator's death:—Held, that the gift was not a gift to such children of the son and daughter as should be living at the period of distribution and the issue of such of them as should be then dead, but a gift to all the children of the son and daughter, with a gift over by way of substitution of the shares of such of them as might die before the period of distribution leaving issue; that when the gift over of any share was void for remoteness the original gift remained unaffected, and that the heir-at-law had no title. *Re Goodier, Goodier* v. *Johnson*, 18 L. R., Ch. D., 441; 51 L. J., Ch., 369; 45 L. T. 515; 30 W. R. 449.

Leasing Power.] 1. An estate was devised in strict settlement to A. and his children (in tail), with remainder to B. and her children in like manner, with remainder to right heirs of testator; and by the will, a power of leasing was given to the trustees, to take effect during the minority of any child, who, by virtue of the will, should at any time be entitled to the possession of the estate:—Held, that the power given, though for an indefinite period, was good, as it might be barred, by recovery, by A. and his eldest son when of age. *Wallis* v. *Freestone*, 10 Sim. 225.

Power to cut Timber.] 2. By a settlement family estates were vested in trustees, upon trusts to raise moneys towards the discharge of incumbrances, and, subject thereto, upon trust for a father for life, remainder to his eldest son for life, without impeachment of waste, subject to a power thereinafter given to the trustees, remainder to the first and other sons of the son in tail male, remainder to the heirs and assigns of the father in fee. The power given to the trustees was, that it should be lawful for them at any time or times thereafter, so long as there should be any mortgages upon the estates (but, after the death of the father, not without the consent of the son, if living) to fell timber upon the estates, and to apply the proceeds in discharge of the incumbrances:—Held, that the power to the trustees was not to any extent invalid as tending to perpetuity. *Briggs* v. *Oxford (Earl)*, 1 De G. M. & G. 363; 21 L. J., N. S., Ch., 829; 16 Jur. 558. Affirming 5 De G. & Sm. 156; 16 Jur. 53.

See also IX. *infra.*

VIII. TERMS PRECEDENT TO ESTATE TAIL.

3. The trusts of a term, limited previous to an estate tail, for raising extra portions on the death of a party without issue, were held invalid, as tending to a perpetuity, because, the term being limited antecedently to the estate tail, it could not be defeated by a recovery. *Case* v. *Drosier*, 2 Keen 764; 6 L. J., N. S., Ch., 353; 1 Jur. 352.

Testator devised two estates to trustees for 500 years, and subject thereto devised one estate to his grandson A. for life, with remainder to A.'s son in tail male, with remainder to A.'s daughters in tail general, with remainder to testator's grandson B. for life, with similar remainders to B.'s issue, and devised the other estate to B. for life, with remainder to B.'s sons in tail male, with remainder to his daughters in tail general, with remainder to A. for life, with similar remainders to his issue; and he declared the trusts of the 500 years' term to be that in case either A. or B. should die without issue, whereby the survivor of them would become entitled to both estates, 2,000*l.* should be raised for each of the testator's two granddaughters. A. died, leaving a daughter, and then B. died without issue, whereupon the two estates became united in A.'s daughter; but, as both A. and B. were dead, the event of the survivor of them becoming entitled to both estates did not happen:—Held, that if it was intended that the 2,000*l.* should be payable in case of an union of both estates happening otherwise than in the lifetime of one of the two grandsons (A. and B.), such intention was too remote. S. C. on appeal, 5 Myl. & C. 246; 3 Jur. 1164.

4. A testatrix devised real estate to trustees and their heirs, upon trust, in the first place, to receive and retain out of the rents and profits a sum of 800*l.* yearly, and, subject to such annual sum, she devised the said real estate to the use of her daughter for life for her separate use, with remainder to her daughter's son, T., for life, with remainder to his first and other sons successively born during the testatrix's lifetime, for life, with remainder, after the death of each such son, to his first and other sons in tail male, with remainder to the sons of T. born after the death of the testatrix, successively in tail male, with remainder to her daughter's son R. for life, with like remainder to his sons and their issue male, with remainder to her daughter's son E. for life, with like remainder to his sons and their issue male, with like remainders to the other sons of her daughter, and the heirs male of the body of each such son, with remainder over. And the testatrix declared that her trustees should, during the continuance of the limitations given by her will to her daughter and her male issue, accumulate the aforesaid sum of 800*l.* and apply the accumulations to the discharge of incumbrances on the estate, or in the purchase of head-rents in perpetuity, or real or freehold estates in Ireland, said rents or estates to be held upon the like uses or trusts as her real estate:—Held, that the gift of the annuity of 800*l.*, and the trusts upon which it was given, were void *ab initio*, as transgressing the rule against perpetuities. *Cochrane* v. *Cochrane*, 11 L. R., Ir., 361.

5. A term limited, after estates for life, but antecedently to estates tail, for the purpose of raising portions on failure of the issue in tail, is void for remoteness. *Sykes* v. *Sykes*, 41

L. J., Ch., 25; 13 L. R., Eq., 56; 25 L. T., N. S., 560; 20 W. R. 90.

A testator devised hereditaments to his eldest son R. for life, with remainder to the eldest son of R. for life, with remainder to trustees for a term of 500 years upon the trusts thereinafter expressed concerning the same, and from and after the end or sooner determination of the term, and in the meantime subject to the trusts thereof, to the first and other sons successively of R., the grandson of the testator, in tail male, with remainders to the second and other sons successively of R., the son of the testator in tail male, with remainder to the testator's son N. for life, with remainders to the first and other sons successively of N. in tail male, with remainders over, and declared the trusts of the term to be that in case any one or more of his younger sons, or their respective issue, should become seised in possession by virtue of the limitations aforesaid of the hereditaments, the trustees should raise 5,000*l.* and pay the same to such of the testator's sons (except such son as should be so seised in possession) as should be then living, or their issue if dead. A great-grandson of N. became seised in possession by virtue of the limitations aforesaid of the hereditaments:—Held, that the charge of 5,000*l.* was void for remoteness. *Ib.*

IX. TERMS CONCURRENT WITH ESTATE TAIL.

1. Trust of term during minorities of respective tenants for life or in tail, in possession, etc., to receive and lay out rents, etc., in stock, to accumulate for such persons as should, upon expiration of such minorities or death of minors, be tenants in possession, or entitled to the rents, and of age of twenty-one, is too remote; and being void in its creation is incapable of modification, so as to establish it in the extent to which it might legally have been carried. *Southampton (Lord)* v. *Hertford (Marquis)*, 2 Ves. & B. 54.

2. Testatrix, after giving real estates to trustees in trust for A. B. for life, with remainder in trust for his issue in strict settlement, directed that during the minority of any person taking any estate or interest under the limitations of the will, the rents should be received by the trustees and invested; and the interest, etc., thereof to be from time to time invested; all which securities and the accumulations were to be held by the trustees upon the same trusts, etc., as had been limited concerning the lands, so far as the different nature of the property would permit, or such of them as should be then subsisting or capable of taking effect:—Held, that this trust for accumulation was void. *Turvin* or *Turvin* v. *Newcome*, 5 W. R. 35; 3 Jur., N. S., 203; 3 Kay & J. 16.

3. By a settlement real estate was assured to the use of trustees for a term of 500 years, and, subject thereto, to the use of A. for life, with remainder to his first and other sons in tail, with remainder to B. for life, with remainder to his first and other sons in tail, with divers remainders over; and a power was given to the trustees during the minority of any person who should from time to time be entitled under the limitations of the settlement to the immediate freehold as tenant for life or in tail, to enter into possession of and manage the estates:—Held, that the power was void for remoteness. *Floyer* v. *Bankes*, 8 L. R., Eq., 115.

4. Case in which an account of timber felled during life of tenant for life, etc., refused on account of the power given to trustees being void, etc. *Ferrand* v. *Wilson*, 4 Hare 344; 15 L. J., N. S., Ch., 41; 9 Jur. 860.

5. Devise of freehold on trust for the first and other sons successively in tail male, directing that "if any person, beneficially entitled, should be under twenty-one, the trustee should apply a competent part of the rents, etc., for his maintenance, and invest the remaining part, so as the same might accumulate, and be invested from time to time, and settled to the same uses as the devised estate:—Held, that the trust for accumulation was void. *Browne* v. *Stoughton*, 14 Sim. 369. S. C. *nom. Browne* v. *Houghton*, 15 L. J., N. S., Ch., 391; 10 Jur. 747.

6. Devise and bequest of real and personal estate on trust, to invest the rents and profits, and annual proceeds, while any person beneficially interested in the real and personal estate, by virtue of trusts afterwards declared, should be under twenty-one, for the purpose of accumulation; and subject thereto, in trust for the eldest son then living of the testator's daughter C., for life; remainder to his first and other sons, in tail, with like remainder to the other living sons of C.; with remainder to the eldest living daughter of C. for life; remainder to her first and other sons in tail, with like remainder to the other living daughters of C., remainder to every other son of C., in tail, remainder to the daughters of the testator's eldest grandson; with remainder to the daughters of his other living grandsons; remainder to the daughters of his eldest granddaughter, as tenants in common in tail, with like remainder to the daughters of his other living granddaughters; remainder to the daughters of C., as tenants in common in tail, with cross-remainders in tail: and an ultimate limitation to the testator's heir and next-of-kin; with a proviso, that such persons as should be entitled to an estate in tail in the real estate should not be absolutely entitled to the personal estate before twenty-one, which should, in the meantime, be subject to the trusts before declared: the eldest grandson, an infant, takes a vested interest for life; the trust of accumulation is void, and the infant entitled to maintenance. *Marshall* v. *Holloway*, 2 Swan. 432.

7. A testator directed a settlement to be made to certain uses, so far as the rules of law and equity would permit; he then gave certain estates to trustees for 2,000 years, and, subject thereto, to certain of his sons and their issue, in settlement; and he directed the trustees of the term to pay to any child of his body, or the issue of such, who should for the time be entitled to the rents of the estates, and who, having attained his age of twenty-one years, should be under his age of twenty-five years, an annuity, and to receive and accumulate the surplus. He then directed his trustees, during the minority of any person entitled to the actual possession of the estates, to apply a competent part of the rents and profits to the

maintenance of such person, and invest and accumulate the residue; and he made the accumulations a fund to be resorted to for payment of debts:—Held, that the trusts for accumulation were void. *Scarisbrick* v. *Skelmersdale*, 19 L. J., N. S., Ch., 126; 14 Jur. 562; 17 Sim. 187.

1. Devise to J. for life, remainder to his first and other sons in tail male, with a proviso that if the devisees entitled to the possession of the estate shall be severally under the age of twenty-six, the trustee shall receive the rents and apply them as directed. J. died leaving a son under twenty-six; and held, the proviso was void as against him. *Lade* v. *Holford*, Ambl. 479; 3 Burr. 1416; 1 W. Bla. Rep. 428.

X. TERMS OR LIMITATIONS SUBSEQUENT TO ESTATE TAIL.

2. Proviso in a will that, in case the devisee should come into possession of the family estate, the trustees should stand seised of the devised estate to the use of the next person in remainder, valid; and the eldest son of the tenant in possession is the next person in remainder. *Nicolls* v. *Sheffield*, 2 Bro. C. C. 215.

3. A testatrix devises to A. for life, remainder to A.'s first and other sons in tail male, remainder to A.'s daughters as tenants in common in tail, with cross-remainder between them in tail; remainder to trustees for a term of years upon trusts to raise and pay such legacies as she had thereafter given, or should give by any codicil; and in subsequent part of the will, she bequeaths various legacies from and immediately after the decease and failure of issue of A.:—Held, that "failure of issue," in the gift of the legacies, must be considered "failure of such issue" as were included in the limitation of the estate, and that therefore the bequests were not too remote. *Morse* v. *Ormonde*, 1 Russ. 382; 4 L. J., Ch., 158.

4. Testator bequeathed 5,000*l.* in trust to pay the interest to his nephew John for life, remainder to John's first son for life, remainder to the principal for the children of John, and for default of such issue to pay the interest to the second and other sons of John successively and to their respective issue; and for default of issue male of John, to pay the interest to the testator's nephew Charles for life, etc., etc.:—Held, that the words in italics did not mean "if John shall never have a son," so as to make the limitation to Charles take effect by way of substitution, but that that and all the other limitations subsequent to the limitation to the first son of John were void for remoteness. *Burley* v. *Evelyn*, 16 Sim. 290; 12 Jur. 712.

5. A., having the reversion in fee of lands settled upon the marriage of B. his son, in the usual manner, devises all the lands in that settlement on failure of issue of the body of B., and for want of heirs male of his own body, to his daughter F. and the heirs of her body. This will does not give an estate tail by implication to B., the devise to F. is executory, and is void as being on too remote a contingency. *Lanesborough* (*Lady*) v. *Fox*, Forrest. 262.

6. When property is limited in remainder after an estate tail to trustees to sell and distribute the proceeds amongst a class to be ascertained at the determination of the estate tail, the gift of the proceeds will not be void for remoteness, even though the class may comprise individuals beyond the limits of the rule against perpetuities. *Heasman* v. *Pearse*, 41 L. J., Ch., 705; 7 L. R., Ch., 275; 20 W. R. 271; 26 L. T., N. S., 299. Reversing 11 L. R., Eq., 522; 40 L. J., Ch., 258; 24 L. T., N. S., 864; 19 W. R. 673.

XI. REMAINDERS.

Legal.] 7. Remoteness does not affect the validity of contingent remainder. *Cole* v. *Sewell*, 2 Con. & L. 344; 4 Dr. & War. 1; 6 Ir. Eq. R. 66. Affirmed 2 H. L. Ca. 186; 12 Jur. 927.

An estate was settled by deed upon A., B., and C., for life, as tenants in common, remainder to their first and other sons respectively in tail male, remainder to their daughters respectively as tenants in common in tail, remainder, "in case one or two of the said A., B., and C. should die without issue of her or their bodies, then as to the share of such one or two dying without issue, to the use of all and every the daughters of such survivors, as tenants in common in tail:—Held, that the limitation to the daughters of the survivor was a good contingent remainder, and not void for remoteness, and that the word survivors must be construed "others." *Ib.*

8. J. M., by his will, devised the Maytham Hall estate, being of gavelkind tenure, to trustees, upon trust to sell a competent part for the payment of debts, and subject thereto upon trust for P. M. for life, and after his decease for the first son of P. M. for life, and after his decease for the first son of such first son and the heirs male of his body, and in default of such issue, for every other son of P. M. successively for the like interests and limitations, and in default of issue of the body of P. M., or in case of his not leaving any at his decease, for T. M., for life, and after his decease for T. G. M., the eldest son of T. M., for life, and after his decease for the first son of T. G. M. and the heirs male of his body, and in default of issue of the body of the said T. G. M., for every other son of T. M. successively for the like estates and interests, and on failure of all such issue of the body of T. M., upon trust for him, his heirs, and assigns for ever. P. M. never had any children:—Held, that P. M. took an estate for life with remainder to his first unborn son, if such son had been born, and that all the remainders over were void. Held, also, that effect was to be given to the gift over to T. M. and his sons in default of issue of the body of P. M., etc., as an independent clause, and that it was consequently valid. *Monypenny* v. *Dering*, 2 De G. M. & G. 145; 17 Jur. 467; 22 L. J., Ch., 313. And see S. C. 15 Jur. 1050; 14 Jur. 1083; 7 Hare 568.

9. A testator gave a fund to his four brothers and sisters for life, with remainder to their children for life, with benefit of survivorship, "and from and immediately after the decease of the survivor of the said children of my said brothers and sisters," then over:—Held, that the gift over was void, and the corpus (subject

to the prior gifts to the testator's brothers and sisters, and their children) belonged to the next-of-kin. *Cooke* v. *Bowler*, 2 Keen 54; 5 L. J., N. S., Ch., 250.

1. A testator devised real property in trust for his daughter E. for life, and after her death to such children as she might have, if a son or sons, who should live to the age of twenty-three, and if a daughter or daughters, who should live to the age of twenty-one, their heirs and assigns, as tenants in common. He then provided for the disposition of the property in the event of one or more of the children of E. dying leaving others or another surviving; and in case all the children of E. should die, if a son, under the age of twenty-three, or if a daughter, under the age of twenty-one, or if she had none, he gave the property to his other three children, J., S., and A., equally, with the following devise over: "In case of the death of my son, or either of my two daughters, without leaving a child, if a son, that shall live to attain the age of twenty-three, or if a daughter, who shall live to attain the age of twenty-one, I give the pa and parts such children or child would be entitled to as aforesaid unto the child or children of my son and two daughters, having issue, if a son or sons, living to attain the age of twenty-three, and if a daughter or daughters, living to attain the age of twenty-one; if two of my said last-named children have such children or child, to their, his, or her heirs and assigns, as taking in equal shares from his or her father and mother, or his, her, or their assigns." E. died, never having had a child; afterwards A. died, never having had a child; S. died, leaving seven children, who attained the prescribed ages. J. had two children, who attained the prescribed ages in his lifetime:—Held, that the devise to the children of J. and S. on the death of A. without issue was not void for remoteness, but took effect as a contingent remainder, and not as an executory devise. *Doe* d. *Evers* v. *Challis*, 5 Jur., N. S., 825; 7 W. R. 622; 7 H L. Ca. 531; 29 L. J., Ch., 121.

Equitable.] 2. A testator devised and bequeathed real and personal estate to trustees upon trust to pay the income to his wife during her life, and after her decease, if H. was then living, to retain the rents of the realty to their own use during his life, and to pay him the income of the personalty during his life, and after his death upon trust to convey and transfer the real and personal estate to such son of M. as should first attain the age of twenty-five years, upon condition that such son of M. as should become entitled to any property under the will should, within two years after he should so become entitled, take the name and arms of the testator. At the testator's decease M. was living and had no son who had attained twenty-five, but his eldest son attained that age during the lives of the widow and H. This son died in the lifetime of H. without having taken the name and arms of the testator:—Held, by Malins, V.-C., that although the limitation of the personal estate to the first son of M. who should attain the age of twenty-five was void for remoteness, the direction to convey the real estate to him gave him a contingent remainder which was not void for remoteness, although his estate was only equitable, the doctrine of contingent remainders being applicable to equitable as well as to legal estates; that he was not bound to take the name and arms of the testator until his estate came into possession, and that the real estate devolved upon his heir. But held, on appeal, that the limitation to such son of M. as should first attain the age of twenty-five years could not, as in *Riley* v. *Garnett* (3 De G. & Sm. 629), be treated as intended to give an immediately vested interest liable to be divested on death under twenty-five, but was a limitation contingent on the son's attaining the age of twenty-five years. *Abbiss* v. *Burney*, *Re Finch*, 17 L. R., Ch. D., 211; 50 L. J., Ch., 348; 44 L. T. 267; 29 W. R. 449. Reversing 49 L. J., Ch., 710; 43 L. T. 20; 28 W. R. 903.

Held, also, that when the legal estate in fee is vested in trustees under the instrument which creates the beneficial limitations, the feudal rule by which a contingent remainder fails if it does not vest before the determination of the particular estate does not apply, and that the limitation to such son of M. as should attain twenty-five years, assuming it to have been an equitable remainder, would still have been void for remoteness. *Ib.*

Held, also, that the direction to the trustees to convey on the death of H. did not create a contingent equitable remainder, but was an executory devise. *Ib.*

XII. SUCCESSIVE LIFE INTERESTS.

3. J., by will, devises his real estates to trustees, in trust for several persons for life, with remainders to their first and other sons in tail male successively; but directs his trustees, upon the birth of every son of each tenant for life, to revoke the uses before limited to their respective sons in tail male, and to limit the premises to such sons for their lives, with immediate remainders to the respective sons of such sons in tail male:—Held, that this clause of revocation and resettlement, as tending to a perpetuity, and repugnant to the estate limited, was void and of no effect. *Spencer* (*Lord*) v. *Marlborough* (*Duke*), 3 Bro. P. C. 232.

4. Testator devises his real estates to trustees, to several persons for life, with remainder to their first and other sons in tail male successively; but directs his trustees, upon the birth of every son of every tenant for life, to revoke the uses before limited to their respective sons in tail male, and to limit the premises to such sons for their lives, with immediate remainders to the respective sons of such sons in tail male:—Held, that this clause of revocation and resettlement was void, as tending to a perpetuity, and being repugnant to the estate settled. *Marlborough* (*Duke*) v. *Godolphin* (*Earl*), 1 Eden 404.

5. Power of alterations of estates tail as they were to come *in esse* into tenancies for life:—Held, to be void. *Heath* v. *Heath*, 2 Eden 330.

XIII. TOMBS. GIFTS FOR.

6. If an annual bequest for the repair of a tomb proceeds out of a life interest, it is not

void as a perpetuity. *Lloyd* v. *Lloyd*, 2 Sim., N. S., 255; 21 L. J., N. S., Ch., 596; 16 Jur. 306.

By a codicil a testator gave the rent of a copyhold house for the benefit of his wife and A., to be applied as in his will set forth, subject to all the conditions contained in his will, share and share alike; and after the death of his wife, and A., or in default of their (his wife and A.) not fulfilling the conditions contained in his will, he gave the said house upon trust for the minister and churchwardens of St. Mary's, Chatham, to apply the rents as follows: to take 5*l.* per annum for themselves out of the rents to keep the tomb in repair; and the residue and remainder of the rent to be applied for the benefit of his nephew, and after the death of his nephew the remainder of the rent to be applied for the benefit of the Church Missionary Society. At the original hearing, the devise to the ministers and churchwardens was declared void, and they were dismissed:—Held, that this decree was conclusive against the whole of the gift to the churchwardens, and that all the trusts failed; that the widow and A. took the legal estate in the rents during their joint lives, and the life of the survivor, with remainder to the customary heir of the testator. *Ib.*

1. A bequest of money, the interest of which was to be applied in keeping up the tombs of the testator and of his family, is void as a perpetuity. *Rickard* v. *Robson, Re Rickard*, 31 Beav. 244; 8 Jur., N. S., 655; 31 L. J., Ch., 897; 10 W. R. 657; 7 L. T., N. S., 87.

2. A testator directed his executors to apply the income of a legacy in or towards keeping in repair certain tombs, and to pay the surplus of the yearly income to the rector of B. for the time being:—Held, that the trust for keeping in repair the tombs was void for perpetuity. *Fowler* v. *Fowler*, 10 Jur., N. S., 648; 12 W. R. 972; 33 L. J., Ch., 674; 33 Beav. 616.

Held, also, that the gift of the surplus income was void for uncertainty. *Ib.*

3. A gift "of the upper storey of four specific houses or shops, to be occupied by the several members and descendants of K. T. C. and L. K. W., as already proposed," *i.e.*, as the context showed, as a family house for the use of two separate families, is void for uncertainty, and as denoting an intention to create a perpetuity. *Yeap Cheah Neo* v. *Ong Cheng Neo*, 6 L. R., P. C., 381.

A devise of "two plantations, in which the graves of the family are placed, to be reserved as the family burying place, and not to be mortgaged or sold," is void as a devise in perpetuity. *Ib.*

A direction that "a house for performing religious ceremonies to my late husband and myself be erected" is void; such a devise being in perpetuity, and not for a charitable use. *Ib.*

Gifts for Tombs and Monuments generally.] See CHARITY, III. v. 9.

PERSONAL ASSETS AND ESTATE.

See EXECUTOR AND ADMINISTRATOR, XI. TO XIV.

PERSONAL CHATTELS.

— *Delivery up of.* See CHATTELS.
— *Settlement of as Heirlooms or on Limitations corresponding with Limitations of Real Estate.* See SETTLEMENT.
— *Specific Performance of Agreement relating to.* See SPECIFIC PERFORMANCE.
— *Of Wife.* See HUSBAND AND WIFE.

See also BILLS OF SALE—GIFT—LEGACY—MORTGAGE—SALE OF GOODS—SETTLEMENT—STOCK—TRUSTS—WILL.

PERSONAL REPRESENTATIVE.

— *Limitations to.* See SETTLEMENT—WILL.

See also EXECUTOR AND ADMINISTRATOR—PRACTICE (PARTIES).

PETITION.

— *Generally.* See PRACTICE (PETITION).
— *In Bankruptcy.* See BANKRUPTCY, XXXII. ii.
— *Charity.* See CHARITY, I.
— *Under Lands Clauses Act.* See LAND CLAUSES ACT, XV.
— *In Lunacy.* See LUNATIC, XV.
— *Of Right.* See PETITION OF RIGHT.
— *For Winding-up of Companies.* See COMPANY, XVII.

PETITIONING CREDITOR.

See BANKRUPTCY, IX.

PETITIONING CREDITOR'S DEBT.

See BANKRUPTCY, X.

PETITION OF RIGHT.

See also COLONIES AND COLONIAL LAW, VIII.

I. IN WHAT CASES, 5651.

II. PROCEEDINGS ON, 5652.

I. IN WHAT CASES.

1. It is not competent to the king, or rather to his responsible advisers, to refuse capriciously to put into a due course of investigation any proper question raised on a petition of right, *semble*. *Ryves* v. *Wellington* (*Duke*), 9 Beav. 579; 15 L. J., Ch., 461; 10 Jur. 697.

2. The reigning sovereign is not liable to make compensation for damage to the property to an individual occasioned by the negligence of the servants of the Crown in a preceding reign; nor, *semble*, even where such damage has been done in his own reign. *Canterbury* (*Viscount*) v. *Att.-Gen.*, 1 Ph. 306; 12 L. J., Ch., 281; 7 Jur. 224.

A petition of right does not lie to recover compensation from the Crown for damage to the property of an individual, occasioned by the negligence of the servants of the Crown. *Ib.*

3. A., a British subject, claimed to be entitled to compensation for certain losses suffered by him through confiscation of his property in the first French revolution. The Governments of England and France entered into conventions respecting compensation to be afforded to British subjects. The English Government received all the money agreed upon between the two Governments as the amount of compensation, and undertook to satisfy all the claimants. An Act of Parliament was passed, declaring how claims were to be preferred and liquidated. A. presented a claim to commissioners appointed under the Act, and adopted the modes of proceeding provided by it; his claim was rejected. After payment of the claims which were established to the satisfaction of the commissioners, a surplus remained, which, in accordance with one of the provisions of the Act, was paid over to the Lords of the Treasury. A. proceeded to make his claim afresh under a petition of right:—Held, that he had no remedy except under the provisions of the statute. *De Bode* v. *Reg.*, 3 H. L. Ca. 449.

4. An officer in military service in a colony sold his commission and settled there on the promise of a grant of "an allotment of land" at W. This promise was made verbally by the governor, and afterwards recognised by him and his successors in certain official letters and minutes, but was never performed. Subsequently the settlor consented to an allotment of land at H. being substituted for that at W. The second allotment was otherwise disposed of, and was never conveyed to him, and he was subsequently offered a third allotment at L., which he refused. He then brought an action against the Government under the Local Act to afford relief in substitution of the process by petition of right:—Held, that proceedings under this Act materially differed from ordinary actions, both in the nature of the claim and the evidence by which it may be supported:—Held, also, that the letters and minutes of the governor afforded good evidence of the fact of such a promise being given, and the agreement to settle in the colony would constitute a good consideration, if it were necessary to prove this. Damages for breach of such a promise were rightly assessed by reference to the highest value of that of which the claimant had been deprived during the breach of agreement. *Robertson* v. *Dumaresq*, 3 N. R. 587; 2 Moo. P. C., N. S., 66; 13 W. R. 280; 10 L. T., N. S., 110.

5. Demurrer allowed to a petition of right presented by a medical officer in the army claiming compensation for loss sustained by him by reason of his being deprived of an appointment alleged by him to be permanent, and compulsorily retired upon half-pay. *Re Tufnell*, 45 L. J., Ch., 731; 3 L. R., Ch. D., 164; 24 W. R. 915; 34 L. T., N. S., 838.

6. Where land in a colony is vested in the Queen by a colonial Act for the public purposes of the colony, the 23 & 24 Vict., c. 34 does not give jurisdiction to the Court of Chancery to entertain proceedings against the Crown as a trustee of such land present within the jurisdiction of the Court. *Holmes* v. *Reg.*, 2 John. & H. 527; 8 Jur., N. S., 76; 31 L. J., Ch., 58; 5 L. T., N. S., 548; 10 W. R. 39.

By an Act of the legislature of Canada, land taken for a canal was vested in the Queen. By a second Act the land so taken was vested in the officers of the ordnance; and it was enacted that so much of the land taken as had not been used for the canal should be restored to the owners. By a third Act the lands were revested in the Queen for the purposes of the colony, and subject to future colonial legislation. To a petition of right by suppliants claiming the restoration of lands taken for the canal from their predecessors in title, but not used, a demurrer was allowed on the ground that the Courts of this country had no jurisdiction. *Ib.*

The fiction that the Crown is at all times present in all parts of its dominions, does not give jurisdiction to the Courts in this country, acting *in personam*, to entertain a petition of right in respect of lands situate in a colony, and vested in the Crown, for the purposes of the colony, by an Act of the Provincial Legislature. *Ib.*

7. In a suit against Her Majesty's Deputy Commissary-General for Natal, and as such representing Her Majesty's commissariat department, to recover certain moneys as the price on hire of certain waggons and oxen, for the carriage of certain goods, for damages for illegal acts of defendant or his *employés* and for general damage:—Held, on exceptions by the defendant to the jurisdiction of the Court and to the declaration, that the defendant could not be sued, either personally or in his official capacity, upon a contract entered into by him on behalf of the commissariat department; and that there was no cause of action against him. The Government revenue cannot be reached by a suit against a public officer in his official capacity. *Quære*, whether the Court would have had jurisdiction if a petition of right had been presented and the Crown had ordered that right should be done. *Palmer* v. *Hutchinson*, 6 L. R., App. Cas., 619; 50 L. J., P. C., 62; 45 L. T. 180.

II. PROCEEDINGS ON.

1. When a petition of right is referred to the Lord Chancellor, with the endorsement "Let right be done," if such right, supposing it to exist, be subject to certain rules of proceeding for its ascertainment and enforcement, those rules must still be followed, and the rights of the parties will be bound by all equities to which they are properly subject. *Monckton* v. *Att.-Gen.*, 2 Macn. & G. 402.

2. Course of proceeding by a subject to enforce a claim to property as against the Crown. *Taylor* v. *Att.-Gen.*, 8 Sim. 413.

3. The Lord Chancellor will not make an order for a commission upon a petition of right, without notice to the attorney-general. *Re Robson*, 2 Ph. 84; 16 L. J., N. S., Ch., 105.

4. The first step in proceedings upon a petition of right, on which the royal indorsement has been made, is to ascertain the facts on which the petitioner's claim is founded, and a commission for that purpose is of course, unless the attorney-general be willing to admit the facts as alleged, and to take issue upon them by demurrer. *Re Bodé* (*Baron de*), 2 Ph. 85.

Where a petition of right is referred to the Lord Chancellor, with the usual indorsement, "Let right be done," the Lord Chancellor has not jurisdiction to adjudicate upon the merits, as he would upon the merits of a bill on demurrer; but the petitioner is entitled, as a matter of course, to have a commission to inquire into the facts of the case. S. C. 9 L. J., N. S., Ch., 402; 4 Jur. 645.

5. Preliminary commission to investigate claim upon petition of right substantially dispensed with. But upon inquisition found, the Crown is entitled to dispute facts, or admitting them to demur. *Reg.* v. *Francius*, 6 W. R. 288; 26 L. J., Ch., 797.

6. A plaintiff filed a bill for an injunction against the secretary-at-war, as an officer of the Crown. The defendant, on the ground that the plaintiff's remedy was by petition of right, and not by bill, put in an appearance, but raised the question of jurisdiction. The plaintiff, after the time had expired, moved for leave to enter an appearance for the defendant:—Held, that the Court could not recognise the right of any subject of the Crown to refuse to appear. The question of jurisdiction should be argued after appearance, upon demurrer or otherwise. *Felkin* v. *Herbert* (*Lord*), 30 L. R., Ch., 604; 9 W. R. 609.

7. The attorney-general may dispense with the usual preliminary investigation on a petition of right. *Re Von Frantzius*, 2 De G. & J. 126; 27 L. J., Ch., 368.

On applying for time to answer the case found on the inquisition, the Crown ought not to be precluded from demurring. *Ib.*

8. In the place of the usual commission issued on a petition of right, the Court, with the assent of the attorney-general, issued a formal commission, the return to which was to be made on the oath of the petitioner. *Robert* v. *Frantzius*, 26 L. J., Ch., 797.

9. Leave given to a petitioner who had presented a petition of right to file a bill against the attorney-general, notwithstanding the issuing of a commission under the petition of right. *Re Rolt*, 4 De G. & J. 44.

10. A motion in a suit by the attorney-general for an injunction to restrain a contractor with the Secretary of State for War from continuing on the site of Government land, after notice to quit given under the powers of the contract; and a motion by the contractor (who had presented a petition of right) for an injunction to restrain the Secretary of State for War from preventing the suppliant completing his contract, and from continuing the superintending officer of engineers in the supervision of the works, ordered to stand until the hearing of the suits. *Kirk* v. *Reg.*, 14 L. R., Eq., 585.

PETTY BAG.

See PRACTICE (PETTY BAG).

PEWS.

See ECCLESIASTICAL PERSONS AND PROPERTY, X.

PHOTOGRAPH.

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See MEDICINE AND MEDICAL PRACTITIONER.

PICTURES.

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— *When Settled as Heirlooms.* See SETTLEMENT, XV.

PIER.

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PLAY AND RECREATION GROUNDS.

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PLAYS.

See ACTOR—COPYRIGHT, III.—THEATRE.

PLEA.

See PRACTICE (PLEA).

PLEADING AND PRACTICE.

See VOLUME, V.

PLEDGE AND PAWN.

See also MORTGAGE—PRINCIPAL AND AGENT, STOCK EXCHANGE.

1. The difference between pledging and bailing is that a pawnee has a special property, but a bailee the custody only. *Hartop* v. *Hoare*, 3 Atk. 46.

The disposition of a pawn is quite variant from a sale; for a vendee can transfer the thing to any other, and trade is thereby promoted; but it is otherwise in pawns, for they stop the change of the property in the thing pledged. In this case, the custom of London, as to the sales in market overt, not being found by the jury, the Court could not judicially take notice of it; but taking it as stated, they were of opinion, it did not extend to pawning; and as there seems to have been no instance that the custom of London has ever been allowed in the case of a pawn, the pawnee has no title to retain the goods against the true owner. *Ib.*

2. A bill being pledged in part, the whole may be proved by the pledge. *Exp. Crossley*, 3 Bro. C. C. 237.

3. Bankers, having securities deposited as a pledge for 1,000*l.*, though the depositor at his death is indebted in a larger sum, have no lien farther than the 1,000*l.* *Vanderzee* v. *Willis*, 3 Bro. C. C. 21.

4. The rules as to the power of sale possessed by the pledgee of a chattel apply also to the pledgee of a chose in action. *Exp. Sargent* (17 L. R., Eq., 273) distinguished. *France* v. *Clark*, 22 L. R., Ch. D., 830; 52 L. J., Ch., 362; 48 L. T. 185; 31 W. R. 374.

5. The doctrine that an equitable mortgagee by deposit of title deeds is entitled to foreclosure, does not extend to a pledgee of personal chattels. *Carter* v. *Wake*, 4 L. R., Ch. D., 605; 46 L. J., Ch. D., 841.

A. deposited with B. certain Canada railway bonds as security for a debt. On bill filed by B. for foreclosure or sale:—Held, that B. was entitled to an order for sale only. *Ib.*

6. A. borrows 200*l.* on the pawn of some jewels; afterwards he borrows three several sums, for each of which he gives his note without taking notice of the jewels; his executors shall not redeem the jewels without paying the money due on the notes. *Demandry* v. *Metcalf*, Pre. Ch. 419; 2 Vern. 691; Gilb. 104.

7. A., the owner of certain chattels (*e.g.*, warrants), pledged them to B., who was a broker, to secure advances made on his behalf by B., and B. afterwards in his own name, and unknown to A., re-pledged the same chattels to C. to secure advances made by C. to B., but of which, unknown to C., A. was to have the benefit. C., having subsequently applied in vain to B. for payment of his advances, threatened to realise his security by a sale, which, however, he was from time to time induced to postpone, by the solicitations of B., and his assurances of speedy payment; and this was communicated by B. to A., his principal. In a suit by A. against B. and C., praying to redeem the property in pledge on payment of any balance found due on the account between himself and B.:—Held, that A. had no equity to restrain C. from proceeding to an immediate sale. *Nicholson* v. *Hooper*, 4 Myl. & C. 179. Reversing 2 Jur. 9.

Whether under the circumstances above mentioned, C. could make a good title to a purchaser, *quære*. *Ib.*

8. Bill lies by assignee for account and delivery of goods pledged by the bankrupt, notwithstanding the Statute of Limitations. *Kemp* v. *Westbrook*, 1 Ves. 278.

9. Goods shipped at Liverpool for Quebec were taken on their arrival to the examining warehouse, and were entered as consigned to M. & S. and were marked "M. & S." By the regulations of the warehouse, consignees were entitled to possession on payment of freight and duty. M. & S. having obtained an advance on the goods from Y. & Co., signed a request

note directed to the officer of the warehouse, directing him to "hold their goods subject to their order, they paying duty and storage charged before removal." The officer wrote across the note "accepted," and signed it:—Held, that by the express agreement of the parties, followed by the acceptance of the officer of the warehouse, there was a valid constructive delivery of the property in the goods to Y. & Co., sufficient for the purposes of the pledge. *Young* v. *Lambert*, 3 L. R., P. C., 142; 39 L. J., P. C., 21; 22 L. T. 499; 18 W. R. 497; 6 Moo. P. C., N. S., 406.

1. Mortgage and pledge distinguished. *Jones* v. *Smith*, 2 Ves. J. 378.

Personal securities pledged for a specific debt: after a mortgage to the creditor the same securities with others were pledged to him for the balance of an account, redemption of the personal securities was decreed without discharging what was due on the mortgage. *Id.* 372. *Sed quære.*

2. The general rule of the civil law is, that possession of movables is not necessary to the validity of a lien, whether created by contract or act of law, and that such lien will attach upon movable property even in the hands of a *bonâ fide* purchaser without notice. This rule has been modified by the Roman-Dutch law to this extent—that if the goods left in the possession of the mortgagor are sold, or mortgaged by him to another, they cannot be followed into the hands of such transferee for value; but the contract is binding on the debtor, and the goods themselves may be taken if they remain in his hands. A debtor having, by way of security for a debt, pledged movables to a creditor, subsequently became insolvent. The movables were in the possession of the debtor at the time of committing the act of insolvency, but the creditor had, before the act of insolvency, claimed the movables, and they had been placed in the hands of a third person:—Held, that the creditor had a right to the movables as against the assignees of the insolvent. *Tatham* v. *Andree*, 9 Jur., N. S., 1019; 9 L. T., N. S., 2; 1 Moo. P. C. 386.

3. Jewellery is pledged with a pawnbroker, and the usual deposit notes given. Upon forfeiture the articles are sold, and a balance admitted upon application of the assignees of the party pledging, who was a bankrupt. The pawnbroker by an agent buys a lot representing the deposit notes, an agent also attending for the assignees and permitting the sale. The assignees then state the sale to have been a mistake in ignorance of the balance due, when the pawnbroker offers a small sum for the assignees' interest in unsold notes, claiming to retain the difference. On a bill to restrain an action brought for the whole balance by the assignees, bill dismissed without costs. *Attenborough* v. *Edwards*, 3 W. R. 39; 3 Eq. Rep. 124.

4. The Pawnbrokers Act (39 & 40 Geo. 3, c. 99) does not apply to transactions above 10*l.* With regard, therefore, to such transactions, a pawnbroker is in the same position as any other person, and may avail himself of the 2 & 3 Vict., c. 37, for the purpose of obtaining a higher rate of interest than 5 per cent.; and a contract for that purpose made upon the deposit of goods will not be invalid merely because it contains stipulations peculiar to an ordinary pawnbroking transaction. *Fitch* v. *Rochfort*, 1 Macn. & G. 184; 1 H. & Tw. 255; 18 L. J., N. S., Ch., 458; 13 Jur. 351.

5. An agreement for a secret partnership is a contravention of the laws made for regulating the business of a pawnbroker, and no legal partnership is thereby constituted. *Armstrong* v. *Armstrong*, *Lewis* v. *Armstrong*, 3 Myl. & K. 45; L. J., N. S., Ch., 101.

PLENE ADMINISTRAVIT.

See EXECUTOR AND ADMINISTRATOR.

POACHING.

6. The taking bonds to prevent poaching is for the benefit of the obligor, as that sort of idleness tends to worse consequences. *Roy* v. *Beaufort* (*Duke*), 2 Atk. 190.

There is no Act of Parliament which directs taking bonds in this particular case, but the Acts which relate to the customs, and the Act against deer-stealing, direct such bonds, so that the doing of it is not *malum in se*. *Ib.*

These bonds are not intended as a bare security that the obligor shall not offend for the future, but are by way of stated damages between the parties. *Ib.*

7. Bequest for purchasing the discharge of poachers, committed to prison for non-payment of fines, fees, or expenses under the game laws:—Held, void, as encouraging offences, and opposed to public policy. *Thrupp* v. *Collett*, 26 Beav. 126; 5 Jur., N. S., 111.

POLICY.

— *Of Insurance.* See INSURANCE.
— *Contracts in Violation of Public.* See CONTRACT.

POOR LAW.

— *Rating to Poor.* See LOCAL GOVERNMENT.
See also PARISH.

8. The guardians may be reimbursed the expenses of relief and maintenance of a pauper by an assignment out of a legacy by the Court of Chancery. *Re Cubley*, 21 W. R. 170.

9. An agreement had been come to by a committee appointed under 25 & 26 Vict., c. 108, and 27 & 28 Vict., c. 39, by a board of guardians out of their own number. An order was made against the committee in breach of the agreement; this order the pleadings in the present action, which was brought by the guardians, admitted would be enforced against the guardians:—Held, that the committee must be added as co-plaintiffs. *Blackburn Union* v. *Brooks*, 26 W. R. 57; 37 L. T., N. S., 427; 7 L. R., Ch. D., 68.

PORTION.

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I. Property Chargeable.

1. A., by several deeds, charges different parts of his real estates with portions for his younger children, and afterwards by his will confirms the charges so made, and then gives the residue of his personal estate, after payment of his debts and legacies, to trustees, in trust to lay out the same in purchase of land to be settled to particular uses. The eldest son brings bill controverting the validity of the deeds, and insisting that the personal estate was liable to make good the several charges so far as it would extend:—Held, that personal estate shall go according to will, and that each particular estate should bear the specific charge made upon it. *Ferrers (Earl)* v. *Ferrers (Countess)*, 6 Bro. P. C. 97.

2. A. devises 500*l.* apiece to his three daughters at their ages of twenty-one or marriage, to be paid out of his stock, and devises the rents of his real estate to his wife for life, in lieu of dower, and for the maintenance of his children, and towards making up their portions; and after his debts and legacies paid, devises the lands to his son, who, together with his wife, he made executors. The stock was but of 100*l.* value; the wife being dead, and the two eldest daughters having had their portions paid them:—Held, that the lands were liable, in the hands of the son, to the youngest daughter's portion. *Tomkins* v. *Tomkins*, Pre. Ch. 397; Gilb. Eq. Rep. 90.

3. A., on marriage of his son, settles lands, which he covenants to be worth 800*l.* per annum, reserving to himself a power of charging the same with 1,200*l.* for the portions of his younger children. A. charged the estate with only 600*l.*; but because the value of the lands was defective, the son refused to pay these portions:—Held, that the portions were well charged, as they only amounted to a moiety of what the father had power to charge; and if there was a deficiency in the value of the lands, the son ought to sue upon the covenant for satisfaction out of his father's assets. *Ormsby* v. *Dodwell*, 6 Bro. P. C. 41.

4. By a marriage settlement, a freehold estate was settled on husband and wife for their lives, remainder to the first, etc., sons in tail, remainder to trustees for 500 years to raise portions for daughters, remainders over; covenant from the husband to settle his copyhold estate to the same uses. A surrender is made, but no term is limited. The freehold estate not being sufficient to raise the daughters' portions, decreed, the copyhold estate should be charged, and liable to raise the portions. *Shouldham* v. *Shouldham*, 2 Vern. 321.

5. Where real estates are devised in strict settlement, subject to trust for raising portions to younger children, during minority of tenant for life, out of rents and profits, or by sale or mortgage:—Held, certain funds that had arisen from rents during such minority, were applicable to payment of the portions, and that deficiency only could be raised by sale or mortgage. *Warter* v. *Hutchinson*, 1 Sim. & S. 276.

6. A. charges land in D. with a portion for a daughter by a first *venter*, and then marries, and settles part of these lands for the jointure of a second wife, who has no notice of the charge. A., believing the portion would take place of the jointure by will, gives other lands in E. in lieu thereof. The wife, by combination with the heir, refuses to accept the devise. Decreed, the daughter should hold the lands in D. till her portion was paid. *Reeve* v. *Reeve*, 1 Vern. 219; 2 Vent. 363.

7. One devises lands to his son by his second wife, in tail male, remainder to his eldest son by his first wife, provided that if the land should come to his eldest son, that then C. or his heirs should pay 100*l.* to the testator's daughter, within four months after the estate should come to them; and in de-

fault of payment, the trustees to enter and raise the money. The son by the first wife dies, leaving a son. The son by the second wife suffers a recovery of a moiety of the lands, and dies without issue, so that the moiety only of the premises comes to the son of the son by the first wife. Though no part of the premises ever came to the eldest son, yet the moiety of lands shall be liable to the payment of the whole 1,000*l.* without any apportionment. *Hooley* v. *Booth*, 2 Vern. 359.

1. Devise of lands to A., charged with a portion of 500*l.*; part of the lands are entailed by an ancient deed:—Held, that the entailed lands are not liable to this portion. *Ferrand* v. *Jackson*, 3 Bro. P. C. 2.

2. J. having, by his marriage settlement, a power of appointing portions to his daughters to the amount of 16,000*l.*, under a term for years, created for that purpose, appointed among four of his daughters, upon their respective marriages, 13,000*l.* in part thereof, and took assignments from them of their interests in the said term; he afterwards, in the marriage settlement of his eldest son, joined such son in a covenant, in the fullest and most extensive terms, that the settled estates were free from all incumbrances due by either of them; and by will appointed the residue of the 16,000*l.* to another daughter, and died. In a suit to compel the trustees to raise the 16,000*l.* out of the term of years, it was held that the evident intention of J. to keep the term on foot for his benefit would clearly entitle his executors, as against those claiming under his own marriage settlement, but that his covenant would bar him, and all claiming under him, as against those claiming under the settlement of the son; and, consequently, the son himself, who, notwithstanding his joining in the covenant, so far as his interest in that settlement, must be considered as a purchaser under it, and consequently a covenantee. *Gower* (*Countess*) v. *Gower* (*Earl*), 1 Cox 53.

3. Estates were settled, after the death of husband and wife, to trustees, for a term, and subject thereto to the husband in fee. The trusts of the term were, in case the wife should die in the lifetime of the husband, leaving children living at her decease, to raise 8,000*l.* for the portions of such children, to be divided between them in such shares as the husband should by deed or will appoint. By his will, the husband, dying before the wife, devised part of the settled land to his eldest son, in strict settlement, with powers of jointuring, and charging portions for his younger children; and other part of the settled lands to his second son in the same manner; and after reciting that he had by his settlement a power of appointing 8,000*l.* among his children, he, in pursuance of the power, and of every other power to him reserved, gave and appointed the 8,000*l.* amongst his children; and he bequeathed to his daughter E. 1,000*l.*, in addition to the sum already appointed to her; and he directed that in case all his younger children should die before their portions became payable, the said sum of 8,000*l.* should sink into the inheritance; and that his personal estate should be applied *pro tanto* in discharge of the 8,000*l.*, in exoneration of the real estate charged therewith. The husband died, leaving his wife and several children him surviving:—Held, that the 8,000*l.* was well charged upon the real estate of the testator. *Mandeville* v. *Roe*, 1 J. & L. 371.

4. In the year 1817, A., who was not then a trader, on his marriage covenanted that all his property, real and personal, as well that in possession as what he should thereafter acquire, should stand and be charged and chargeable with a sum of 3,000*l.* as a provision for his wife, and the issue of the marriage in the manner therein mentioned. Some months after his marriage, A. became a trader, and in the year 1835 was found and declared a bankrupt:—Held, on a bill filed by the wife and children, who were interested under the settlement of 1817, that the covenant to charge after-acquired property created a valid charge on all the freehold estates of A. purchased subsequently to his marriage, and should be carried specifically into execution against the assignees of the bankrupt A. *Lyster* v. *Burroughs*, 1 Dr. & Wal. 149. And see *Gubbins* v. *Gubbins*, *id.* 160. n.

5. Case in which it was held that additional portions given to younger children were a primary, if not an exclusive charge on the testator's fee-simple estates devised to his eldest son for life. *Burrell* v. *Egremont* (*Earl*), 7 Beav. 205; 13 L. J., N. S., Ch., 309; 8 Jur. 587.

6. A., by deed, settles his estate to himself for life, and then to trustees, to raise portions for his younger children, provided, that if his eldest son (who was otherwise provided for) should pay the portions, then the trustees were to stand seised to the use of the right heirs of A. for ever; and after raising and paying said portions, the trustees and their heirs to stand seised of such part of the premises as should remain unsold to the use of the right heirs male of A. for ever. The son did not pay the portions, but died intestate, leaving D., his daughter and only child:—Held, that D., being heir general, was entitled to the estate, subject to the charge thereon by the grandfather. *Beckford* v. *Pendarvis*, 5 Bro. P. C. 93.

7. The Court leans against the construction for raising portions or maintenance out of reversionary term, and upon that principle when the term fell into possession, and the portion was raised, refused to charge the difference between the sum annually allowed by the infant's grandfather for her maintenance, and the sum charged. *Clinton* v. *Seymour*, 4 Ves. 440.

8. By a settlement, two estates, one in N. and the other in S., are subject to the raising of a portion of 2,000*l.* to a daughter, by a term of 500 years, commencing after the respective decease of two several lives; one upon the S. estate, and the other upon the N. estate; the life on the S. estate fell, and the daughter bringing her bill for the 2,000*l.*, J. S., to whom that estate was come, paid the 2,000*l.* Afterwards the life on the N. estate fell, and the fee simple thereof descended to the daughter. J. S., who paid the 2,000*l.*, shall have the contribution out of the N. estate, in proportion to its value only; the estate shall be valued as an estate in possession, and the N. estate as an estate in reversion. *Heveningham* v. *Heveningham*, 2 Vern. 355.

1. By marriage articles, under seal, made between W. S., the intended husband, and M. S., his father, of the one part, and H. B., the intended wife, and T. B., her father, of the other part, it was agreed as follows: M. S. covenanted that he would, at his death, leave and devise to W. S., his heirs, executors, etc., all such property, real and personal, as he should then be possessed of and entitled to, charged only with a jointure for his wife, and with pecuniary legacies not exceeding 1,000*l.* It was further agreed that H. B., in case she should survive her intended husband, should have and receive a certain jointure, charged and chargeable upon all and singular the property, real and personal, of both M. S. and W. S.; that the eldest son of the marriage should have and become entitled to a perpetual annuity or rent charge of 400*l.* a year, to issue out of and be charged upon all and singular the real and personal estates which M. S. or W. S., or either of them, should be seised or possessed of or entitled to; subject, nevertheless, to such jointure as should be appointed for the wife of M. S., and to the jointure provided for H. B.; and also subject to a further sum of 2,000*l.* as a provision for the younger children of the intended marriage:—Held, that the 2,000*l.* was not charged upon the rent charge of 400*l.* a year; and that the proper fund for the payment of the 400*l.* a year and the 2,000*l.* was the residue of the real and personal estate of which M. S. and W. S., respectively, should die seised, after payment thereout of all their debts, whether by judgment, specialty, or simple contract. *Ennis* v. *Smith*, Jon. & C. 400.

2. By a marriage settlement certain lands were conveyed to A. (intended husband), his heirs and assigns, and in case A. should die, leaving one or more son or sons of the marriage, the elder of such sons and the heirs of his body being always preferred before the younger, with full liberty for A. to make such reasonable provision as he should think fit for such younger children, and in case A. should die, leaving no son, and there should be one or more daughters, then to such daughter or daughters (if more than one), on their attaining their respective ages of twenty-one years, their heirs and assigns, share and share alike. There was issue of the marriage eight children, four sons and four daughters; and A. by his last will and testament, in pursuance of the power contained in the marriage settlement, charged the said lands with the sum of 1,500*l.*, to be divided amongst the younger children of the marriage in manner therein mentioned. The first taker having disputed the right to charge in favour of daughters, on a bill filed by one of the daughters to raise her portion of the 1,500*l.*:—Held, that the power was well exercised, and as the intention of the settlement was evidently to provide for all the children as well daughters as sons, the Court would effect that intention, and support the appointment, by transposing the clause creating the power, and that containing the limitation to the daughters in the event of there being no son, whereby the words "such younger children" would include both sons and daughters. *Fenton* v. *Fenton*, 1 Dr. & Wal. 66.

3. A tenant for life, having a power to charge the estate with portions for younger children, mortgaged his life estate, and covenanted not to exercise the power:—Held, that he could not afterwards charge the estates with portions, to the prejudice of his mortgagees. *Hurst* v. *Hurst*, 16 Beav. 372; 22 L. J., Ch., 538.

4. The father of the plaintiff, by a settlement made in 1835 on the marriage of the plaintiff, settled estates in trust for himself for life, remainder for his wife for life, remainder for his son (the plaintiff) for life, remainder for the plaintiff's children, and, in default of issue, for the plaintiff and his heirs absolutely. In the settlement was reserved a power to the settlor to charge the estates, by any deed or instrument in writing, with portions for his younger children to the extent of 500*l.*, and to create a term for the payment. The settlor, by his will, devised the settled estates to the plaintiff, his heirs and assigns, subject to and charged with three legacies, amounting together to 500*l.*, bequeathed in favour of his three daughters. The testator did not create a term of years, nor in his will in any way refer to the powers contained in the settlement of 1835. On a bill filed by the plaintiff, praying that the 500*l.*, which he had paid to the legatees out of his own moneys, might be raised by a mortgage or sale of the estates, the Court made a declaration that that sum was well charged by the will of the plaintiff's father on the property comprised in the settlement. *Davies* v. *Davies*, 4 Jur., N. S., 1291; 28 L. J., Ch., 102.

5. On a marriage, two separate sums were provided by two separate deeds, for the portions of younger children, and each deed contained a hotchpot clause:—Held, that these clauses were separate and distinct, and operated only on the fund contained in each settlement respectively. *Montague* v. *Montague*, 15 Beav. 565.

6. A tenant for life, on his marriage, appointed, in pursuance of a power, a jointure and portions payable after his death. By another deed he charged an additional jointure and portions on certain estates "to which he would become entitled on the death of his father," and covenanted to convey such estates and all other hereditaments to which he might be entitled for an estate of freehold to trustees to such uses for securing the additional jointure and portions as were contained in the first settlement:—Held, in the absence of any fraud or misrepresentation, that the wife and children were not entitled as against incumbrancers without notice to any lien or charge on the settlor's life estate. *Ford* v. *Tynte*, 6 N. R. 51; 11 Jur., N. S., 402; 13 W. R. 643; 12 L. T., N. S., 512; 34 L. J., Ch., 452. Affirming 2 Hem. & M. 319.

II. Amount.

7. A man has issue a son and four daughters; he settles lands on himself for life, remainder for twenty-one years for raising 5,000*l.* daughters' portions, 2,000*l.* whereof

to be paid to the eldest, remainder to the son in tail, remainder to himself in fee. The son dies without issue, and after the father devises the lands to his four daughters equally; yet held that the eldest should have 1,000*l.* more than any of the rest. *Teviot* v. *Spencer*, Pre. Ch. 5.

1. In marriage settlement, it was agreed that, if there should be but one daughter, she should have 500*l.* for her portion, and 200*l.* each should be paid to every of the other younger daughters. There were three daughters:—Held, each was only entitled to 200*l.* *Chamberlain* v. *White*, 6 Bro. P. C. 61.

2. By marriage settlement, the husband's family estate was settled in the usual way, and it was covenanted with the husband that the wife's portion (1,500*l.*) should be paid to trustees to provide for the daughters and younger sons after his death, in equal shares, in default of an appointment by him. It was provided also, that in case of there being but one child, it should have 1,000*l.* and the eldest son the other 500*l.*, and that a daughter, being an only child, should have the whole. The husband was to have the interest for his life, and a power of laying out the principal in the purchase of lands, in trustees' names, as a fund for the purposes aforesaid. Of this marriage there was issue two sons, the elder of whom only survived his father, and claimed the 1,500*l.*; but the Court decreed him only 500*l.*, to which it was admitted he was entitled. Where money was to be laid out in land as a more secure fund, for certain purposes, it (as well as the land when purchased) shall be considered as money, and the heir can claim no benefit of it. *Watkins* v. *Watkins*, Vern. & Scriv. 61.

3. A power to charge estates "with reasonable portions or fortunes for younger children, and for their maintenance and education," is sufficiently certain, to be capable of execution. The word "reasonable" is applicable not only to the amount of the portion, but also to the time and occasion on which the child would want it. Therefore, an appointment of a portion to an infant, payable with interest from the death of the appointor, does not so vest the portion as to make it, on the death of the infant, transmissible to her representative, the appointment being under the implied condition that the child should attain that age at which the portion would be required for advancement in life. But the infant being entitled to a reasonable maintenance while it lived, her administrator decreed, under the head of general relief, entitled to a reasonable allowance for maintenance, though not specifically prayed by the bill. By authorising the donee to appoint maintenance and education, it implied that the portions could not be raised during infancy, for if they could, the interest of the money so raised would supply those purposes. Whether the Court could make a reference to the Master to inquire whether the sum appointed was reasonable in amount, and if not, could authorise him to substitute his discretion for that which the donor had reposed in the donee of the power, *quære*. *Edgeworth* v. *Edgeworth*, Beat. 328.

4. By settlement, 10,000*l.* provided for one daughter, or younger son; 15,000*l.*, if more. There being but one daughter, the father by will, under a power reserved to him, appoints the time of payment, and the application of the interest of the 15,000*l.* provided for her by settlement, and gives her the farther sum of 5,000*l.* She was held entitled to 20,000*l.* *Phipps* v. *Mulgrave* (*Lord*), 3 Ves. 613.

5. Articles, on marriage, to settle estates of husband and wife, of equal value, in strict settlement, and providing portions; wife's estate being withdrawn by decree on the ground of her infancy, the younger children were confined, as against the eldest, to half the portion, the articles providing, in the event of no issue male, in which case the estates were to separate, that each should bear a moiety, though they also contemplated the case of wife's refusal to be bound, providing against it by the forfeiture of her interest. *Clough* v. *Clough*, 5 Ves. 710.

6. Two estates, X. and Y., were devised to trustees for 500 years, with remainder, as to estate X., to A. for life, with remainder to his first and other sons in tail, with remainder to A.'s daughters, equally in tail general, with remainder to B. for life, with remainder to his first and other sons in tail, with remainder to his daughters equally, in tail general. The estate Y. was, *mutatis mutandis*, similarly settled on B. and his issue, with remainder to A. and his issue; the trusts of the term were declared to be, to raise 2,000*l.* each for C. and D.; and "if A. or B. should depart this life without issue, whereby the survivor of them would become entitled to the estates X. and J., to raise a further sum of 2,000*l.* apiece for C. and D. After the death of C. and D., B. died without issue:—Held, that the further sums of 2,000*l.* were not raisable. *Case* v. *Drosier*, 2 Keen 764; 6 L. J., N. S., Ch., 353; 1 Jur. 352. Affirmed 3 Jur. 1164.

7. By settlement, estates were limited to A. for life, with remainder to trustees for a term of years, for raising 4,000*l.* for the portions of his younger children, remainder to his first and other sons in tail male. There was one son, B., and two daughters, C. and D. By Act of Parliament passed during the children's minority, the estates were vested in trustees in fee, discharged from the uses of the settlement, upon trust to raise by mortgage or sale the expenses of the Act and of the trusts, and afterwards certain portions affecting the estate prior to the settlement, and private debts of A. to a large amount, and to convey the unsold estates, and the equity of redemption of those which should be mortgaged, to the uses of the settlement. Under this Act, the estates were mortgaged in fee for 41,386*l.* to E., who having died largely indebted to the Crown, and it appearing that the former Act was obtained by false representations, it was provided by another Act, that if, on payment of 25,000*l.* into the Exchequer, the real and personal representatives of E. should convey the estates to some person to be approved by B. (who had then succeeded to the estate), the estates should be vested in such person, discharged of all claims of E. and of the Crown, to the intent to secure the repayment of the money so paid into the Exchequer, to the person advancing the same, and subject thereto in trust

for securing such proportionable provision for C. and D. as they should be entitled to in respect of the portions originally secured upon the settled estates, and subject thereto in trust for B. The money was paid into the Exchequer, and the estates conveyed accordingly:—Held, that C. was entitled to a full half of the 4,000*l.*, with interest from A.'s death, and was not bound to contribute towards payment either of the 25,000*l.*, or the expenses incurred in obtaining or executing the Acts of Parliament. *Hansard* v. *Kemeys*, 2 Wils. 106.

1. L., having joined her father in raising 24,000*l.* to pay his debts, afterwards, upon her marriage, a settlement being made by which 30,000*l.* was to be raised for the payment of E.'s debts, it was determined by the Court, and affirmed in Parliament, that the 24,000*l.* should be taken as part of the 30,000*l.*, and not raised beyond it. *Shelburne* v. *Inchiquin*, 1 Bro. C. C. 339.

2. On marriage, lands are settled on A. for life; remainder in the first, etc., sons of the marriage in tail male; remainder to trustees for 500 years, to raise 5,000*l.* portions for daughters, payable at eighteen or marriage; remainder to A. in fee. After the marriage, A. settles other lands, and a term is created for raising the like sum of 5,000*l.* for daughters, on failure of issue male, payable at sixteen or marriage. A. dies, leaving a daughter his heir-at-law, who attains eighteen, and dies unmarried. The trust of the term is not merged in the fee, but the portion shall go to the daughter's executors, and is indisposable by her will; but there shall be but one 5,000*l.* raised. *Thomas* v. *Kemeys*, 2 Vern. 348; 2 Freem. 207.

3. Settlement on marriage to the use of the husband for life, remainder to trustees for five hundred years in trust, after the death of the husband and not before, unless with his consent as therein mentioned, to raise portions for younger children to be paid in such shares and at such times as husband and wife should appoint, in default of appointment to be paid, if but one besides an eldest son, 5,000*l.*, if two, 6,000*l.*, if three, 8,000*l.*, and if four or more, 10,000*l.* equally, to be paid respectively at twenty-one or marriage of daughters, if after the age of sixteen, if such times of payment happen after the death of the husband, if in his life then within twelve months after his decease and not before, unless with such consent; provided that if any of such younger children should die before his, her, or their portions should become payable, so that the number should be reduced to less than four, no more should be raised than what would make the whole sum for the portion of the survivor or survivors of such younger children equal to the sum originally limited for the portion of such child or children, if one, two, or three. Three younger children only survived their father, but more than four had attained twenty-one. The sum to be raised is 10,000*l.* *Willis* v. *Willis*, 3 Ves. J. 51.

4. By indenture of marriage settlement a term of years was created, the trusts of which were declared to be, to raise a sum of money, not exceeding in the whole 2,000*l.*, for the portions of the younger children of the marriage, which sum, in default of appointment by the settlor, was to be equally divided amongst such younger children, and to be payable to the sons at their ages of twenty-one years, and to the daughters at their ages of eighteen years or days of marriage, whichever should first happen; with a proviso, that, if any of such younger children should happen to die under age and unmarried, that the share of the child so dying should go to the survivors; "and in case there should be but one younger child, son or daughter, the same should have and be entitled to the sum of 1,000*l.*, and no more; and that in that event the sum of 1,000*l.*, and no more, should be raised." There were two younger children of the marriage, who both survived their parents, but one of them died under the age of eleven years. On a bill filed by the representative of the surviving child, claiming the entire sum of 2,000*l.*:—Held, that in the events that had happened the sum of 1,000*l.* only was raisable. *Clarke* v. *Jessop*, Dr. 301.

5. A trust created to raise 36,000*l.* for the portions of three children, A., L., and C., to be paid to and amongst them at such time and times, and in such share and proportion, as M. should appoint by deed or will; and in default of appointment, to be paid to and amongst the said A., L., and C., in equal shares, on their respectively attaining twenty-one, or marriage; provided, that if any of the said daughters should die under twenty-one, or unmarried, 24,000*l.* only to be raised for the surviving daughters, to be paid to and amongst them at such time or times, and in such shares, as M. should appoint; and if no appointment, then to be paid equally between them at twenty-one, or marriage, and if two die before twenty-one, and unmarried, then a like proviso for raising only 12,000*l.* L. attains twenty-one and dies. The whole 36,000*l.* to be raised; but M. has no power to appoint the share of L. It goes equally between the survivors and the personal representatives of L. An appointment as to the remaining 24,000*l.* between A. and C., unequally, is good. *Vane* v. *Dungannon* (*Lord*), 2 Sch. & Lef. 118.

6. Lands settled on M. for life, with remainder over, charged with 25,000*l.* for portions, raisable on the decease of M., were sold under the Irish Incumbered Estates Act. The commissioner retained 25,000*l.* out of the sale moneys to answer such portions, which he directed to be invested in consols, and transferred to the credit of a suit in the Court of Chancery:—Held, that this money must be dealt with as part of the original lands, and as being still real estate; that the portioners must, on the decease of M., take to it in lieu of the sum charged, and run the risk of a rise or fall in the stocks; and therefore, as between the estate of the tenant for life (deceased) and the portioners, the former was entitled to the dividends for his life, with an apportioned payment up to the day of his decease, although, owing to a fall in the stocks, the fund would not, on a sale, realise 25,000*l.* cash. *Mornington* v. *Wellesley*, 4 Jur., N. S., 6.

7. M. being tenant for life of real estate, on which there was a charge of 1,500*l.*, vested in trustees for life of J., remainder to his wife for life, remainder to the children of the marriage, advanced moneys to support J.'s

wife, who was living separate from her husband, On a suit to raise the portion of 1,500*l.*, M. claimed to set-off against J.'s life interest the money he had advanced:—Held, that M. could not set off his debt against J.'s life interest; the portion being payable to trustees, and the claim against M. for it, being not more personal than against any of the other persons entitled to the estate. *Jenner* v. *Morris*, 3 L. T., N. S., 497.

1. Articles which were agreed to on the marriage of the parents of Mrs. H., in 1825, contained *inter alia* a power for raising portions for younger children, to the effect, that if there should be but one child of the marriage, other than and except an eldest or only child, whether son or daughter, entitled to the hereditaments, then to levy and raise 8,000*l.* for the portion of such child; if there should be two such children of the marriage, except as above mentioned, then to levy and raise 12,000*l.* for the portions of such children; and if there should be three or more such children, except as above mentioned, then 15,000*l.* for the portion or portions of such children; the 8,000*l.* to be paid to such one child, and the other sums to such children as the parents should jointly appoint; and in default of such appointment, then as the survivor should appoint; and in default, to become a vested interest in such child or children, being a son or sons, at twenty-one; or, being a daughter or daughters, at that age or marriage; if the husband should survive the wife, the portions not to be payable, unless otherwise directed under the power, until after his decease: but if the wife survived the husband, one moiety of such portion not to be payable until after her decease. The articles contained powers for raising any part of the portion or portions for the advancement, and, during the suspense of vesting, of raising interest on the portions for maintenance and education. There were three younger children of the marriage, two of whom died in infancy. The husband survived the wife, and Mrs. H. was the sole surviving younger child of the marriage. She presented a petition praying that she might be declared entitled to the 15,000*l.*:—Held, that as there were three younger children born, the only part of the trust which could come into operation was that which related to that sum, and that she was entitled to the whole. *Hemming* v. *Griffith*, *Griffith* v. *Hemming*, 6 Jur., N. S., 745; 8 W. R. 687; 2 Giff. 403.

2. A term of years was limited by will to trustees, upon trust, if there should be two or more younger children of D., to raise for their portions such sum or sums, not exceeding 8,000*l.*, to be paid to such of the children and in such shares as D. should appoint, and in default of appointment to all the children equally. D., by his marriage settlement, directed that 6,000*l.* should be raised for the younger children of that marriage, if two or more; and that if he should survive his intended wife, and die without being married again, or if so married, should not have any issue of any future marriage, who should take an interest in the sum provided by the will for younger children, then the further sum of 2,000*l.* should be raised for the younger children of the first marriage, if there should be two or more; neither the will nor the settlement contained a hotch-pot clause. Afterwards, D. appointed to one of his daughters the sum of 2,000*l.*, part of the sum of 8,000*l.*, made raisable by the will in the event which had happened, of there being two or more younger children. D. died in the lifetime of his wife:—Held (affirming 2 Jur., N. S., 1117; 3 Sm. & G. 353), that, on the construction of the will, 8,000*l.* was to be raised, unless D. directed that a less sum and no more should be raised, and that neither of the instruments so executed by him contained anything amounting to such a direction, and that therefore 8,000*l.* and not 6,000*l.* only must be raised. *Walmsley* v. *Vaughan*, 1 De G. & J. 114; 3 Jur., N. S., 497; 26 L. J., Ch., 503.

Semble, that D.'s settlement ought to be construed as directing that if no child of a future marriage became entitled, the additional 2,000*l.* should be raised for the children of the first marriage. *Ib.*

Held (reversing the decision of the Court below), that the appointee of 2,000*l.* was entitled to participate in the unappointed 6,000*l.* *Ib.*

3. A term of years was by deed vested in trustees, on trust to raise 31,000*l.*, and apply and dispose of the same to A., B., C., and D., who were the younger children of the Earl of C., for their maintenance and education, at such times, ages, and in such shares, as the earl should appoint; and in default of appointment, or so far as same should not extend, in trust, after the death of the earl, for the four children equally, for their lives: and in case any one or more of the children should die leaving a child or children living at his or her death, in trust, as to the parent's share, for such child or children, in equal shares. The deed contained clauses of survivorship and accruer among the younger children, and a proviso that no one of the children for whom portions were to be provided under the trusts should, by virtue, of the provisions for survivorship and accruer, be entitled to receive more than 16,000*l.* in the whole, including his or her original share of the 31,000*l.*; and no two of the children should, by virtue of the same provisions for survivorship and accruer, become entitled to more than 21,000*l.*, including their original shares of 31,000*l.*; it being declared and agreed that if, by reason or virtue of such survivorship or otherwise, any such child or children should, under the provisions thereinbefore contained, be entitled to a greater sum than 16,000*l.* or 21,000*l.* for his, her, or their portion or portions, the residue or surplus of the sum before directed to be raised for the younger children was to sink into the inheritance. C. and D. died unmarried and without issue, and in the earl's lifetime. 8,250*l.* was appointed to A., who, after the earl's death, became the eldest son, and entitled to the estate; and 10,250*l.* to B., who became the younger child:—Held, that notwithstanding the appointment, the sum of 21,000*l.* only was raisable. *Stuart* v. *Castlestuart* (*Earl*), 8 Ir. Ch. R. 408.

The earl became surety for A. in a bond and warrant of attorney, on which judgment was entered, for 2,000*l.* By his will he appointed 2,500*l.* of the 31,000*l.* to A., to be raised and paid immediately after his death, upon con-

dition that A. should have paid off and discharged the debt of 2,000*l.*, and interest, and that the creditor should have released the testator's effects from the 2,000*l.*; and in case A. should not have paid, and the creditor should not release the same, 2,500*l.* should be considered as unappointed, and A. should not be entitled to any of the unappointed part of the 31,000*l.*:—Held, that the appointment of the 2,500*l.* was valid, and was not vitiated by the condition annexed to it. *Ib.*

1. A testator, by his will, limited real estate for a term of 500 years, upon trust in a certain event to raise 20,000*l.*, and to stand possessed as to one-fourth part thereof "upon such trusts as are hereinafter declared touching 20,000*l.* Three-and-a-half per Cent. Consolidated Bank Annuities hereinafter bequeathed, in trust for the benefit of my son W. F. H., his wife, children, and issue as hereinafter mentioned." In a subsequent part of his will he directed other trustees to stand possessed of a sum of 20,000*l.* Three-and-a-half per Cent. Consolidated Bank Annuities, upon trust to pay out of the dividends, interest, and annual produce thereof, the yearly sum of 200*l.*; but if she should marry again, then after her second marriage to pay to her separate use, free from the debts and engagements of any her future husband, the clear sum of 100*l.* only during the then remainder of her natural life; and after the death of his son W. F. H., subject to the said provision for his wife, upon trusts for the children of his son W. F. H.:—Held, reversing the decision of Romilly, M. R. (29 Beav. 109), that the widow of the testator's son W. F. H. took only one annuity of 200*l.* *Hindle* v. *Taylor*, 6 De G. M. & G. 577; 1 Jur., N. S., 1029.

2. The testator by his will bequeathed 187,500*l.* to trustees in trust for A. for life, and after his decease in trust to raise 5,000*l.* for each of such younger children of A. as thereinmentioned, and subject thereto upon the trusts therein-mentioned. In a subsequent part of the will he bequeathed one-fifth of his residuary personal estate upon the trusts thereinbefore declared concerning the sum of 187,500*l.*:—Held, that the younger children were not entitled to two charges of 5,000*l.* each. *Hindle* v. *Taylor* (5 De G. M. & G. 577) followed. *Boyd* v. *Boyd*, 2 N. R. 486; 9 L. T., N. S., 166.

3. A father bound himself to give his daughter a marriage portion of 2,000*l.*, and said that she was and should be noticed in his will. He had previously made a will, giving her a lac of rupees; but afterwards he made another will, which, after giving all his property to his wife for life, and then to his two sons, gave the same, if they should die without issue, to his daughter's issue:—Held, affirming a decree below, that there was no contract by the father to give more than the 2,000*l.* *Moorhouse* v. *Colvin*, 21 L. R., Ch., 782. Affirming 15 Beav. 341; 21 L. J., Ch., 177.

4. A tenant for life under a power charged the estate with portions for younger children varying according to the number, being, if there were four or more, 5,000*l.* There were four younger children born, two of whom died before the portions were raisable. The tenant for life subsequently made an appointment of the full amount of 5,000*l.*:—Held, that the appointment was effectual, notwithstanding the death of the children. *Knapp* v. *Knapp*, 24 L. T., N. S., 540; 12 L. R., Eq., 238.

5. By a marriage settlement, portions for daughters and younger sons, varying in amount according to the number of such children, and subject to a power of appointment in the father, were directed to be raised in certain specified events; amongst others, in case there should be a son taking the settled estate, and only one other child, a daughter, and such daughter should attain twenty-one or marry, a sum of 6,000*l.* was made raisable for her. In some of the events, also provided for by preceding clauses, the portions were directed to be raised for the daughters or younger sons, "who should" attain twenty-one or marry; and in others the portions were expressed to be raisable in case there should be by number of daughters and younger sons mentioned, and "such" childen should attain twenty-one or marry. The power of appointment reserved to the father, and the trust, in default of appointment of the sum or sums to be raised, were in terms applicable to all the children of the marriage other than an eldest or only son, their interest to become vested at twenty-one, or, in the case of daughters, upon marriage under that age. There were issue of the marriage an eldest son and a daughter, both of whom attained twenty-one, and two other children, who died under that age unmarried:—Held, that the sum of 6,000*l.* was raisable for the daughter under the above clause, the words "and such daughter" being construed as "who." *Rye* v. *Rye*, 1 L. R., Ir., 413.

A marriage settlement, from the very nature of the instrument, imports an intention to provide for all the children of the marriage. *Ib.*

Held also, that, in the present case, a paramount intention was manifested to provide for every child who should live to require a portion. The amount of the provision in each case to be dependent on the number of children attaining vested interests. *Ib.*

6. A testatrix who had a power to direct the raising of 10,000*l.* out of estates, after directing the same to be raised, appointed 5,000*l.* to A., and directed and appointed the residue to be distributed in the proportions thereinafter mentioned, giving various sums, amounting together to 3,400*l.*, to eleven persons and a charity. She then proceeded:—"I give and bequeath to B. 300*l.*, to C. 200*l.*, and to D. 50*l.*;" and, in the event of any of the legatees or appointees dying in her lifetime, she gave their shares to other persons:—Held, that the whole of the 10,000*l.*, and the costs of raising the same, must be raised; that, after setting apart the 5,000*l.* given to A., the residue must be apportioned between the fifteen appointees (including the charity); and that the part so appropriated to the charity sank for the benefit of the estates charged with the raising of the 10,000*l.* *Cust* v. *Middleton*, 16 W. R. 391; 37 L. J., Ch., 385.

As to Cumulative and Substitutional Legacies.] See LEGACY.

III. Interest.

1. From 1725 the Court has never allowed more than 4 per cent. interest, in cases of account as to a portion. *Wood* v. *Briant*, 2 Atk. 523.

2. Devise to A. for life, with remainder to his first and other sons, remainder to his daughters; and in default of such issue, the premises to stand charged with two sums to be paid after the death of A. without issue, and subject to such charge over, with a power to A. of jointuring the whole estate, which he executed; A. dying without issue:—Held, that the sums only carried interest from the death of the jointress, who survived him. *Reynolds* v. *Meyrick*, 1 Eden 48.

3. By a marriage settlement a term was limited to trustees for raising, on failure of issue male, 3,000*l.* for daughters' portions, payable at eighteen or marriage. The father and mother die, leaving issue, two daughters only, who, at the death of the father (who survived the mother), were fifteeen or sixteen years of age, and who had, by the father's will, 500*l.* apiece devised to them, payable at the same time with their original portions, but the estate was devised to S., one of the daughters being married and being of the age of twenty:—Held, on her bill, that she must have maintenance from the time of her father's death, till the portion became due, and from thence interest at 5 per cent. till paid. *Greenhill* v. *Waldoe*, Pre. Ch. 367; Gilb. Eq. Rep. 31.

4. The right to interest upon the sum of 2,500*l.*, part of a sum to be raised out of a term, was limited to the year 1825, the period to which the claim to this sum was put forward, but interest upon the sums of 1,000*l.* and 1,300*l.* the residue thereof, was allowed upon the former, from the filing of the original bill in the year 1800; and upon the latter, upon the accruer of the right to that sum. *Reilly* v. *Fitzgerald*, Dr. 122; 6 Ir. Eq. R. 335.

5. Where a tenant for life had exercised a power of charging the inheritance (which had been conferred upon him by settlement) in favour of H., and afterwards became bankrupt, and J. became the purchaser of all the estate which had vested in the assignee, and also of H.'s charge, and the bankrupt died:—Held, that as the person entitled to receive the interest on the charge was also owner of the life estate which was to pay it, it should be considered to have been regularly paid during the life of the tenant for life, and that after his death, S., the owner of the charge, was entitled to claim out of the inheritance only the arrears of interest which had accrued since the death of the tenant for life. The rate of interest was held to be 5*l.* per cent., there being no contract as to it. *Simpson* v. *O'Sullivan*, 3 Dr. & War. 446.

6. Portions charged on a reversionary fund shall not in general be raised until the term comes into possession: yet when it is expressly directed, under a power, that they shall be raised as soon as may be, they shall bear interest from the death of the testator. *Conway* v. *Conway*, 3 Bro. C. C. 267. But see note there. See also *Codrington* v. *Foley* (*Lord*), 6 Ves. 364.

7. It is the rule of this Court to allow no more than 4 per cent. where the will does not mention interest on portions charged upon land, and it has also been extended to legacies and portions charged upon personal estate. *Guillam* v. *Holland*, 2 Atk. 343. And see *Lewis* v. *Freke*, 2 Ves. J. 507.

8. Term to raise daughter's portion, to daughters of son, on failure of issue male of grandson, with power for grandson to jointure:—Held, the portions not raisable, nor interest payable, till after the death of the jointress. *Churchman* v. *Harvey*, Ambl. 366.

9. Where the principal of portion to be paid to sons at twenty-one, to daughters at twenty-one or marriage, with interest at 5 per cent. per annum from the death of father to the payment thereof, the interest ought not to accumulate till the portions are payable, but to be paid annually; for it is given as a recompense in the meantime till the principal becomes due. *Boycot* v. *Cotton*, 1 Atk. 553.

Where there is a power of charging interest on a portion, it shall be considered as maintenance. *Id.* 556.

If younger brother have provision under settlement, and live with the elder brother, whose estate is charged with his portion, he shall have an allowance for his maintenance out of the interest due. *Ib.*

10. A term is created for the purpose of raising out of the yearly profits several sums for the maintenance and education of younger children, until their portions should be due, and then upon trust for raising such sums of money out of the estate, not exceeding 2,000*l.*, as father and mother or survivor should appoint:—Held, that this 2,000*l.* should carry interest from the time that it might have been raised out of the yearly rents, etc., of lands, and an inquiry was directed to ascertain that time. *Bagenal* v. *Bagenal*, 6 Bro. P. C. 81.

11. What interest portions to carry, and from what time. *Beal* v. *Beal*, Pre. Ch. 405; Gilb. Eq. Rep. 93.

12. A term of forty years is limited for raising 2,000*l.* either by profits or sale. The trustees take possession but make no interest of profits:—Held, that portion should carry interest from time it was payable, the estate being sufficient, and trustee might have raised portion immediately. *Roseberry* v. *Taylor*, 6 Bro. P. C. 43.

13. A., by a deed, dated in 1826, settled property on himself for life, with remainder for such of his children as he should by deed or will appoint, with remainder, in default of appointment, to all of his children equally. The deed contained a power enabling A. to give a jointure to any wife whom he might afterwards marry, and a direction that, unless the contrary should be directed by any appointment, it should be lawful for the trustees to apply the income of the share of any child for his maintenance. A. married soon after the date of this deed, and his wife died in 1836, and there were two children of this marriage. In 1836 A. married B., and by a deed dated in that year he gave a jointure to B., and directed that if there should be two children of the marriage the trustees should raise 4,000*l.* for the portions of such children, to be paid to them at their ages of twenty-one years, after the death of the survivor of A. and B., with power for the trustees to give interest on the portions between

the death of the survivor of A. and B. and the time of payment. A. afterwards appointed portions for the children of the first marriage, with interest from his death. There were two children of the second marriage. A. died in 1849:—Held, that the children of the second marriage were not entitled to interest on their portions between the death of A. and the death of his widow. *Gardner* v. *Perry*, 20 L. J., N. S., Ch., 429.

1. Reversioner cannot redeem a term for raising portions, and exonerate the estate, without paying interest for the portions from the time they became due, notwithstanding the proviso that the term should cease on payment of the portions, either before or after the same became due. *Hall* v. *Carter*, 2 Atk. 358; 9 Mod. 347.

2. Testator having, by his marriage settlement, a power of appointment and distribution over a fund of 5,000*l.*, by his will appointed same payable with interest from his death. He also gave a further sum of 3,000*l.* to be divided equally among his children, subject to the same limitations, in all respects, as the said sum of 5,000*l.* Both sums were charged upon the same lands:—Held, that the sum of 3,000*l.* was not to bear interest. *Bredin* v. *Bredin*, 1 Dr. & War. 494.

3. By deeds of settlement and appointment a sum of 15,000*l.* was charged for three daughters, and appointed to them in equal shares, payable at twenty-one or day of marriage, with interest from the death of the father; by a subsequent deed, whereby the estates were re-settled, a term of 500 years was created, one of the trusts of which was to raise, in case all three daughters should attain their respective ages of twenty-one years, or be married, a sum of 6,000*l.*, and pay each of the daughters a sum of 2,000*l.* in addition to the portions provided for them by the previous deeds, with a proviso that if any of them should happen to die before twenty-one or marriage, the said sum of 6,000*l.* or any part thereof should not be raised:—Held, upon the true construction of this latter deed, that interest on the additional portions thereby provided was only payable from the time when the youngest daughter attained twenty-one years; the deed, in every other instance in which it was intended that interest should be given, having expressly provided for the payment of interest. *Clayton* v. *Glengall* (*Earl*), 1 Dr. & War. 1; 1 Con. & L. 311. Affirming Fl. & K. 151.

In the construction of family deeds when the intention is plain to give interest, the Court is bound to effectuate such an intention, even though there are no express words to that effect. *Ib.*

An intention apparent on the face of a particular clause that sums given in addition to portions already provided should bear interest, may be controlled by the general intention appearing on the entire instrument. *Ib.*

4. Where a testator made special provision for the maintenance of his younger children until receipt of their portions, and stated the sum appointed for the maintenance of the sons to be in lieu of interest:—Held, that the daughters were not entitled to interest on their portions, although there was a general clause in the will, that the trustees should stand possessed of the trust funds, and the annual produce thereof, for the benefit of the daughters upon their attaining twenty-one. *Selby* v. *Gillum*, 2 Y. & Coll. 379.

5. Trust term by marriage settlement, without impeachment of waste, immediately expectant upon the father's death, subject to a jointure to the mother, by sale or mortgage, rents and profits, or by any other ways and means, to raise portions for younger children at twenty-one, if after the death of both parents; and by such ways and means as the trustees think fit to raise interest for maintenance until the portions shall respectively become payable: if the remainderman should pay the portions and the interest, or if there should be no younger child, the term, or so much as should remain unsold, to attend the inheritance, which was limited in the usual way. Interest due from the death of the father, in the minority of all the children, and the wife surviving. *Lyddon* v. *Lyddon*, 14 Ves. 558.

6. Interest not given upon arrears of maintenance, any more than upon arrears of a jointure. *Mellish* v. *Mellish*, 14 Ves. 516.

7. Interest not given on a portion beyond the filing of bill, where a plaintiff, under no disability, and where no compromise has taken place, has slept on his rights, of which a defendant, not guilty of fraud, was ignorant, *Barrington* v. *O'Brien*, 1 Ball. & B. 180.

8. Portions under a settlement for younger children were increased by the will of the father: there being an express maintenance of 2 per cent. upon the original portions, the rule for interest upon the legacies does not apply, but the Court continued the 2 per cent. upon them. *Mitchell* v. *Bower*, 3 Ves. 286.

9. In a settlement before marriage was a proviso, that if the husband and wife should die, leaving issue unprovided for, then the trustees might enter upon the estate, and take the rents, till they had received 200*l.* for the benefit of such unprovided children, in such manner as the survivor of the husband and wife should appoint. The wife survived, and appointed the 200*l.* for a daughter, plaintiff's wife, being an unprovided child. Upon a bill to have the 200*l.* raised, decreed, the 200*l.* and interest by way of maintenance, from the death of the mother. *Green* v. *Belchier*, 1 Atk. 505.

Where the words "to be raised by rents and profits" are used in a deed, the Court will construe them liberally, and decree a sale, if there are no words to make it annual. *Ib.*

10. Though, in general cases, portions out of the real estate carry interest in their nature without particular mention, yet in the principal case, as a great length of time had elapsed, and some degree of laches occurred, with some complication of circumstances relative to the portion itself, the commencement of interest was fixed from the time of the sum to be raised having become a duty decreed upon a former occasion. *Pomfret* (*Earl*) v. *Windsor* (*Lord*), 2 Ves. 472.

11. Daughters' portions by will, charged on personal, then on real estate, with interest for maintenance, so far as the personal deficient; they carry but 4 per cent. *Trimlestown* (*Lord*) v. *Colt*, 1 Ves. 277.

1. A., who, under a settlement entered into upon the marriage of his father in 1783, was entitled to a younger child's portion, filed his bill in 1825 for the purpose of raising the same, praying at the same time an account of all prior incumbrances, the inheritrix having set up certain prior articles executed in the year 1765 upon the marriage of the plaintiff's uncle (the elder brother of his father), and which articles had been registered in the year 1767; the plaintiff amended his bill in 1829 by bringing before the Court B. and her husband, who were the only parties beneficially entitled under these articles. B. having answered the bill, a decree was pronounced in 1834, according to the terms of the prayer, and the usual reference made; B. and her husband claimed before the Master in right of her charge under the articles of 1765, the principal sum so charged by those articles, and sixty-eight years' interest thereon. The Master having made his report:—Held, that the account of interest on foot of this charge should be confined to the filing of the bill, and that according to the settled practice of this Court, the plaintiffs are only entitled to their costs according to the priority of their demands. *Peyton* v. *M'Dermott*, 1 Dr. & Wal. 198.

2. Where portions for younger children are created, if their interests are vested, and the contingencies have happened on which the portions are to be paid, interest on them is payable, and the portions on them must be raised, although the only means of raising them may be the sale or mortgage of a reversionary term. The intention of the parties creating the portions is to govern. *Massey* v. *Lloyd*, 10 H. L. Ca. 248; 8 L. T., N. S., 122; 9 Jur., N. S., 391; 11 W. R. 484. Affirming 12 Ir. Eq. R. 298. Reversing 11 Ir. Eq. R. 429.

But if the principal is not raisable till the death of the survivor of father or mother, though the title to the portion may be vested, interest on it will not be payable till that time, except on express words. *Ib.*

There is a distinction between the word "payable," when used in speaking of a sum payable to a beneficiary, and when used in speaking of a sum payable by a trustee. *Ib.*

In a marriage settlement the estate was given to trustees to pay the rents to the wife for life; to raise by sale or mortgage 10,000*l.* for a child of the wife by a former marriage, and also 500*l.* for a relative of the first husband, then, after the death of the wife, to pay 1,000*l.* a year to the husband for life; to raise 15,000*l.* for younger child or children, to be paid at such time, in such shares, and with such yearly interest as the wife should appoint, and, in default of appointment, at twenty-one or marriage, and until such portion should become payable, to raise money for the maintenance and education of the children as the wife should deem meet: provided, that if there should be no younger child, or it should die before twenty-one or marriage, 5,000*l.* additional should be paid to the wife's daughter by the former marriage. The wife died in 1806, leaving a son and a daughter, both very young. The daughter attained twenty-one, and married in 1824. The father died in April 1859. The Irish Court of Chancery held that the principal of 15,000*l.*, though the right to it vested on the daughter marrying, could not be raised during the life of the father, but declared interest on that sum to have become payable from the date of her marriage. On appeal the decree of the Court of Chancery was reversed, and the cause remitted, with directions that interest did not become payable till the death of the father. *Ib.*

3. By a settlement B. was empowered to charge lands in Ireland with any sum not to exceed 400*l.* a year, as a jointure for his wife, and with any sum not to exceed 2,000*l.* sterling for his younger children. In exercise of the power B. charged the lands with 2,000*l.* late Irish currency, to be vested in and paid to his younger children in equal shares on their attaining twenty-one or marriage; and he directed, in the event of his dying before the shares became vested, that his children should be entitled to interest on their presumptive portions at 5*l.* per cent. by way of maintenance from the time of his death until such portions should be payable:—Held, that the 2,000*l.* carried interest at 5*l.* per cent. Irish currency from the death of B. until the shares of the younger children became payable. *Denny* v. *Denny*, 14 L. T., N. S., 854.

4. By a settlement made in England on the marriage of D. certain real estates in Ireland were limited to trustees for 1,000 years, upon trust by mortgaging the said estates, or out of the rents and profits thereof, to raise 15,000*l.*, to be divided among the younger children of the marriage, as D. should appoint. D. appointed the whole of the portions among his children, appointing 4,000*l.* to his daughter, to be raised at certain specified times, with interest in the meantime at 5 per cent. The trustees being unable to raise the portions by mortgage, an action was brought to carry the trusts into effect:—Held, that D. having only a power of distributing the portions and not of charging them, had no power to fix the rate of interest; but that the land being in Ireland, 5 per cent. was the proper rate to be fixed by the Court. *Lewis* v. *Freke* (2 Ves. 507) and *Young* v. *Waterpark* (*Lord*) (13 Sim. 199) distinguished. *Balfour* v. *Cooper*, 23 L. R., Ch. D., 472; 52 L. J., Ch., 495; 48 L. T. 323; 31 W. R. 569.

Limitations. Statute of.] 5. By a marriage settlement of the year 1798, certain lands were limited to trustees to the use of A., the husband, and B., the intended wife, and the survivor of them, for their respective lives, with remainder to the issue of the marriage; and also to C. (a daughter of B. by a former marriage) in such shares as the survivor of them, the said A. and B., should appoint. In 1819, A. being the survivor, in pursuance of the power, appointed a certain sum to C., and limited a portion of the said lands to trustees to receive and levy by sale or mortgage the sum so appointed, and directed that the same should bear interest and be payable on the marriage of C., with a proviso, that if the marriage of C. should take place within the lifetime of A. the said principal sum should not be raised until twelve months after the decease of A. On a bill filed by C. and her husband, after the death of A., against a son of A. and B. who had got into and continued in the possession of the lands since the year 1825, and disputed

the validity of the original settlement of 1798: —Held, that the plaintiffs were within the 42nd section of the 3 & 4 Will. 4, c. 27, and therefore only entitled to six years' arrears of interest on their charge. *Burne* v. *Robinson*, 1 Dr. & Wal. 688; 1 Ir. Eq. R. 333.

1. A., who, under a settlement entered into upon the marriage of his father in 1783, was entitled to a younger child's portion, filed his bill in 1825 for the purpose of raising the same, praying at the same time an account of all prior incumbrances, the inheritrix having set up certain prior articles executed in the year 1765 upon the marriage of the plaintiff's eldest brother, and which articles had been duly registered in the year 1767:—Held, that the charge under the articles of 1765 was not affected by the 3 & 4 Will. 4, c. 27, that statute not being retrospective, and that the account of interest on foot of this charge should be confined to the filing of the bill. *Peyton* v. *M'Dermott*, 1 Dr. & War. 198.

Charge of Interest when Authorised by Powers to Charge in General.] See POWER, XIX. II.

IV. Time for Raising.

2. Portions at twenty-one or marriage, "when C. and his wife should die without issue male":—Held, a condition precedent, and not to be raised till both are dead, though one die, and other remain tenant in tail after possibility of issue extinct. *Champney* v. *Champney*, 10 Mod. 312.

3. When a portion is to be raised by the annual profits or fines, if no time is appointed the portion is not due until such time as it might be so raised. *Ivy* v. *Gilbert*, 2 P. W. 20; Pre. Ch. 583. Affirmed 6 Bro. P. C. 68.

4. As to when portions are to be raised. See *Evelyn* v. *Evelyn*, Fitzg. 131; 2 P. W. 659; Selw. 18; 2 Barnard K. B. 118.

5. By marriage settlement lands are limited to husband and wife for their lives, remainder to the heirs male of their bodies, and if there should be no issue male of their bodies, and one or more daughters, then to trustees for 500 years from the decease of the survivor, in trust, by sale or mortgage to raise 1,000*l.* for daughters' portions, but there is no time appointed for the payment of them. The father dies, leaving a daughter only. The portion vesting in the daughter in the lifetime of the mother, it was decreed to be raised by a sale, with reasonable maintenance in the meantime, though no maintenance is provided by a settlement. *Staniforth* v. *Staniforth*, 2 Vern. 460.

6. A., by will, gives portions to his daughters, but mentions no time when to be paid, but adds a proviso, that his daughters should marry with consent of his wife, and if any married without such consent the portion to go over. On a bill brought by the daughters for their portions, the Court decreed the portions to be paid, but on security to refund if the condition should be broken. *Aston* v. *Aston*, 2 Vern. 452; 1 Ch. Rep. 164; Pre. Ch. 226.

7. Term created for daughters' portions, commencing after the death of the father and mother, upon trust to raise the portions from and after the commencement of the term. Father dies, leaving a daughter; decreed the portion is vested, but not raisable during the life of the mother. *Butler* v. *Duncomb*, 1 P. W. 448; 2 Vern. 760; 10 Mod. 432.

8. Where portions were provided for daughters on failure of issue male, to be paid at twenty-one or marriage, after the death of the survivor of the father or mother; the father having died, and there being an only daughter who had attained twenty-one, it was held, from the clear indication of the intention to postpone the raising till after the death of the survivor, that the portion should not be raised during the lifetime of the mother. *Verney* v. *Verney* (*Earl*), 2 Eden 25.

9. Term limited in remainder after father's death, in trust for raising portions for daughters at eighteen, or marriage; portions may be raised during life of father. So if on contingency, and the contingency happens in the life of the father, but not before contingency happened. *Corbett* v. *Maidwell*, 1 Salk. 158.

A term is limited in remainder after the father's death, in trust if he died without issue male, and there should be one or more daughters unmarried or unprovided for at his death; the trustees were to raise 2,000*l.* for their portions, to be paid at eighteen or marriage. The mother being dead, and there being one daughter who was married, and no issue male, the Court would not decree the portion to be raised in the life of the father, it not vesting till his death. S. C. *nom. Corbett* v. *Maydwell*, 2 Vern. 640; 3 Ch. Rep. 160.

10. A sum of 2,000*l.* was by certain articles provided for the daughters of a marriage, without any restriction as to the time of payment. By subsequent articles between the father and his eldest son, the former security was discharged, and securities to the amount of 8,000*l.* substituted for it, part provided by the father and part by the son. The intent was declared to be, that if the three daughters respectively should marry with the consent of their father (or after his death, of their mother), they should receive each a certain portion of the said 8,000*l.* on the day of her marriage, with interest from that day; and in case any of them should marry without such consent, or if any of them should die before she was married as aforesaid, her share should go between the others or to the survivor; and such of them as should be unmarried at their father's death, were to receive interest on their respective portions by way of maintenance. After the death of the father and mother, two of the daughters married and received their portions; the third having attained twenty-one years, though unmarried, was held entitled to have her portion raised. *Nugent* v. *Clare*, Wall. Lyn. 105.

11. Lands of an heir are charged with portions to infants at twenty-one, or marriage. The portions shall not be admitted to be paid in before they grow due in ease of the land. *Oldfield* v. *Oldfield*, 1 Vern. 337.

12. Portions raised in the lifetime of the father. *Hillier* v. *Jones*, 1 Eq. Abr. 337.

13. By marriage settlement, a term is limited to raise 5,000*l.*; if but one daughter to be paid at twenty-one or marriage, which should first happen after the death of the father and mother, or within six months after either of those days or terms. There being one daugh-

ter only, and she having attained twenty-one, and her father being dead, her portion was decreed to be raised in the lifetime of her mother. *Gerrard* v. *Gerrard*, 2 Vern. 458.

1. Under what circumstances payment of portion under a will shall be postponed until all the father's debts are satisfied. *Daly* v. *French*, 6 Bro. P. C. 55.

2. One has several daughters, and, being seised in fee, charges his lands with 1,000*l.* a-piece to his daughters, payable at twenty-one or marriage; and, if any die, then to the survivors, but no time limited when the additional portion should be paid to the surviving daughters. If one die unmarried before twenty-one, the additional portion shall not be paid to the surviving daughters until the deceased daughter should have come to twenty-one. *Feltham* v. *Feltham*, 2 P. W. 271.

3. Upon a marriage settlement, lands are limited to the use of the husband and wife for their lives, remainder to their first and every other son in tail, and in default of issue male of the marriage, to trustees in trust to raise 2,500*l.* for daughters, payable at twenty-one or marriage, which shall first happen, and out of the profits to pay 100*l.* per annum for maintenance; the first payment of the maintenance to commence after the estate of the trustees shall have come into possession. Husband dies without issue male, leaving a daughter, and a wife who is jointured in the premises; the portion shall not be raised in the mother's lifetime. *Brome* v. *Berkley*, 2 P. W. 484. Affirmed 6 Bro. P. C. 108.

4. Where there is a term for years for raising daughters' portions, payable at a certain time, and a vested interest, they shall not stay till the death of the father and mother; but the Court will lay hold of the slightest circumstance in a settlement that shows an intention to postpone raising them in the life of father and mother. *Stanley* v. *Stanley*, 1 Atk. 549.

5. A., upon his marriage with B., settles his estate to the use of himself for life, remainder to first and other sons in tail male, remainder to trustees for 1,000 years, remainder to his brother C. for life, remainder to the heirs male of his body, hereafter to be begotten; and then declares the trust of the term, that if there should be no issue male of the bodies of A. and B. begotten, that should live to the age of twenty-one years, or be married and have issue, and that there should be a daughter or daughters of the bodies of A. and B., such daughter should have 4,000*l.* for her portion; and if two or more, they to have 5,000*l.*, equally to be divided at their ages of twenty-one, or days of marriage, which should first happen; and if only one daughter, she to have the yearly sum of 100*l.* to be paid half-yearly for her maintenance; if two or more, the like sum to be paid them half-yearly, in equal shares, until their respective portions paid; if the portions not paid, the trustees to raise them out of the rents, or by sale or mortgage of the premises, or of part. Provided that, if the father should, in his lifetime, prefer them in marriage with portions equivalent, or the remainderman should, after the father's death, or that there should be no daughter who should attain the age of twenty-one, or be married, then the term to cease. B. died in the lifetime of A., leaving no son, but three daughters, who are all unmarried: C. took an estate tail under this settlement; and the portions may be raised for the daughters in the lifetime of A., their father. *Hebblethwaite* v. *Cartwright*, Forrest. 30.

6. The Court in late cases has thought it hard to raise daughters' portions in the father's lifetime, and therefore refused to do it. *Hall* v. *Carter*, 2 Atk. 356; 9 Mod. 347.

In late cases, where the portion was large, the Court has refused it in favour of the remainderman. *Ib.*

A jointress having, on the execution of the power creating her jointure, an estate precedent to a term for raising portions, the portions cannot be raised in the lifetime of the jointress so as to affect her. *Ib.*

Conveyancers now insert negative words to prevent portions being raised in a father and mother's lifetime. *Ib.*

A power in trustees of raising portions by rents or by mortgage, is no reason for postponing the raising, in order that they may make their election. *Ib.*

7. Directing a gross sum to be raised does not imply that it shall be raised at once, for it may be raised out of the rents and profits, and so laid out till it amounts to that sum. *Okeden* v. *Okeden*, 1 Atk. 550.

The Court of Equity lays great stress upon a particular time being appointed for payment of a portion, and has enlarged the power of trustees to raise it within the time. *Id.* 551.

8. Estate settled on husband and wife for life, and then to trustees for a term to raise portions for daughter, by leasing, assigning, or mortgaging: the husband dies, leaving daughters at his death, and no issue male. Their portions shall be raised in the life of the mother out of the reversion. *Smith* v. *Evans*, Ambl. 533.

9. Term to raise daughter's portion, to daughters of son, on failure of issue male of grandson, with power for grandson to jointure: —Held, the portions not raisable, nor interest payable, till after the death of the jointress. *Churchman* v. *Harvey*, Ambl. 366.

10. Where parent is tenant for life of settled estate, with remainder to trustees for 500 years, upon trust to raise portions for younger children, and parent has power to appoint portions by deed or will, they cannot be raised during parent's lifetime, and whole sum cannot be raised until they have attained twenty-one. *Wynter* v. *Bold*, 1 Sim. & S. 507.

11. In a power to appoint to children, by authorising the donor to appoint maintenance and education, it implied that the portions could not be raised during infancy, for if they could, the interest of the money so raised would supply those purposes. *Edgeworth* v. *Edgeworth*, Beat. 328.

12. A charge payable at a future day is in general not raisable, if the party die before the day, except when the time of payment is postponed for the convenience of the estate, when it is otherwise; but this exception does not apply to children's portions, which are not generally raisable for the child's representative if he dies before he wants a provision. The rule and cases on the subject considered. *Ruby* v. *Foot*, Beat. 581.

1. Where, under a settlement, a sum of money is to be raised out of real estates, for the portions of younger children, and some of the portions have become payable, the Court will raise the whole sum at once, although some of the children have not acquired vested interests. *Gillibrand* v. *Goold*, 5 Sim. 149; 2 L. J., N. S., Ch., 100.

2. Where a testator gave 2,000*l.* charged upon land to his daughter, with a direction that she should let it remain in the hands of his executors (who were his sons), at the interest of 4 per cent. till she married, and some time after, the executors, who succeeded to the business of the testator, died, and their sons, who next succeeded to the business, and one of whom succeeded to the estate upon which the legacy was charged, became bankrupt:—Held, that the daughter, though not married, was entitled to have the legacy raised out of the estate. *Exp. & Re Forster*, 1 M. D. & De G. 418; 10 L. J., N. S., Bky., 24; 5 Jur. 176. Affirmed 2 M. D. & De G. 177; 10 L. J., N. S., Ch., 340.

3. Portions held to be raisable before the time of payment, under the particular construction of the will by which they were given. *Selby* v. *Gillum*, 2 Y. & Coll. 379.

4. A term was limited in remainder after the death of a man and his wife, to raise daughter's portions at eighteen or marriage. One of the daughters attained that age after the death of her father. It was decreed that the portion should be raised in the mother's lifetime. *Cotton* v. *Cotton*, 3 Y. & Coll. 149. n.; 7 L. J., N. S., Exch. Eq., 41.

5. By a marriage settlement, lands were limited to trustees for a term, upon trust to raise a sum of 4,000*l.* for the younger children of the marriage; the shares of sons to be payable at twenty-one, and of daughters at twenty-one or marriage. There were several younger children of the marriage, and some of them having attained twenty-one filed a bill to raise the amount of their portions:—Held, that the entire sum of 4,000*l.* could be raised at once, although some of the younger children were under age and unmarried, and that the shares of the latter should be paid into court, with liberty for them to apply when their shares should become payable. *Leech* v. *Leech*, 5 Ir. Eq. R. 69; 2 Dr. & War. 568.

6. Where, by a settlement, portions were to be raised at any time after the death of the father by the trustees of a term, to commence after the death of the father and mother, the portions to be paid at twenty-one or marriage of daughters, which should first happen, after the death of the father:—Held, that the portions were raisable during the lifetime of the mother, who was the survivor, and that the cost of raising them fell on the estate. *Michell* v. *Michell*, 4 Beav. 549; 7 Jur. 887.

7. The trustees of a term of years were to raise, as portions for younger children, 5,000*l.* if there should be one, 8,000*l.* if two, and 10,000*l.* if three or more, to be divided among them equally, the shares of the sons at twenty-one, and the shares of the daughters at twenty-one or marriage. There were three younger children:—Held, on petition, that the heir at law, on attaining twenty-one, was not entitled to have the portions raised and his estate discharged before the portions became payable, and that the Court would not order a larger sum to be raised for portions than had actually become vested and payable to the children who had attained twenty-one or married. *Sheppard* v. *Wilson*, 4 Hare 392; 9 Jur. 920.

8. An estate was limited to trustees for a term, with remainders to A. and afterwards to his sons in tail, with similar limitations successively to B. and C., and their sons in tail. The trusts of the term were, on the death of A., and of B., and of C., respectively, to raise portions for their respective younger children:—Held, on the death of C. in the life of B., that the portions for the younger children of C. could not be raised during the life of B. *Lawton* v. *Swetenham*, 18 Beav. 98.

9. Portions charged on a reversionary fund shall not in general be raised till the term comes into possession; yet when it is expressly directed, under a power, that they shall be raised as soon as may be, they shall bear interest from the death of testator. *Conway* v. *Conway*, 3 Bro. C. C. 267. But see note there.

10. On a settlement before marriage, the trust of a term was, that in case the husband should have no issue male, and there should be daughters, to raise, if two daughters, 25,000*l.*, to be paid at twenty-one or marriage, but not to be raised till the death of their grandfather. The father died leaving two daughters, and then the grandfather died; the husband of one daughter claimed 12,500*l.*, with interest from the time of the marriage:—Decreed, with interest, as a vested portion on the words of the settlement; but upon portions, or interest on them, to be raised out of reversionary terms, especially upon construction or implication only, the Court reluctantly interfered. *Lyon* v. *Chandos* (*Duke*), 3 Atk. 416.

11. When a reversionary term, expectant upon an estate for life, is vested in trustees for the purpose of raising and securing portions for children, such reversionary terms may be sold in the lifetime of the tenant for life, to raise the portions. *Whaley* v. *Morgan*, 2 Dr. & Wal. 330.

A reversionary term, expectant upon the estate for life of the settlor, was vested in trustees, to secure children's portions, payable after the death of the tenant for life (the settlor). The deed contained a provision that it should be lawful for the settlor and the trustees in his life to raise and levy, by sale or mortgage, or other disposition of the term, the aforesaid portions, or any part thereof, in his, the settlor's lifetime:—Held, that this provision entitled the settlor to charge such portions in his lifetime, payable with interest from the day of the date of his so charging. *Ib.*

12. Under a marriage settlement, lands were limited to trustees for a term in remainder, after successive life estates, to the husband and wife, and limitations to sons, etc., in tail, upon trust, that in case there should be an eldest son, and one or more child or children of the marriage, the trustees should by sale or mortgage of the term raise a certain sum for portions, such portions to be paid to a son at twenty-one, and to a daughter at twenty-one

or marriage; and there was also a trust for maintenance out of the rents, issues, and profits, and also for the advancement of the sons, etc., after the decease of the husband, or in his lifetime with his consent:—Held, upon a bill filed after the death of the wife by the younger children, who had all attained twenty-one, that they were entitled to have their portions raised immediately by sale or mortgage of the reversionary term. *Smyth* v. *Foley*, 3 Y. & Coll. 142; 7 L. J., N. S., Exch. Eq., 34.

Quære, whether "rents, issues, and profits" mean annual profits merely, or authorise a sale. *Ib.*

In the construction of marriage settlements, courts of equity will not act upon any views of expediency or inexpediency of their provisions. *Ib.*

1. After a devise of his estates to trustees for twenty-one years, if any child should so long live and remain a minor, and, being a daughter, unmarried, upon certain trusts, the testator directed that after the determination of that term, and subject thereto, all his estates should remain to the use of the trustees for the term of ninety-nine years, to commence from the day of his decease, upon trust, to raise during so much of the life of his son as should fall within the period of twenty-one years from his death, and also during such other time or times of the life of his son as there should be in existence and actually born any children of his son entitled by virtue of the trusts to the benefit of the sum to be accumulated from time to time, an annuity of 2,000*l.* After other provisions, he declared that the annuity of 2,000*l.* was given to the trustees upon trust to lay out and invest the same and receive the interest, and lay out and invest the same so that the whole might accumulate, in the way of compound interest, until the decease of the plaintiff, and then upon trust for all and every the younger children of the body of the plaintiff, exclusive of an eldest or only son, to be paid to them as the plaintiff should appoint; and in default of appointment, the accumulated fund was to be equally divided between all such younger children, the shares of sons to be paid at twenty-one, and of daughters at twenty-one or days of marriage, which should first happen. By a proviso he declared that if the children of the plaintiff should die under age, the accumulated fund should be part of the personal estate of the plaintiff. The plaintiff had issue a son in 1845, who died in 1850. In 1850 a daughter was born, and in subsequent years three other sons. On a bill filed by the plaintiff, praying that it might be declared that the trustees ought not to have resumed the raising of the 2,000*l.* out of the rents, and under the trusts of the term of ninety-nine years, upon the birth of the daughter in 1850, and that the sum had not become and was not raisable under the trusts of the term:—Held, that as soon as there was a younger child born, he must be considered entitled within the meaning of the language which directed the trustees to raise the annuity. *Beech* v. *St. Vincent* (*Viscount*), 3 Jur., N. S., 762; 19 L. J., N. S., Ch., 130; 14 Jur. 731; 3 De G. & Sm. 678.

2. The question as to the time when portions become payable is one of construction, and when according to that construction the period has arrived when the portion is directed to be raised and paid, this must be done, although it can only be done by a waste of property, and sale or mortgage of a reversionary term. *Massey* v. *Lloyd*, 8 L. T., N. S., 122; 10 H. L. Ca. 248; 9 Jur., N. S., 391; 11 W. R. 484 Affirming 12 Ir. Eq. R. 298. Reversing 11 Ir. Eq. R. 429.

A portion is not properly said to be payable by trustees until two things have occurred, namely, when the time appointed for raising has arrived, and when the person entitled is able to give a discharge; but a portion is often said to be payable to a child so soon as the event has happened which gives the child a vested interest in it. *Ib.*

By a marriage settlement, lands were conveyed to the use of trustees for a term of 999 years; and subject thereto, to the first and other sons of the marriage in tail male. The trusts of the term were for the wife for life; and subject thereto, and to 10,000*l.*, for her daughter by a former marriage, to pay yearly, during the residue of the term, out of the rents, to the husband 1,000*l.* during his life; and as to the residue to such persons as the wife should appoint; and in default, to her right heirs. And as to the residue of the term, in case there should be issue of the marriage one or more child or children other than an eldest or only son, by sale or mortgage of the term, or a competent part, and by the rents, in the meantime. and until such sale, to raise 15,000*l.* for the portions of such child and children; and if only one such child, then the 15,000*l.* to be paid to such child; and in case there should be more than one such child, the said sum to be paid to such children at such time and times, and in such shares, and with such yearly interest, not exceeding the legal interest in the meantime, as the wife should by deed or will appoint; and in default of appointment, to sons at twenty-one, and to daughters at twenty-one or marriage; and should, out of the rents of the premises, in the meantime, and until the portions should become payable, raise such yearly sums for maintenance as the wife should direct, not exceeding interest at 5*l.* per cent.; and if no appointment, then interest at the same rate, with benefit of survivorship in respect of such portions. The wife appointed the surplus rents, after the two charges of 10,000*l.* and 1,000*l.* annuity, and some other legacies, to her son:—Held, that the sum of 15,000*l.* directed to be raised for portions was not payable until the death of the husband as well as the wife, and that no interest was payable thereon in the meantime. *Ib.*

Raising Portion before the Proper Time. Real and Personal Estate.] 3. The testator, some time before his death, executed a settlement whereby he covenanted with the trustees, that if he should die in the lifetime of his daughter, who was then an infant and unmarried, his heirs or executors should, within six months after his death, pay to the trustees the sum of 10,000*l.*, which he charged on his real estates; and he declared the trusts of that sum to be for his daughter during her life, and after her death for her children; but if she should die without leav-

ing a child who should attain twenty-one years, then the trustees should stand possessed of the trust funds as part of his personal estate. The testator during his life raised 10,000*l.* (part of a larger sum), and paid it to the trustees. They afterwards lent 4,500*l.* to the testator, on mortgage of part of his real estates, and 5,500*l.* to other persons. The testator by his will gave his personal estate to the plaintiff, and his real estate to the defendants. His daughter survived him, but died within six months after his death, an infant and unmarried, so that the trust fund never became raisable under the covenant:—Held, that the whole of the 10,000*l.* was part of the testator's personal estate, and belonged to the plaintiff. *Tucker* v. *Loveridge*, 6 W. R. 786; 4 Jur., N. S., 939; 2 De G. & J. 650; 27 L. J., Ch., 731. Affirming 1 Giff. 377.

V. How Raised.

1. If trustees are empowered to pay portions at fixed days, out of the rents and profits of lands, and they are inadequate, the trustees may sell the lands. *Backhouse* v. *Middleton*, 1 Ch. Ca. 175.

2. The words, "to be raised by rents and profits," will imply a power to sell. *Green* v. *Belchier*, 1 Atk. 506. *Okeden* v. *Okeden*, 1 Atk. 551, and notes.

3. Where there is a trust for raising portions out of rents and profits, the lands may be sold. *Sheldon* v. *Dormer*, 2 Vern. 310.

4. Trust of a term to raise portions out of the rents and profits, to be paid as soon as conveniently may be. By virtue of the word "profits," trustees may sell or mortgage; *secus*, if said "annual profits." *Trafford* v. *Ashton*, 1 P. W. 415.

5. Where portions were directed to be raised "as soon as conveniently may be," Court decreed a sale of the lands. *Ashton* v. ——, 10 Mod. 401.

6. Lands settled on trustees for raising portions for daughters; on a bill for a sale, Court will decree the heir to join in the sale though he has no legal interest. *Roll* v. *Roll*, 2 Vern. 99.

7. Lands are settled on marriage upon condition if there should be a daughter, the persons in remainder should pay her 2,000*l.* at sixteen, with power for the daughter, in case of non-payment, to distrain for the 2,000*l.* and damages. Though no power to sell, yet a sale decreed for raising the portion. *Wharton* v. *Wharton*, 2 Vern. 1.

8. Portion raised out of reversionary terms: the rule is, that it depends upon the particular penning of the trust, and a fair construction of the whole instrument, as to the intention. Upon limitation to parent for life, with a term to raise portions at twenty-one, or marriage; if there is nothing more, and the interests are vested, and the contingencies happened at which the portions are to be paid, upon the general rule the interest is payable, and the portions must be raised by sale or mortgage of the term. *Codrington* v. *Foley* (*Lord*), 6 Ves. 364.

9. The Court leans against the construction for raising portions or maintenance out of a reversionary term: and upon that principle, when the term fell into possession, and the portion was raised, refused to charge the difference between the sum annually allowed by the infant's grandfather for her maintenance, and the sum charged. *Clinton* v. *Seymour*, 4 Ves. 440.

10. If lands are devised to a wife for life, and afterwards to be sold by the executor to pay younger children's portions, and the executor and the wife die, the younger children may compel the heir to sell, though the executor had only an authority. *Garfoot* v. *Garfoot*, 1 Ch. Ca. 35; 2 Freem. 176. See also *Hebblethwaite* v. *Cartwright*, 2 Barnard. K. B. 438.

11. Lands are settled on marriage, upon condition, if there should be a daughter, the persons in remainder should pay her 2,000*l.* at sixteen, with power for the daughter, in case of non-payment, to distrain for the 2,000*l.* and damages. Though no power to sell, yet a sale decreed for raising the portion. *Wharton* v. *Wharton*, 2 Vern. 3.

12. Where a term is limited to raise portions for younger children by rents and profits, the heir may have the portions raised by a sale, though the younger children oppose it, as well as he may insist on a sale if he think fit. *Warburton* v. *Warburton*, 2 Vern. 420.

13. Where the ordinary profits of a term are not sufficient to raise a portion, timber may be felled, or a mine worked for it against the heir. *Offley* v. *Offley*, Pre. Ch. 27.

14. A portion, charged on lands by virtue of a power, shall be raised by a sale or mortgage, and not by the rents and profits of the lands charged, because it could not thereby be received in any reasonable time. The party entitled might be abridged of half the value of the portion by that manner of raising it. *Kelly* v. *Bellew* (*Lord*), 4 Bro. P. C. 501.

15. By a marriage settlement, lands are limited to husband and wife for their lives, remainder to the heirs male of their bodies; and if there should be no issue male of their bodies, and one or more daughters, then to trustees for 500 years from the decease of the survivor, in trust, by sale or mortgage to raise 1,000*l.* for daughters' portions; but there is no time appointed for the payment of them. The father dies, leaving a daughter only. The portion vesting in the daughter in the lifetime of the mother, it was decreed to be raised by a sale with reasonable maintenance in the meantime, though no maintenance is provided by a settlement. *Staniforth* v. *Staniforth*, 2 Vern. 460.

16. The trust of a term is to raise daughters' portions by rents, issues, and profits, or by making leases for three lives, at the ancient rent, or by granting copyholds on fines, the money to be paid to the daughters at the age of eighteen, or marriage, or as soon after as the same could be raised out of the premises as aforesaid. The portions, as it seems, may not be raised by sale or mortgage. *Mills* v. *Banks*, 3 P. W. 1.

17. A reversionary term, raised for securing maintenance and portions of daughter, shall, in cases of necessity, be mortgaged to pay either; and when fallen into possession, shall pay all the arrears of maintenance incurred

before it came into possession. *Ravenhill* v. *Dansey*, 2 P. W. 179.

1. The trust of a term was for raising a portion for a daughter, in default of issue male, payable at eighteen, or marriage, or so soon after as the same might conveniently be raised. The mother died, leaving only one daughter. The Court was of opinion that the portion could not be conveniently raised by sale of the reversion. *Reresby* v. *Newland*, 2 P. W. 93. Affirmed 6 Bro. P. C. 75.

The Court will not go further than warranted by precedents, in selling reversionary terms to pay portions. *Ib.*

2. A trust term for raising daughters' portions; if it direct a particular method of raising the portions, it implies a negative that they shall not be raised any other way. *Ivy* v. *Gilbert*, 2 P. W. 13; Pre. Ch. 583. Affirmed 6 Bro. P. C. 68.

A trust term to raise portions out of the rents, etc., as well as by leasing for three lives, or twenty-one years, at the old rent. This extends only to raise the portions by annual profits, or by leasing, and not by mortgage or sale; and if the trustee in such trust term mortgage for the portion, the mortgage is void when the portion might have been raised by the profits. *Ib.*

Where a portion is to be raised by the annual profits or fines, if no time be appointed, the portion is not due till such time as it might be so raised. *Ib.*

3. A reversionary term sold for the raising of daughter's portion. *Sandys* v. *Sandys*, 1 P. W. 707.

4. Portions secured by settlement out of lands, or articled so to be, are not to be paid out of the personal estate. *Edwards* v. *Freeman*, 2 P. W. 437.

5. As to how and when portions are to be raised. *Evelyn* v. *Evelyn*, Fitzg. 131; 2 P. W. 659; Kelw. 18; 2 Barnard K. B. 118.

6. Where land was originally charged with daughters' portions, it must bear the burden, and they shall not be paid out of the personal estate. *Burgoigne* v. *Fox*, 1 Atk. 576.

7. Portions to be raised by a trust term in a marriage settlement: the real estate held the primary fund, and a covenant by the settlor to pay them, auxiliary only. *Lechmere* v. *Charlton*, 15 Ves. 193.

8. Where real estates are devised in strict settlement, subject to trust for raising portions for younger children, during minority of tenant for life, out of rents and profits, or by sale or mortgage:—Held, certain funds, that had arisen from rents during such minority, were applicable to payment of the portions, and that deficiency only could be raised by sale or mortgage. *Warter* v. *Hutchinson*, 1 Sim. & S. 276.

9. Lands are limited by marriage settlement, upon failure of issue male, to the daughters of the marriage and their heirs, until the next remainderman should pay them 3,000*l.*; there being four daughters only, they entered: decreed at the Rolls, they should account for the profits, and that the rents should be applied first to pay the interest, and then sink the principal, as in the case of a common mortgage. Decree affirmed by the Lord Chancellor, with this variation, that the principal should not sink till a third part was raised above the interest, and so again when another third part was raised. *Blagrave* v. *Clunn*, 2 Vern. 523.

10. A., having power to raise the portions provided for his younger children under his settlement by sale, or mortgage, or other disposition of a reversionary term of 1,000 years, did, in 1815, on the marriage of one of his daughters with Lord Chancellor, purport to charge by appointment this reversionary term with 4,000*l.* and interest. After the death of Lord Chancellor, his personal representative, having been advised that the power to charge had not been duly executed, proceeded at law against A., on the covenant of title. A. gave judgment at law, and filed his bill, stating that the sum would in a court of equity be decreed to be well charged, and praying a perpetual injunction against the proceedings at law, offering, at the same time, to execute any instrument which should be deemed necessary for charging the same:—Held, that A. should, with the trustees of the term, execute to the representatives of Lord Chancellor a mortgage of the lands and premises in the term for 4,000*l.* and interest, and that a perpetual injunction should be granted against any further proceedings at law. *Whaley* v. *Morgan*, 2 Dr. & Wal. 330.

11. A wife's lands were conveyed by her settlement to trustees for 999 years, on trust, during so many years of the term as she should live, to pay the rents to her or her appointees, and, subject to a prior charge of 10,000*l.*, to pay the husband during the residue of the term, for so many years as he should live after her death, an annuity of 1,000*l.*, and to pay the residue as she, by deed or will, should appoint; and as to the residue of the term, after the death of her and her husband, on trust, if there should be younger children of the marriage, that the trustees should, by sale or mortgage of the residue of the term, and by the rents and profits in the meantime, raise 10,000*l.* for their portions, payable with interest as she should appoint, or in default of appointment to sons at twenty-one and to daughters at twenty-one or marriage, and should, by the rents in the meantime and until the portions should be payable, raise such sums as she should appoint for maintenance, not exceeding interest on the respective portions. The wife appointed the surplus rents (after the 10,000*l.* charge and 1,000*l.* annuity and some legacies) to her son, the defendant, and died:—Held, that during the husband's lifetime the portions could not be raised by a sale of the term, either in possession or expectancy on his death; and held, also, that no appointment having been made to provide for the interest, it, too, was only raisable along with the principal, and not by a receiver in the meantime. *Lloyd* v. *Massey*, 12 Ir. Eq. R. 298. Affirmed S. C. *nom.* *Massey* v. *Lloyd*, 9 Jur., N. S., 391; 11 W. R. 484; 8 L. T., N. S., 122; 10 H. L. Ca. 248. And see S. C. 11 Ir. Eq. R. 429.

12. Lands were limited to trustees for a term of years in trust to raise a sum for portions for younger children, to be vested at twenty-one or marriage, with a proviso that no sale or disposition should be made until some one of the portions should be actually payable. The eldest of the younger children had attained twenty-one:—Held, that the whole sum was raisable at once, and that, after

paying the adult child her share, the remaining portions ought to be provided for by carrying over a sum of stock sufficient, at the present price, to provide for them, with a margin for depreciation. *Pearoth* v. *Greenwood*, 28 W. R. 417.

Scheme for Raising.] 1. Where four portioners, entitled each to a fifth of a portions fund, became entitled in undivided shares to the estate upon which the portions fund was charged, the entire estate being also subject to a mortgage:—Held, that no one of portioners could claim the right of having the whole fund divided, and thrown in fourths upon the respective shares, in order that, by payment of the difference between what was chargeable on her share of the estate, and what was due to her in respect of the portion, her share of the estate might be cleared. *Otway Cave* v. *Otway*, 2 L. R., Eq., 725.

Held, also, that such a proposal was a proper subject for arrangement in chambers; and upon a bill filed by a portioner under the circumstances to have her share in the estate discharged, and to have the trusts of the portions term administered by the Court, leave was given to the plaintiff to bring into chambers a scheme for the purpose. *Ib.*

Where persons entitled to a charge on land secured by a term become entitled to the land charged, it is not competent to any one of them, upon bringing in the share of the charge proportionate to his share of the land, thereupon, without more, to throw the remaining portions of the charge on the remaining shares of the land. S. C. 15 W. R. 6.

VI. Currency. Payable in What.

2. Prior to 1826 a marriage was solemnised in England, between a gentleman domiciled in Ireland and a lady domiciled in England. By their marriage settlement, which was drawn and executed in England, and of which one of the two trustees was domiciled in England, the other in Ireland, the husband assigned to trustees lands in Ireland, of which he was possessed in fee, for a term of 500 years, upon trust to levy and raise, by perception of the rents and profits, or by sale or mortgage, a sum of "5,000*l.* of lawful British money," as portions for the younger children of the marriage, and to hold the same in trust for the children, in such shares as the husband should appoint:—Held, that the portions should be paid in British currency. *Re Boate*, 10 Ir. Ch. R. 164.

See also III. *ante.*

VII. Costs of Raising.

3. The costs of raising portions are payable out of the estate, and not out of the portions. *Michell* v. *Michell*, 4 Beav. 549; 7 Jur. 887.

4. Bill by inheritor of real estate against the incumbrancers on it, stating that it would be an insufficient fund, praying an account of incumbrances, and a sale for the benefit of all parties:—Held, to be proper, and inheritor, plaintiff's, costs to be paid first out of the produce of the sale. *Head* v. *Massey*, 2 Moll. 467.

5. The value of a settled estate being less than the sum charged thereon for younger children's portions, the inheritor filed a bill against the younger children for a sale of the estate, and at the final hearing asked for his costs in priority to their demands:—Held, that, in the absence of any agreement to that effect, he was not entitled to them, overruling *Head* v. *Massey* (2 Moll. 467). *Hughes* v. *Nash*, 3 Ir. Eq. R. 495.

6. Where several children appeared and proceeded jointly, by the same solicitor, for a sum to which they were entitled in equal shares, and incurred costs to a considerable amount, two of the children having died, and there being a continuing litigation as to the persons entitled to their shares, the solicitor in the meantime allowed the surviving children to draw out their shares of the fund without any deduction for the costs for which they were jointly and severally liable; and they now applied for payment, out of the sum in bank (that was, the shares of the two deceased children), of the entire amount of the costs:—Held, that the shares of the two deceased children were liable, in the first instance, for that proportion only of the costs which they should have paid if the others had contributed equally, and that it was the duty of the solicitor to take care that the costs should be borne equally by the several younger children. *Crone* v. *O'Dell*, 3 Ir. Eq. R. 12.

7. The costs of raising a family charge should be borne by the estate, but the costs occasioned by dealings with the charge should be borne by the charge, and not by the estate. *Stewart* v. *Donegal* (*Marquis*), 2 J. & L. 636; 8 Ir. Eq. R. 621.

8. Costs of raising a family charge under a power, but not of the suit to raise it, given out of the estate. *Alleyne* v. *Alleyne*, 3 Ir. Eq. R. 493; 2 J. & L. 544.

9. By the exercise of the usual power of appointment in a marriage settlement the shares of children were appointed unequally, but were equalised, or nearly so, by a division of the unappointed property under a hotchpot clause:—Held, that the costs of an action to administer the trusts of the settlement must be paid ratably out of the appointed and unappointed shares. *Moore* v. *Dixon*, 15 L. R., Ch. D., 566; 49 L. J., Ch., 807; 29 W. R. 12.

10. A power in trustees to raise by mortgage a fixed sum implies a power to raise also the incidental costs of the mortgage. *Armstrong* v. *Armstrong*, 18 L. R., Eq., 541; 43 L. J., Ch., 719.

Trustees of a marriage settlement made in 1802 were empowered to raise and levy the sum of 6,000*l.* for portions on the security of a term of 300 years in certain freeholds. Part of the 6,000*l.* was raised. In 1872 it became necessary to raise the residue, which then amounted to 3,290*l.* 8*s.* 4*d.* By an order then made in a suit which was instituted for the execution of the trusts of certain indentures of

settlement, the trustees were authorised to advance this amount out of their trust funds upon the security of the term. Considerable costs had to be incurred in effecting the security, and it was asked that the last-named trustees might be at liberty to advance a further sum out of their trust funds upon the same security to cover the costs so incurred:—Held, that the term of 300 years might properly be taken as a security, not only for the whole amount of 6,000*l.*, but also for the costs. *Ib.*

VIII. Survivorship.

1. Where, under a marriage settlement, portions were provided, to be vested and be paid at such times as the husband should appoint, and on default of appointment to vest at twenty-one, and be paid at the husband's death, and it was provided that if any child should die before the time appointed for payment of his portion, it should survive to the others, the husband appointed the portion fund among the younger children, directing the portions to vest at the time of such appointment, but to be paid after his death:—Held, that the share of a son who died, after such appointment, in his father's lifetime, did not survive, but belonged to the son's estate. *Spencer* v. *Spencer*, 8 Sim. 87; 5 L. J., N. S., Ch., 310.

2. Father having power under marriage settlement to appoint shares, in which his younger children were to take a sum to be raised for their portions, having exercised that power by will, afterwards advances to one of daughters, took release from her of her portion, and by codicil revoked his appointment by will as to her:—Held, her portion was to go to the other children. *Noel* v. *Walsingham* (*Lord*), 2 Sim. & S. 99; 3 L. J., Ch., 12.

3. Where father has power to appoint among children, and one died in his lifetime:—Held, that share which lapsed by death should go among all, as in default of appointment, notwithstanding a direction that each receiving a share should release the fund, and there is no presumption of satisfaction or purchase from another provision, which was expressly made in satisfaction of different interest. *Burges* v. *Mawbey*, 10 Ves. 319.

4. Portions held vested in the case of parent and child, by implication from the whole settlement against express words; and a clause of survivorship upon death of child "before the portion should become payable," was upon the authorities construed "before it should be vested." *Hope* v. *Clifden* (*Lord*), 6 Ves. 499.

5. The trusts of a term in a post-nuptial settlement of real estates were: "After the decease of the husband and wife (the settlors) to raise 1,000*l.* for the portion of every daughter and younger son, to be paid to sons at the age of twenty-one, and to daughters at that age or marriage, if such ages should be attained or marriages had after the decease of the survivor of the settlors and not sooner; and if any younger son died or became an eldest or only son before twenty-one, or any daughter died before that age unmarried, or before his or her portion became vested, the portions provided for such son or daughter so dying, etc., before his or her portion became payable as aforesaid, should survive and accrue to the survivors of such daughters and younger sons, to be equally divided between them, and paid when their original portions should become payable." Then followed a proviso for the issue of a younger son or daughter dying in the lifetime of the settlors, or after their death, before his or her portion became due and payable; and a trust after the death of the settlors for maintenance of such sons and daughters, or their issue entitled to portions as aforesaid, until his or her portion became payable, with cesser of the term on payment of the portions, or in case there should not be any younger children or issue of them living at the death of the survivor of the settlors. The settlors had seven children (besides an eldest son), four of whom died in the lifetime of their parents under the age of twenty-one and unmarried:—Held, by the Lords, reversing a decree in Chancery, that the three survivors were entitled to have the portions of the four deceased children raised for them in addition to their own. *Evans* v. *Scott*, 1 H. L. Ca. 43; 11 Jur. 291.

6. By the marriage settlement of A., a sum of 15,000*l.* was to be raised for the portions of the younger children, in such shares, and payable at such times, as A. should appoint; and in default of appointment, among the children equally; the share of each son to be vested at twenty-one, and of each daughter at twenty-one or marriage; with a proviso that the share of any younger child, dying before the time prescribed for the vesting of his or her portion, should go over to the survivors. Afterwards A., by his will, bequeathed unto all and every his daughters who should be living at his death, or born in due time afterwards, 40,000*l.*, share and share alike; but if he should have only one daughter, then unto such only daughter the sum of 20,000*l.*; to be paid to them or her, at such time or times, etc., as the provisions made for them by this marriage settlement were payable. A. died, leaving two daughters, one of whom died under age and unmarried:—Held, that the surviving daughter was entitled to the whole of the 40,000*l.*, if the personalty was sufficient to raise it. *Sanford* v. *Irby*, 4 L. J., Ch., 28.

Quære, Whether the surviving daughter would be entitled to such part of 20,000*l.* (moiety of the 40,000*l.*) as it might be necessary to raise out of real estate. *Ib.*

7. The trust of a term limited by marriage settlement was declared to be in case there should be issue male of the marriage, and one or more younger children, to raise 3,000*l.* for the portions of such younger children, in such shares and proportions as J. C., by any writing, etc., should appoint; and for want of appointment equally amongst the children, the portions of the sons to be paid at twenty-one, and of the daughters at twenty-one or marriage. J. C. by will appointed 1,250*l.*, part of the 3,000*l.*, to one of his younger sons, who, after the making of the will, attained the age of twenty-one, but died in the lifetime of the appointer:—Held, that the sum of 1,250*l.* went as in default of appointment. *Colthurst* v. *Colthurst*, 2 Jones 262.

IX. Merger.

1. On marriage, lands are settled on A. for life, remainder to the first, etc., sons of the marriage in tail male, remainder to trustees for 500 years, to raise 5,000*l.* portions for daughter, payable at eighteen or marriage; remainder to A. in fee. After the marriage A. settles other lands, and a term is created for raising the like sum of 5,000*l.* for daughters on failure of issue male, payable at sixteen or marriage; A. dies, leaving a daughter his heir-at-law, who attains eighteen, and dies unmarried. The trust of the term is not merged in the fee, but the portion shall go to the daughter's executors, and is disposable by her will, but there shall be but one 5,000*l.* raised. *Thomas* v. *Komeys*, 2 Vern. 348; 2 Freem. 207.

2. Lands charged with portions for A., afterwards descending to A.:—Held, not to extinguish or satisfy the portion. *Rushout* v. *Rushout*, 6 Bro. P. C. 39.

3. A daughter's portion secured by a trust term, not extinguished by a devise of the lands to the daughter in tail. *Laurence* v. *Blatchford*, 2 Vern. 457.

4. By a marriage settlement, lands are limited to the husband and wife, with remainder to their first, etc., sons, and then a term for years to secure portions for daughters. The husband dies, leaving only a daughter, upon whom the inheritance descends. The daughter dies an infant, and indebted, and disposes of her portion by her will. Equity relieves against the merger of the portion. *Powell* v. *Morgan*, 2 Vern. 90.

5. A father, tenant for life, with power to charge 500*l.* for younger children, and son tenant in tail, resettled the estate to the use that the son should receive a rent-charge of 100*l.* for their lives and that of the survivor, with powers of distress and entry for non-payment; then to the use of the father for life with a power to charge an additional sum of 1,000*l.* for younger children; then to the son in tail:—Held, that although if it was the intent to give the annuity priority over the 1,000*l.*, equity would not allow a legal merger to destroy it; yet on the true construction it was not intended that it should exist after the father's death, though granted for the son's life; and therefore that the general rule giving priority in family settlements to charges for younger children should prevail. *Mills* v. *Mills*, 9 Ir. Eq. R. 299; 3 J. & L. 242.

X. Conditional.

6. Agreed, in marriage articles, that a portion shall be paid, and a settlement made, but that payment is to be withheld, unless the settlement be made within a limited time. Afterwards, the marriage settlement not being proceeded with:—Held, that the latter clause could only be intended to hasten the marriage settlement, and that the right to the portion was independent of its execution. *Kendrick* v. *Winter*, 2 Ken. Ch. 96.

7. The rule that a condition to marry with consent is *in terrorem* only when no devise over, must be understood of legacies only, and not of portions. *Harvey* v. *Aston*, 1 Atk. 379; Forrest. 212, and note (i) *id.* 217.

8. A., by will, gives portions to his daughters, but mentions no time when to be paid, but adds a proviso, that his daughters should marry with consent of his wife, and if any married without such consent, her portion to go over. On a bill, brought by the daughters for their portions, the Court decreed the portions to be paid, but on security to refund if the condition should be broken. *Aston* v. *Aston*, 2 Vern. 452; 1 Ch. Rep. 164; Pre. Ch. 226.

9. Portions at twenty-one or marriage, when C. and his wife should die without issue male:—Held, a condition precedent, and not to be raised till both are dead; though one die, and the other remain tenant in tail after possibility of issue extinct. *Champney* v. *Champney*, 10 Mod. 314.

10. Devise upon trust, by mortgage, or out of the rents and profits, to pay debts, and afterwards to raise portions for the testator's daughters, "such portions to become due, and be considered as vested at the expiration of two years next after my decease, if my debts shall be then paid." This is a condition precedent to the portions becoming vested; and one of the daughters having died while her portion remained unpaid, upon a question between her representative and the persons who would be entitled, in the event of the portion not having become vested in her lifetime; an inquiry was directed as to the time when the debts were, or might have been, paid. *Bernard* v. *Mountague*, 1 Meriv. 422. See 11 Ves. 508. n.

11. One, having two sons, G. and T., and a daughter, devises several estates to his two sons and their issue, with cross-remainders, and declared, that if either of them should die without issue living at his death, so that his estate should come to his brothers, the surviving brother should pay 2,000*l.* to his daughter, within one year after his brother's death, and charged the estate with it. G. died, leaving two sons; afterwards T. died without issue. *Quære*, whether the 2,000*l.* should be raised.—Held, it should. *Tollett* v. *Tollett*, Ambl. 177, 194.

12. A. covenanted in B.'s marriage settlement "that in case there shall not be any issue male of the marriage, or that all such issue male shall happen to die under the age of twenty-one years, or that if there shall be three or more daughters of the marriage, that, and in that case," A. would pay an additional portion of 1,000*l.* among B.'s daughters at twenty-one or marriage as B. should appoint, and in default of appointment among "such daughters, in case there shall be three or more such daughters, share and share alike":—Held, that A. was chargeable only in the case of one of the first two events and the last happening together, the last "or" being to be construed "and." *White* v. *Supple*, 1 Con. & L. 525; 2 Dr. & War. 471.

Semble, the gift in default of appointment would not vest unless the three daughters attained twenty-one, or married. *Ib.*

Conditions relating to Marriage.] See CONDITION, VIII.

XI. Satisfaction and Ademption.

I. *Satisfaction of Portions by Legacy*, 5674.
II. *Ademption of Legacy by Portion*, 5681.
III. *Satisfaction of Portions by Subsequent Deed*, 5689.
IV. *Express Proviso for Deduction of Advances*, 5690.
V. *Payment of and Purchase of Child's Interest*, 5693.
VI. *Admissibility of Parol Evidence*, 5693.

I. SATISFACTION OF PORTIONS BY LEGACY.

1. *General Principles*, 5674.
2. *Illustrative Cases*, 5675.
3. *Covenants to leave Property to Children by Will*, 5680.
4. *Express Proviso for Deduction of Advances.* See IV. *infra.*

1. General Principles.

1. A cumulative provision in will shall not double a portion, unless plainly proved that testator intended to do so. *Blois* v. *Blois*, 2 Vent. 347.

2. The Court leans against double portions, yet regard must be had to circumstances; as where there is an eldest son, or more children, and the demand would be to their prejudice. Otherwise in the case of an only child. *Bellasis* v. *Uthwatt*, 1 Atk. 427.

When one bequest is made in satisfaction for that to which the legatee is previously entitled, the thing given in satisfaction must be of the same nature, and attended with the same certainty, as the thing in lieu of which it is given, as land for land, money for money. If personal estate be given for personal estate, one shall not be with a contingency and the other without, for here the same certainty is wanting. *Ib.*

3. Slight circumstances are laid hold of to get rid of the rule that a legacy to a creditor extinguishes the debt, but a little difference between a portion and a legacy to a child, and as to the time of payment, will not prevail against the presumption of satisfaction. *Barclay* v. *Wainwright*, 3 Ves. 466.

4. Portions for the children by the will of the parent:—Held, a satisfaction of a provision by settlement upon the intention; slight circumstances of difference that would repel the presumption of satisfaction between strangers are not sufficient in the case of parent and child. *Sparkes* v. *Cator*, 3 Ves. 530.

5. Portions for the children by the will of the parent, presumed a satisfaction of a prior provision by settlement, unless clearly not so intended; the presumption is not rebutted by slight circumstances. *Hincheliffe* v. *Hinchcliffe*, 3 Ves. 516.

6. Portion by will, *primâ facie* a satisfaction of a portion by settlement. *Tolson* v. *Collins*, 4 Ves. 491.

7. Bequest of the residue of testator's personal estate, to a younger son, being greater than the provision by the father's marriage settlement, is a satisfaction of that portion. *Kirkman* v. *Morgan*, 2 Bro. C. C. 394.

8 Land, though of much greater value, left to a daughter, no satisfaction of a portion. *Lechmere* v. *Carlisle* (*Earl*), 3 P. W. 225.

9. Equity leans against satisfaction of debt by legacy, but in favour of a provision by will being in satisfaction of a portion by contract. *Thynne* (*Lady*) v. *Glengall* (*Earl*), 2 H. L. Ca. 131; 12 Jur. 805. Affirming S. C. *sub nom.* *Glengall* (*Earl*) v. *Barnard*, 1 Keen 769; 6 L. J., N. S., Ch., 25, and subsequent orders.

Small differences between the debt and the legacy negative the presumption of satisfaction, but are disregarded in the case of portions. So in case of debt, a smaller legacy is not a satisfaction of a larger debt, but may be a satisfaction of a portion *pro tanto.* *Ib.*

A gift of residue cannot be a satisfaction of a debt, because, the amount being uncertain, it may be less than the debt; but as a portion may be satisfied by a smaller legacy *pro tanto*, so on principle a residue ought to be considered as satisfaction of a portion altogether, or *pro tanto*, according to the amount. *Ib.*

A. having invested in stock a sum of money, in pursuance of a settlement, by way of portion for one of his daughters, and having given a bond for the payment of a further sum at his decease, entered into an agreement with B. to make a provision for his unmarried daughter, on her marriage with B., on a basis of equality with the provision made for his married daughter. A memorandum of the terms of the agreement (in which some variations were afterwards made by the parties) was written, at the direction of A., by A.'s solicitor, in the presence and with the approbation of B.; and A. gave instructions to his solicitor to prepare a settlement in conformity with the memorandum, subject to the variations, but he died before such settlement was executed, having made a will, by which he gave a share of the residue of his estate to his married daughter. B. married the daughter of the testator and performed his part of the agreement comprised in the memorandum:—Held, that the share of the residue, given by the will to the daughter married in the testator's lifetime, was a satisfaction of that part of her portion which was secured by bond. *Ib.*

10. If a father makes a provision for a child, by settlement on her marriage, and afterwards makes a provision for the same child by his will, it is *primâ facie* to be presumed that he does not mean a double provision. But this presumption may be repelled or fortified by intrinsic evidence, from the nature of the two provisions, or by extrinsic evidence of the intention of the testator at the time of making his will. Slight differences between the two provisions will not repel the presumption against double provisions. Slight differences are such as, in the opinion of the judge, leave the two provisions substantially of the same nature. Declarations of the parent, referring to his intention at the time of making his will, whether made at the time, or before or after, are admissible evidence to prove that he did not mean to give a double provision. A paper written some time after the date of his will, and showing the state of his property, but having no reference to his intention, is not admissible for that purpose. A father, by

articles made previous to the marriage of his daughter, agreed to settle, either by deed or will, lands of the value of 3,000*l.*, in trust for his daughter for life to her separate use, remainder to the husband for life, remainder to the children of the marriage, as tenants in common in tail, with cross-remainders. By his will he devised a real estate, worth more than 3,000*l.*, in trust for his daughter for life, for her separate use, but without the power of anticipation or alienation, remainder to the husband for life, he maintaining and educating the children of the marriage, as tenants in common in fee, with a limitation over of the shares of those who should die under twenty-five, without leaving issue, to the survivors:—Held, that the differences between the two provisions were not such as to repel the presumption against double portions, and that the daughter, her husband, and children were not entitled both to the benefits given by the will, and to the provisions stipulated for by the articles. *Weall* v. *Rice*, 2 Russ. & M. 251; 9 L. J., Ch., 116.

1. When a benefit given by a parent by a settlement, on the marriage of a child, and a legacy given by the parent to the same child, are both limited according to the ordinary forms of portions for children, the presumption is that a double portion was not intended, although the limitations of the will differ in detail from those of the settlement, and in such a case it is immaterial whether the will precedes or is subsequent to the settlement. *Coventry* v. *Chichester*, 10 Jur., N. S., 435; 12 W. R. 664; 33 L. J., Ch., 361; 2 Hem. & M. 149; 11 L. T., N. S., 103. Affirmed 10 Jur., N. S., 896; 12 W. R. 1126; 15 W. R. 849; 2 De G. J. & S. 336; 33 L. J., Ch., 676; 36 L. J., Ch., 673; 11 L. T., N. S., 171; 17 L. T., N. S., 35; 4 N. R. 535.

The meaning of the rule, that slight differences in the limitations of a portion secured by settlement and of a portion given by a subsequent will do not rebut the presumption against double portions, is, that the rule of satisfaction applies wherever the provision of both instruments, though differing from each other, are in the nature of portions to the same child. A portion is not necessarily a provision for the child alone; the successive limitations of a fund in favour not only primarily of the child herself, but likewise of her husband and children, and even of strangers, if their interests arise in default of the exercise of a general power of appointment vested in the child, together constitute "a portion." *Semble*, the operation of the rule of satisfaction is, that before the gift of "the portion" under the will can take effect, "the portion" secured by the settlement must be brought into hotchpot. In effect, therefore, it may displace the interests of other persons secondarily interested in the portion of the child. Such displacement cannot be justified by the doctrine of simple election, and satisfaction is not to be confounded with election, because it involves an act of election. S. C. 3 N. R. 666.

2. Illustrative Cases.

2. A., by settlement, was made tenant in tail, and a provision was made of 3,000*l.* a-piece to his daughters. A. docked the entail, and bequeathed to his daughters 3,000*l.* a-piece. It was proved that A. had declared he would augment his daughters' portions. Decreed, the daughters to have both sums. *Pile* v. *Pile*, 1 Ch. Rep. 199.

3. A term is created by marriage settlement to raise 3,000*l.* for daughters' portions within twelve months after the death of the survivor of the husband and wife. There being one daughter, the father devises the trust lands to make good his wife's jointure, and to raise 3,000*l.* for his daughter's portion: the daughter shall not have two portions of 3,000*l.*; and she dying at the age of five years, and the portion to be raised out of land, it shall not be raised for her administrator, but the interest or maintenance the child was entitled to shall. *Brewin v. Brewin*, Pre. Ch. 195; 2 Vern. 439.

4. A man has one daughter, to whom 8,000*l.* is secured by marriage settlement, and afterwards he gives 8,000*l.* by his will for her portion, and 200*l.* per annum. The daughter shall have but one 8,000*l.*, though she may elect which of the portions she pleases. *Copley* v. *Copley*, 1 P. W. 147.

5. A., upon his second marriage, settles lands to raise 5,000*l.* for the children of the marriage. Having four children by that marriage, he, by his will, in which he takes no notice of the settlement, gives 1,000*l.* to each of them as his or her portion:—Held, that they were not entitled to portions under both instruments, and that as they had accepted the provision by the will, they were bound by such acceptance. *Byde* v. *Byde*, 2 Eden 18; 1 Cox 44.

6. Agreement between mother, tenant in fee and in tail, and her son, that she would convey to him the estate in fee, and that he should, when in possession of the estate tail at her death, pay his sister 20,000*l.* for her fortune and portion; the agreement was never executed, but the mother afterwards made a general devise in favour of her son, charged with a legacy of 20,000*l.* to her daughter for her portion, fortune, and advancement; the legacy is a satisfaction of her interest under the agreement. *Finch* v. *Finch*, 1 Ves. J. 534; 4 Bro. C. C. 38.

7. A child, entitled by his fathers' marriage articles to a share of his father's personal estate, has a legacy given him by the will of his father. If he will have the legacy, he must waive the benefit of the articles. *Herne* v. *Herne*, 2 Vern. 555.

8. In marriage settlement, by which a life estate was given to the wife, there was a power to raise 10,000*l.* for younger children; the settlor, forgetting that he had made such a settlement, and by will reciting that he had made no settlement on the wife, provided portions of 5,000*l.* if but one younger child, and 2,000*l.* each if more: there being two younger children:—Decreed, that this provision by the will is in part satisfaction of the portion by settlement, and only 10,000*l.* should be raised. *Warren* v. *Warren*, 1 Bro. C. C. 305.

9. Upon marriage articles, 15,000*l.* was vested in trustees on trust, together with 5,000*l.* covenanted by the husband to be paid, to be laid out in land to be settled upon the husband for life, remainder to the wife for

life, remainder to the use of such child and children, in such shares, for such estates, and subject to such powers, limitations, and provisions as the husband and wife, or the survivor, should appoint; in default of appointment, to the children in tail; in default of issue, to the husband in fee. The husband and wife joined in a direction to the trustees, reciting their resolution to invest the trust fund in an estate lately purchased by the husband for 16,300*l.*, and directing them to deliver the said stock, etc., to him, at the price they were at on the day of the purchase, which was done. The wife died; there were two daughters; the father, by will, reciting the purchase, and that he had not conveyed it to the uses of the settlement, and that it was not his intention that the said purchase should be an investment of the trust fund, but that the said fund, with its increase, should be taken out of his personal estate, gave 10,000*l.*, part of the trust fund, in trust to be laid out in land, to be conveyed to one daughter for life for her separate use, remainder to her children in tail, remainder to the other daughter in fee, for whom he also appointed the residue of the fund, but revoked that by codicil, reciting a portion given on her marriage:—Held, that the share of the daughter, to whom the portion was advanced on marriage, was thereby satisfied. *Smith* v. *Camelford* (*Lord*), 2 Ves. J. 698. See further this case *sub nom.* *Pitt* v. *Jackson*, 2 Bro. C. C. 51.

1. By marriage settlement part of wife's fortune was advanced to husband for the purpose of his trade, for which he secured her an annuity, the rest being settled upon the children, after the decease of husband and wife, in such proportions as the wife should direct; by will he directed the wife should relinquish her claim under the settlement, and left a larger sum to trustees, the interest to be paid to her while sole, with a power to her to dispose of the whole among the children; that is a satisfaction for their portions under the settlement. *Moulson* v. *Moulson*, 1 Bro. C. C. 82.

2. Bond conditioned that executors pay 5,000*l.* to a natural son at twenty-one if he should attain that age; by will afterwards, the father gave 15,000*l.* to trustees to pay 200*l.* per annum for the maintenance of the son till twenty-five, and then to pay him the principal, and if he should marry between twenty-two and twenty-five, and die, to pay the whole to the issue; but if he died unmarried, before twenty-five, the whole over: the devise is not a satisfaction of the bond. *Jeacock* v. *Falkener*, 1 Bro. C. C. 295.

3. A man, by marriage settlement, provides 4,000*l.* for daughters, and, having two daughters, by will give them 2,000*l.* a-piece for their portions, without taking notice of the settlement. The 2,000*l.* a-piece by the will shall be in satisfaction of the portion by the settlement. *Webb* v. *Webb*, 2 Vern. 111.

4. One on the marriage of his daughter gives a bond to the husband for the daughter's portion, and afterwards, by will, devises land of much greater value to the husband, and the wife and their heirs. The devise is not a satisfaction of the bond, though there be a defect of assets to pay the testator's debts. *Goodfellow* v. *Burchett*, 2 Vern. 298.

5. Bill is to have 3,000*l.* provided for daughters' portions on failure of issue male, by an old settlement in 1631. The brother of the plaintiffs, who might have barred them by a recovery, giving them by will above the value of 3,000*l.*, it shall be intended a satisfaction. *Smith* v. *Duffield*, 2 Vern. 177.

6. By a marriage, in case of failure of issue male, a remainder is limited to the daughters until they should raise 3,000*l.* for portions. There is issue a son and two daughters; the father, by will, gives the daughters 700*l.* a-piece and dies; the son gives by his will to the daughters to the amount of 7,000*l.*, and devises the land to his male heirs, and dies without issue. The father's or son's legacies to the daughters shall not be a bar and satisfaction of the 3,000*l.* secured by the marriage settlement. *Duffield* v. *Smith*, 2 Vern. 258.

7. A gift of 20,000*l.* to the daughters by the codicil to the will of their father, held a cumulative provision for them without prejudice to their claim of 2,000*l.* each under their father's marriage settlement. A bond by their brother for payment of 10,000*l.* out of his personal estate, not a satisfaction for such provision. *Hanbury* v. *Hanbury*, 2 Bro. C. C. 352.

8. Though generally a satisfaction by will of a portion must be of the same nature, and equally certain, a bequest of a share in powder works, to be made up in value 10,000*l.*, charged with an annuity of 20*l.* for a life, was held a satisfaction of a portion of 2,000*l.* *Bengough* v. *Walker*, 15 Ves. 507.

9. On a marriage the father and husband of the lady gave bonds for 3,000*l.* each, to be paid to the trustees upon the trusts of the settlement. The father died leaving the whole of the principal, and some of the interest, due on his bond, and having bequeathed 3,000*l.* to his executors upon the same trust for the benefit of his daughter and her husband, and their issue, as were declared by the settlement of the trust moneys therein comprised:—Held, that the legacy was not a satisfaction of the father's bond. *Foster* v. *Evans*, 6 Sim. 15; 2 L. J., N. S., Ch., 74.

10. Testator having for valuable consideration charged particular freehold estates with annuities of 300*l.* to each of his sisters for life, payable in January, April, July, and October, afterwards by will devises all his estates upon trust to pay to his widow an annuity expressly in lieu of dower and of any payment she might be entitled to under his marriage settlement, and, subject to a trust for payment of his debts, upon trust to pay one of his sisters an annuity of 900*l.* and the other an annuity of 500*l.*, in each case for their separate use, and the annuities to be payable on the four most usual quarterly days of payment:—Held, that the annuities given by the will were not in satisfaction of those secured by the deeds. *Hales* v. *Darell*, 3 Beav. 324; 10 L. J., N. S., Ch., 10.

11. A father advances some of his children with portions in his lifetime, and then makes his will; and thereby recites he had advanced B. and C., but omits reciting D. (whom he had also advanced), and leaves to him a sum certain, and devises the residue equally among them. The money which D. had received shall go in

satisfaction of the legacy left to him. *Upton* v. *Prince*, Forrest. 71.

1. B., by his marriage settlement made in 1811, covenanted to secure upon certain estates an annuity of 400*l.* for his wife, for her life, in case she should survive him, in addition to the provision made for her by the settlement. He afterwards, by a deed executed in 1818, and intended to be made in pursuance of the covenant, granted an annuity of 400*l.* to his wife, which was made payable to her after his decease, during her widowhood. By his will in 1830, after ratifying and confirming the settlement, he gave an annuity of 400*l.* to his wife during her widowhood, in addition to the provision made for her by the settlement: —Held, that the widow was entitled both to the annuity granted to her by the deed, and the annuity given by the will. *Douce* v. *Torrington*, 2 Myl. & K. 600.

2. A person transfers a sum of stock into the names of trustees, and by an indenture under his hand and seal declares that the stock shall be held by the trustees upon certain trusts for the benefit of A. and her children by the settlor; and he afterwards obtains from the trustees a retransfer of the stock to himself, and razes the seals from the deed. By will he gave A. an annuity, etc., and the residue of his estate to the children. A. is entitled to the provision, both in deed and will. *Smith* v. *Lyne*, 2 Y. & Coll. C. C. 345.

3. By a marriage settlement a sum of 2,000*l.* was charged upon land for the daughters of the marriage, with power of appointment in the father; there was issue of the marriage one son and two daughters. The father by will, after confirming his marriage settlement, left 1,000*l.* to each of his daughters, and charged on the estate these sums, and directed that if his son should die without issue, his estate should go to the elder daughter, charged with 5,000*l.* for her younger sister. The son died without issue; the elder daughter became seised of the estate:—Held, that the younger sister was entitled to have the 1,000*l.* under the settlement, and the 5,000*l.* under the will, raised off the estate—the latter being charged on a contingency, and therefore no satisfaction of the former; but she was not entitled to the 1,000*l.* given by the will, the 5,000*l.* being intended to be substituted for it in the contingency which occurred. *Maxwell* v. *Maxwell*, Wall. Lyn. 163.

A legacy payable out of an uncertain fund is no satisfaction of a charge out of a certain fund. *Ib.*

4. A father, upon the marriage of his daughter, executed to the intended husband his bond, with warrant of attorney for confessing judgment thereon, conditioned for the payment of 800*l.* by instalments. He afterwards, by his will, bequeathed to his said daughter 800*l.*: —Held, that this legacy could not be considered as a satisfaction of the debt due to the husband. *Hall* v. *Hill*, 1 Dr. & War. 94; 1 Con. & L. 120; 4 Ir. Eq. R. 27.

5 Stock was transferred into the names of three trustees, on trusts of a marriage settlement. There was a power to alter and vary securities with the consent of the husband and wife. All the trustees transferred 2,000*l.*, part of the fund, to the husband, and the same was sold out, and the produce used by him and his co-partners, one of whom was one of the trustees. Two of the trustees became bankrupt. The other trustee, who was the father of the wife, by his will gave 6,000*l.* new 3½ per cents. to the trustees of the settlement. His will contained the following direction:—"For giving my daughter her legacy of 6,000*l.* new 3½ per cents., I order and direct, that whatever foreign bonds A. B. & Co. should have of mine be sold, and the produce thereof, with my balance of accounts with the said house, shall be added, for purchasing the said legacy." The testator also directed his bankers to pay all his dividends, and his balance of accounts with them, to his wife during her life, after having paid his legacy and debts. A suit was instituted against the executor of this will for a replacement of the 2,000*l.* out of the estate, and another suit was instituted by the same party against the executor for payment of the 6,000*l.* legacy:—Held, that the gift of the 6,000*l.* was a satisfaction of the 2,000*l.* and interest. *Bensusan* v. *Nehemias*, 20 L. J., N. S., Ch., 536; 15 Jur. 503.

6. By deed made on the marriage of A. and B., C., the father of B., settled 1,000*l.* upon A. and B. and their issue, which sum was recited as having been paid to the trustees, and covenanted to pay another 1,000*l.* upon his decease, upon the same trusts. Shortly before C.'s death, he, by deed, gave to other trustees 5,000*l.* upon trusts nearly identical with the trusts of the settlement for A. and B. and their issue; and by his will, of the same date, he declared that what he had given to B. should be taken in full satisfaction and discharge of all claims and demands upon him in any right or manner whatsoever. The trustees of the settlement never received the 1,000*l.* under the covenant of C., and C.'s estate had long been administered. Bill by one of the children of A. and B. against the representative of one of the trustees of the settlement, claiming a portion of the two sums of 1,000*l.* and 1,000*l.*. Defence, that the trustees never received either 1,000*l.*, and that the 5,000*l.* was in satisfaction:—Held (reversing 2 Jur., N. S., 1158; 5 W. R. 39), first, that the 5,000*l.* was to be taken in satisfaction of the 1,000*l.* covenanted to be paid. *Davis* v. *Chambers*, 3 Jur., N. S., 297; 5 W. R. 245.

Held, secondly, that although *primâ facie* the recital in the settlement of payment to trustees is the strongest possible evidence to charge them, yet that the circumstances of this case negatived the receipt by the trustees. *Ib.*

7. A., on the marriage of his son, covenanted with the trustees of the settlement, that if the son died in the lifetime of the wife, he (the covenantor) would pay to the widow 100*l.* a year during her widowhood, by half-yearly payments, the first payment to be made six months after the death of her husband, such annuity to be in satisfaction of her dower. By his will A. directed his residuary estate, after the death of his wife, to be equally divided among his children, subject and charged nevertheless, as to his son's share, with the payment of 100*l.* a year to his daughter-in-law, such annuity to commence from the death of the testator or her husband, which should last happen; and he directed all his debts and

legacies to be paid out of his estate, and provided that in no case should the annuity thereby provided for his daughter-in-law be in any way affected or disturbed:—Held, that the provision thereby made was not a satisfaction or performance of the covenant, and that the daughter-in-law was entitled to both annuities. *Charlton* v. *West*, 7 Jur., N. S., 905; 9 W. R. 884; 5 L. T., N. S., 16.

1. W., by a settlement on the marriage of his son, covenanted with trustees to bequeath to his son, if living, or to his intended wife if he were dead, a legacy of not less than 2,500*l.*, to be held upon the trusts of the marriage settlement. By his will, W., after reciting a power of appointment he had over 10,000*l.* comprised in his own marriage settlement in favour of his children (which sum, in default of appointment, was settled upon the children in equal shares), appointed to his son 2,500*l.* in full discharge of his (the testator's) covenant for payment or bequest of that sum contained in the settlement:—Held, first, that the appointment by the testator in exercise of the power contained in his own settlement could not operate as a satisfaction of the personal liability created by his covenant. *Graham* v. *Wickham*, 32 L. J., Ch., 639; 8 L. T., N. S., 679; 9 Jur., N. S., 702; 11 W. R. 1009; 2 N. R. 410; 1 De G. J. & S. 474; 31 Beav. 447.

Held, secondly, that the covenant did not merely confer a right to receive a legacy of the amount named after payment of simple contract debts, but created a specialty debt in favour of those claiming under the settlement. *Ib.*

2. A debt due on a bond executed in contemplation of marriage:—Held, not to be satisfied by a legacy of a greater amount. *Haynes* v. *Mico*, Romilly's Notes of Cases, 41; 1 Bro. C. C. 129.

3. A testator, having covenanted on the marriage of his daughter F. to pay to the trustees of her settlement, within twelve months after his death, a share of personalty equal to the share which the most favoured child and his issue should take, by his will gave one-fifth of his personal estate to each of two children and a daughter of a deceased child, one other fifth to the said trustees, and one other fifth upon trust for his son H. for life, with a gift over for want of issue to the other three children and the grandchild, the shares of daughters and the granddaughter to be for their separate use:—Held, that the whole will indicating an intention to put the families of the children on an equality, the contingent gift for the separate use of F. was intended as a satisfaction of the covenant, and was bound by the trusts of the settlement. *Davenport* v. *Hinchcliffe*, 1 John. & H. 713.

4. The doctrine of satisfaction, so called, as applied to the case of double portions, rests upon the same general principle, whether there is first a will made and then a settlement, or first a settlement and then a will, viz., that the child shall not be doubly provided for, and shall take nothing under the will, whether prior or subsequent in date, without bringing into hotchpot the provision made by the settlement. *Coventry* v. *Chichester*, 10 Jur., N. S., 435; 33 L. J., Ch., 361; 2 Hem. & M. 149; 11 L. T., N. S., 103; 3 N. R. 666. Affirmed 10 Jur., N. S., 896; 33 L. J., Ch., 676; 11 L. T., N. S., 171; 2 De G. J. & S. 336; 36 L. J., Ch., 673; 2 L. R., H. L., 71; 17 L. T., N. S., 35; 15 W. R. 849; 4 N. R. 535.

In order that the doctrine may be applicable, all that is needed is that in each case the property given should be given or settled in some one of the usual modes of dealing with a child's portion. *Ib.*

A father on the marriage of his daughter C. covenanted to pay 10,000*l.* three months after demand to trustees, to be held upon trust during the joint lives of the husband and wife, to pay 200*l.* a year to the wife pin money, and the residue of the income to the husband, and after the death of either, the whole income to the survivor for life, and after the death of the survivor upon the usual trusts of a marriage settlement, for children and issue. The father also covenanted to pay interest till the principal was paid. By his will he gave his residuary estate to trustees to convert it into money, pay thereout his debts and legacies, and stand possessed of the residue as to one moiety to pay the income to his daughter C. for life, for her separate use, and after her death, then, if she died in her husband's lifetime, for such persons other than her husband as she should by will appoint, but if she survived him, for such persons as she should by deed or will appoint, and in default of appointment, upon precisely similar trusts for his daughter P., with an ultimate limitation, in default of appointment, to his nephew B.; and as to the other moiety upon precisely similar trusts, except that the dispositions in favour of P. preceded those in favour of C. The 10,000*l.* was not paid by the testator in his lifetime:—Held, that the entire dissimilarity of the trusts of the settlements and will, and the directions in the will for payments of debts before the division of the residue into moieties, were sufficient to outweigh the leaning of the Court against double portions, and that the 10,000*l.* ought to be paid out of the whole residue, and not out of C.'s moiety. *Ib.*

The question whether a gift by a parent, or person *in loco parentis*, by deed or will, is to be considered as an addition to, or as a satisfaction or ademption of, a gift by a prior deed or will, is one of intention. The rule against double portions is founded on a presumption of intention, which may be rebutted by intrinsic evidence raising a counter-presumption, as where the object of the bounty is not the same in both instruments, or there is any substantial difference in the provisions of the two instruments. Less is required to countervail the rule where the question is one of satisfaction, that is, where the settlement is followed by the will, than in the converse case of ademption. *Ib.*

5. A father voluntarily granted a rent-charge of 100*l.* to his second son for life, which was secured on estate X., and also by his covenant. By his will he devised his real estates upon trust to pay him an annuity of 500*l.*:—Held, under the circumstances, that the latter was not a satisfaction of the former. *Lethbridge* v. *Thurlow*, 15 Beav. 334; 21 L. J., Ch., 538.

6. By a settlement made in the Scotch form upon the marriage of his daughter with a domiciled Scotchman, A., a domiciled

Englishman, covenanted to pay the trustees 4,000*l.* as a provision for the benefit of his daughter and her husband and the younger children of the marriage. The 4,000*l.* was not paid by A. during his lifetime; but by his will made after the death of his daughter, A. gave 16,000*l.* between the younger children of the marriage:—Held, that the will being an English disposition, the English doctrine of presumption against double portions was applicable, and that the provisions made by the testator's will in favour of his grandchildren operated as a satisfaction of the provisions made for them by the settlement. *Campbell* v. *Campbell*, 1 L. R., Eq., 383; 12 Jur., N. S., 118; 35 L. J., Ch., 241; 14 W. R. 327; 13 L. T., N. S., 667.

But, *secus*, having regard to the differences in the provisions made by the two instruments, if the case had been merely that of satisfaction of a debt; upon which point the doctrine of law is similar in England and Scotland. *Ib.*

1. A father on his daughter's marriage in 1861 covenanted that his heirs, executors or administrators, should, within six months after his death, pay 2,000*l.* to the trustee of the daughter's marriage settlement. By his will, made in 1871, he directed that his debts and funeral and testamentary expenses should be paid out of his residuary estate, part of which he gave to the daughter. He also directed that future advances made by him to any of his children, and also certain specified sums already advanced to some of his children, including the daughter, should be taken in satisfaction of their shares under the will. And, by a codicil, he directed 4,000*l.* to be set apart for his wife out of his residuary estate, before the latter was divided, according to the directions of his will:—Held, that the gift by will was not a satisfaction of the covenant in the settlement, and that the 2,000*l.* must be paid before the residue of the testator's estate was ascertained for the purpose of division pursuant to the will. *Smyth* v. *Johnston*, 31 L. T., N. S., 876.

2. Upon the marriage of his daughter the father covenanted to give an equal share of his estate upon the trusts declared in her marriage settlement. By his will he left such equal share to persons other than the trustees of the settlement, upon trusts for the benefit of his daughter. The trusts of the will differed from those of the settlement by giving the first life interest to the wife instead of the husband (giving her only a power to appoint by will to her husband for life), and also by giving a power of appointment among children to the wife alone, instead of to the husband and wife jointly. The investment clauses were also different:—Held, that the gift by will was in satisfaction of the covenant, and the funds were ordered to be transferred to the trustees of the settlement upon the trusts thereof. *Romaine* v. *Onslow*, 24 W. R. 899.

3. G., upon the marriage of his daughter M., covenanted to pay to the trustees of her settlement an annuity of 300*l.* for her for life, for her separate use, without power of anticipation. G. devised his real estate to the use that his daughter M. should receive an annuity of 400*l.* for life, for her separate use, and also that another daughter, L., should receive an annuity of 1,000*l.*, and bequeathed his residuary personal estate, subject to the payment of his debts, upon trusts therein mentioned. In other respects, both in his lifetime and by his will, the testator had given his two daughters equal benefits:—Held, that having regard to the general tone of the will, and particularly to the direction for the payment of debts, M. took the 400*l.* annuity in addition to the 300*l.* annuity. *Paget* v. *Gronfell*, 37 L. J., Ch., 833; 6 L. R., Eq., 7.

4. A wife having property so settled on her, covenanted during the coverture (but without reference to herself as a married woman) to cause 1,000*l.* to be paid after her death to the trustees of her daughter's marriage settlement. The trusts were for her daughter for life for her separate use, without power of anticipation, with remainder to the husband for life, with remainder to the children of the marriage in the usual form. This covenant did not refer to the power or the property comprised in the original settlement. Afterwards by her will made in execution of the power during the coverture, she bequeathed 1,000*l.* on trust for the daughter for life, for her separate use, with remainder on certain trusts for her children slightly different from those declared under the covenant. She also bequeathed the residue of her estate upon certain trusts:—Held, that the gift of the 1,000*l.* by the will was a satisfaction to the extent to which the daughter and her children took under the settlement. *Mayd* v. *Field*, 45 L. J., Ch., 699; 3 L. R., Ch. D., 587; 24 W. R. 660; 34 L. T., N. S., 614.

5. J. D., on his daughter's marriage, covenanted that in case he should depart this life in the lifetime of his said daughter, he would bequeath to the trustee for the time being of her marriage settlement the sum of 5,000*l.*, to be held upon the trusts of the settlement. The daughter died first, and after her death J. D. made his will, and thereby bequeathed to the trustee for the time being of the settlement the sum of 4,000*l.*, to be held upon the trusts of the settlement, this bequest being expressed to be in pursuance of the covenant in the settlement. Then followed a devise and bequest of the testator's residuary estate, a direction to pay debts, and, among other legacies to his children, a legacy of 4,000*l.* in trust for the children of the daughter above mentioned on attaining the age of twenty-one:—Held (1), that the testator's estate was not liable under the covenant in the settlement; (2) that the trustee for the time being of the settlement was entitled to the first sum of 4,000*l.*, notwithstanding that it was expressed to be bequeathed in pursuance of the covenant which was already inoperative at the date of the will; (3) that the two gifts of 4,000*l.* in the will were independent gifts, and that the daughter's children were entitled both to the second gift of 4,000*l.* and to the beneficial interest of the first gift of that amount. *Re Dyke, Dyke* v. *Dyke*, 44 L. T. 568.

6. A father, on the marriage of his daughter in 1867, covenanted with the trustees of her settlement that his executors or administrators would, within twelve calendar months after his death if he survived his wife, but if she survived him, then within six calendar

months after her death, transfer to the trustees 2,000*l.* consols to be held on the trusts of the settlement, which were for such persons as the wife, with the consent of the trustees, should appoint, and in default of appointment in trust for the wife for life for her separate use, then for the husband for life, and after the decease of the survivor, for such children of the marriage as, being a son or sons, should attain twenty-one, or being a daughter or daughters should attain that age or marry, and if more than one in equal shares, and in default of children for the husband absolutely. In 1871 the father satisfied this covenant to the extent of one moiety. In 1873 he made his will, bequeathing 2,800*l.* to trustees in trust for the daughter for life for her separate use, without power of anticipation, and after her decease for such of her children as should attain twenty-one in equal shares:—Held, that there were such substantial differences between the provisions made by the settlement and by the will as to rebut the presumption against double portions. *Re Tussaud, Tussaud* v. *Tussaud*, 9 L. R., Ch. D., 363; 47 L. J., Ch., 849; 26 W. R. 874; 39 L. T., N. S., 113.

Parol evidence of the intention of the parties is admissible to rebut the presumption against double portions, and there is no difference in this respect between the cases of a deed and a will. *Ib.*

3. Covenants to Leave Property to Children by Will.

1. Covenant in settlement to leave by will satisfied by legacy to amount, though followed by general directions for payment of debts. *Wathen* v. *Smith*, 4 Madd. 236, 325.

2. Upon a treaty of marriage, K. promised that his son, the intended husband, should participate in common with the rest of his children in the provisions of his will:—Held, that a substantial legacy given to the son, although of less amount than that which he would have received, had the testator's property been equally divided among all his children, sufficiently satisfied such a promise. *Kay* v. *Crook*, 5 W. R. 220; 3 Jur., N. S., 104.

3. A person who has covenanted to bequeath or otherwise provide that a share of his estate shall go to the covenantee, fulfils his covenant by bequeathing the share to the covenantee, who then stands in the same position as any other legatee. *Jervis* v. *Wolferstan*, 18 L. R., Eq., 18; 43 L. J., Ch., 809; 30 L. T., N. S., 452.

A testator has covenanted to leave by will or otherwise provide for his daughter one-third of the residuary estate; he bequeathed one-third to her, which was settled on her marriage and paid to the trustees of her marriage settlement:—Held, that the testator had satisfied his covenant; that the daughter took her share, not as a creditor, but as a residuary legatee, and that her trustees must refund the amount with the other residuary legatees. *Ib.*

4. A father, on the marriage of his son, covenanted that he would, during the joint lives of himself and of his son's wife, pay 400*l.* a year for her separate use, and that he would by his will direct his executors to invest 10,000*l.*, to be held by the trustees of the marriage settlement upon trust for his daughter-in-law for life, for her separate use, with remainder to her children. By his will, the father directed that for five years from his death there should be paid to his daughter-in-law an annuity of 2,000*l.* for the maintenance of her husband, herself, and the support and education of her children; and at the end of the five years that there should be paid to his son's wife and children 10,000*l.* upon the trusts and for the purposes of the settlement made on his son's marriage:—Held, that the annuity of 2,000*l.* during the five years was in substitution for and in satisfaction of the interest of the 10,000*l.* during that period, and that the daughter-in-law was not entitled to both the annuity of 2,000*l.* and the interest on the 10,000*l.*, but that the annuity of 2,000*l.* must abate to the extent of the interest on the 10,000*l.* to which she was entitled under the settlement. *Bethell* v. *Abraham*, 31 L. T., N. S., 112.

5. A father, on the marriage of his son, covenanted with the trustees of the settlement that he would leave to them one-fifth share of his residuary real and personal estate, to be held by them upon the trusts of the settlement. These were for the husband during his life, or until bankruptcy or alienation; then for the wife for life, and then for the children of the marriage. By his will he gave his residuary real and personal estate equally among his five children:—Held, first, that the bequest to the husband was not a satisfaction of the interests of the wife and children under the covenant. *M'Carogher* v. *Whieldon*, 36 L. J., Ch., 196; 3 L. R., Eq., 236; 15 W. R. 296.

Held, secondly, that the bequest to the husband was a satisfaction of his life interest under the covenant, and that he must elect between them. *Ib.*

Held, thirdly, that his election to take the bequest and give up the life interest under the covenant was an alienation of his life interest within the terms of the settlement, and that it thereupon passed to his wife. *Ib.*

6. A., upon the marriage, in 1851, of B., one of his two daughters, covenanted with the trustees of her settlement to give her or her trustees by his will one moiety of all the real and personal estate to which he should be entitled at his death, subject to payment of debts and to such devises and bequests (not exceeding in the whole one-fourth of the said real and personal estate) as he might think fit to make. And the deed contained a covenant for the settlement of any property which should be so given on specified trusts. By his will, made in 1864, A., after giving an annuity and directing payment of his debts out of his personal estate, directed the trustees to stand possessed of one moiety of the proceeds of his real and residuary personal estate upon trust for B., for her separate use for life, with remainder to her husband until bankruptcy or alienation, and remainder to her children as she should by deed or will appoint, and in default of appointment, to her children equally as tenants in common, with limitations over on the trusts of the other moiety which were in favour of A.'s other daughter C. and

her children. The limitations in the settlement of 1851 were not identical with those of the will; in particular, the husband took the first life interest, which was not made determinable upon bankruptcy or alienation, and the limitations to children were confined to the children of the marriage, and were subject to a joint power of appointment in husband and wife:—Held, that the legal presumption that the covenant had been satisfied by the gift in the will was not rebutted by the difference of the limitations in the two instruments, having regard to the identity of the subject-matter; and that B. and the other persons interested must elect between the provisions covenanted to be made by the settlement and given by the will. *Russell* v. *St. Aubyn*, 21 L. R., Ch. D., 398; 35 L. T., N. S., 395; 46 L. J., Ch., 641.

II. ADEMPTION OF LEGACY BY PORTION.

1. *General Principles*, 5681.
2. *Illustrative Cases*, 5683.
3. *Illegitimate Children*, 5688.

1. General Principles.

1. The Court leans against double portions, yet regard must be had to circumstances, as where there is an eldest son, or more children, and the demand would be to their prejudice: otherwise, in the case of an only child. *Bellasis* v. *Uthwatt*, 1 Atk. 427.

2. Where, after making a will, a father advances a child, with a portion as great or greater than the legacy, such provision has always been held an ademption, but when the devise has been of a residue, no instance where a subsequent portion has been held to be an ademption. *Farnham* v. *Phillips*, 2 Atk. 215.

3. A provision by will by a father to a child is adeemed by a subsequent portion given by the father in his lifetime. The Court leans against double portions. *Watson* v. *Lincoln*, Ambl. 326.

4. A legacy by a stranger to a female infant is not adeemed by his paying a marriage portion, and making other provisions for her and her husband. *Powel* v. *Cleaver*, 2 Bro. C. C. 500.

5. Legacy to child, discharged by provision subsequent to will. *Scotton* v. *Scotton*, 1 Stra. 235.

6. Devise and legacy from an uncle to his niece held not adeemed by an advancement upon her marriage. *Brown* v. *Peck*, 1 Eden 140.

7. As to presumption of satisfaction of legacy. *Campbell* v. *Sandford*, 8 Bli. N. S. 622; 2 Cl. & F. 429.

8. Satisfaction of a legacy from a father to his then unmarried daughter, by a portion of equal amount afterwards advanced by him on her marriage; as equity will not, where there is contradictory evidence, reject the presumption arising from the will and marriage settlement, and decide against the legal effect and operation that is to be attributed to them. *Dwyer* v. *Lysaght*, 2 Ball. & B. 156.

9. Where a father gives a legacy generally under a will to a daughter, he must be understood to mean it as a portion, and if he afterwards gives her a sum on marriage, it is a satisfaction of the legacy. *Shudal* v. *Jekyll*, 2 Atk. 518.

Double portions are what equity strongly bears against, and whether the portions given in the lifetime be less or not, is no way material. Where an orphan is under the care of a collateral relation, and he by will gives her a legacy, which is expressed to be for her portion, and afterwards provides for her in his lifetime, Lord Hardwicke was inclined to think this would be satisfaction. *Ib.*

Where father gives his daughter 500*l.* as a portion in marriage, and says, I will leave her something by my will, but will not oblige himself to do it, this would not be an ademption. *Id.* 519.

The altering of a will as to one niece cannot be taken as an evidence of the testator's intention to alter the legacy as to the other. *Ib.*

Ademptions are confined to instances where a testator applies a sum of money to the same purposes for which he had before given a legacy. *Ib.*

10. Where a parent or person *in loco parentis* gives a legacy to a child by way of portion, and afterwards makes advances in the nature of a portion to that child, that will be a satisfaction of the gift by will, and a court of equity will presume he meant to satisfy the one by the other; but this doctrine applies only to legacies, and not to a bequest of a residue, or to a devise of real estate; and to hold that the doctrine applies to devises of real estate, would be to repeal the sixth section of the Statute of Frauds. *Davys* v. *Boucher*, 3 Y. & Coll. 397; 3 Jur. 674.

11. The proper definition of a person *in loco parentis* to a child, is that of a person who means to put himself in the situation of the lawful father of the child, with reference to the father's office and duty of making a provision for the child. *Powys* v. *Mansfield*, 3 Myl. & C. 359; 7 L. J., N. S., Ch., 9; 1 Jur. 831. Reversing on this point S. C. 6 Sim. 528; 5 L. J., N. S., Ch., 153.

A person may stand *in loco parentis* to a child, although the child lives with and is maintained by its father. *Ib.*

12. Slight circumstances are laid hold of to get rid of the rule, that a legacy to a creditor extinguishes the debt, but a little difference between a portion and a legacy to a child, and as to the time of payment, will not prevail against the presumption of satisfaction. *Barclay* v. *Wainwright*, 3 Ves. 466.

13. Distinction between a legacy and a residuary bequest as to a presumed satisfaction by the advancement of a portion. The presumption from the former does not arise from the latter. *Freemantle* v. *Bankes*, 5 Ves. 79.

14. Gift of 500*l.* by father to daughter:—Held, not a satisfaction in part of legacy of 1,000*l.* by previous will, the presumption against double portions in case of parent and child being repelled by circumstances, the gift not being by way of portion, but after marriage, and from a particular motive appearing by declaration of testator to wife, which she proved. *Robinson* v. *Whitley*, 9 Ves. 577.

15. Ademption of a legacy from a father

to his then unmarried daughter, by a portion of equal amount, afterwards advanced by him on her marriage, as equity will not, where there is contradictory evidence, reject the presumption arising from the will and marriage settlement, and decide against the legal effect and operation that is to be attributed to them. *Dwyer* v. *Lysaght*, 2 Ball. & B. 156.

1. A trust fund, to which a father was entitled for life, and his son and daughter in remainder, was sold, and the proceeds were received by the father. Subsequently, on the marriage of the daughter, the father settled property for her benefit of a larger value than the proceeds of the trust fund:—Held, that the claim of the daughter against the father in respect of her share of the proceeds of the trust fund must be presumed to be satisfied by the settlement; and that neither the expression in the settlement of the consideration of natural love and affection, nor the ignorance of the husband of the rights of the wife in the trust fund, had the effect of excluding the presumption of satisfaction. Evidence is admissible either to support or rebut the presumption. *Semble*, whether, in the case of a portion of the precise amount of the debt, the expression of natural love and affection, as the consideration for the settlement, might not be material on the question of satisfaction, *quære*. *Plunkett* v. *Lewis*, 3 Hare 316; 13 L. J., N. S., Ch., 295; 8 Jur. 682.

2. A grandfather having, in the opinion of the Court, placed himself *in loco parentis* to certain grandchildren, although their father was living, and having given them certain sums by his will, and having afterwards made settlements upon their respective marriages, the presumption against double portions was held to be applicable; but inasmuch as the advancements were smaller in amount than the sums expressed to be given by the will, such advancements were held to be satisfactions *pro tanto* only of the gifts contained in the will. *Pym* v. *Lockyer*, 5 Myl. & C. 29; 10 L. J., N. S., Ch., 153; 5 Jur. 34, 620. Reversing 8 L. J., N. S., Ch., 362.

3. If a presumption arises that payments by a testator to his children were made in satisfaction of legacies they would become entitled to under his will, it is not rebutted by their believing such payments to have been gifts when the belief is unsupported by any testimony of the intention of the testator. *Schofield* v. *Heap*, 28 L. J., Ch., 104; 27 Beav. 93; 4 Jur., N. S., 1067.

4. Satisfaction and ademption are upon the same footing, by reason of the doctrine against double portions. *Montefiore* v. *Guedalla*, 6 Jur., N. S., 329; 29 L. J., Ch., 65; 1 De G. F. & J. 93.

The question whether there is to be an ademption of a residuary bequest is one of intention, and should not depend upon the mere uncertainty of the amount of the residue. *Ib.*

The slight difference between the trusts of the residue and the trusts of the settlement is not sufficient to rebut the general presumption that a testator intended an advance to be adeemed. *Ib.*

5. A legacy by a parent or a person *in loco parentis* to a child is not satisfied by occasional small gifts in the testator's life. *Watson* v. *Watson*, 33 Beav. 574.

Thus, a legacy of 2,500*l.* was held satisfied *pro tanto* by a gift of 1,000*l.* stock on marriage, but not by gifts of 80*l.* and 100*l.*, or by an annual allowance of 60*l.* a year. *Ib.*

In order to create a case of satisfaction of a legacy given by a person *in loco parentis*, that relation must exist at the date of the will. *Ib.*

A legacy being held *pro tanto* satisfied by a gift of stock:—Held, that its value must be ascertained as at the time of the gift. *Ib.*

6. The presumption is against double portions, and the burthen of proof lies on those who contend for two portions, to show that this presumption is rebutted. *Montague* v. *Montague*, 15 Beav. 565.

7. The presumption of law is against double portions; where a sum of money is given by the will of a parent to a particular child, and the like sum is afterwards secured by a settlement on the marriage of that child, there is a presumption in favour of the ademption of the legacy, but this presumption may be rebutted by evidence of intention to the contrary. The burden of proof of intention is on the person claiming the double portion. It is not necessary that the legacy should be paid in order that it may be adeemed. *Hopwood* v. *Hopwood*, 7 H. L. Ca. 728. Reversing 26 L. J., Ch., 292; 3 Jur., N. S., 549; 5 W. R. 331; 2 Jur., N. S., 747; 22 Beav. 488.

Where a parent has given a portion by a will, and afterwards pays or secures the same portion by a settlement, the legacy is from that moment gone, and the will is to be read as if the bequest were expunged from it. S. C. 5 Jur., N. S., 897; 29 L. J., Ch., 747.

The covenant in the settlement was an indication of intention that the son should not have the legacy; the father must be held to have substituted the provision by deed for the provision by will; and it was not necessary that the amount of the legacy should have been paid in order that it should be adeemed. *Ib.*

8. The presumption that a legacy or a gift of residue is adeemed or satisfied by a subsequent advancement made by the testator to the legatee, arises only in the case of children or persons towards whom the testator stands *in loco parentis*. Therefore, if a testator has placed himself *in loco parentis* to one member only of a family, there can be no presumption as against that one that a provision made for him in common with the others by the testator's will is satisfied or adeemed by a subsequent advancement to him by the testator in his lifetime. *Fowkes* v. *Pascoe*, 10 L. R., Ch., 343; 44 L. J., Ch., 367; 32 L. T. 545; 23 W. R. 538. See *Rose* v. *Rogers*, 39 L. J., Ch., 791.

The selection of particular persons as the sole or principal objects of a testator's bounty, accompanied by acts and expressions about adoption in a *quasi*-parental sense, is not sufficient to place the testator *in loco parentis* to such persons, so as to raise the question of ademption in respect of gifts made after the date of the will. *Ib.*

9. There is no presumption of law that the payment of a sum of money to a child (even by a father) before the date of the will is to be set off against a legacy given to that child. *Taylor* v. *Cartwright*, 4 L. J., Ch., 529; 20 W. R. 603; 14 L. R., Eq., 167; 26 L. T. 571.

10. When a father after giving by his will a portion to his child advanced to such child a

portion without any deed or instrument, such provision, in the absence of circumstances negativing the presumption, was held an ademption *pro tanto*. *Leighton* v. *Leighton*, 43 L. J., Ch., 594; 18 L. R., Eq., 458; 22 W. R. 727.

The occasion of a subsequent advancement satisfying or ademing a previous one need not be the marriage of the child or any other occasion calling specially for the advancement of the child. *Ib.*

2. Illustrative Cases.

1. A., by will, gives 750*l.* to his son, and afterwards buys him a cornet of horse employment for 650*l.*, which sum it was proved he intended to strike out of his will:—Held, that the 650*l.* should go in diminution of the 750*l.* *Hoskins* v. *Hoskins*, Pre. Ch. 263.

2. A., by will, gives his daughter 200*l.*, and afterwards gives with his daughter in marriage above 200*l.* The testator paying his daughter her portion in his lifetime is a satisfaction of the legacy. *Jenkins* v. *Powell*, 2 Vern. 115.

3. Father by will gives his son 500*l.*; he afterwards takes him into partnership. The stock being 3,000*l.* is not satisfaction of legacy. *Holmes* v. *Holmes*, 1 Bro. C. C. 555; 1 Cox 39.

4. C. provided by his will a maintenance for his second son out of the real estate; he afterwards gave large legacies to his younger children, with maintenance out of the interest. The second son entitled to both maintenances. *Clive* v. *Walsh*, 1 Bro. C. C. 146.

5. A. devises his estate to B., his son, charged with 500*l.* to his granddaughter, the daughter of B., payable at twenty-one or marriage. B. marries his daughter, and gives her 1,500*l.* portion, but no notice is taken of the 500*l.* legacy, nor any release given. Twenty-one years afterwards the daughter and her second husband bring a bill against the father for the 500*l.*; bill dismissed. The 1,500*l.* shall be presumed a satisfaction of the 500*l.*, especially after such a length of time. *Mackdowell* v. *Halfpenny*, 2 Vern. 484.

6. A., by his will, gives his children several legacies, and gives his eldest son 2,000*l.*; afterwards gives him 400*l.* to go to Italy, and being a merchant, enters his son debtor 400*l.* Afterwards, upon a calculation of his estate, and finding it not sufficient to pay the whole, he, by a codicil, retrenches 400*l.* out of the younger children's legacies, without taking notice of this 400*l.* The 400*l.* shall not be deducted out of the 2,000*l.* to the eldest son. *Bird* v. *Hooper*, Pre. Ch. 298.

7. One devises to his daughter a portion of 500*l.*, and afterwards, in his lifetime, gives her 300*l.* for her portion in marriage, and four years after dies without revoking the will. The husband a bankrupt; the assignees not entitled to the 500*l.* legacy, nor any part thereof. *Hartop* v. *Whitmore*, 1 P. W. 681; Pre. Ch. 541.

8. Testator bequeathed 1,000*l.* apiece to M. and S., payable at twenty-one, and if either die before, the whole to the survivor. He afterwards enters into two bonds to M. and S. for securing 2,000*l.* to each of them, provided they marry in his lifetime, with his consent, or in case they survive him. As the moneys given by the bonds are on contingencies, they are not a satisfaction of the legacies. *Spinks* v. *Robins*, 2 Atk. 91.

Legacy to a daughter by her father, satisfied by his giving her a marriage portion afterwards. *Ib.*

9. 500*l.* given in testator's lifetime to child is a satisfaction of similar legacy by will. *Biggleston* v. *Grubb*, 2 Atk. 48.

10. One devises to his wife six messuages, and the rest of his real estate equally to his two daughters in fee, and afterwards, on the marriage of his eldest daughter, he covenants to settle one moiety on her and her husband: the devise of the six houses shall be good, and subsist out of the remaining moiety. *Rider* v. *Wager*, 2 P. W. 332.

A. has two daughters, B. and C., and devises one moiety of his real and personal estate to B.; the other moiety of his real and personal estate to C., and afterwards A., in consideration of marriage, covenants to settle a moiety of his real estate upon the husband that marries B.; the husband shall have one moiety by the settlement, and the wife the moiety of the other moiety by the will. *Ib.*

11. A sum of 2,000*l.* paid by testator on marriage of daughter, with covenant to pay 4,000*l.* at death, extinguishes two legacies giving more to her by prior will. *Clarke* v. *Burgoine*, Dick 353.

12. A., by will, gives 300*l.* to daughter, if she marries with consent of B., otherwise only 200*l.*; A. procures her to be married, and gives 200*l.* with her. Legacy of 300*l.* held adeemed. *Anon.*, 1 Stra. 207.

13. Testator bequeathed interest of 400*l.* to daughter, and afterwards advanced 100*l.* to daughter's husband, and latter gave receipt for it, expressive of its being part of daughter's portion, and testator enclosed the receipt, together with his will, in an envelope, and husband since his wife's death received only interest on 300*l.*:—Held, advance of 100*l.* was not an ademption *pro tanto* of the 400*l.* legacy. *Bell* v. *Coleman*, 5 Madd. 22.

14. R. directed his executors to place out 1,000*l.* at interest, and to apply the interest for maintenance, etc., of his grandson, empowering them to pay part of the principal as an apprentice fee, and the residue to be transferred to him at twenty-one. Testator put his grandson apprentice, and paid 126*l.* with him. A year after, testator made a codicil to his will, and gave him a legacy of 1,000*l.* The question was whether paying the apprentice fee was an ademption *pro tanto*:—Held, that as the 1,000*l.* was not given for that purpose alone, the codicil was a confirmation of the legacy and a republication of the will. *Roome* v. *Roome*, 3 Atk. 181.

15. J. makes his will the 4th March, 1738; soon after S. pays his addresses to the plaintiff, and in July applied to J., her great-uncle, for his approbation, who agreed to give S. 500*l.*, and drew a note payable to him on the 25th March, 1739, and lodges it in G.'s hands, to be delivered to S. after the marriage was had, and said he would leave the plaintiff something by will, but would not be obliged to do it. On the 19th August, 1738, J. dies; and the next day the plaintiff and S. were married. Ld. Hardwicke held, the legacy of 1,000*l.* given under J.'s will to the plaintiff, was not satisfied by

the 500*l.* given upon the marriage in the testator's lifetime. *Shudal* v. *Jekyll*, 2 Atk. 516.

1. On deficiency of assets, marriage portions no satisfaction of a legacy to the wife from her father; the portion, being less than the legacy, having been paid absolutely to the husband upon giving up a certain interest of his wife; the legacy being to the wife for life, remainder to her children and grandchildren, remainder over, and being expressly in satisfaction of another distinct interest of the wife; and held, no ademption, the intent not being sufficiently plain. *Baugh* v. *Read*, 1 Ves. J. 257.

2. The testator gave 17,000*l.* to each of his two eldest daughters, and 16,000*l.* to the youngest, as portions, with a gift over to the others, if any daughter should marry without consent, or die under twenty-three, and unmarried. By a codicil he recited an advance of 5,000*l.* to L., one of the elder daughters, and declared it to be part of the provision made for her by the will. The youngest daughter died unmarried, and under twenty-three:—Held, not to be a case of ademption, but of part satisfaction, and the estate proving deficient, that the other daughter was entitled to a similar proportion of her legacy of 17,000*l.* before L. could take any part of the testator's estate:—Held, also, that the moiety of the younger daughter's legacy, not being intended as a provision, was not subject to the same construction. *Nelson* v. *Bridges*, 1 Jur. 753.

3. Testator, by his will, gave to his son and to his two daughters, M. and B., 100*l.* each, and after the death of his wife, he gave all his freeholds at R. or elsewhere to his son in fee, subject and charged as thereinafter mentioned; and he devised to M., her heirs, and assigns, a rent charge of 50*l.* a year, and a similar rent charge to B., payable out of the R. estates; and in case either M. or B. should die without issue before her rent charge should become payable, he gave one half thereof to the other, and the other half was no longer to be made a charge on the estates. Afterwards, testator purchased the P. freehold estate, and devised it to M. and B. in fee as tenants in common. On the marriage of M., testator gave a bond for 1,000*l.* as an immediate provision, and 40*l.* payable after his death. On B.'s marriage, testator settled the whole of P. and 400*l.* as a provision for her:—Held, that the provisions so made by the testator for M. and B. did not amount to an ademption of the benefits given them by the will. *Darys* v. *Boucher*, 3 Y. & Coll. 397; 3 Jur. 674.

4. P. H. devised and bequeathed all his real and personal property to trustees, to pay S. an annuity out of the lands of M. and B. during his life; and to pay unto his children, viz., to Ellen H. 2,000*l.* and to Edward, Anne, Francis, and William, 1,000*l* each; and to pay to J. H. an annuity for his life out of the lands of B. and R.; and as to all his interest in all his estates, lands, houses, and landed property, to the use of his son, H. H.; and he appointed Ellen H. his residuary legatee, and his trustees to be his executors. By a codicil executed the same day, he bequeathed all his household furniture, and his horses, stock, etc., to his son, H. H., and directed that all rents then due by the tenants on the respective lands should belong to H. H. Ellen H. subsequently married, and by a settlement, to which she, her father, and her intended husband were parties, after reciting that P. H. had agreed to give his daughter 2,000*l.* for a marriage portion, certain sums of money and securities for money were vested in a trustee for the benefit of the intended husband and wife and the issue of the marriage, in the manner therein mentioned. By a second codicil, executed after the settlement on his daughter Ellen, P. H. declared it to be his intention that all his lands, houses, etc., should revert to his son, H. H., and he bequeathed all his money, and securities for money, equally to Ellen, Anne, and Francis; and he left to William the lands of T.; "these bequests subject to a bequest already made in my will;" and he desired that all rents due on his property in those respective lands, should belong to his son, H. H.:—Held, that the provision made for Ellen H. on her marriage, was a satisfaction of the legacy of 2,000*l.* given to her by the will. *Barry* v. *Hardinge*, 1 J. & L. 475; 7 Ir. Eq. R. 313.

5. Testator bequeathed 10,000*l.* to trustees, in trust, to pay the interest to his daughter for life, provided, that when she married, one moiety of the 10,000*l.* should be paid to her or her husband, and that the other moiety should be held in trust to pay the interest to his daughter for life, and after her decease in trust for her children, and if she had no children, then to sink into the residue of his personal estate, which he gave to his two sons. The daughters married during the testator's lifetime, and the testator settled 10,000*l.* in trust for his daughter for life, for her separate use, and after her decease, in trust for her husband for life, and after the decease of the survivor in trust for the children of the marriage, as the husband and wife should jointly appoint, and, in default of such joint appointment, then as the survivor should appoint; and, in default of any appointment, then in trust for the issue of the marriage; and on failure of such issue, then in trust for the issue of the testator living at the death of the survivor of the husband and wife:—Held, that the provision made by the settlement was a satisfaction of the legacy. *Platt* v. *Platt*, 3 Sim. 503.

6. W. bequeathed 5,000*l.* to the daughter of his brother J., charged on his real estates, and directed the interest to be raised for her maintenance, if J. should so direct; and he devised his real estates so charged to J. in fee. J. bequeathed 10,000*l.* in trust for his daughter for life, and after her death in trust for her children, and declared that that sum should be in addition to the sums which she was entitled to under W.'s will. The daughter afterwards married. Her father advanced to her husband 15,000*l.* as his daughter's marriage portion, and, by the settlement, pin-money, and a jointure for the wife, and portions for the younger children of the marriage, were provided out of the husband's property, and the 15,000*l.* was declared to be in satisfaction of the sums which the wife was entitled to under W.'s will:—Held, that the 10,000*l.* was satisfied by the marriage portion. *Durham* (*Earl*) v. *Wharton*, 3 Cl. & F. 146; 10 Bli. N. S. 526; 3 Myl. & K. 698; 6 L. J N. S., Ch., 17. Reversing 5 Sim. 297; 3 Myl & K. 472; 2 L. J., N. S., Ch., 25.

1. A testator by his will gave to his daughter, Sophia, and her children under certain circumstances, a sum of 10,000*l.* 4 per cent. annuities, and directed that, with the exception of certain sums, of which this was not one, and which were expressly ordered to be brought into hotchpot, the legacies bequeathed to any of his children were to be, not in satisfaction of, but in addition to, any portion or provision to which they were, or should be, entitled under any articles or settlement then already executed by him. Afterwards, upon her marriage, a sum of 10,000*l.* 4 per cent. bank annuities was settled upon Sophia, her husband, and her children. She is not entitled to both provisions, notwithstanding the differences in the limitations. The testator, on the marriage of another daughter without his consent, revoked a bequest of 10,000*l.* 4 per cent. bank annuities, which he had made by the same will in favour of that daughter and her children, and gave her a life interest in a sum of 5,000*l.* 4 per cent. bank annuities; he afterwards settled 10,000*l.* on her and her children, and by a codicil declared the settlement to be in satisfaction of the legacy; this circumstance, even coupled with the difference of the provisions, and the language of the will, is not sufficient to repel the presumption against double portions in the case of the daughter Sophia. *Sheffield* v. *Coventry* (*Earl*), 2 Russ. & M. 317.

2. An advance of a marriage portion to a daughter, does not of itself, by the law of Scotland, bar her claim to legitim. *Breadalbane* (*Marquis*) v. *Chandos* (*Marquis*), 7 L. J., N. S., Ch., 28; 4 Cl. & F. 43; 2 Myl. & C. 711.

Such a claim cannot be barred by implication. *Ib.*

A marriage contract, in which the father of the lady agreed to pay a certain sum of money, as the portion or fortune of his daughter, and which then went on to describe how the sum should be paid partly in his lifetime, and partly out of his estate after his death, was held not to be capable, without more, of barring her claim to legitim. *Ib.*

3. A testatrix, *in loco parentis* to A., bequeathed 10,000*l.* sterling to M., and afterwards transferred 12,000*l.* consols into the joint names of herself and M.:—Held, under the circumstances of the case, that the transfer was an ademption or satisfaction of the legacy. A legacy is given to M., with a contingent limitation over to N. in the event of M. dying without children. The legacy to M. is adeemed by a subsequent gift to M. in the lifetime of the testatrix, to which no limitation in favour of N. is attached. The legacy is not merely adeemed as to M., but also extinguished as to N. *Twining* v. *Powell*, 2 Colly. 262.

4. A testator, by his will, reciting that he had, on the marriage of two daughters, advanced and transferred, for their respective benefit, 500*l.* sterling, and 900*l.* bank stock, bequeathed 500*l.* sterling and 900*l.* bank stock in trust for his remaining daughter, Francisca, during her life, to her separate use, without power of anticipation or alienation; then for her children, subject to an exclusive power of appointment by her, and if there were no children in whom the fund should vest, then for such person as she should appoint. Francisca afterwards married, and on her marriage her father advanced to her 500*l.*, and transferred to the trustees of her marriage settlement 900*l.* bank stock in trust for her separate use during her life; then for her husband during his life, and after his decease to the children; but if she died in the lifetime of her husband, without leaving any child, then to her husband absolutely, and if he died in her lifetime, without leaving any child by her, to her absolutely:—Held, that the provision made for Francisca on her marriage was an ademption of the legacies of 500*l.* and of 900*l.* bank stock. *Carver* v. *Bowles*, 2 Russ. & M. 301; 9 L. J., Ch., 91.

5. A testator having left his son 10,000*l.* by his will, expressed an intention, verbally, of settling 10,000*l.* stock on the son's marriage, and then became insane. The marriage took place, and the 10,000*l.* stock was purchased out of the testator's moneys, and settled accordingly. The testator then had a lucid interval, and on being told of the transaction, did not disapprove thereof. He afterwards became irrecoverably lunatic:—Held, first, that the testator confirmed the settlement upon his son by not expressing any disapprobation during this lucid interval; and, secondly, that the evidence did not prove that the settlement of the 10,000*l.* was an ademption of the legacy. *Browne* v. *Browne*, 11 L. J., N. S., Ch., 57; 5 Jur. 1053.

6. The testator bequeathed a sum of 3,000*l.* to his daughter for her separate use for life, with remainder to her children as she should appoint, and, in default of appointment, to her children equally, with provision for survivorship, advancement, and for the substitution of their issue; and, subject to an annuity and to his debts, he devised and bequeathed all the residue of his real and personal estate, naming securities for money, unto his son absolutely. After the date of the will, the testator gave to his daughter and her husband a promissory note for 500*l.*, then due to the testator. In a suit by the children of the daughter against the son, claiming to have the legacy of 3,000*l.* invested and secured for their benefit, the defendant tendered parol evidence that, after the date of the will, the testator was requested by his daughter to confer some benefit on her husband, and that thereupon the testator gave her a promissory note, declaring that it was to be in part satisfaction of the legacy of 3,000*l.*, and that the testator was advised by his solicitor that it was not necessary to alter his will to give it that effect:—Held, that the advance to his daughter and her husband was an ademption *pro tanto* of the legacy bequeathed by the will for the benefit of the daughter and her children. Whether, if the children had been all living at the date of the will, and been named therein individually, and not merely described as a class, the advance would have been an ademption, *quære*. *Kirk* v. *Eddowes*, 3 Hare 509; 13 L. J., N. S., Ch., 402; 8 Jur. 1024.

7. A father makes his will and gives a legacy of 5,000*l.* to his son, and afterwards takes his son into partnership, and gives him half the stock in trade, to the amount of 15,000*l.*; this advancement shall not be taken in satisfaction of the legacy. *Holmes* v. *Holmes*, 1 Cox 39.

1. Testator being seised of a reversion in fee, expectant on the death and failure of issue male of himself and his brother, and being possessed of a leasehold estate, and of stock in the funds, devised the reversion to trustees for the term of 1,000 years, and gave to them the leasehold estate and stock, in trust to raise 10,000*l.*, which he directed to be held in trust for his niece, Julia, the daughter of his brother, for life, and, after her decease, in trust for any husband who might survive her, and after the decease of the survivor of them, in trust for all the children of his niece who should be then living. The niece married about three months after the date of the will, and by a settlement made, in contemplation of the marriage, the testator, in consideration of natural love, etc., for his niece, Julia, the daughter of his brother, and for her advancement in life, and to provide a maintenance for her, charged the reversion with the payment (after the death of the survivor himself, and his brother, without leaving issue male, who should attain twenty-one), of the interest of 10,000*l.* to his niece's husband for life, and after his decease to his niece for life, and after the decease of the survivor, with the payment of 10,000*l.* to trustees in trust for the younger children of the marriage. About a year afterwards, the testator, by a codicil, disposed of a certain portion of his property, not before mentioned, and in all other respects confirmed his will. The testator died a bachelor. His brother afterwards died leaving issue, Julia, and five other daughters:—Held, that the provision made by the settlement, was a satisfaction of the provision made by the will. *Powys* v. *Mansfield*, 3 Myl. & C. 359; 7 L. J., N. S., Ch., 9; 1 Jur. 861. Reversing on this point 6 Sim. 528; 5 L. J., N. S., Ch., 153.

2. A father made his will, giving to each of his three younger children 5,000*l.* On the marriage of one of them, a daughter, he paid to the husband 2,000*l.* By a codicil he declared that sum to be in part satisfaction of the 5,000*l.* One of his younger sons, F., married. On that marriage the father entered into a covenant that he would cause to be paid to the trustees of the marriage, within twelve months after his death, 5,000*l.*, with interest in the meantime at the rate of 5 per cent., such interest to be employed in the payment of premiums on life policies. By a codicil made after the date of this settlement, the testator recited what he had given by his will to each of his two younger sons, and directed his trustees to raise "a farther sum of 7,000*l.*" for each of them, and to hold such farther sum on the same trusts as those of the 5,000*l.* The testator afterwards raised 5,000*l.*, with which he purchased a lieutenant-colonelcy in the Guards for his other younger son, H.; and he then made a codicil, declaring that this sum so laid out was to be taken by H. in satisfaction of the legacy given him by the will:—Held, that these circumstances did not show an intention on the part of the testator rebutting the presumption that the 5,000*l.* given by the will to F. was adeemed by the settlement. *Hopwood* v. *Hopwood*, 7 H. L. Ca. 728; 5 Jur., N. S., 897; 29 L. J., Ch., 747. Reversing 3 Jur., N. S., 549; 26 L. J., Ch., 292; 5 W. R. 331; 2 Jur., N. S., 747; 22 Beav. 488.

3. A testator who has contributed to the maintenance and education of a female infant nearly related to him, from the time of her father's death, and who has been treated by her as the person whose consent was necessary to her marriage, and who has taken upon himself the obligation to make a provision for her in that event, is, as to the question of a double provision by will and settlement, to be considered *in loco parentis*, and the presumption against a double provision, which would arise in the case of a father, will apply to such a case. In such a case parol evidence may be adduced to prove the intention against a double provision, as well as on the question whether the testator was *in loco parentis*. *Quære*, whether, if the testator were not to be considered *in loco parentis*, parol evidence of his intention not to make a double provision by will and settlement would be admissible. It being proved by parol evidence that the testator intended the provision made by the settlement to be in lieu of a legacy given by the will, the settlement was held to be a satisfaction of the legacy, though the two provisions differed so much from each other that they could not be considered substantially the same. The legacy was not set up by a codicil, made after the settlement, ratifying and confirming the will and all the devises and bequests therein contained. *Booker* v. *Allen*, 2 Russ. & M. 270; 9 L. J., Ch., 130.

4. The testator, upon the marriage of a daughter, entered into a bond for payment of 5,000*l.* within six months after his decease to the trustees of his daughter's settlement, the interest to be paid to the husband for life, and after his decease, if the wife survived him, and there were children of the marriage, 1,000*l.*, part of the 5,000*l.*, to be paid to the wife, and the remainder to be applied for the use of the children of the marriage; but if there were no children, 2,000*l.* to be paid to the wife, and the remainder of the 5,000*l.* to be paid to the executors and administrators of the husband, and in case the husband survived the wife, and there were no children, then the whole of the 5,000*l.* to the husband. The testator afterwards made his will, and gave his daughter 5,000*l.*, stating it to be in addition to what he had secured upon her marriage. About five years afterwards the testator executed a deed, whereby he covenanted that his executors should pay to the trustees, within six months after his death, the sum of 5,000*l.* upon the trusts of the settlement. Parol evidence of the declarations of the testator was admitted to prove that he did not intend a double portion. *Quære*, whether the different interests of the husband, wife, and children in the legacy of 5,000*l.*, and in the sum of 5,000*l.* given by the deed, would repel the common presumption against double portions. *Lloyd* v. *Harvey*, 2 Russ. & M. 310.

5. A testator gave all his personal estate equally between his three children, one of whom was his daughter M. There was a direction in the will that only one moiety of his daughter's share should be paid to her absolutely, and that the other moiety should be held by the trustees of his will upon the usual trusts. M. married before the testator's death, and on her marriage the testator gave her 800*l.* by way of outfit, and settled on her

and her children 7,000*l.* The testator died without having revoked his will, and it was held that the 7,800*l.* must be brought into hotchpot, and that the direction in the will as to the share of M. thereunder applied only to such share minus the sum of 800*l.*, and the sum of 7,000*l.* settled on her marriage. *Woodhouse* v. *Woodhouse*, 2 Eq. Rep. 1271.

1. In 1842, a parent having a power to appoint two separate sums of 5,000*l.* and 10,000*l.* amongst his children, made his will, by which he appointed the 5,000*l.* to James, and the 10,000*l.* between Theodosia and Catherine. In 1844, he, by deed, appointed the 5,000*l.*, which he had before appointed by will to James, to Theodosia. In 1846, he, by codicil, confirmed his will, and he died in 1847. Theodosia claimed the two sums of 5,000*l.*; but James contended, first, that she was bound by election to give effect to the bequest of 5,000*l.* to him, or to relinquish the 5,000*l.* given her by the will; and, secondly, that the appointment of 1844 was a satisfaction of the legacy of 5,000*l.*:—Held, that no case of election had arisen, but that the legacy to Theodosia was satisfied, and the amount unappointed. *Montague* v. *Montague*, 15 Beav. 565.

The confirmation of a will by a codicil does not revive a legacy adeemed in the interval between the will and codicil. *Ib.*

2. A testator gave a legacy to his adopted daughter, to be paid to her on her marriage. She married in his lifetime, and the testator gave sums of money from time to time after the marriage to the husband, to advance him in his business:—Held, that the sums so advanced were an ademption *pro tanto* of the legacy. *Ferris* v. *Goodburn*, 4 Jur., N. S., 847; 27 L. J., Ch., 574; 6 W. R. 485.

3. A gift of a share of residue to a child:—Held, *pro tanto*, satisfied by a provision made by the testator on her marriage after the date of the will. *Beckton* v. *Barton*, 27 Beav. 99; 5 Jur., N. S., 349; 28 L. J., Ch., 673.

4. A bequest of a share of residue for the benefit of the testator's son and his family may be adeemed wholly or partially by a subsequent advance by way of settlement on the son's marriage, and such a settlement may, having regard to the provisions of the will, so operate, rather than as an ademption of an absolute pecuniary legacy. *Montefiore* v. *Guedalla*, 1 De G. F. & J. 93; 6 Jur., N. S., 329; 29 L. J., Ch., 65.

A testator, by will, made in 1829, bequeathed to each of his three children, H., M., and G., 3,000*l.* The will recited that he had already advanced 3,000*l.* to H., and to M., his second son, 3,000*l.*, and that he had also settled, upon the marriage of M., 2,000*l.* stock; and it directed that, in calculating his residue, these sums so advanced should be brought into hotchpot. The testator bequeathed the residue to trustees, upon trust, as to one-third part, to H. for life, or until he should assign the same, and after his decease, to his children, and in default of issue, to his next of kin; and made similar bequests of the remaining two-thirds of the residue in favour of his other children. H., subsequently to the date of the will, married, and on his marriage his father settled 2,000*l.* stock upon trust for the wife for life, with remainder to the husband for life, with remainder to the children of the marriage; and in default of issue, to the next of kin of H.:—Held, that the one-third share of the residue bequeathed to H. must be adeemed by the portion settled on his marriage. *Ib.*

5. A testator, by will, made an equal division of his real and personal estate among his children; in the course of fifteen years afterwards he made advances of large sums to some of his daughters on their marriage, and to some of his sons on establishing them in business; to others trifling sums only:—Held, that the small sums were intended as free gifts, but that the larger sums, being for permanent advancements, were in part satisfaction of the benefits given to them by the will. *Schofield* v. *Heap*, 28 L. J., Ch., 104; 27 Beav. 93; 4 Jur., N. S., 1067.

6. Bequest by a father of 7,000*l.* in remainder after the death of his widow, in trust for his daughter for life, with remainder to her children of any marriage:—Held, adeemed by a subsequent gift in possession of 19,000 rupees, Indian Stock, made by the father on the marriage of his daughter, and settled on her husband for life, with remainder to herself for life, with remainder to the children of that marriage. *Phillips* v. *Phillips*, 34 Beav. 19.

7. A father by will gave his daughter a legacy of 700*l.* Two subsequent codicils contained no reference to the legacy. The daughter then became engaged to be married, and her father thereupon gave her 100*l.*, which she used for her outfit. After the marriage the father gave the husband of the daughter 400*l.* On neither occasion was any reference made to the will of the testator's intended testamentary dispositions. Afterwards he executed a further codicil to his will, which contained no reference to the 700*l.* legacy, and expressly confirmed the will:—Held, first, that the 100*l.* was a gift and not an advancement, nor a substitution total or partial of the 700*l.* legacy. *Ravenscroft* v. *Jones*, 4 De G. J. & S. 224; 33 L. J., Ch., 482; 12 W. R. 362; 9 L. T., N. S., 818. Affirming 32 Beav. 669.

Held, secondly, that the same was the case as to the 400*l.* *Ib.*

8. A testator bequeathed to his daughter 500*l.*, in case she should marry, to be paid to her on the day of marriage. Subsequently to the date of the will, the daughter married in her father's lifetime, and thereupon the father gave 400*l.* to her husband towards paying for the furnishing of their house. He afterwards promised the husband 600*l.* more for the same purpose, but died without having fulfilled his promise:—Held, that notwithstanding the unfulfilled promise of further help, the gift of 400*l.* was *pro tanto* an ademption of the legacy of 500*l.* *Nevin* v. *Drysdale*, 36 L. J., Ch., 662; 15 W. R. 980.

9. A father, after directing his debts to be paid, gave a share of his residuary estate upon trust for one of his daughters for life, with remainder to her children as tenants in common, with remainders over in favour of the other children of the testator. Subsequently to the date of the will the daughter married, and upon the occasion of the marriage a settlement was executed to which the testator was a party, by which, after a recital of an agreement by the testator to give his daughter

a portion of 5,000*l.*, whereof 1,000*l.* was to be paid to the husband, and 4,000*l.* to be a provision for the daughter, her husband, and their issue, the testator covenanted to pay 4,000*l.* to the trustees in his lifetime, or within two years after his death, to be held upon trusts for the benefit of the husband and wife and their children, and in case of there being no issue of the marriage who should attain twenty-one as the testator should appoint, and in default of appointment for his next of kin. The sum of 1,000*l.* was paid to the husband, who died leaving his wife surviving him. No child of the marriage lived to take a vested interest under the settlement:—Held, that the gift of residue in favour of the daughter was adeemed to the extent of the 4,000*l.* covenanted to be paid by the testator; but that there was no ademption as to the 1,000*l.* given to the husband absolutely. *Cooper* v. *Macdonald*, 16 L. R., Eq., 258; 28 L. T., N. S., 693; 42 L. J., Ch., 533.

1. Legacy at twenty-one, the interest for maintenance; the debt is not satisfied by advancements, during minority, for the infant's benefit, nor by a legacy larger, but of a different nature, received under the will of the executor, there being no positive relinquishment, though no demand for ten years. *Lee* v. *Brown*, 4 Ves. 362.

2. A testator divided his residuary estate among his children, and provided that if any child should die in his lifetime, its issue should "stand in the place" of it, and be entitled to the share which the parent would have taken. He afterwards lent a sum of money to a son greater than the share to which the latter would have been entitled; and the son died in his lifetime indebted to the testator, leaving issue:—Held, that there was no satisfaction as regarded the issue, although the parent could have got nothing. *Rose* v. *Rogers*, 39 L. J., Ch., 791.

3. A legacy may be adeemed by a gift, although not made on marriage or any other special occasion with reference to the donee. *Leighton* v. *Leighton*, 18 L. R., Eq., 458; 43 L. J., Ch., 594; 22 W. R. 727.

By a marriage settlement an estate was limited to trustees for a term of years to raise 12,000*l.* for the portions of younger children of the settlor as he should appoint. Two of the younger children, on their marriages, being paid certain sums, released their shares. The settlor, by his will in 1866, devised the estate to trustees for a lesser term of years, and subject thereto to his eldest son in strict settlement, the trusts of the term being to raise and pay, within three months of his death, to two other younger children, C. and M., 4,000*l.* and 6,000*l.*, the same to be accepted by them in full satisfaction and discharge of their shares of the 12,000*l.* The testator also gave C. and M. annuities for life, or until marriage, charged upon the same estates, and other annuities charged upon another estate, which he devised to his younger son in satisfaction and discharge of his share of the sum mentioned in the settlement. Between the dates of his will and his death, and also before the date of the will, the settlor gave to C. and M. sums of money, and transferred to them certain stocks:—Held, that the legacies were adeemed *pro tanto* by the gifts of stock made after the date of the will. *Ib.*

The daughters of A. were each entitled to a charge on real estate under his marriage settlement. By his will, in 1866, he bequeathed to them legacies and annuities, the same to be in satisfaction of their rights under the settlement. He afterwards, at various times, transferred to them railway stock and other securities. He died in 1871:—Held, that the transfers were in satisfaction or ademption of the gifts by will. In order to raise a presumption that satisfaction was intended it was necessary only to prove that the transfers were made, without showing on what occasion. *Ib.*

4. There is no presumption of law that the payment of a sum of money to a child (even by a father) before the date of his will, is to go against a legacy bequeathed by the will to that child. *Taylor* v. *Cartwright*, 41 L. J., Ch., 529; 20 W. R. 603; 14 L. R., Eq., 167; 26 L. T. 571.

Mrs. M., by her will, dated March 30th, 1848, bequeathed her residuary personalty to her two sons, E. and T., upon trust for them, and her son J., and her married daughter A. T., equally. A. T.'s share was left to her for her life, for her separate use, with a restraint on anticipation, and on her death to her children. The testatrix died on March 31st, 1848. In 1850 a family arrangement was entered into by two deeds, one a declaration of trust, the other a release, for the division of testatrix's property among her children. The release was executed by the daughter, but not by her husband, and it contained a recital that "the testatrix during her lifetime advanced to A., the wife of T., with his privity and consent, 400*l.*, in part of, and to be deducted out of, any money which the testatrix might leave by will to A. T., or her issue. The division of the property was made on the assumption that that recital was true; and it was said that T. had had his share, less a like sum of 400*l.* The trustees of the will had both since died, and their legal personal representatives were defendants. A. T. died in 1870, leaving her husband and six children. The children filed a bill against the defendants to compel them to make A. T.'s share of the property good, by the addition to it of the 400*l.*, deducted in 1850:—Held, that the recital was not binding on A. T. in her lifetime, and therefore not effectual as against the children; that there was no such presumption in law as that above stated; that Mr. Taylor was not bound by the recital; and that the defendants must pay the 400*l.* or other the proper sum to the children, with interest at 4*l.* per cent. from their mother's death. *Ib.*

5. A father on the marriage of his daughter covenanted to settle 8,500*l.*, and he advanced 2,000*l.* to purchase a share in a business for his son; by his will he gave the residue of his property equally between his daughter and his son:—Held, that these advances were both *pro tanto* in satisfaction of his children's shares. *Stevenson* v. *Mason*, 43 L. J., Ch., 134; 22 W. R. 150; 17 L. R., Eq., 78.

3. Illegitimate Children.

6. Presumption of satisfaction of a legacy by

a portion from a parent or person *in loco parentis*, not applied to an illegitimate child, no relationship existing in law nor recognised expressly or by inference by the testator, neither a legal parent nor assuming the parental character, nor discharging parental duties, and nothing in the nature or manner of the legacy indicating that it was given as a portion by a father for his child. *Wetherby* v. *Dixon*, 19 Ves. 407; Coop. 279.

1. A father, by will, gives the residue to his three natural children equally; he afterwards gives two of them (daughters) marriage portions; they shall not be held to be a satisfaction *pro tanto*. *Smith* v. *Strong*, 4 Bro C. C. 493.

2. The value of a beneficial lease granted to a natural son, held not to be a satisfaction *pro tanto* of a legacy to the son in the father's will. *Grave* v. *Salisbury*, 1 Bro. C. C. 425.

3. The presumption of intention to satisfy a legacy by a portion to a child, from a parent or a person placing himself *in loco parentis*, not raised upon a legacy not described as a portion, the legatee reported to be the testator's natural daughter, described not so, but as the daughter of another man. *Exp. Pye*, 18 Ves. 140.

The law does not acknowledge the relation of a natural child, who is therefore considered as a stranger within the rules of satisfaction of a legacy *primâ facie* by an advance of money. *Id.* 147

III. SATISFACTION OF PORTIONS BY SUBSEQUENT DEED.

4. A power upon marriage was reserved to the father to appoint 1,000*l.*, charged upon certain lands, amongst the younger children of the marriage. Upon his second marriage, he charged other lands with 5,000*l.* for the younger children (naming them) of the first marriage. These portions are not accumulative, and the latter only to be raised. A younger son, though named as one to take part of the 5,000*l.*, afterwards becoming the eldest before the portions raised, and as heir taking the estate charged, not entitled to any part of the charge. *Savage* v. *Carroll*, 1 Ball & B. 265.

In cases of portions, courts of equity lean against double provisions moving from the father to the same persons, and for the same purposes. *Id.* 276.

Every appointment to a younger son is under a condition that he become not the eldest son and heir. *Ib.*

5. W. J., by a settlement made upon his first marriage, covenanted, that upon the death of his intended wife he would provide a sum of 100*l.* to be paid to or amongst the children of the marriage, in equal shares, upon their severally attaining twenty-one, with interest in the meantime for their maintenance. The wife died in the lifetime of W. J., leaving seven children, and W. J., in contemplation of a second marriage, conveyed land to trustees upon trust after his death, or in his lifetime, if he should think fit, to raise 600*l.*, in trust for the six younger children of the first marriage, in equal shares, to be vested in them at twenty-one. The children attained their ages and received their portions under the second settlement:—Held, that such portions were a satisfaction of their portions under the first settlement. *Jones* v. *Morgan*, 2 Y. & Coll. 403.

6. Portions for younger children under a settlement, father provides otherwise for one; intending 10,000*l.* apiece for the rest; they are confined to that, and not also to claim an equivalent for the other's share out of provision made; otherwise, if they had other satisfaction. *Bridgwater* (*Duke*) v. *Egerton*, 2 Ves. 123.

7. By a marriage settlement a term for years, expectant on failure of issue male, is raised for securing 3,000*l.*, portions for daughters, not preferred in the life of the father, payable at eighteen or marriage; there are a son and two daughters. The father in his lifetime, by a sale of part of his estate, raises 1,800*l.* for his daughters, which by another deed was made payable at twenty-one or marriage, and dies, leaving also a son by a former marriage, who dies an infant, without issue. This 1,800*l.*, though payable at a different time, and though not intended to go as part of the portion (there being a son then living), shall be taken as part of the 3,000*l.* portion. *Jesson* v. *Jesson*, 2 Vern. 255.

8. A fund was settled upon the settlor for life, and after his death to be divided among his children, with power to the trustee, at the request of the settlor, to make advances to the children in the settlor's lifetime. Advances were accordingly made to some of the children, and the settlor made further advances to two of his daughters out of his own moneys:—Held, in the absence of evidence to the contrary, that these advances were not a satisfaction *pro tanto* of the daughter's shares under the settlement. *Samuel* v. *Ward*, 2 Jur., N. S., 962; 4 W. R. 540; 22 Beav. 347.

9. Where annuities were granted to seven persons, to commence from the death of the grantor, and secured by a demise of land to trustees for a term, and by a subsequent deed annuities of different amounts were granted to five of the same annuitants, to commence from the same period, but secured by the personal covenant only of the grantor:—Held, that no presumption against double portions appeared upon the face of the second deed, and therefore that parol evidence was inadmissible to prove the intention of the grantor. *Palmer* v. *Newell*, 1 Jur., N. S., 929; 3 W. R. 333; 24 L. J., Ch., 424. Affirmed 4 W. R. 346; 24 L. J., Ch., 461; 2 Jur., N. S., 268.

10. A devise to a child, of a legal rent charge, will not be satisfied by a subsequent gift, by deed, by way of advancement, of a rent charge equal in amount. *Preston* v. *Gormanstown* (*Lord*), 13 Ir. Ch. R. 329.

11. T. L. bound himself by a bond to pay his reputed son 10,000*l.* on the 30th April, 1872. On the 22nd March, 1872, he took the son into partnership, and by the articles of partnership, after a recital that T. L., in consideration of his love and affection for his reputed son, was desirous of giving him 19,000*l.* absolutely, it was provided that 19,000*l.*, part of the capital brought into the firm by T. L., should be considered to belong to the son, being absolutely and irrevocably given to him by T. L. for his own use and benefit, and it was stated that that amount was then standing

to the separate credit of the son in the partnership books, as representing his capital in the concern. T. L. also gave the son by a separate deed the lease of the business premises:—Held, that T. L., standing *in loco parentis* to the reputed son, the rule against double portions applied, that the presumption of the later gift being given in satisfaction of the earlier gift was not rebutted, and that the son could not claim the 10,000*l.* on the bond as well as the 19,000*l.* under the articles, and the business premises under the deed of gift. *Re Lawes, Lawes* v. *Lawes*, 20 L. R., Ch. D., 61; 45 L. T. 453; 30 W. R. 33. Affirming 45 L. T. 273.

IV. EXPRESS PROVISO FOR DEDUCTION OF ADVANCES.

1. Declaration in the deed providing portions for daughters, that if any lands should come from the father they should be taken as part of the portions; an estate tail being devised, it is to be considered as part satisfaction, according to the value of it. *Watson* v. *Lincoln*, Ambl. 328.

2. In a settlement made on the second marriage of S. was a proviso, that "if any estate of inheritance shall descend from the father to the daughters (of the marriage) of as great value (to be sold) as their portions, then the trust terms (created to raise such portions) shall cease for the benefit of the person who shall be entitled to the settled lands as next in remainder." S., the father, being seised of other lands in fee, devised them to his daughters in tail:—Held, this not such an estate of inheritance as will be a satisfaction of the portions for the daughters of S., by his second wife, because the daughters claim those lands by purchase, and the proviso in the marriage settlement restrains the satisfaction to lands coming to the daughters by descent from their father. *Saville* v. *Saville*, 2 Atk. 458; Sel. Ch. Ca. 32.

Held, also, that the valuation of lands descending from the father to the daughters, and which would have to go in satisfaction of the portions, must be made according to the value of the lands at the time of the descent; for till valuation made, it could not be known whether they were a full or a partial satisfaction. S. C. 2 Atk. 461.

Lands descended to the daughter in tail are not such an estate of inheritance as is within the meaning of the proviso, for such an inheritance was intended as is of certain value, as an inheritance in fee simple. *Ib.*

Reversions in tail, expectant on the death of others, are not such estates of inheritance descended from the father as are within the intent of the proviso. *Id.* 463.

Tenant for life shall keep down interest by rents and profits; but portions or principal money due on any other incumbrance, shall be borne by the whole estate; therefore, tenant for life shall not account for rents, or value of timber cut down, in order that they might be applied towards raising portions. *Ib.*

3. Although no time is specified for payment of a legacy given as a portion, subject to a contingency, provision to go over if legatee die before twenty-one, raises a necessary implication, that it is payable at twenty-one. Legacies to A. and B., and "in case the said A. and B., or either of them, shall become entitled to the said lands (real estate settled in remainder, on the event of C. dying without issue), my intention is, that she or they so becoming entitled shall not have, possess, or enjoy any part of my property; but in case A. and B. shall not become entitled to the settled estate, I leave each of them 300*l.*," with other provisions in the event of dying before twenty-one, or marriage with consent, that the legacies should go over. A. having attained twenty-one, and married with consent:—Held, that her legacy became absolutely vested not liable to be devested, notwithstanding the devolution of the settled estate by the subsequent happening of the event. *Colhoun* v. *Thompson*, 2 Moll. 281.

4. In a settlement a term was raised for daughters' portions, viz., 10,000*l.*, with a proviso that if the father, by deed or will, should give or leave the sum of 10,000*l.* to his said daughters, it should be a satisfaction; the father leaves land to the daughters of the value of 10,000*l.*: this no satisfaction. *Chaplin* v. *Chaplin*, 3 P. W. 245.

5. Portions by settlements, for the children living at the death of the survivor of the parents, with a proviso that advancements should be in satisfaction, unless the contrary is declared; the father by will, desiring the settlement may be punctually complied with, made a residuary disposition of real and personal estates among the younger children, directing, that what they may have received in his life shall be brought into the account, so as to make them all equal. Construction upon the whole, that advancement in marriage or otherwise, though not the grammatical construction, is within the proviso; and equality being the object, an arrangement was made upon that principle. One of the younger children having become the eldest, and therefore owner of the estate, between the death of parents, after advances received in satisfaction of the portion in the former character, is to be considered a younger child in the account. *Leake* v. *Leake*, 10 Ves. 477.

Provision by will considered as an advancement in life of testator. *Id.* 489.

6. A provision by marriage settlement with a proviso that sums advanced should go in satisfaction, unless otherwise declared: 4,000*l.* left by will, subject to the life of the mother, and the residue of the personal estate, being given by the will to a child entitled to the provision under the settlement, must go in satisfaction of that provision. *Bickman* v. *Morgan*, 1 Bro. C. C. 63.

7. In 1779, S. L., in contemplation of his marriage with A. V., covenanted for the payment of 3,000*l.* within three months after his decease, for the benefit of the children of the marriage. In 1815, upon the marriage of Emma, one of his daughters by A. V., he executed a deed, which recited that it had been agreed, that by way of additional portion for Emma, he should enter into a covenant, that she should have an equal share at least with his other children of the real and personal estate which he should be entitled to at his decease, after payment

of his debts; and that any money, or other estate and effects which any of the children might receive in the lifetime of S. L., or might become entitled to under or by virtue of any gift or disposition by will, or otherwise made or to be made by A. V., the mother, or otherwise howsoever under her, should be deemed an advancement within the meaning of the indenture. This recital was followed by a covenant, that his heirs, etc., should, within three months after his death, convey to the trustees of Emma's settlement a share of his real and personal estate, equal to the share which any other of his children should have had or be entitled to; and afterwards came a proviso, that any money and other estate and effects which might afterwards be conveyed or advanced by S. L. to any of his children, and also that certain copyholds, of which A. V. was tenant in tail, whose interest, it was stated, was forthwith intended to be barred; and further, that any money, or other estate and effects, which any of the children might receive by the gift, bequest, or other disposition by will or otherwise to A. V., or under the Statute of Distributions in case of her intestacy, or which any of them should derive by, from, or under, by any ways or means, should be deemed an advancement within the meaning of the covenant. No act was done to bar the estate tail of A. V. in the copyholds; and on her death, and the death of S. L., the eldest son and customary heir became entitled to the copyholds, under the limitations in the surrender, which created the estate tail:—Held, that these copyholds were to be considered as an advancement to the eldest son, within the meaning of the covenant: that the 3,000*l.* due under the covenant of 1779 was to be paid, before any part of the assets could be applied in satisfying the covenant contained in the deed of 1815. *Bailey* v. *Lloyd*, 5 Russ. 330; 7 L. J., Ch., 98.

1. Trust term by will of grandfather for raising portions, provided, among other events, that if the children should be by their father in his lifetime advanced and preferred, with portions as good, or greater, to cease. Personal property under intestacy of father, held no satisfaction. *Twisden* v. *Twisden*, 9 Ves. 413.

2. Portion by settlement vested at twenty-one or marriage of daughters, to be paid at the death of the surviving partner; if the parents, or either, should, in their or either of their lifetime, settle, give, or advance money, land, etc., on marriage, or otherwise, such advancement to be taken as part or the whole of the portion, unless the contrary declared in writing. A legacy payable at twenty-one, a satisfaction *pro tanto*. *Onslow* v. *Mitchell*, 18 Ves. 490.

Rule as to satisfaction of portion by a legacy, that there must be some express evidence, or at least a strong presumption, that it was intended as such, slight variation in the time of payment, between twenty-one and twenty-one or marriage, immaterial. *Ib.*

Share of personal property until father's intestacy, not considered in advancement by him in his life. *Id.* 494.

Provision by will considered as an advancement in the lifetime. *Ib.*

3. Where money is expressed to be given in part of a portion, though of small amount, yet it is an advancement, and must be brought into hotchpot. *Morris* v. *Burroughs*, 1 Atk. 403.

4. Where A. B. invested some of the funds, subject to the trusts of his settlement, in the purchase of real estate, and added some money of his own:—Held, that it was an advancement to the parties entitled under the settlement. *Ouseley* v. *Anstruther*, 10 Beav. 461.

5. By a marriage settlement, a term of years was created for raising portions for younger children, which were to vest at the usual periods, but were not to be paid till after the father's death. And there were the usual clauses for survivorship and maintenance, and also a proviso, that any advance of money made by the father, in his lifetime, to the children, should be a satisfaction, *pro tanto*, of their portions, unless the father should, in writing, direct the contrary. The father devised all his real estates, not in settlement, to trustees, in trust, to sell and pay his debts, etc., and to pay the surplus equally amongst all his children (except his eldest son), at the usual times; and if any of them died under twenty-one, leaving issue, their shares were to go to their issue; but if they left no issue, then to the survivors; and the will contained a clause for the advancement of the children, but was silent with respect to the provision being a satisfaction of the portions. The eldest son filed a bill, insisting that the provision by the will was intended to be a satisfaction of the portions. Some of the younger children demurred. The Court was of opinion that the provision by the will, although it was to arise from the sale of lands, and although the will contained no declaration on the subject, might be a satisfaction of the portions; but the demurrer was overruled, as it could not appear until the hearing, whether there would be any fund that might be a satisfaction. *Fazakerley* v. *Gillibrand*, 6 Sim. 591.

6. Estates were settled on A. for life, remainder to trustees for 1,000 years to raise 5,000*l.* for the portions of his daughters and younger sons, and subject thereto, to A. in fee; provided that if A. in his lifetime, or by his will, should give to any of his children entitled to portions under the trusts of the term any sum of money, etc., for or towards their advancement in marriage or otherwise, the same should be taken in part or in full satisfaction (according to its amount) of the portion thereby provided for that child, unless A. should by writing under his hand declare to the contrary. A. had eight daughters and two younger sons. By his will, after reciting the trusts of the settlement as regarded the portions, he devises this estate, "subject to the 5,000*l.* charged thereon as aforesaid," and also other estates, to trustees, in trust by sale or mortgage to raise money to supply the deficiency of his personal estate for payment of his debts and legacies, and, in the next place, to pay 2,000*l.* to each of his younger sons; and he declared, that after the payment of his debts and legacies and the sums of 2,000*l.*, the estates, or such part thereof as should remain unsold for any of the purposes aforesaid (subject, nevertheless, to any mortgage or mortgages which should be made by the trustees in pursuance of the power there-

inbefore given to them for that purpose), should go to his eldest son:—Held, that the will did not contain anything that was equivalent to a declaration that the legacies of 2,000*l.* should not be a satisfaction for the portions of the two younger sons, and, consequently, that they were not entitled to their legacies, and, also, to their shares of the 5,000*l.* *Papillon* v. *Papillon*, 11 Sim. 642; 10 L. J., N. S., Ch., 186.

1. A legacy given by a father's will is such an advancement of younger children, in lifetime of father, as will be accounted in equity a satisfaction *pro tanto* of portions to be raised for them under the testator's marriage settlement; if it contains a clause providing that advancement shall be a satisfaction so far; the will being silent in that respect is not *per se* equivalent to a declaration, that a legacy shall not be towards such satisfaction. *Golding* v. *Haverfield*, 18 Price 593; M'Clel. 345.

2. By a settlement of trust funds for the benefit of a husband and wife for their lives, with remainder to the children of the marriage equally, it was provided that if the husband should, during his life, advance or pay any moneys for or on account of the advancement or preferment in life of any child of the marriage, or in case any lands or tenements, moneys, goods, or chattels should descend or come by or from him unto or for the benefit of any such child, then such moneys, goods, and chattels, and the value of such lands or tenements, should be accounted as part or in full of the portion provided by the settlement, unless the husband should by writing declare the contrary:—Held, that the advances and payments referred to in the first part of the provision should be construed advances and payments made *inter vivos*, perfected in the lifetime of the husband, and that the lands, tenements, moneys, goods, or chattels, in the second part of the clause, should be confined to matters not perfected, or not having effect until after his death; that property which, during the coverture, accrued to the husband and wife, in right of the wife, and by a settlement, to which the husband and wife were parties, was settled upon them for their lives, with remainder to their children, as they or the survivor of them should appoint (but which was not otherwise received or reduced into possession by the husband), was not property to be accounted for as part of their portion, by the children to whom the husband and wife, or the survivor of them, afterwards appointed it; that the value of a leasehold house, assigned by the husband in his lifetime to one of the children of the marriage, for his more comfortable maintenance and support, did not affect the share of such child of the trust fund; that an advance by the husband in his lifetime to one of his daughters of a sum of money for the purpose of apprenticing her son,—the share of such daughter of the trust fund having been settled upon herself and her husband, with remainder to her children,—did not affect the share of such daughter of the trust fund. *Douglas* v. *Willes*, 7 Hare 318.

3. By will, dated in 1827, the testator bequeathed to C. (to whom he stood *in loco parentis*) a particular legacy of 12,000*l.* charged on a family estate, and also made him residuary legatee. In 1832 C. married, and the testator on his marriage settlement covenanted that his executors should, within six months of his decease, pay 10,000*l.* to the trustees of the settlement, upon usual marriage settlement trusts, for the benefit of C., his wife and issue: and it was provided that any gift *inter vivos* or by will by the testator to C., for his own benefit, should be taken to be a satisfaction of the covenant *pro tanto*, and should not be subject to the trusts of the settlement. By a codicil in 1833 the testator confirmed his will in other respects, but he directed that 5,000*l.* out of the 12,000*l.* charged on the family estate, and 5,000*l.* out of his general residue, should be given in satisfaction of his covenant; and he again appointed C. his sole residuary legatee. By a second codicil the testator confirmed all previous gifts and arrangements, but gave his residuary estate to C. and H. equally, declaring at the same time that the two sums of 5,000*l.* and 5,000*l.* were to be in satisfaction of the covenant:—Held, that notwithstanding the proviso in the settlement, that gifts to C. by the testator for his own benefit should be in satisfaction of the covenant *pro tanto* and should not be subject to the trusts of the settlement, yet that here the testator had sufficiently declared his mind that the gifts to C. were not to be in satisfaction of the covenant, but that the 5,000*l.* and 5,000*l.* were to be paid to the trustees on the trusts of the settlement. *Milligan* v. *Hardwicke* (*Earl*), 1 Jur., N. S., 793.

4. A father devised real estates upon trust for his daughter E. for life, with remainder to her husband W. for life, with remainder to trustees for 1,000 years, to raise 30,000*l.* for portions for younger children, with remainder to E.'s eldest son for life, with remainders over. And he directed that if E. or W., or either of them, should at any time during their joint lives or the life of the survivor of them advance or pay any sum or sums of money for the use or benefit of any younger child or children for whom portions were provided, then and in such case, unless the contrary should be directed by E. and W., or the survivor of them, by deed or writing to be sealed and delivered in the presence of one or more witnesses, the sum or sums so advanced should be taken in satisfaction *pro tanto* of the portion or portions of such child or children. E. had several children, one of whom, J., was of weak mind; and while she was still under age W. and E., and their eldest and second sons, executed a deed whereby they covenanted that if the share of J. devolved upon them, or any of them, they would divide it among the other younger children. J. attained twenty-one and died, and her share thus devolved on her father W. and became subject to his covenant. W., having survived his wife, made a will, whereby he gave legacies to his younger children, and gave the residue of his personal estate for the benefit of two of them:—Held, that none of the gifts under W.'s will were to be taken towards satisfaction of the portions of the younger children. *Cooper* v. *Cooper*, 8 L. R., Ch., 813; 21 W. R. 921; 29 L. T., N. S., 321; 43 L. J., Ch., 158. Varying 21 W. R. 501; 28 L. T., N. S., 87.

Held, also, that the division of the share of

J. was not to be taken towards satisfaction of the portions of the younger children. *Ib.*

Hotchpot Clauses and Deduction of Advances in general between Parent and Child.] See PARENT AND CHILD, II. 1.

V. PAYMENT OF AND PURCHASE OF CHILD'S INTEREST.

1. Father, under marriage settlement, with power to appoint shares, in which his younger children were to take a sum to be raised for their portion, having exercised that power by will, afterwards advances one daughter, took release from her of her portion, and by codicil revoked his appointment by will as to her:—Held, her portion was to go to the other children. *Noel* v. *Walsingham* (*Lord*), 2 Sim. & S. 99; 3 L. J., Ch., 12.

2. Where a power is given to appoint a fund among the children as the parent shall direct, and one of the children is advanced by the parent, out of his own funds, a portion equivalent to the share which such child would have taken in the settled fund, if no appointment had been made, the effect of it is to increase the shares of the other children, and not to make the advanced child's share part of the parent's assets. *Brownlow* v. *Meath* (*Earl*), 2 Ir. Eq. R. 383; 2 Dr. & Wal. 674.

3. Power to appoint to or among one or more younger children; in default of appointment, equally. One of two objects being removed by effect of express satisfaction by way of advancement, the other takes the whole, as in the case of death, by analogy to customs of York and London. *Folkes* v. *Western*, 9 Ves. 456.

4. A. settled property upon himself for life, with remainder to his children, with power, at his request, to advance any part thereof in his lifetime. Some advances were made to the children expressly under the power, besides which, on the marriage of two of his daughters, he advanced to them certain sums out of his own moneys, but there was no evidence of an intention to purchase their shares:—Held, that the latter advances were not to be treated as a satisfaction, *pro tanto*, of the daughters' shares under the settlement. *Samuel* v. *Ward*, 22 Beav. 347; 2 Jur., N. S., 962; 4 W. R. 540.

Satisfaction can only arise where the person who makes the payment is himself the party bound to pay, or is the owner of the estate charged with the payment. *Ib.*

5. By settlement in 1790 a power of appointment amongst the children of the marriage was reserved to the father, and, in default of appointment, equally between the children as tenants in common in tail. Upon the marriage of E. M., one of the two children of the marriage, her father advances 6,000*l.* as her portion, to be taken by her in lieu, bar, and full satisfaction of all and every sum and sums, legal and beneficial estates and interests, to which she was then, or might thereafter be, entitled under the settlement of 1790:—Held, 1st, that the 6,000*l.* advanced to the daughter was in satisfaction of her entire interest under the settlement of 1790, and that she was absolutely barred therefrom. 2ndly, that the will of 1831 operated as an appointment of the daughter's interest in favour of the son, and that, consequently, the whole interest under the settlement of 1790 became vested in the son, as the only other object of the power, as tenant in tail. 3rdly, that the advancement by the father did not constitute him a purchaser of his daughter's share under the settlement of 1790. Where an intention is declared that an advancement to a child, one of the objects of a power, shall be regarded in lieu and satisfaction of the share of such child, such share shall, in the absence of evidence of intention to the contrary, be presumed to be, not for the benefit of the parent making the advancement, but of the other children entitled to the remainder of the fund. The principle upon which *Folkes* v. *Western* (9 Ves. 456) was decided upheld, as consistent with the decision in *Pitt* v. *Jackson* (2 Bro. C. C. 51), although the reasons assigned for that decision in *Folkes* v. *Western* may not be satisfactory. *Lee* v. *Head*, 3 Eq. Rep. 1046; 1 Kay & J. 620; 1 Jur., N. S., 722; 3 W. R. 591.

6. Where a father pays a portion *simpliciter*, by way of advancement for one of the objects of a settlement, the presumption is, that the payment is for the benefit of the other children entitled under the settlement. *Ford* v. *Tynte*, *Re Cooper*, 10 Jur., N. S., 1193; 11 L. T., N. S. 367; 5 N. R. 73.

To rebut this presumption, no specific declaration by the father is necessary, but all the circumstances at the time of the advance will be looked at, evidence not being admitted of subsequent transactions. *Ib.*

A father and mother entitled for life under a settlement of real estate, with power of appointing amongst their younger children a sum to be raised for their portions, and which sum, in default of appointment, was to be divided equally, appointed an equal fourth share (there being four younger children) to each of two daughters on her marriage. No other appointment was made, but on the marriage of the third daughter, the father advanced, out of his own moneys, to the trustees of her settlement, a sum equal to another fourth share of the trust funds. The correspondence at the time showed that the motive of the father for so doing was to raise the money at once, the intended husband being anxious to invest at a higher rate of interest:—Held, that this was a purchase by the father of the share of the daughter so advanced for his own benefit, and not a payment for the benefit of the other objects of the settlement. *Ib.*

VI. ADMISSIBILITY OF PAROL EVIDENCE.

7. In the cases of satisfaction of legacies, parol declarations have always been admitted. *Shudal* v. *Jekyll*, 2 Atk. 518.

8. Portions for the children by the will of the parent presumed a satisfaction of a prior provision by settlement, unless clearly not so intended; the presumption is not rebutted by slight circumstances: accounts in the testator's handwriting were admitted as evidence of the circumstances under which he made his will, but not to explain the will. *Hinchliffe* v. *Hinchliffe*, 3 Ves. 516.

1. Portions for the children by the will of the parent held a satisfaction of a provision by settlement, upon the intention; slight circumstances of difference that would repel the presumption of satisfaction between strangers, are not sufficient in the case of parent and child. *Sparkes* v. *Cator*, 3 Ves. 530.

2. Distinction between a legacy and a residuary bequest as to a presumed satisfaction by the advancement of a portion. The presumption from the former does not arise from the latter, and parol evidence of an intention to satisfy cannot be admitted originally, as it may where first introduced to repel a presumption. *Freemantle* v. *Bankes*, 5 Ves. 79.

3. Presumed satisfaction of legacy by a portion, the evidence not being sufficient to rebut the presumption, but parol evidence admissible to rebut the presumption, without regard to the nature of it. *Trimmer* v. *Bayne*, 7 Ves. 508.

4. Satisfaction of a legacy by a parent to a child by a portion of the same amount, though with some circumstances of difference. Whether parol evidence can be admitted originally of an intention to substitute the one provision for the other, or only where it is first offered against the presumption, it is clearly admissible to show that the father was the author of the portion, viz., by stipulating or joining in the marriage settlement of his eldest son for a charge, and giving wife interests in consideration of it. *Hartopp* v. *Hartopp*, 17 Ves. 184.

5. Where a testator made bequests to his two daughters, and afterwards settled portions upon them:—Held, that the evidence of one daughter was not admissible to prove that the testator did not intend to adeem the legacy given to the other daughter, it being likewise in evidence that the testator intended to provide for his two daughters equally. *Davys* v. *Boucher*, 3 Y. & Coll. 39; 3 Jur. 674.

6. By the marriage settlement of T. G., portions were provided, out of settled real estate, for his younger children, to be paid after his decease, or before, if he should direct; and it was provided, that any advances by T. G. in his lifetime should be considered as in satisfaction *pro tanto* of the portions of the children to whom advances should be made, unless T. G. should declare a contrary intention by writing under his hand:—Held, that the evidence of the wife to prove that a gift in the will of T. G. of his personalty not under settlement in favour of his younger children, was not meant to be in satisfaction of the portions, was not admissible. *Fazakerley* v. *Gillibrand*, 1 Jur. 656.

7. Where a legacy is given for a particular purpose, as a portion, and another bounty is afterwards given to the same purpose, it is considered as implying an intention in the testator to satisfy the legacy. But this, being only a presumption, may be rebutted by evidence showing a contrary intention. *Debeze* v. *Mant*, 1 Cox 346; 2 Bro. C. C. 165. Affirmed *id.* 519.

8. Legacy to a feme covert, and afterwards a note given to the husband for the same amount, and proof admitted that the one was intended in lieu of the legacy, and thereupon decreed to be taken in satisfaction. *Chapman* v. *Salt*, 2 Vern. 646.

9. B., by will, gave all his real and personal estate equally among his children, and at the conclusion of his will, he directed his executors to lay out a sum not exceeding 300*l.* in putting out defendant, his son, apprentice. B. in his lifetime laid out 200*l.* in placing his son as a clerk in the navy office, and died without revoking his will. Evidence was allowed to be read of testator's declarations, that this advancement should be an ademption of the legacy. *Rosewell* v. *Bennett*, 3 Atk. 77.

10. Presumed satisfaction of legacy by a portion, the evidence not being sufficient to rebut the presumption. But parol evidence admissible to rebut the presumption, without regard to the nature of it. *Trimmer* v. *Bayne*, 7 Ves. 508.

11. Gift of 500*l.* by father to daughter held not a satisfaction in part of legacy of 1,000*l.* by previous will, the presumption against double portions in case of parent and child being repelled by circumstances, the gift not being by way of portion, but after marriage, and from a particular motive appearing by declaration of testator to wife, which she proved. *Robinson* v. *Whitley*, 9 Ves. 577.

12. Portion held a satisfaction of a legacy from the father, to the same amount; the evidence not being sufficient to repel the presumption. *Ellison* v. *Cookson*, 1 Ves. J. 100.

13. Gift by testator in lifetime to legatees after a will making them such, held part satisfaction on evidence of testator's intention to that effect. *Thellusson* v. *Woodford*, 4 Madd. 420.

14. Parol evidence is admissible to prove that a person did mean to put himself *in loco parentis* towards a child, so far as relates to the child's future provision; and evidence of the declarations, as well as the acts, of such a person are admissible for that purpose. *Powys* v. *Mansfield*, 3 Myl. & C. 359; 7 L. J., N. S., Ch., 9; 1 Jur 861. Affirming on this point 6 Sim. 521; 5 L. J., N. S., Ch., 153.

If the presumption of law against double portions, provided by a person *in loco parentis*, be attempted to be rebutted by parol evidence, it may be supported by evidence of the same kind. *Ib.*

Declarations of a person *in loco parentis* are admissible in evidence upon the question of his intention as to providing a double portion for a child to whom he stands in that relation. *Ib.*

15. The testator, upon the marriage of a daughter, entered into a bond for the payment of 5,000*l.* within six months after his decease to the trustees of his daughter's settlement, the interest to be paid to the husband for life; and after his decease, if the wife survived him, and there were children of the marriage, 1,000*l.* part of the 5,000*l.* to be paid to the wife, and the remainder to be applied for the use of the children of the marriage; but if there were no children, 2,000*l.* to be paid to the wife, and the remainder of the 5,000*l.* to be paid to the executors and administrators of the husband; and in case the husband survived the wife, and there were no children, then the whole of the 5,000*l.* to the husband. The testator afterwards made his will, and gave his daughter 5,000*l.*, stating it to be in addition to what he had secured upon her marriage. About five years after-

wards he executed a deed, whereby he covenanted that his executors should pay to the trustees, within six months after his death, the sum of 5,000*l.* upon the trusts of the settlement. Parol evidence of the declarations of the testator was admitted to prove that he did not intend a double portion. *Lloyd* v. *Harvey*, 2 Russ. & M. 310.

1. Declarations of the parent referring to his intention at the time of making his will, whether made at the time, or before, or after, are admissible evidence to prove that he did not mean to give a double provision. A paper written some time after the date of his will, and showing the state of his property, but having no reference to this intention, is not admissible for that purpose. *Weall* v. *Rice*, 2 Russ. & M. 251; 9 L. J., Ch., 116.

2. A testator who has contributed to the maintenance and education of a female infant nearly related to him, from the time of her father's death, and who has been treated by her as the person whose consent was necessary to her marriage, and who has also taken upon himself the obligation to make a provision for her in that event, is as to the question of a double provision by will and settlement to be considered *in loco parentis*, and the presumption against a double provision which would arise in the case of a father will apply to such a case. In such a case, parol evidence may be adduced to prove the intention against a double provision, as well as on the question whether the testator was *in loco parentis*. *Quære*, whether, if the testator was not to be considered *in loco parentis*, parol evidence of his intention not to make a double provision by will and settlement would be admissible. It being proved by parol evidence that testator intended the provision made by the settlement to be in lieu of a legacy given by the will, the settlement was held to be a satisfaction of the legacy, though the two provisions differed so much from each other that they could not be considered substantially the same. The legacy was not set up by a codicil, made after the settlement, ratifying and confirming the will, and all the devises and bequests therein contained. *Booker* v. *Allen*, 2 Russ. & M. 270; 9 L. J., Ch., 130.

3. A testator, by his will, made in 1838, devised his real estates at M. to his nephew, and bequeathed legacies amounting to 8,000*l.* to other persons, which legacies were primarily charged upon the moneys which might be in bank to the credit of the testator at his death. In 1839, the nephew, in compliance with the express desire of the testator, became the purchaser of real estates at C. The testator, out of moneys standing to his credit in the bank, lent the purchase money to the nephew, who shortly afterwards repaid it in part, but a balance of 7,700*l.* still remained due to the testator. By a codicil made in 1840, the testator, reciting that he had by his will devised certain real estates to his nephew, charged the same with a sum of 8,000*l.*, with interest at the rate of 5 per cent. from his decease, and directed that sum of 8000*l.* and interest to be paid to his executors within six months from his decease, for the purpose of paying off certain legacies named in his will: —Held, that parol evidence was admissible of facts showing that the testator stood *in loco parentis* to the nephew, and also to show the above-mentioned circumstances attendant upon the purchase of the estates at C.; and that the nephew being unable to pay the balance of 7,700*l.*, the testator refused to accept a security from him for it, but instead thereof had directed his own solicitors to prepare a codicil, charging 8,000*l.* upon the estates at M., which sum was to be applied towards the purposes to which he had by his will directed a similar sum formerly in cash at bank to be applied; in consequence of which direction, the codicil executed by him in 1840 was preferred. *Hedges* v. *Aldworth*, 13 Ir. Eq. R. 406.

The Court admitted the parol evidence, not for the purpose of construing the will or codicil, but in order to ascertain whether or not the 7,700*l.* was a debt due to the testator at the time of his death. *Ib.*

4. The testator bequeathed a sum of 3,000*l.* to his daughter for her separate use, for life, with remainder to her children as she should appoint; and in default of appointment, to her children equally, with provisions for survivorship, advancement, and for the substitution of their issue; and, subject to an annuity and to his debts, he devised and bequeathed all the residue of his real and personal estate (naming securities for money) unto his son absolutely. After the date of the will, the testator gave to his daughter and her husband a promissory note for 500*l.*, then due to the testator. In a suit by the children of the daughter against the son, claiming to have the legacy of 3,000*l.* invested and secured for their benefit, the defendant tendered parol evidence that after the date of the will the testator was requested by his daughter to confer some benefit on her husband, and that, thereupon, the testator gave her the promissory note, declaring that it was to be in part satisfaction of the legacy of 3,000*l.*; and that the testator was advised by his solicitor, that it was not necessary to alter his will to give it that effect: —Held, that this evidence was admissible, as constituting an essential part of a transaction subsequent to, and independent of, the will, of which subsequent transaction there was no evidence in writing. *Kirk* v. *Eddowes*, 3 Hare 509; 13 L. J., N. S., Ch., 402; 8 Jur. 530.

Held, also, that the parol evidence was not received as evidence of revocation or alteration of any part of the will, but as evidence of a transaction whereby the legatee had received part of her legacy by anticipation. *Ib.*

5. When the donor of a benefit which is claimed to be satisfied by subsequent benefits stands in the place of a parent, the presumption against double portions arises, and evidence is admissible for the purpose of rebutting or sustaining it. In the case of a stranger, the presumption against double portions does not arise, and it is solely a question of construction, whether the donor intended that his benefits should be diminished or adeemed by benefits derived from any other source. *Cooper* v. *Cooper*, 21 W. R. 501; 28 L. T., N. S., 87. And see 29 L. T., N. S., 321; 8 L. R., Ch., 813; 43 L. J., Ch., 158.

6. When a parent, or one standing *in loco parentis*, bequeaths a legacy to his child, and afterwards advances a like or greater sum on the marriage of the legatee, the law presumes the legacy adeemed; but the presumption may

be rebutted by evidence of a contrary intention. *Curtin* v. *Evans*, 9 Ir. R., Eq., 533.

Parol evidence alone will rebut the presumption, though the advancement be by settlement and as a marriage portion. But the evidence must be clear to show the real intention of the parent in reference to the very advancement which *primâ facie* has adeemed the legacy. *Ib.*

A testator, who, prior to his will, had made a present to his step-daughter of bank shares, bequeathed to her, in addition to the bank shares, 5,000*l.* On her marriage, a few months after the will, she, at the testator's request, transferred the shares to her brother, and by her marriage settlement, to which the testator was a party, he advanced, as a marriage portion, 5,000*l.*, which was paid to the trustees to be applied by them to the payment of incumbrances on the husband's estate, on which an adequate jointure was secured to her:—Held, that the presumption of ademption was rebutted by parol evidence of contemporaneous declarations of the testator showing his intention that the legacy should not be adeemed by the marriage portion. *Ib.*

1. Whether a settlement by a father, on the marriage of his child, is an ademption of a legacy, previously given in a will, which will is subsequently confirmed by a codicil, is a matter in which the presumption against double portions may be rebutted by evidence. *Hopwood* v. *Hopwood*, 5 Jur., N. S., 897; 29 L. J., Ch., 747; 7 H. L. Ca. 728. And see S. C. 26 L. J., Ch., 292; 3 Jur., N. S., 549; 5 W. R. 331; 2 Jur., N. S., 747; 22 Beav. 488.

2. Parol evidence, though inadmissible to raise, is admissible to rebut the presumption of the satisfaction by one instrument of an obligation created by another instrument. *Re Tussaud, Tussaud* v. *Tussaud*, 39 L. T., N. S., 113; 47 L. J., Ch., 849; 26 W. R. 874; 9 L. R., Ch. D., 363.

XII. Other Matters.

3. Portions by will, governed by rules from the civil law, not applicable to a deed. *Hubert* v. *Parsons*, 2 Ves. 261.

4. Marriage portions recovered at common law, and reversed in Exchequer, and holpen in Chancery. *Cutting* v. ——, Cary 8.

5. Construction of a trust; surplus rents, etc., not included in the term "portion." *Vane* v. *Vane*, 1 Ves. 57.

6. Portion not only implies a fortune out of the father's estate, but may also relate to what the wife brings with her in marriage, and answers to the Latin word *dos*. *Wood* v. *Briant*, 2 Atk. 522.

7. The Court will supply a defective conveyance in favour of children. But there is no case where the Court could decree satisfaction out of assets, if the father had no title to the thing he conveys to his child. *Salter* v. *Melhuish*, Ambl. 251.

8. Power to charge portions not inconsistent with an estate tail. *Jervoise* v. *Northumberland* (*Duke*), 1 Jac. & Walk. 575.

9. Where Court has at instance of eldest son ordered trustees to join in destroying contingent remainders, it has sometimes imposed conditions on the son as a provision for a sister. *Frewin* v. *Charleton*, 1 Eq. Abr. 386.

10. Upon the construction of an instrument creating a power of raising portions:—Held, that the donee had a right to distribute portions unequally. *Cotgreave* v. *Cotgreave*, 1 De G. & Sm. 38; 16 L. J., N. S., Ch., 145; 11 Jur. 51.

11. A. lent B. and C. 260*l.* and took their bond for 800*l.*, payable on the marriage of either, or on the death of either's father; B.'s father died, and C. married, but his portion was invested in trustees: equity would not subject this portion to the payment of C.'s bond. *Rich* v. *Sydenham*, 3 Ch. Rep. 75.

12. One, by his will, gives 3,000*l.* to his younger children, which was secured by mortgage from A., and declares that, if his eldest son does not pay this 3,000*l.*, then his lands shall go to the younger children. A. brings a bill to redeem his mortgage, and to pay in his mortgage money, and pays it pursuant to the decree; and the Master puts it out upon a security that proves ill. The eldest son shall not be compelled to pay it over again to his younger brothers. *Oldfield* v. *Oldfield*, 1 Vern. 336.

13. Devise to A. until B. shall attain forty years. B. dies before forty, A.'s estate ceases. *Secus*, if the devise to A. be made a fund to pay debts or portions which cannot be raised until B. shall have attained his age of forty, in which case the word "shall" is taken for "should." *Lomax* v. *Holmeden*, 8 P. W. 176.

14. Under a power for raising portions for younger children, an appointment by a charge, confined to the particular event of four or more, was not extended by implication from general words in a subsequent part of the deed, providing for the case of no appointment. *Mosley* v. *Mosley*, 5 Ves. 249.

15. H. T., on his marriage, covenanted to settle certain lands upon certain trusts, under which portions were to be secured to his younger children; he afterwards sold the lands, and levied a fine to the purchaser: the fine was held to have no operation in equity to protect the purchaser:—Held, also, that H. T. was a trustee for his children, and that the fine could not give to the purchaser a benefit which the father himself could not take. *Thompson* v. *Simpson*, 1 Dr. & War. 459.

16. A., tenant for life, remainder to his son B. in tail, A. and B. execute a deed, whereby, after reciting an agreement between them, that A. should grant to B. and his assigns an annuity of 100*l.*, chargeable upon the lands, payable during the lives of A. and B., and the survivor of them; and that in consideration thereof A. should have power to charge said lands with 1,000*l.*, with interest from his death, for his own benefit, but not to be raised or paid till two years after his death. A. and B. declared the uses of a recovery suffered by them to be, that B. and his assigns should, during the lives of A. and B., and the survivor of them, receive thereout an annuity of 100*l.*, with the usual powers of distress and entry in case of non-payment thereof; and subject thereto, to the use of A. for life, and after his decease to the use of B. in tail: and A. was thereby empowered to charge the lands with 1,000*l.*, with interest from his death, to be

disposed of as he should appoint amongst his younger children. A. died, having exercised his power, leaving B. and several younger children surviving:—Held, that the 1,000*l.* was a charge on the lands in priority to B.'s annuity. *Mills* v. *Mills*, 3 J. & L. 242; 9 Ir. Eq. R. 299.

1. Trustees appointed for raising and paying a portion of 500*l.* to A. Trustee enters and gives judgment to A. for paying the 500*l.* to A. when raised: the trustee raises the 500*l.* and more, and becomes insolvent; whether the land is discharged, *quære*. *Harrison* v. *Cage*, 2 Vern. 85.

2. An estate was devised to the eldest son of the testator, in fee, charged with four portions of 5,000*l.* each, for younger children. The eldest son, on his marriage, settled the estate to the use of his intended wife after his decease, for her life, if she should survive him, with remainder to himself in fee, and covenanted within six months to pay off the four sums of 5,000*l.*, and release the estate therefrom. He paid off one sum of 5,000*l.*, and died intestate:—Held, that the husband was not a purchaser under the settlement, and that the covenant in the settlement could not be taken to have been for indemnity only, but that, so far as the wife and younger children were concerned, the husband had adopted the portions as his own debt, and that he had also made them his debt as between his real and personal representatives. *Barham* v. *Clarendon* (*Earl*), 10 Hare 126; 17 Jur. 336; 22 L. J., Ch., 1057.

3. By a marriage settlement a father gave to his son an annuity during his own life, charged upon certain lands of which the father was tenant for life, with remainder to the son for life; and he conveyed certain other lands held for lives renewable for ever, to which he was absolutely entitled, to trustees, upon trust to permit him, and his heirs and assigns, to receive the rents during his son's life, and subject thereto to secure a jointure to the son's intended wife, and portions for his younger children, and subject thereto for the father absolutely; and it was declared that the portions should be payable to the younger children at twenty-one or marriage, if such events should happen after the death of the son, and if before then in three months after his death, "and not sooner, unless with the consent of the father if living, and if dead of the son":—Held, that this enabled the son, after the death of the father, to charge the lands with a portion for a younger child of his, who had attained twenty-one, and to make it payable immediately. *Keily* v. *Keily*, 5 Ir. Eq. R. 435; 4 Dr. & War. 38.

4. The custom of the manor of D. was, that each tenant should have an estate tail, with reversion to the lord, in fee, and that he might with the license of the lord alien by deed to any other person, to hold to him and the heirs of his body, with remainder to the lord in fee. In 1792 T. H., who was a tenant according to such custom, executed marriage articles by which 2,000*l.* was to be raised for the younger children of the marriage. No settlement was ever made in pursuance of these articles. In 1794 T. H. procured an enfranchisement from the lord of the manor to himself in fee. In 1828 the same lands were conveyed to trustees after the death of T. H. and his wife, in trust for F. H. (the eldest son of T. H.) for life, remainder to his wife for her life, with remainder upon the ordinary trusts of a marriage settlement in favour of F. H. and his wife: and by such settlement F. H. covenanted to settle any after-acquired property of his wife. T. H. died in 1844, and his wife in 1850. F. H. became bankrupt in 1849, having previously mortgaged all his property to the trustees of his settlement to secure the repayment of a sum of 2,000*l.*, which he had received in right of his wife since marriage; neither the wife of F. H. nor the trustees had heard of the articles of 1792 till 1854. Upon a bill filed by the younger children of the marriage of 1792, to have their sums of 2,000*l.* raised according to the articles:—Held, first, that the lands were not within the operation of the Statute *de Donis*; and, secondly, that the trustees of the marriage of F. H. were entitled to have the sum of 2,000*l.* raised first of all, inasmuch as they were purchasers for value without notice; and, thirdly, that the younger children were entitled to have their portions raised according to the articles of 1792, in preference to F. H. or his assignees. *Cresswell* v. *Hawkins*, 3 Jur., N. S., 407.

5. Upon a sale in the Incumbered Estates Court of Irish property, charged with portions for younger children raisable at death of tenant for life, 25,000*l.* was set apart by the Commissioners to answer these portions, and invested in consols. The dividends were received from them by the tenant for life, who died on the 1st July 1857:—Held, that the portioners were only entitled to that portion of the half year's dividend due upon the 5th July which had accrued since the 1st July, the tenant for life being entitled under the Incumbered Estates Act to receive the income upon the fund set apart for portions, and not distributable during his lifetime, as if it had remained unconverted. *Wellesley* v. *Mornington* (*Lord*), 6 W. R. 177; 27 L. J., Ch., 150; 4 Jur., N. S., 6.

PORTS.

See HARBOURS, DOCKS, AND PIERS.

POSSESSION.

— *Adverse.* See LIMITATIONS, STATUTE OF, X.
— *Recovery of.* See EJECTMENT—LANDLORD AND TENANT, IX.
— *Protection of.* See INJUNCTION, II. X.
— *Delivery of and Effect of.* See LANDLORD AND TENANT—SPECIFIC PERFORMANCE—VENDOR AND PURCHASER.
— *Mortgagee in.* See MORTGAGE, VI.

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POSSIBILITY.

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POSTHUMOUS CHILDREN.

— *Rights of Posthumous Children on Intestacy and Under the Custom of London.* See DISTRIBUTION OF ESTATE, I. II.—III. II. 3.

— *Devises and Bequests to and Class Gifts.* See SETTLEMENT—VESTED CONTINGENT AND FUTURE INTERESTS—WILL.

— *After-born Children.* See SETTLEMENT—VESTED CONTINGENT AND FUTURE INTERESTS—WILL.

I. GENERAL RIGHTS OF, 5698.
II. RENTS AND PROFITS, 5698.

I. GENERAL RIGHTS OF.

1. A child *en ventre sa mere* may be vouched, may be an executor, may take under the Statute of Distributions by devise, under a charge for portions, may have an injunction and a guardian. *Thellusson* v. *Woodford*, 4 Ves. 322. Affirmed 11 Ves. 112.

2. A child *en ventre sa mere* may be vouched, is capable of taking; the mother may detain charters on behalf of such child; a suit may be brought on behalf of such child; and the Court will grant an injunction to stay waste, and *hæredibus de corpore procreatis* and *procreandis* are the same. *Musgrave* v. *Parry*, 2 Vern. 710.

3. A child *en ventre sa mere* is *in rerum natura*, and is as much one as if born in the father's lifetime. *Wallis* v. *Hodson*, 2 Atk. 117.

The Court will grant an injunction to stay waste in favour of an infant *en ventre sa mere*. *Id. Sed quære.*

The civil law makes a difference between a child *en ventre sa mere in esse* at the father's death, and only conceived. S. C. 1 Atk. 118.

A parent's duty to provide for all his children will extend to posthumous ones. S. C. 2 Atk. 114.

4. Testator gave his estate to trustees, to apply the profits for the use of the child with which his wife was then pregnant, during infancy, and at twenty-five to the child in fee; but in case the child should die before twenty-five, without issue, remainder over; the child was still-born. Afterwards testator made a codicil affirming his will, and died without issue. Forty-three weeks after his death, his widow was brought to bed of a son; this son cannot take the estate, though found to be legitimate, but it shall go to the devisees over. *Foster* v. *Cook*, 3 Bro. C. C. 347.

5. The description of children of A. does not extend to a child *in ventre sa mere*. *Pierson* v. *Garnet*, 2 Bro. C. C. 38; Pre. Ch. 201; *id.* 226.

6. Bequest to all children "born in the lifetime of testator," includes child of which the feme was *enciente* at death of testator. *Trower* v. *Butts*, 1 Sim. & S. 181; L. J., Ch., 115.

7. The law is clear that a devise to an infant *en ventre sa mere* is good, though he be born after the death of the testator, and he shall take by way of executory devise when he is born. *Anon.*, 1 Freem. 293. S. P. *Taylor* v. *Bydall*, *id.* 243.

8. One devises, in case he have no son at the time of his death, to S. The testator dies, leaving his wife *privement enciente* with a son; this posthumous son is a son living at the testator's death, and S. not entitled. *Burdet* v. *Hopegood*, 1 P. W. 486.

9. Distinction between *privement* and *grossment enciente*. *Nurse* v. *Yerworth*, 3 Swan. 620.

An infant *en ventre sa mere*, under a devise to heirs of the body of the devisee begotten and to be begotten, cannot take, by purchase, the legal fee; the terms of description not amounting to a legal designation of him; but is entitled in equity, by virtue of the apparent intention, to the trust of a term attendant on the inheritance, though merged at law. *Id.* 608.

10. A. gave a bond to pay 900*l.* to his daughter, in case he should have no son living at his death; A. died, leaving his wife *enciente* with a son; the daughter shall not have this 900*l.* *Gibson* v. *Gibson*, 2 Freem. 223.

11. Power to charge lands for portions for younger children living at the father's death; a child *en ventre sa mere* is a child within the power. *Beale* v. *Beale*, 1 P. W. 246.

12. A posthumous child within a provision in marriage articles, for such children of the marriage as should be living at the death of the father or mother. *Millar* v. *Turner*, 1 Ves. 85.

13. A. conveys a term for years, in trust to raise 1,500*l.* for such child or children as should be living at his death. A posthumous child held a child living at his death, to take within the meaning of that trust, which was not to be construed so strictly as a limitation at law. *Hale* v. *Hale*, Pre. Ch. 50.

14. Lands by marriage settlement are limited to the son in tail male, remainder to A., the husband in fee; provided if A. and his wife, or either of them, die without issue male living at the time of his or her death leaving only one daughter unmarried, the trustees to stand seised till they have raised 1,500*l.* for such daughter; and if more daughters unmarried at the death of A. and his wife, or either of them, and no issue male being begotten between them, then 3,000*l.* for such daughters. A. dies, leaving daughters, and his wife *enciente* of a son, who is afterwards born: *quære*, whether the daughters are entitled to the 3,000*l.* *Palmer* v. *Cracroft*, 2 Vern. 578.

15. The fiction of the law which treats an unborn child as actually born, applies only for the purpose of enabling the unborn child to take a benefit which, if born, it would be entitled to. *Blasson* v. *Blasson*, 10 Jur., N. S., 1113; 34 L. J., Ch., 18; 13 W. R. 113; 11 L. T., N. S., 353; 5 N. R. 65; 2 De G. & S. 665.

II. RENTS AND PROFITS.

16. A posthumous child, born after the next rent-day, and since the death of the father, is entitled, under 10 & 11 Will. 3, c. 16, to the

intermediate profits of the lands settled, as well as the lands themselves, and the Court will consider an uncle as a receiver or a trustee for an after-born son, though the point at law be against him. The profits of an estate descended belong to a posthumous child from his birth only. *Basset* v. *Basset*, 3 Atk. 203, 206, 207. And see *Goodtitle* v. *Newman*, 3 Wils. 526. It is evident that all skilful conveyancers have considered that the statute carries the intermediate profits as well as the estate, for before that statute, and before the case of *Reeve* v. *Long*, 3 Lev. 408, they always inserted a limitation to preserve contingent remainders to posthumous children, but since that time they have omitted it. *Basset* v. *Basset*, *supra*. And see *Robinson* v. *Robinson*, 2 Ves. 231.

1. Testator gave to each and every of his children born or thereafter to be born, and who should be living at the time of his death, 5,000*l.* apiece, to be paid at their ages of twenty-one, etc., with interest from the day of his death. A child *en ventre sa mere* is entitled to a legacy of 5,000*l.*, but the interest is to be computed only from the birth. *Rawlins* v. *Rawlins*, 2 Cox 425.

2. Devise to trustees to the use of the first and other sons of M. in tail male, with a residuary devise. Three months after the testator's death the first son of M. was born:—Held, that the residuary devisees were entitled to intermediate rents from the testator's death to the birth of the tenant in tail. *Re Mowlem*, 18 L. R., Eq., 9; 43 L. J., Ch., 353; 22 W. R. 398.

Posthumous Heir.] 3. A posthumous heir is entitled to the rents of a descended estate only from the date of his birth, whether the prior rents have been actually received or not. *Richards* v. *Richards*, 1 Johns. 754; 6 Jur., N. S., 1145; 29 L. J., Ch., 836.

An estate, which, by virtue of settlement, devolves on a posthumous heir as tenant in tail by descent, is not a settled estate within the operation of 10 & 11 Will. 3, c. 16. *Ib.*

4. A. being seised of real estate, died, leaving his sisters his presumptive co-heirs, his wife being *enciente* of a son, born subsequently. The rents, from the ancestor's death, remaining unreceived by the co-heirs:—Held, that their seisin being gone, on the birth of the posthumous child, they were not entitled to so much of the intermediate rents as they had not received before the birth of the heir. *Goodale* v. *Gawthorne*, 2 Sm. & G. 375; 18 Jur. 927; 23 L. J., Ch., 878; 2 W. R. 680; 2 Eq. Rep. 936.

POST NUPTIAL SETTLEMENT.

— *In General.* See SETTLEMENT.
— *Validity as against Creditors.* See FRAUDULENT CONVEYANCES, I.
— *Validity as against Purchasers.* See FRAUDULENT CONVEYANCES, II.

POST OBIT.

See HEIRS EXPECTANTS AND REVERSIONERS, III.

POST OFFICE.

See also LETTERS—TELEGRAPH.

5. By the terms of the articles of agreement usually entered into between the postmaster-general and the persons supplying horses for the mail coaches, the postmaster-general cannot exercise the power of nominating a new party to perform neglected duty, for which provision is made in the articles, without notice to all the parties to the agreement who have the option of performing the neglected duty themselves. A bill for an account by a substituted party, of whose nomination the postmaster-general had given no notice to one of the defendants, an original contracting party, who was entitled to the option of performing the neglected duty himself, was therefore dismissed at the original hearing; but the decision was reversed upon appeal, upon the ground that, although no notice had been given by the postmaster-general, the defendant knew of the nomination of the plaintiff, and that his conduct was equivalent to a waiver of the option. *Lovegrove* v. *Nelson*, 3 Myl. & K. 1.

6. Upon forfeiture of a bond to the Crown for conveyance of the mails by a railway company, a plea, that the company was prevented from performing their obligation by the neglect or default of a servant of the post-office, would be a good defence. *Att.-Gen.* v. *London & North-Western Railway Co.*, Johns. 28.

Therefore, under the 1 & 2 Vict., c. 98, s. 13, a railway company was ordered to execute a bond without any proviso protecting them against such an event. *Ib.*

Form of bond to be given by railway companies under that section. *Ib.*

7. A plaintiff had been manager of a company, but had quitted their service, and opened a place for business in a similar trade to the company. Advertisements had been published, calling attention to the fact of his being no longer manager of the company. Letters, some of which were admitted to have been intended for the company, were addressed to him at his new place of residence as manager. Others were addressed to him at the place of business of the company, which were about his own private affairs. Some of these had been opened by the company, the servants of the General Post-office delivering there all letters addressed to the place of business of the company. Motion by the plaintiff to restrain the postmaster-general from delivering letters directed to plaintiff at the company's place of business was refused with costs. *Stapleton* v. *Foreign Vineyard Association*, 12 W. R. 976; 11 L. T., N. S., 77.

It was also sought to restrain the company from receiving and opening letters addressed to the plaintiff at the company's place of business, and having no external indication that they were intended for the company:—Held, that the company should give an undertaking, until the hearing, not to open, except in the plaintiff's presence, letters addressed to him at the company's place of buisness, unless, after due notice, the plaintiff did not attend there for the purpose by a specified hour. *Ib.*

POWER.

— *Power of Attorney.* See POWER OF ATTORNEY.
— *Powers of Management.* See EXECUTOR AND ADMINISTRATOR, X. VIII.—TRUSTS.
— *Power of Appointment of New Trustees.* See TRUSTS.
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— *Powers of and Trusts for Advancement and Maintenance.* See TRUSTS.
— *Power to Compromise Claims.* See EXECUTOR AND ADMINISTRATOR, X. V.
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I. General Principles.

1. Power of appointment does not prevent the fee vesting, subject to being devested by execution of the power. Such a power is a mode which the owner of the estate reserves to himself, or gives to another, through the medium of the Statute of Uses, of raising and passing an estate. *Maundrell* v. *Maundrell*, 10 Ves. 265, 266.

A general power of appointment over the whole estate may subsist in the same person who has the fee simple. *Id.* 10 Ves. 247, overthrowing the principle of *Cross* v. *Hudson*, 3 Bro. C. C. 30. See note there.

2. Distinction between a power and absolute property. A power, unless executed, not assets for debts. *Holmes* v. *Coghill*, 12 Ves. 206.

3. Where a person has an absolute and general power of appointing a fund, as well in his lifetime as at his death, and there is no gift over, yet if no appointment be made his administrator cannot claim the fund, and even creditors will not be entitled to the benefit of it without some steps taken towards an appointment; though where any such appointment be made, the Court will arrest the fund *in transitu* for the benefit of creditors. *Harrington* v. *Harte*, 1 Cox 131.

4. There is a diversity between a naked power and a power which flows from an interest, for where a bare power is given to a feme by will to sell lands, though she afterwards marries, she may sell the lands, and may sell to her husband; but where a feme, upon a settlement of her own estate, reserves a power which flows from an interest, that power ought to be executed by the feme whilst sole, and yet it is said such powers ought to be taken liberally, though formerly they were taken strictly. *Antrim* (*Marquis*) v. *Buckingham* (*Duke*), 1 Ch. Ca. 17; 3 Salk. 276; 2 Freem. 168.

Where a reversioner, upon an estate for life made a settlement on herself for life, with power for her, being sole, to make leases for three lives in possession, and she and her husband, in the lifetime of the tenant for life, made a lease for twenty-one years, *habendum*, from the date, it was held not pursuant to her power; for, by the marriage, she put herself under the control of her husband. S. C. 1 Ch. Ca. 17. In this case, Lord K. took a diversity between a naked power and a power which flows from an interest.

5. Naked powers construed strictly; powers coupled with an interest liberally. *Marlborough* (*Duke*) v. *Godolphin*, 2 Ves. 61.

6. A deed in exercise of a power of appointment divesting vested estates must be construed strictly. *Re Kingston's Estate*, 5 L. R., Ir., 169.

7. A., the tenant for life under a settlement, dated in 1794, of estates comprised in such settlement, had under the same settlement a general and unrestricted power of appointing the fee by deed or will, subject, however, to her life estate. In 1830, A., by deed, duly executed the power fully, but reserving to herself thereby a power to revoke and newly appoint, such power only to be exercised by deed. In 1833 A. duly exercised the power reserved by the deed of 1830 fully, so as, with respect both to revocation and new appointment, to exhaust the power; but she, by the deed of 1833, reserved to herself a power to revoke and newly appoint, to be exercisable only by deed. In 1835 A. exercised duly and fully the power reserved to her by the deed of 1833, so as to exhaust it with respect both to revocation and new appointment; but she reserved to herself, by the deed of 1835, a power exercisable by deed only, enabling her to revoke and newly appoint. In 1836 A. duly and fully revoked the uses declared by the deed of 1835, but did not by that deed of 1836, or by any other subsequent deed, re-appoint:—Held, that the power to appoint by will, reserved to A. by the settlement of 1794, remained unaffected by the various deeds of appointment subsequently executed by her, and that it was duly executed by her will, dated in 1848, and purporting to be made in exercise of that power. *Evans* v. *Saunders*, *Evans* v. *Evans*, 1 Jur., N. S., 265; 24 L. J., Ch., 609; 6 De G. M. & G. 654; 3 W. R. 323; 3 Eq. Rep. 462. Affirmed *sub nom. Saunders* v. *Evans*, *Sanders* v. *Price*, 8 H. L. Ca. 721; 31 L. J., Ch., 233; 7 Jur., N. S., 1293; 9 W. R. 501; 5 L. T., N. S., 129. Reversing 18 Jur. 256; 1 Drew. 415, 654; 22 L. J., Ch., 471, 1024; 1 W. R. 220; 1 Eq. Rep. 444.

By law, a power which, in any mode and to any extent whatever, has been exercised revocably, and the revocable appointment made under which has been revoked, without being operated upon, is generally, if not universally, of the same force, and exercisable in the same manner, as if the revoked appointment had not existed; and a power cannot be necessarily exhausted by a revocable act, although exercising otherwise the power to the utmost, more than by a conditional act, or by an act of merely partial execution, *i.e.*, of execution in no sense and in no possibility full and complete. *Ib.*

A power to appoint by deed or will does not constitute two separate and distinct powers, but is a single power, with a restriction on its exercise, requiring it to be exercised by one or other of those two instruments, but leaving to the donee the option, within the limits of that restriction, to choose which instrument e will use in exercising the power. *Ib.*

Where, by the terms of the reservation of powers of revocation and new appointment, the donee is authorised to exercise them, at his option, either by the same or by different deeds, if he first exercises by deed the power of revocation, the power of new appointment continues to subsist as a valid operative power, capable of being exercised by a subsequent deed; and admitting that it is as competent to the donee of such powers, exercising only the power of revocation, to release, extinguish, or destroy the power of appointment which was reserved to him, yet the mere exercise of the power of revocation as above will not *per se* have any such effect. *Ib.*

Where a person has a general power of appointment by deed, whether it is a primary power (*i.e.* a power preceding the uses declared in default of appointment), or a power of appointment connected with a power of revocation, and following the uses declared by the instrument creating the power, and exercises that power of appointment, and by the deed exercising that power reserves to

himself a new power of appointment, whether such new power be reserved as a primary power or as connected with a power of revocation, such power so reserved is to all intents and purposes a new power, newly created by him, and is not the old power, which he has exercised; and it is equally a new power, whatever the kind or degree of restriction which he has thought fit to impose on its exercise, *i.e.*, whether such restriction be precisely the same in kind and degree as that imposed on the old power, or be greater or less in kind or degree. *Ib.*

A general power of appointment over the fee will not be exhausted by an appointment to uses exhausting the fee, but reserving a power of revocation. *Ib.*

Where a general power of appointment by deed or will has been exercised by an appointment by deed, reserving a power of revocation and appointment to new uses to be exercised by deed only, the creation of this last power to appoint by deed only cannot, without clear evidence of intention, be taken as operating to destroy the original power to appoint by deed or will; and *semble*, that if it is to be taken as at all affecting such original power, it is to be considered merely as in substitution of that branch of the original power which it purports to replace, namely, the power to appoint by deed. *Ib.*

Semble, that two general powers of appointment in fee can exist in the same person at the same time. *Ib.*

What Law governs Construction.] 1. Where a power of appointment was created by a Scotch deed over a sum of money charged on estates in Scotland, the Court of Chancery in England declined to decide the validity of appointments made under it without first ascertaining the law of Scotland on the subject; and for that purpose directed a case to be stated for the opinion of the Court of Session, pursuant to 22 & 23 Vict., c. 63. *Topham* v. *Portland* (*Duke*), 32 L. J., Ch., 257; 11 W. R. 507; 8 L. T., N. S., 180.

II. Creation of.

I. *In General*, 5705.
II. *Whether General or Limited*, 5707.
III. *Property or Power*, 5709.
IV. *Implied Gift of Life Estate, with Power Superadded*, 5714.
V. *By Reference*, 5716.
VI. *Whether Substitutional or Accumulative*, 5717.
VII. *Extent of Estate, or Interest given to Donee of Power*, 5718.
VIII. *Property within the Power*, 5718.
IX. *Powers in Nature of Trusts*, 5719.
X. *Infringing Rule against Perpetuity*. See PERPETUITY, VIII. VII.

I. IN GENERAL.

2. A bequest of property to be at the disposal of testator's wife "for herself and children":—Held, not to give her a power of appointment. *Crockett* v. *Crockett*, 5 Hare 326.

3. Held, from the recitals contained in a codicil, that a power to appoint was thereby given, although the words used by the testator were those only of substantive bequest. *Hopkinson* v. *Phipps*, 7 L. J., N. S., Ch., 255.

4. A gift to A. by will of an equitable estate for life, in real and personal estate, and after the death of A. a gift of the property to her heirs, executors, administrators, and assigns, gives A. an absolute general power of appointment; and in default of appointment an estate to her heirs by way of purchase in the realty, and an absolute interest in the personalty, to her personal representatives. *Quested* v. *Mitchell*, 3 Eq. Rep. 1014.

5. A., on his marriage, conveys his land to a trustee to the use of himself for life, remainder to his wife for life, remainder to the heirs of their two bodies, remainder to A. in fee. Proviso, that in default of issue of the marriage, the trustees shall convey to such uses as the survivor shall appoint. Although the husband devises the land, and dies first without issue, yet the wife has a good power of disposing of the estate by her appointment. *Oxon* (*Bishop*) v. *Leighton*, 2 Vern. 376.

6. Where there is a gift to A. for life, remainder to all or such one or more of his children as he shall appoint, it is a power, and not an estate; but where it is in such manner as he may be pleased to appoint, that merely points out the *quantum*, and not the mode. A covenant to settle money to be paid in twelve months after decease of settlor is a satisfaction of all claims under an appointment where the appointee joins in conveying to a purchaser, and the Statute of Limitations is not a bar to the covenant. *Hardingham* v. *Thomas*, 2 W. R. 547; 2 Drew. 353; 23 L. J., Ch., 910.

7. In a partnership deed it was stipulated, that the testator's interest in the partnership concern, after his death, and during the term of the partnership, should go to such persons as he should by will name or appoint, and in default of appointment that it should devolve to his wife; in case of her death to his children in equal shares; and in case of the death of all his children, to his executors or administrators:—Held, that the true construction of this is, not to create a technical power of appointment, but to reserve to the testator an absolute power of disposition by will. The testator made a will, not containing any allusion to the power, by which he gave all his estate and effects to one of his children:—Held, that his interest in the partnership passed by this bequest. *Ponton* v. *Dunn*, 1 Russ. & M. 402.

8. By the contract for sale it was agreed that 600*l.*, part of the purchase money, should be paid after the vendor's death to such uses as she should direct, for the benefit of J. B. and her children. By the conveyance, that sum was made payable to the executors, etc., of the vendor, or as she should appoint by her will; she appointed it to J. B. absolutely:—Held, that the settlement, being execu-

and also subject to all such sums as he might think fit to charge, in the whole not exceeding 4,000*l.* Shortly after the execution of the settlement, the settlor executed the power, and charged the said lands with a sum of 4,000*l.* in favour of the children of his former marriage, and subsequently made his will, and thereby devised certain estates, of which he was seised, to the defendant, who was the only son of the second marriage then living, and reciting "that by his settlement he was empowered to charge the settled lands with 4,000*l.*, and that he had accordingly charged them, etc.," and further declaring that "inasmuch as he had, by the deed of 3rd September 1819, fully provided for the sons of his first marriage, he left the residue of his real and personal estate to his son by his second marriage." A bill having been filed by the assignee of the share of one of the children of the first marriage:—Held, that the power of charging could not be exercised, save in favour of the children of the second marriage; also, that it was not an absolute power, but a power dependent upon the event of there being more sons than one of that marriage, and any one of such sons being preferred to the settled lands according to the terms of the primary power. *Cooke* v. *Briscoe*, 1 Dr. & Wal. 596.

1. A testator devised an estate upon the same trusts as his wife, by her will, should declare "with respect to the disposition of her residuary personal estate." The widow bequeathed the estate to A., and her residue to B., C., and D.:—Held, that the widow had an absolute, and not a restricted power, and that the estate did not pass with the widow's residue, but belonged to A. *Bristow* v. *Skirrow*, 27 Beav. 585.

2. A voluntary settlement in favour of several persons contained a power, authorising the tenant for life (a volunteer) to revoke the trusts of the property, and again re-settle the same upon such trusts as to her should seem meet:—Held, that this general power could not be controlled, and that an appointment of the property to herself absolutely, to the exclusion of the other persons entitled under the settlement, was a good execution of the power. *Meade King* v. *Warren*, 32 Beav. 111.

3. There is no rule of construction of marriage settlements, that a power professing to give either parent the right to deal with the property settled, to the disinheriting of the children of the marriage, shall be construed as a power of appointment for the benefit of the children. *Peover* v. *Hassell*, 1 John. & H. 341; 7 Jur., N. S., 406; 30 L. J., Ch., 314; 9 W. R. 399; 4 L. T., N. S., 113.

Therefore, where, by a marriage settlement, real estate was settled, after the death of the husband and wife, in case there should be any issue living of the marriage, to such uses generally as the husband should appoint, and in default of appointment to the use of all the children equally, and in default of such issue to such uses as the wife should appoint, and in default of appointment to the use of the right heirs; and there was issue of the marriage:—Held, that the husband had a general power of appointment, and not merely a power of appointment amongst the issue. *Ib.*

4. By a marriage settlement, reciting only the intended marriage, and that it had been agreed that the lady's property should be settled and assured to the uses after mentioned, freeholds were conveyed to the use of the wife for life, remainder to the husband for life, remainder to such uses and upon such trusts as the wife should appoint, and in default of appointment to uses in favour of the issue of the marriage. The wife covenanted to surrender her copyholds "to the uses hereinbefore expressed," concerning the freeholds:—Held, that the power of appointment was general, and could not be restricted to a power to appoint to issue. *Minton* v. *Kirwood*, 3 L. R., Ch., 614; 37 L. J., Ch., 606.

Held, also, that the covenant to surrender the copyholds to the same uses as the freeholds made the copyholds subject in equity to the same power of appointment as the freeholds, though powers were not expressly referred to in the covenant. *Ib.*

An appointee under the power was admitted to the copyholds, and obtained an enfranchisement to himself:—Held, that the concurrence of the customary heir of the settlor was a question of conveyance, and not of title, for that the heir clearly had no beneficial interest. *Ib.*

5. A feme sole, by a settlement made three years before her coverture, declared the trusts of a fund, which she had previously transferred into the names of trustees, to be for such person or persons and for such uses as she should by deed appoint, and in default of such appointment, for herself so long as she should continue sole and unmarried, and in the event of her marriage, for herself for life for her separate use, without power of anticipation, with remainder for all or any one or more of her children, grandchildren, or other issue, as she should by deed or will appoint, with remainder, in default of such appointment, for her children equally, with remainder in default of children who should obtain a vested interest for her next of kin as therein mentioned:—Held, that, upon the marriage of the settlor, her ability to exercise the general power of appointment reserved in the settlement became suspended, the trust declared of the fund in the event of marriage being inconsistent with the continuance of a general power of appointment in the settlor over the fund. *Gould* v. *Gould*, 2 Jur., N. S., 484; 25 L. J., Ch., 642.

6. A father gave his residuary estate to trustees upon trust for his daughter for life, and after her death amongst her children, grandchildren, or other issue, as she should by deed or will appoint, and in default of appointment as she should by deed or will generally appoint, and in default of appointment under that power to her nearest of kin, according to the Statute of Distributions. The daughter made a testamentary appointment under the general power in favour of her husband, reciting, as the fact was, that she had then no children. She afterwards had children, but died without revoking the appointment:—Held, first, that there was an implied gift to the objects of the first power in default of appointment. *Re Jeffrey*, 14 L. R., Eq., 136; 26 L. T., N. S., 821.

Held, secondly, that if not, the appointment was conditional on there being no children,

and they took as nearest of kin as in default of appointment. *Ib.*

1. A general power of appointment was given to a feme sole under a settlement of her property, with subsequent trusts, in default of appointment, for herself and any future husband, and a power of appointment among children, and with a provision that her after acquired property should be subject to the same trusts:—Held, that the power could be exercised during coverture, and that an appointment made in exercise of it after marriage in favour of the donee of the power and her husband was valid. *Wood* v. *Wood*, 10 L. R., Eq., 220; 39 L. J., Ch., 790; 18 W. R. 819; 23 L. T., N. S., 295.

2. Where, in a deed, a power is given to appoint among issue, followed by a limitation over in their favour, and then it is declared that the children shall take in equal shares, the word "children" does not cut down the strict technical meaning of the word "issue." *Harrison* v. *Symons*, 14 W. R. 959.

3. By marriage articles a reversionary interest in a fund was agreed to be settled on the husband for life, remainder to the wife for life, and after the death of the survivor on the issue of the marriage living at the death of such survivor, in equal shares if more than one, and if but one, then the whole to such only child; and if there should be no issue of the marriage living at the death of the survivor, then as the husband should appoint. The only child of the marriage died in the father's lifetime, leaving a child:—Held, that the word issue was to be construed child, and that an appointment made by the father to himself was valid. *Swift* v. *Swift*, 8 Sim. 168; 5 L. J. N. S., Ch., 376.

III. PROPERTY OR POWER.

1. *Gift to be at the Disposal of a Person (Absolute Interests)*, 5709.
2. *Gift of Absolute Interest with Power Superadded*, 5711.
3. *Express Gift of Life Interest with Power Superadded*, 5712.

1. Gift to be at the Disposal of a Person (Absolute Interests).

4. Bequest of 3,000*l.* to A. to dispose of by will:—Held, an absolute interest in A. *Maskelyne* v. *Maskelyne*, Ambl. 750.

5. A gift of personalty to trustees to pay the interest to A., with a power to dispose of the fund by will as he pleased, and without any other words of limitation, is an absolute gift of the principal. *Elton* v. *Sheppard*, 1 Bro. C. C. 532.

6. A., by will, devises his land to B. in fee, paying 400*l.*, whereof 200*l.* to be at the disposal of his wife, by her will, to whom she should think fit; the wife dies intestate; her administrator shall have this 200*l.*, the property thereof being absolutely vested in the wife. *Robinson* v. *Dusgate*, 2 Vern. 181.

7. Bequest to the testator's wife of 60*l.* a year for life, and the sum of 300*l.* to be disposed of as she thinks proper, to be paid after her death, and a leasehold house and furniture for life; an absolute interest in the 300*l.* transmissible to the administrator; not a mere power of appointment. Will not construed by reference to a settlement, the provisions differing in some respects, though a substitution was intended. *Hixon* v. *Oliver*, 13 Ves. 108.

8. Testator bequeathed the remainder of his property to his sister, A. B., to dispose of amongst her children as she might think proper:—Held, that A. B. took no interest in the residue. *Blakeney* v. *Blakeney*, 6 Sim. 52.

9. Testator expressing his will and desire that one-third of the principal of his estate and effects be left entirely to the disposal of his wife among such of her relations as she may think proper, after the death of his sisters: a trust for her next of kin at the time of her death, having made no disposition. *Birch* v. *Wade*, 3 Ves. & B. 198.

10. Testator bequeathed the whole of his property to his wife for her life, and directed that upon her death one-third should devolve on his daughter, and that the other two-thirds should be at the sole and entire disposal of his wife, trusting that, should she not marry again, and have other children, her affection for their daughter would induce her to make the daughter her principal heir. The widow died unmarried:—Held, that she took an absolute interest in the two-thirds under the will. *Hoy* v. *Master*, 6 Sim. 568.

11. Under a bequest "in trust, for the use of my father, to be disposed of by him, share and share alike, as he by will or deed may appoint, among my brothers H. & J., and the daughter or daughters of S.":—Held, that the father took a life estate, and that H. and J., and the daughters of S., were each entitled equally in default of appointment. *Acheson* v. *Fair*, 2 Con. & L. 208; 3 Dr. & War. 512.

12. J. gives the residue of his estate to his daughter C., to dispose of as she shall think fit; but if she should die unmarried, or intestate, then what was left to her should go to his brother's children. C. possessed this residue, and disposed of it in making purchases, and taking securities in her own name. She afterwards died intestate and unmarried:—Held, that all her personal estate belonged to her next of kin; and that no part of it could be considered as the specific personal estate of her father, or go to his brother's children. *Lightburne* v. *Gill*, 3 Bro. P. C. 250.

13. A wife during coverture appoints by deed poll 300*l.* to be paid to her husband, to be employed by him to such charitable uses, or other purposes and intents, as he should think fit:—Held, that the husband had the complete ownership of the 300*l.*, and notwithstanding other directions in his will, it might be applied to satisfy the debts. *Hinton* v. *Toye*, 1 Atk. 465.

14. "I give to A. C. 500*l.*, and it is my will and desire that A. C. may dispose of the same amongst her relations, as she by will may think proper":—Held, a trust for the relations of A. C., and the 500*l.* well bequeathed by the will of A. C. to her sister, and her sister's children, though made without reference to

the will of the first testator. *Forbes* v. *Ball*, 3 Meriv. 437.

1. A testator directed his property to be placed in the funds, and the income to be paid to his wife for her life. After her death he bequeathed two legacies of 6,000*l.* and 1,000*l.* The remainder of his property he left "at the disposal" of his wife, if she remained a widow. If she should marry she was to have no control over his property, but the executors were to pay her an annuity during her life; and the remainder of the testator's property, after paying the above legacies, was to be divided among his nephews and nieces:—Held, that the widow, who did not marry again, took the capital of the residue, subject to the legacies. *Nowlan* v. *Walsh*, 4 De G. & S. 584.

2. A testator gave the interest of 10,000*l.* to his son for his life; and in case of his death, leaving issue, the capital to be divided among his children equally; but if he should die without lawful issue, then he gave a moiety of the capital to be disposed of as his son should think proper. The son died without having had any issue:—Held, that he took an absolute interest in the moiety of the 10,000*l.* *Re Maxwell*, 3 Jur., N. S., 902; 26 L. J., Ch., 854; 24 Beav. 246.

3. A., after particularising his real and personal estate, bequeathed the residue to his children living at his death, share and share alike, the share of his daughters to be paid to them on their marriage, provided a settlement, with the approbation of his executors, was executed on the marriage of each, and in case such settlement was not made, each of his daughters should be entitled to the interest of her share for life only, with a gift over; and he declared, that in case any of his daughters should die unmarried, "she shall have power and liberty to dispose of, by will or otherwise, 500*l.* of her share, and the remainder of her share is to be divided, share and share alike, amongst all my other children then living, except those who may have married without the settlement aforesaid." C., one of his daughters, died intestate and unmarried:—Held, that she took an absolute interest in her share, to the extent of 500*l.*, which was to be considered as a gross sum of money, taken out of her share, and not as an aliquot part of her share; and that it was to be considered as personalty in C., and not as partly real and partly personal. *Re M'Donnell*, 13 Ir. Ch. R. 268.

4. If a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails. *Kellett* v. *Kellett*, 3 L. R., H. L., 160.

5. A. having been indebted to the estate of B. in a sum of money, but from which he had been discharged under a commission of bankruptcy, voluntarily executed to C., the widow of B., a bond for the payment of part of such debt, for the use of herself and children, but at her disposal. Two years afterwards, A. executed to C. another bond for the payment of the remainder of such debt, for the use and benefit of herself and children only, in what proportions among the latter she may think proper to direct, but for no other use, purpose, or interest whatsoever:—Held, that the widow took a life interest in the money secured by the bonds, and that the principal, after her decease, became payable among the children, in such manner, and in such proportions, as she should direct; and the widow having made an exclusive appointment in favour of two of her children, it was held that such appointment was void, and that all the children took as tenants in common. Though, generally speaking, an instrument must be construed by the provisions contained in it, and not by anything *dehors*, yet, under the circumstances of this case, held, that the Court might call the language of the second bond into aid in construing the effect of the first. Where there is a general power of appointment among children, and the appointment from any circumstance becomes void, the children take as tenants in common. *Fowler* v. *Hunter*, 3 Y. & J. 506.

6. A testator, in his will, gave to G., then unmarried, 2,000*l.* for life, whom failing, to her children at her death; whom failing, to P. Some years afterwards, G. having been married, but having no children or the prospect of any, the testator, by codicil, said: "I reverse that clause, and commit to G.'s discretion the sole and ultimate disposal of the 2,000*l.*":—Held, though if G. had been *sui juris*, this would have amounted to an absolute gift to her of the 2,000*l.*, yet as she was a married woman, and the sole object of the codicil was to meet the case of her want of issue, she had merely a power of appointment of that sum. *Pursell* v. *Elder*, 13 L. T., N. S., 203.

7. A testator gave to his wife all his copyhold, freehold, and personal estate for her absolute fee for ever and ever, and to her heirs, executors, administrators, and assigns, also all his personal, leasehold, and general possession, to and for her use, and for the use of his children, and authorised her to appropriate any part for her immediate use, and for that of her children:—Held, that the wife and children were joint tenants, with a power to the wife to appropriate the property on the testator's death for a pressing exigency. *Curtis* v. *Graham*, 12 W. R. 993; 10 L. T., N. S., 734.

8. Under a bequest of personal property to a married woman for her own proper use and benefit for ever for her separate use, and the proceeds to be applied in the bringing up and maintenance of her children, there is no trust. *Mackett* v. *Mackett*, 41 L. J., Ch., 704; 14 L. R., Eq., 49; 20 W. R. 860.

9. A husband devised a freehold house to his wife, to be at her will and disposal in any way she might think best for the benefit of herself and family:—Held, that the widow took the fee simple of the house unfettered by any trust. *Lambe* v. *Eames*, 40 L. J., Ch., 15. Affirmed 40 L. J., Ch., 447; 6 L. R., Ch., 597; 25 L. T., N. S., 175; 19 W. R. 659.

10. A testator gave all his property to his wife absolutely with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so:—Held, that the wife took absolutely. *Re Hutchinson*, 8 L. R., Ch. D 540; 39 L. T., N. S., 86; 26 W. R. 904.

2. Gift of Absolute Interest with Power Superadded.

1. Where a sum of money is bequeathed in terms that give an absolute interest to the legatee, the mere addition, by subsequent words, of a power to dispose of the legacy by will during the continuance of a prior life interest in the money, does not by implication exclude the right of the legatee to dispose of it by deed *inter vivos* during the same period. *Comber* v. *Graham*, 1 Russ. & M. 450.

2. Testator gave 1,000*l.* stock to a married woman for her separate use, and whenever she should die to be absolutely in her own power to dispose of by will, or writing purporting to be her will, to any person or persons, purpose or purposes, she should then think proper; but in case of failure of any such disposition or appointment, to go over. This is not a power but an absolute gift, qualified only to exclude the husband upon the death of his wife; therefore it passed by general words in her will. *Hales* v. *Margerum*, 3 Ves. 299.

3. Bequest of personal property in trust for A. (a married woman), for her separate use: with a power of disposing by will (except to particular persons). "And in case she dies without a will, I give all that may remain at her decease to B.," followed by a gift of "all the rest and residue" to A., who is appointed executrix. A. takes the absolute interest in the property, not a power of disposing merely. And the gift to B., of "all that may remain at her decease," is void for uncertainty. *Bull* v. *Kingston*, 1 Meriv. 314.

4. S. G. granted and devised to trustees certain freehold property for the term of ninety-nine years, at a peppercorn rent, upon trust to permit his wife and such persons as she should by will bequeath the same to, to take to his, her, or their own use and benefit the rents, etc., of the said lands for the said term of ninety-nine years, exclusively of any husband of his said wife. The wife, after her husband's death, conveyed her interest in the property to certain persons represented by the defendant, and subsequently made her will, giving the property to the plaintiff:—Held, that the wife of S. G. took the property for the whole term of ninety-nine years, and not merely a life estate, with remainder to such persons as she should appoint by will; and that she had conveyed away all her interest to the defendant. *Glover* v. *Hall*, 16 Sim. 568; 18 L. J., N. S., Ch., 305.

5. By a codicil the testator, reciting that by a previous codicil he had given to A. R. 3,000*l.* 3 per cent. annuities, revoked the said bequest, and gave her the sum of 3,000*l.* 3 per cent. consols for her separate use during her life, with power to dispose of the same by her last will:—Held, that the power did not cut down the preceding gift to a life estate. *Reuddock* v. *Poole*, 1 Jur. 980.

6. A testator gave and bequeathed all his personal estate and effects to his daughter, the same to be always considered as vested in her, upon her attaining twenty-one, and to be subject to her disposition thereof; and the testator further directed that in case his daughter should happen to depart this life without attaining twenty-one, or without disposing by her will of the property bequeathed to her, then the same to be subject to the disposition by will of his wife. The testator's daughter married under twenty-one, and by articles previously to her marriage the husband covenanted to settle all the property left her by the testator upon his wife and himself for life, and then for the benefit of the children of the marriage:—Held, that the daughter took the property not absolutely but for life only, with power to dispose of it by will, and that her husband not having reduced it into possession, the articles were not binding upon the wife. *Borton* v. *Borton*, 16 Sim. 552; 18 L. J., N. S., Ch., 219; 13 Jur. 247.

7. Bequest to a woman of the dividends of a sum of stock for her separate use, with a direction that at her death she might leave it to her children, or whom she might choose:—Held, an absolute gift, and that she was entitled to payment. *Southouse* v. *Bate*, 16 Beav. 132.

8. Bequest to two persons "in two equal parts, each for his and her sole use and benefit, and to be disposed of as each of them pleases, at their death, or if not so disposed of, to be equally divided at their deaths between their children":—Held, an absolute gift of the principal. *Re Mortlock*, 3 Kay & J. 456; 26 L. J., Ch., 671; 5 W. R. 748.

9. Gift of residuary real and personal estate to the testator's wife, with power to her to dispose of the same unto and amongst all the testator's children, or to any one or more of them, for such estate, either in fee simple or in tail, term of life, or other interest, temporary or lasting, or in such other shares, proportions, or interest as his wife should, in her discretion, see most fitting and proper:—Held, to be an absolute gift to the wife. *Howarth* v. *Dewell*, 6 Jur., N. S., 1360; 9 W. R. 27; 29 Beav. 18.

10. Devise of copyholds to a married woman to be her sole and separate property, and with power to her to appoint the same to her children and her husband, in such way and in such proportions as she may think fit:—Held, that she was devisee in fee, and that the execution of the power was not made a duty, and therefore no trust in favour of the husband and children. *Brook* v. *Brook*, 3 Sm. & G. 280.

11. A testator made an indefinite bequest of the interest of his residue to a class of children equally, with a declaration that they should have the right to will away their shares on their deaths. There was a gift over, if they should omit to make their wills:—Held, that they took absolute vested interests, and not a life interest, with a power to bequeath, and that the gift over was void for repugnancy. *Weale* v. *Ollive*, 32 Beav. 421.

12. A testator gave all his property to his wife absolutely "and to be by her willed to any or either of my children, in any manner suitable to her wishes." The wife devised the real estate to one of the sons, in liquidation of a debt due to him from the testator, and afterwards entered into an agreement with him and another son to the same effect, stipulating that they should contribute a certain sum towards her maintenance:—Held, that there was a trust engrafted on the estate given to the wife in favour of those children who should survive her, with power to her if she

chose, to bequeath it to any of them; that the will and agreement were not an exercise of the power, they being in consideration of benefits to be derived by herself. *Evans* v. *Evans*, 12 W. R. 508; 10 L. T., N. S., 59; 33 L. J., Ch., 662.

3. Express Gift of Life Interest with Power Superadded.

1. Devise to A., the testator's wife, for life, and then to be at her disposal provided it be to any of his children, gives an estate for life with power to dispose of the fee. *Tomlinson* v. *Dighton*, 1 P. W. 149.

2. Investment of stock directed in trust to pay the dividends to testator's son for life, and, after his death, to transfer part of the capital according to his appointment, gives an interest for life only, with a power. *Nannock* v. *Horton*, 7 Ves. 391.

3. An express estate for life, with a power to dispose by will, does not give an absolute interest, so as to preclude the necessity of executing the power. *Reid* v. *Shergold*, 10 Ves. 370.

4. Bequest of all money, stock, etc., and all other personal estate, to the sole use of the testator's wife for life, to be at her full, free, and absolute disposal during her life, without being liable to any account, and, after her decease, certain articles specified, and 500*l*., according to her appointment by will, in default of appointment to fall into the residue, which was disposed of. An interest for life only, with a limited power of disposition. *Bradly* v. *Westcott*, 13 Ves. 445.

5. Devise of property to be sold, and the proceeds invested in the Bank of England, and the interest to be paid to testator's daughter for her life, and the principal wholly at her disposal at her death:—Held, not to give the daughter an absolute interest, so that she could dispose of it during her life. *Simpson* v. *Forester*, 1 Knapp 241.

6. A gift of personal estate to the wife for life, with a direction that after her death one moiety thereof shall be at her entire disposal, either by will or otherwise, amounts only to an estate for life in the wife, with a power of appointment. *Reith* v. *Seymour*, 4 Russ. 263; 6 L. J., Ch., 97.

7. Bequest of household goods, etc., after payment of debts, etc., to testator's wife for her life or widowhood, with power to her to sell same as she should think proper for her own benefit, and the maintenance of the testator's nephew, etc., during their minority, with a bequest over, upon the death or second marriage of the wife, of the same or so much as should then remain to such nephew, etc.:—Held, that widow was entitled to residue for her life or widowhood, with power to apply any part of the capital for her own benefit, proper maintenance of nephew, etc., during minorities, and that, on death or marriage of widow, remainder of capital unapplied was well limited over. *Surman* v. *Surman*, 5 Madd. 123.

8. "I bequeath to my wife all the household furniture and movable goods and chattels in and belonging to my dwelling-house, except my books; I bequeath to her the use of my plate, with power to dispose of such portion thereof as she shall think proper":—Held, that the wife took a life interest only in the plate, and that, as she had not disposed of it during her life, it fell into the residue. *Espinasse* v. *Luffingham*, 3 J. & L. 186; 8 Ir. Eq. R. 129.

9. Bequest to a lady of a sum of stock, "to be transferred to her for her sole and entire use during her life, that she shall not alienate it, but enjoy the interest of it during her said life, and, at her decease, she may dispose of it as she thinks fit":—Held, to give a life interest, with a power of appointment by will. *Archibald* v. *Wright*, 9 Sim. 161; 7 L. J., N. S., Ch., 120; 2 Jur. 759.

10. Moneys secured by judgments, the property of the wife, were, by an ante-nuptial settlement, assigned to trustees upon trust for her during her life, and in case there should be issue of the marriage upon certain trusts for their benefit, and in case there should not be any such issue then upon trust, to permit the wife to dispose of the moneys to such persons as she, whether sole or married, by any deed or writing, with or without power of revocation, to be by her sealed and delivered in the presence of, or attested by, two or more witnesses, should appoint, or in default of such appointment, gift, or devise to her next of kin, under the Statute of Distributions. There was not any issue of the marriage. The surviving trustee received a portion of the moneys secured by the judgments, and paid a part thereof to the husband during his lifetime, and the remaining part to the wife after his death. No appointment by deed or writing was executed by the wife:—Held, that the wife took only a life estate, with a general power of appointment; and that as she never had exercised that power with the solemnities specified in the settlement, the payments to her and to her husband were invalid, and, accordingly, the trustee was bound to replace the fund for the benefit of the next of kin of the wife. *Reid* v. *Thompson*, 2 Ir. Ch. R. 26.

11. Devise and bequest of real and personal estate, in trust, to pay the rents, dividends, etc., to the separate use of a married woman for life, and after her decease to convey, etc., according to her appointment by deed or will, with a limitation over in case of her death in the life of testatrix or in default of appointment. Absolute property, notwithstanding the said indication of an intention that the estate should remain in the trustee for her life, with powers inconsistent in a degree with the supposition of her having or being able to acquire the absolute interest. *Barford* v. *Street*, 16 Ves. 135.

12. A bequest to a feme sole "to be by her possessed and enjoyed absolutely during the term of her natural life, and to be disposed of as she shall think fit at her death":—Held, to entitle the legatee to payment of the whole fund. *Re David*, 1 Johns. 495.

13. A testator gave a fund to A. for life, and afterwards to his surviving children, but if he died without any, he gave one half of it to be disposed of as A. should think proper. The son never married:—Held, that he took an absolute interest in the one-half, and not a life interest, with a power of appointment. *Re*

Maxwell, 24 Beav. 246; 3 Jur., N. S., 902; 26 L. J., Ch., 854.

1. Settlement by a feme sole in contemplation of marriage, of part of her fortune in trust to pay the dividends to herself for her separate use for life, and after her death for her intended husband, and after the death of the survivor, to transfer the capital, according to her appointment by will, and in case she should die without appointment, and he should be then dead, in trust for her next of kin, their executors, etc., according to the Statute of Distributions; an interest for life only in the widow, with a power of disposition by will. *Anderson* v. *Dawson*, 15 Ves. 532.

2. Testator, having by his will made his daughter tenant for life of his general real estates, and of lands to be purchased, both with his personal estates, and with the profits arising from sale of timber, devises his collieries, etc., upon trust to dispose and convey the same in such manner as she, whether sole or covert, should direct and appoint, and in default of appointment to apply the money produced by the collieries, after paying the expenses, to the same uses as the residue of his personal estate; the testator then, after declaring that, though his meaning was to give his daughter the absolute disposal of the said collieries, etc., to prevent the expense and trouble that must attend the management of affairs of such a nature, under the direction of the Court of Chancery, requested her to direct the money arising therefrom to be applied in such manner as he had directed the same in default of appointment:—Held, that from the general frame and intent of the will, the daughter had not the absolute disposal of this property, but that her interest was confined to a disposition by sale. *Bute* (*Earl*) v. *Stuart*, 2 Eden 88; 1 Bro. P. C. 476.

3. Devise to testator's widow for life, to be by her divided among such of testator's children and their issue as should be surviving at her death. The power well executed by a will appointing a share to each of the surviving children of the testator, or, in case of their deaths, to their children respectively, and another share to the children of a deceased child. *Exp. Williams*, 1 Jac. & Walk. 89.

4. Legacy in trust to be laid out in stock, the dividends as they came due to A. for life; and after her decease, to pay the principal according to her appointment by will or otherwise, with power to her to purchase with it an annuity with the approbation of the trustees, but not to sell it. A. has an absolute power of disposition, and her will was held a sufficient indication of her intention to take the whole, making a formal appointment or writing unnecessary. *Irwin* v. *Farrar*, 19 Ves. 86.

5. Bequests to females, some of whom were married and some single, for their separate use for their respective lives, and after their decease to such persons as they should respectively appoint, and in default of appointment to their respective executors, administrators, and assigns:—Held, that the legatees, whether married or unmarried women, were each entitled upon petition, without executing any formal appointment, to an immediate transfer or payment to themselves of the corpus of their shares of the fund. *Holloway* v. *Clarkson*, 2 Hare 521; 6 Jur. 923.

6. Money in court stood limited to a widow for life, and afterwards as she should by deed or will appoint. The Court directed payment to her, without requiring an appointment. *Cambridge* v. *Rous*, 25 Beav. 574.

7. A. bequeathed the income of his residue to his widow for life, but desired "that in case anything should occur that her income is not sufficient, she shall be at liberty to go to the principal." He gave the residue to his brothers. The residue only produced 30*l.* a year, and the widow claimed the whole capital:—Held, that she was only entitled to so much of the capital as, with the income, would afford her a maintenance suitable to her station in life. *Re Pedrotti*, 27 Beav. 583.

8. A husband left his real and personal property to his wife for her life, with power to dispose of all the property, both real and personal, as she might judge best and wisest, he relying with confidence on her discretion, and that she would make such a distribution or disposal of it as would thoroughly accord with his wishes on the subject, with all of which she was perfectly acquainted. There was some evidence of the testator having communicated some wishes to his wife, but none as to what they were:—Held, that the terms of the gift to the wife did not amount to a precatory trust, and that she took the property, both real and personal, absolutely. *Reid* v. *Atkinson*, 5 Ir. R., Eq., 373.

9. The property of a married woman, settled by an ante-nuptial settlement for her separate use for life, with remainder as she should by deed or will appoint, with remainder in failure of appointment to her executors or administrators, is an absolute settlement for her sole and separate use, without restraint on anticipation, and vests in equity the entire corpus in her for all purposes. *London Chartered Bank of Australia* v. *Lemprière*, 4 L. R., P. C., 572; 42 L. J., P. C., 49; 29 L. T. 186; 21 W. R. 513; 9 Moo. P. C., N. S., 426.

10. Bequest to two persons "in two equal parts, each for his and her sole use and benefit, and to be disposed of as each of them pleases, at their death, or if not so disposed of, to be equally divided at their deaths between their children":—Held, an absolute gift of the principal. *Re Mortlock*, 3 Kay & J. 456; 26 L. J., Ch., 671.

11. A wife by will appointed real estate to her husband upon trust for his own use for life, "with power to take and apply the whole or any part of the capital arising therefrom to and for his own benefit." After his death "subject as aforesaid" over to other persons. The husband died without exercising the power:—Held, that he had only a life estate, and that the property went to the persons to whom it was given in remainder after his death. *Pennock* v. *Pennock*, 41 L. J., Ch., 141; 13 L. R., Eq., 144; 25 L. T., N. S., 691; 20 W. R. 141.

12. A testator gave all his property to his wife for life, and directed her to pay his debts, and, "at her decease, to make such a distribution and disposal of his then remaining property among his children as might seem just and equitable, according to her discretion":—Held, a power to the wife, exer-

cisable by will only, to appoint in favour of the testator's children living at her death. *Freeland* v. *Pearson*, 3 L. R., Eq., 658; 15 W. R. 419; 36 L. J., Ch., 374.

1. Devise and bequest to a widow for the term of her natural life, "and to be distributed to the testator's family at her decease as she might think proper":—Held, that the power of distribution was not testamentary only, but was exercisable by deed, and that, under the word "family," an illegitimate child whom the testator had treated and recognised as a child, was included as an object of the power. *Humble* v. *Bowman*, 47 L. J., Ch., 62.

2. A gift by will to A. for life, and "at," or "after," his decease to such persons as he shall appoint, gives A. a life interest with a power of appointment either by instrument *inter vivos* or by will; there being no rule of construction under which a gift in such terms, unless controlled by the context, can be held to confer a testamentary power only. Bequest of residue to A. for life, "the whole principal at her death to be divided amongst her children, if she has any, in such proportions as she shall think proper; and if she dies without leaving children," then over. A. died without having exercised her power of appointment, and having had three children, of whom one only survived her:—Held, that the three children took vested interests liable to be divested by the exercise, either by instrument *inter vivos* or by will, of A.'s power of appointment: and accordingly that on A.'s death the residue became divisible in equal thirds between the surviving child and the representatives of the two deceased children. *Re Jackson's Will*, 13 L. R., Ch. D., 189; 49 L. J., Ch., 82; 28 W. R. 209; 41 L. T. 499.

3. A bequest of residue to trustees, upon trust to permit the testator's wife to receive the annual produce for her life, with power to apply to her own use such parts of the capital as she should think proper; and after her decease, upon trust, as to such portions as should remain after such application of any part thereof by his wife, for such persons as she should by will appoint; and in default of and subject to any such appointment, in trust for certain persons named:—Held, that the widow took a life interest only in the residue, with power of disposition of the capital, and of appointment by will. *Scott* v. *Josselyn*, 26 Beav. 174; 5 Jur., N. S., 560; 28 L. J., Ch., 297.

4. A testator gave and devised to his brother all his real and personal estate and effects whatsoever and wheresoever, with full power to dispose thereof by deed or will, and then provided that if his brother should not dispose thereof the real estate should go to H. for life, with numerous limitations over. He then bequeathed his furniture, etc., to executors, as heirlooms, and gave all the residue of his estate and effects to the executors upon trust, after the decease of the survivor of his brother and himself, to sell and dispose thereof, and invest in other real estates to be settled to the same uses as he had declared concerning the real estates devised by his will, with powers of investment in the meantime. The brother died before the testator. On the death of the testator in 1803 H. entered into possession, and held the estates till his death in 1869. On the death of H. the persons entitled under his will took possession of the property, which was then claimed by the persons entitled under the limitations in the will of the original testator:—Held, that though the first clause in the will amounted to an absolute gift, the whole will showed a clear intention to give the testator's brother an estate for life only with a power of appointment, and that as that power of appointment had not been exercised, the limitations over took effect. *Re Stringer*, *Shaw* v. *Ford*, 46 L. J., Ch., 633; 6 L. R., Ch. D., 1; 37 L. T., N. S., 233; 25 W. R. 815.

Semble, that if no such intention had appeared on the will, the limitations over would have taken effect, as the brother died in the lifetime of the testator. *Ib.*

5. A testator gave his residuary estate to be equally divided amongst his children. He afterwards gave the dividends for the use of each of his children during their respective lives, and if they had children, then the principal to be at the disposal of the parent to such children:—Held, that the children took their respective shares for their lives, and had power to appoint to their respective children, if any. *Butler* v. *Gray*, 5 L. R., Ch., 26; 39 L. J., Ch., 291.

6. A testator by his will gave realty and personalty to his widow "for the term of her natural life to be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof," and "in the event of her decease should there be anything remaining of the said property or any part thereof," he gave "said part or parts thereof" to certain persons:—Held, that the widow of the testator took a life interest with an absolute power of disposition exercisable by her during her lifetime, but not by testamentary instrument. *Re Thomson's Estate*, *Herring* v. *Barrow*, 13 L. R., Ch. D., 144; 49 L. J., Ch., 16. S. C. on appeal, 14 L. R., Ch. D., 263; 49 L. J., Ch., 622; 43 L. T. 35; 28 W. R. 802.

See also XVI. XI. 1 *post.*

IV. IMPLIED GIFT OF LIFE ESTATE, WITH POWER SUPERADDED.

7. A bequest to a person "to and for her own absolute use and benefit, in the fullest confidence that she will dispose of the same for the benefit of her children, according to the best of her judgment, and as family circumstances may require at her hands," gives to her a life interest, with a power of appointment among her children. *Shovelton* v. *Shovelton*, 1 N. R. 226; 32 Beav. 143.

8. A testator gave all his property (subject to his debts) to his wife, "her heirs, executors, administrators, or assigns, to and for her sole use and benefit, in full confidence that she will, in every respect, appropriate and apply the same unto and for the benefit of all my children;" and the testator appointed his wife executrix. The testator, by a codicil, after alluding to having built two houses, desired that his property in that estate should be disposed of to his wife for the same intents and purposes as in his will his other property was directed to be applied to:—Held, that

the widow took a life interest in the property, with power of appointment among the children, and, in default of appointment, the children took as joint tenants absolutely. *Wace* or *Ware* v. *Mallard*, 21 L. J., N. S., Ch., 355; 16 Jur. 492.

1. Under a bequest "in trust, for the use of my father, to be disposed of by him, share and share alike, as he by will or deed may appoint, among my brothers H. and J., and the daughter or daughters of S.":—Held, that the father took a life estate, and that H. and J., and the daughters of S., were each entitled equally in default of appointment. *Acheson* v. *Fair*, 2 Con. & L. 208; 3 Dr. & War. 512.

2. N. devises to his wife all his estate, leases, and interest in his house in A., and all the goods and furniture therein at the time of his death, and also all his plate, jewels, etc., but desired her, at or before her death, to give such leases, etc., unto such of his own relations as she should think most deserving. The wife did not give, at or before her death, the goods in the said house, or her husband's jewels, to his relations:—Held, that the wife took beneficially only during her life, and that so much of the household goods in A. not disposed of by her according to the power given her by the will of N., in case the same remains in specie, or the value thereof, ought to be divided equally among such of the relations as were his next of kin at the time of his death. *Harding* v. *Glyn*, 1 Atk. 469.

3. A testator gave his residuary real and personal estate to his widow, "to and for her own sole use and benefit for ever, feeling assured and having every confidence that she will hereafter dispose of the same fairly, justly, and equitably, amongst my two daughters and their children;" and he appointed her sole executrix and residuary legatee:—Held, that the widow took beneficially for life, with remainder to the two daughters and their children, as she should appoint; but the Court refrained from declaring how the property would devolve in default of appointment. *Gully* v. *Cregoe*, 24 Beav. 185.

4. Devise to A., the testator's wife, and then to be at her disposal, provided it be to any of his children, gives an estate for life with a power to dispose of the fee. And where such devisee with an after-taken husband did, by lease and release and fine, convey the premises to a trustee and his heir, to the use of the wife for life without impeachment of waste, remainder to her daughter by her first husband and the heirs of her body, remainder to the son by the first husband and his heirs: this adjudged a good execution of the power. *Tomlinson* v. *Dighton*, 1 P. W. 149; Salk. 239; 10 Mod. 31; Com. 194.

5. Upon a bequest by a testatrix of a fund for the separate use of her daughter for life, and afterwards for her executors and administrators, for their own absolute use and benefit, the daughter being separated from her husband made a will, appointing the stock, but the will was not proved, and the husband took out administration:—Held, that the daughter took for life only, had no power to appoint the fund, and the husband was entitled to the stock. *Wallis* v. *Taylor*, 8 Sim. 241.

6. Bequest of residuary personal estate after decease of testator's widow, or her marriage in his daughter's lifetime, to his "daughter, the same to be always considered as vested in her upon her attaining the age of twenty-one years, and to be subject to her disposition thereof;" and in case his daughter should die "without attaining twenty-one, or without disposing by her will of the property," then over:—Held, upon the context, that the daughter took for life, with a testamentary power of disposition. *Borton* v. *Borton*, 16 Sim. 552; 18 L. J., N. S., Ch., 219; 13 Jur. 247.

7. Bequest to E. and W. (nephews) and G. (niece), if they should survive testator and attain twenty-one, when the legacies to nephews were "to be paid." In case of the death of either of the nephews or niece, leaving issue, such issue to take the parent's legacy as by his or her will directed; if no will, equally; but in case of the death of either, before his or her legacy payable, his or her legacy to go to survivor during minority; to apply income for maintenance; and the testator directed that G.'s legacy should be settled. E. and W. attained twenty-one:—Held, that they only took a life interest, with power of appointment among their children, and if no children then absolutely. *Martineau* v. *Rogers*, 4 W. R. 502; 25 L. J., Ch., 398.

8. A testator gave all his realty and personalty to trustees upon trust, as to one-sixth, in trust during the life of L. M., subject to certain payments thereout, to pay the clear rents to L. M. or her assigns not by way of anticipation during her life, and from and immediately after her decease upon trust for the heirs, executors, administrators, and assigns of the said L. M., according to the several natures and qualities thereof. There are then gifts of two other sixths in the same terms:—Held, that both in the realty and personalty L. M. and the donees of the two other sixths took life estates, with absolute powers of appointment by deed. *Quested* v. *Michell*, 5 W. R. 834.

9. Bequest of the testator's property to his wife to bring up and educate his children, and when they should come of age, to settle on them what she should deem prudent, reserving to herself a sufficient maintenance; and, at her death, the property remaining to be equally divided amongst his children; with a gift to trustees for the children, in case of the marriage of his widow:—Held, that the widow took a life interest in the property, with a power to settle or appoint the same on or to the children of the testator, but not on or to his grandchildren; and that the children took vested interests in the property at the testator's death, liable to be divested by such appointment. *Kennerley* v. *Kennerley*, 10 Hare 160; 16 Jur. 649.

10. A father bequeathed to each of the persons thereinafter named, including a married niece, for his or her own absolute use, 10,000*l.*, "except as hereinafter limited." After bequeathing annuities to three ladies, he directed that the legacies to his nieces were to be invested, and the interest therefrom, together with the annuities, were to be in trust for their separate use, and in case any one of the three

annuitants, or either of his nieces, should become bankrupt or insolvent, or sell, mortgage, or dispose of the annual sum or interest bequeathed to her, then the same should cease and become part of his residuary estate as though dead, except in respect of his married niece, whose legacy was to go to her children according to her appointment, and in default to them equally. Upon the death of the married niece:—Held, that she took the legacy for her life only, with remainder to her children as she should appoint, and in default to them equally, and that therefore her husband ought not, in respect of it, to take out administration to her. *Re Ware*, 25 L. T., N. S., 737; 20 W. R. 142.

1. L. directed by his will all his property to be equally divided, share and share alike, among all his children. He then directed the children's shares to be invested in the names of the children respectively and of two trustees, and the dividends to be paid to the children respectively during their lives, and that if any of his children should die leaving children, the shares of the respective parents were to be at their disposal among their children respectively; but should any of his children die without leaving children, the shares of such children were to go to the others:—Held, that each child of L. took a life interest only under his will, with a power to appoint among his or her children. *Butler* v. *Gray*, 18 W. R. 193.

2. A husband appointed his wife sole executrix, and left to her all his property, landed and personal, of every description, for her sole use and benefit, in the full confidence that she would so dispose of it amongst all their children, during her lifetime and at her decease, doing equal justice to all of them:—Held, that the wife took a life interest, with a power of appointment amongst the children as she might think fit. *Curnick* v. *Tucker*, 17 L. R., Eq., 320.

3. Gift to the testator's wife of all property whatsoever that he might die possessed of "for her sole use and benefit, in the full confidence that she will so bestow it on her death to my children in a just and equitable spirit, and in such manner and way as she feels would meet with my full approval":—Held, that the widow took a life interest, with a power of disposition amongst the children, the actual extent of which must be determined at the hearing of the cause. *Le Marchant* v. *Le Marchant*, 18 L. R., Eq., 414; 22 W. R. 839.

4. A testator died leaving a widow and seven children (all of whom were minors except one), and by a will dated in November 1837 he bequeathed to his wife all his property "for the benefit of herself and my children;" if she married she was to get 100*l.*, and the remainder of his property to be divided, share and share alike, among his children or their survivor. He appointed her to execute the will according to its real meaning and spirit, and recommended her to be guided by the Rev. H. H. in all matters relating to the disposal of his property and the education and advancement of his children:—Held, that the children took no interest in possession, but that the wife was, during her widowhood, tenant for life, with a power of appointment amongst the children. *Mill* v. *Mill*, 9 Ir. R., Eq., 104. Affirmed 11 Ir. R., Eq., 158.

Precatory Trusts in General.] See WILL.

V. BY REFERENCE.

5. A father, who had power to appoint to his children and their issue born in his life, appointed 5,000*l.* to his daughter O., who, on the next day, settled it on herself, her husband, and her children generally. Afterwards, by a deed, stating the appointment of 5,000*l.* to O., for her separate use, with power to appoint it, the father appointed another fund to O. "and her children, upon the trusts and subject to the same provisions as are hereinbefore declared of and concerning the sum of 5,000*l.* hereinbefore appointed unto and for the benefit of O., or as near thereto as circumstances will admit:—Held, that O. took the second fund for her separate use, with power to appoint it, and that the children took nothing. *Hanbury* v. *Tyrell*, 21 Beav. 322.

6. A testator devised his residuary estate to trustees, upon trust, as to one moiety, for A. for life, with remainder in trust for her children; and in case A. had no children, then, as to one-half of the moiety, upon trust for such persons as A. should appoint; and as to the other half of such moiety, upon the same trusts as were declared of the other moiety of the residuary estate; and he then declared the trusts of the other moiety precisely in the same manner, substituting B. only for A. Neither A. nor B. had any children:—Held, that each had power to appoint one-half of the residuary estate. *Atkinson* v. *Jones*, 1 Johns. 246; 28 L. J., Ch., 753.

7. By deed, 10,000*l.* was settled on A. B. for life, with power to appoint to her children or their issue, and in default in trust for her children; power was also given to A. B. to appoint a life interest to her husband. Afterwards, by will, the settlor gave a similar sum, "to be laid out for the sole benefit of C. D. in the same manner as nearly as might be as the 10,000*l.*" secured for A. B. by the deed:—Held, that C. D. was entitled to powers of appointment in favour of her children, their issue, and her husband, but that the children took nothing except through the power. *Berchtoldt* (*Countess*) v. *Hertford* (*Marquis*), 7 Beav. 172; 8 Jur. 50.

8. A testator by his will had given certain property to his daughter absolutely, and over other property a power. She dies in his lifetime without executing it. By a codicil he gives the property which he gave to the daughter to her husband according to the nature and quality thereof, and directs that he should stand in the same situation with her:—Held, the husband took the power. *Hopkinson* v. *Phipps*, 2 Jur. 639.

9. A trust created by reference to other trusts ought not, generally speaking, to be so read as to create a duplication of charges. *Hindle* v. *Taylor*, 5 De G. M. & G. 577.

10. A testator gave a legacy to his daughter L., and gave to her and her husband a similar power and control over it as was given by the settlement of her sister. And he directed that if L. should die without issue, her legacy

should revert to his surviving children. The settlement of the other daughter gave to her and her husband a joint power; and in default of appointment to the surviving husband, a separate power to appoint to their children; and in default of children, a separate power to the daughter to appoint the fund to any one by will:—Held, that as there was an inconsistency the will must be read strictly, and that L. had no power of testamentary appointment, but only a joint power with her husband to appoint to children. *Crossman* v. *Bevan*, 27 Beav. 502; 5 Jur., N. S., 1145; 29 L. J., Ch., 77; 1 L. T., N. S., 120.

1. Testatrix, by her will, declared that every person thereby made tenant for life should have such and the like powers of leasing, selling, and exchanging any part of the devised estate as were by her father's will given to the tenants for life and in tail mentioned in his will, or to the trustees thereof. It appeared that the father's will did not give a tenant for life or in tail any power of leasing, selling, or exchanging, but gave trustees full power to sell and exchange the hereditaments therein comprised, and to give receipts for the purchase money:—Held, that tenant for life in possession of the estate devised by the testatrix had the same powers of selling and exchanging that estate as were by the father's will given to the trustees; but that such powers did not extend to giving receipts; and, *semble*, that the difficulties which might be met with in exercising such power of sale, in the absence of a power to give receipts, might be removed by paying the money into court under the Trustee Relief Act, stat 10 & 11 Vict., c. 96, and that upon such payment the purchaser might safely complete. *Cox* v. *Cox*, 1 Kay & J. 251.

2. A., tenant for life in possession, joined with B., the next heir, in the settlement of certain estates. The settlement contained a power for B., in case of the death of his first wife and his marrying again, to charge the settled estates with portions for the younger children of his second marriage, the amounts being regulated with reference to the number of children that might be born of the first marriage. The deed contained a proviso that if the brothers of B. should, respectively, come into possession of the settled estates, "either before or after their marriage with any woman or women," they might charge all or any part of the estates with "the like sum or sums of money for the portion or portions of their child or children (other than an eldest or only son) as B. is entitled to do before or after his marriage with any woman or women after the decease of his first taken wife by virtue of the provision hereinbefore contained":—Held, that this was an absolute power, which, with reference to a younger brother of B. succeeding to the settled estates, was not subject to the restrictions and contingencies which applied to B. himself in making a charge for the children of his second marriage. *Harrington* (*Earl*) v. *Harrington*, 3 L. R., H. L., 295; 37 L. J., Ch., 858.

3. When the intention of a settlement appears from the recitals to be to secure a provision for children, it is a question of the actual circumstances in each particular case whether a power in the settlement which is in terms general must be cut down to a particular power in favour of children only. There is no general principle governing all such cases. *Minton* v. *Kirwood*, 37 L. J., Ch., 606; 18 L. T., N. S., 781; 16 W. R. 991; 3 L. R., Ch., 614.

4. A testator gave real and leasehold property to E. for life, and empowered him to appoint the rents after his death to his wife for life. The testator bequeathed his residuary personalty upon "the like trusts for the benefit of E. and his issue as was thereinbefore declared concerning the real and leasehold estates":—Held, that E. took a power to appoint the income of the residuary personalty to his wife for life. *Edwards* v. *Thompson*, 38 L. J., Ch., 65.

5. A father by will gave specific estates to trustees for each of his children for life, remainder to their issue in tail with cross-remainders. He gave each tenant for life power to appoint an annuity not exceeding one-third of the estates specifically devised to him or her to a husband or wife surviving. After directing payment of his debts he gave the residue of his real and personal estate to the trustees to divide between his children, and hold on the same trusts as the specifically-devised estates. On the marriage of a daughter subsequent in date to his will, he by the marriage settlement covenanted to pay to the trustees 4,000*l.* to be held upon trusts as to half for the wife for life, half for the husband for life, the whole for the survivor with remainder to the children of the marriage, and in default for the settlor absolutely. At the same time he made a gift of 1,000*l.* to the husband absolutely, which was recited in the marriage settlement as being part of her portion of 5,000*l.*:—Held, that the referential trusts of the residue included all the powers given over the specifically-devised estates, and gave powers to each tenant for life to appoint an annuity of one-third of the income of his or her share of residue, as well as of the specifically-devised estate to a husband or wife surviving. *Cooper* v. *Macdonald*, 42 L. J., Ch., 533; 16 L. R., Eq., 258; 28 L. T. 693.

Secus, if the power had been to appoint an annuity of or not exceeding a fixed amount.

Gifts by Reference Generally.] See WILL.

VI. WHETHER SUBSTITUTIONAL OR ACCUMULATIVE.

6. Settlement of two estates in remainder on W. for life, with remainder to his sons in strict settlement, and remainder over to M., with power to tenants for life in possession to charge estates with a jointure of 400*l.*, and power to revoke the uses of the settlement as to one estate, and to appoint new uses. By a subsequent deed, the settlor exercises the power of revocation as to the remainder to M., in lieu of which he appoints that estate to S., and repeats several of the powers contained in the first settlement, and gave power to W. and S. to charge the estate with 400*l.* jointure. W., by separate deeds, executes both powers of jointure:—Held, on bill by his widow for both jointures, that W. had no new power to jointure under the second settlement.

Wigsell v. *Smith*, 1 Sim. & S. 321; 1 L. J., Ch., 121. Affirmed 5 Russ. 299.

1. A father by will gave specific estates to trustees for each of his children for life, remainder to their issue in tail with cross-remainders. He gave each tenant for life power to appoint an annuity not exceeding one-third of the estates specifically devised to him or her to a husband or wife surviving. After directing payment of his debts he gave the residue of his real and personal estate to the trustees to divide between his children, and hold on the same trusts as the specifically devised estates. On the marriage of a daughter subsequent in date to his will, he by the marriage settlement covenanted to pay to the trustees 4,000*l.*, to be held upon trusts as to half for the wife for life, half for the husband for life, the whole for the survivor with remainder to the children of the marriage, and in default for the settlor absolutely. At the same time he made a gift of 1,000*l.* to the husband absolutely, which was recited in the marriage settlement as being part of her portion of 5,000*l.*:—Held, first, that the referential trusts of the residue included all the powers given over the specifically-devised estates, and gave powers to each tenant for life to appoint an annuity of one-third of the income of his or her share of residue, as well as of the specifically-devised estate to a husband or wife surviving. *Cooper* v. *Macdonald*, 42 L. J., Ch., 533; 16 L. R., Eq., 258; 28 L. T., N. S., 693.

Held, also, that the covenant to settle 4,000*l.* was *pro tanto* an ademption of the share or residue taken by the daughter, but that the 1,000*l.* paid to the husband was not. *Ib.*

2. A mortgage deed, dated the 15th June 1825, contained a covenant to pay the mortgage debt twelve months after date, with a power of sale in case of default. A transfer of the mortgage, dated the 2nd July 1830, recited that the old power of sale had not been and was not intended to be exercised, and contained a covenant to pay the mortgage debt seven years after that date, with a power of sale in case of default, and also assigned the debt and all powers and remedies for recovering the same and all the benefit of the previous mortgage:—Held, that the old power was not extinguished. *Boyd* v. *Petrie*, 41 L. J., Ch., 378; 7 L. R., Ch., 385; 20 W. R. 513; 25 L. T., N. S., 460.

VII. EXTENT OF ESTATE, OR INTEREST GIVEN TO DONEE OF POWER.

3. Under a settlement to the use of a married woman for her life for her separate use, or to the use of such persons as she should appoint, and in default of appointment upon trust for herself for life for her separate use, with remainders over:—Held, that she had no power to appoint beyond her own life. *Lewthwaite* v. *Clarkson*, 2 Y & Coll. 372.

4. Testator devised as follows: "I give and devise unto J. C. the lands of D., to hold to him during his natural life; and from and after his decease, I give and devise the same unto the issue male and female of the said J. C., begotten, or to be begotten upon the body of his present wife, C. C., to be divided between and amongst them, in such manner, shares, and proportions as the said J. C. shall by his last will and testament limit and appoint:—Held, that J. C. took an estate for life only. *Crozier* v. *Crozier*, 2 Con. & L. 309; 3 Dr. & War. 353; 5 Ir. Eq. R. 415.

5. E., wife of T., being seised of fee-simple lands, E. and T. conveyed them, by fine and deed leading its uses to a trustee and his heirs, to the use of E. and T., and the survivor for life; with remainder to enable E. to devise the lands to and among the issue of E. and T., in such shares as she should appoint, "it being, however, expressly declared that E. is to have power only to devise such shares and proportions in strict settlement upon such child or children, and their lawful issue, whether male or female; but that if such child should die without having such lawful issue, who should attain twenty-one, or be married, that then and in such case the lands should be devised, go to and among the surviving children and their issue who should attain twenty-one, in such shares and proportions as E. should by will appoint;" in default of appointment, to the children, and to such of their lawful issue as should attain twenty-one, or be married, share and share alike. The deed contained a further provision, in case of E. not making a will, that it should be lawful for T., by will, "to give, devise, and bequeath the lands to and among their issue, in the manner aforesaid, in such shares and proportions as he should thereby direct, limit, and appoint;" in default of appointment, to go equally among the said children, and their lawful issue, for ever:—Held, that T. could not appoint greater estates than life estates to his children. *Bell* v. *Bell*, 13 Ir. Ch. R. 517.

T. had power to appoint life estates to his children *in esse* at the date of the deed, with remainders to their issue in strict settlement. *Ib.*

VIII. PROPERTY WITHIN THE POWER.

6. Where testator gave an annuity to his daughter for life, to be secured by an investment in the funds by the trustees, and after her death he directed the "annuity" to go as she should by will appoint, and in default "the annuity" to be applied to the maintenance, etc., of her children till twenty-one, and then "the principal" to the children, with a gift over "of the said principal sum of money":—Held, that the daughter had the power of appointing the principal sum. *Samuda* v. *Lousada*, 7 Beav. 243.

7. A power to appoint the interest of a fund, held to authorise the appointment of the capital, notwithstanding subsequent powers over and limitation of the said "trust moneys, and the interest." *Phillips* v. *Brydon*, 26 Beav. 77.

8. By a settlement trustees were directed to be possessed of 1,760*l.* in trust for a daughter, and her sons, at twenty-one, and daughters at twenty-one, or marriage. Like trusts of two other sums of 1,760*l.* were declared for two other daughters and their children. Benefit of survivorship and accruer between the three daughters and their children, in default of children, was declared, with a

declaration that the provisions applicable to the original shares should apply to such surviving or accrued shares; and it was provided, that, if either of the three daughters should die without having or leaving any child who should attain a vested interest, she might dispose of any part of "her share," not exceeding one-third, by deed or will. On the death of one of the three daughters, her share accrued among the survivors; one of the survivors then died without a child, and appointed by will "one-third of her share or shares, as well accrued as original, in the said sum of 5,280*l.* The trustees paid so much of the share of the testatrix as had accrued into court, under the Trustee Relief Act:—Held, that the previous provisions of the settlement consolidated the accrued with the original shares, and that the power to appoint overrode the whole share thus consolidated. *Re Hutchinson's Settlement*, 5 De G. & Sm. 681; 17 Jur. 59.

1. A testator gave his real and personal estate to trustees, but with the consent of his widow, to sell and invest the produce and pay the income therefrom and of his estate unsold to his widow for life, and after her death, he directed that the money to be produced by his estate, sold before her death, should be in trust for such persons as she should by deed or will appoint:—Held, that the widow's power did not extend over real estate not sold during her life. *Cross* v. *Wilks*, 35 Beav. 562.

2. Where a settlement gives the wife surviving the husband a power to appoint by will, in default of direction, limitation, or appointment by the husband, the legal effect of such provision is to give the wife a power of appointment in respect of any portion unappointed by the husband or not completely or validly appointed by him. *Exp. Bernard, Re Leigh's Trust*, 6 Ir. Ch. R. 133.

3. A. had, under her father's will, a power to appoint 10,000*l.* By changes in the investment the fund had increased to 11,495*l.*, of which 10,000*l.* was lent on mortgage to B., and 1,495*l.* on mortgage to A. By her will, after reciting that under her father's will she had power to appoint 10,000*l.*, A., in exercise of her power, appointed "the said sum of 10,000*l.* now secured on mortgage of B.'s estate, and any other moneys representing the same":—Held, that the whole 11,495*l.* was well appointed. *Lefevre* v. *Freeland*, 24 Beav. 403.

4. Testator devised all his real estates to the appointment of E. by deed or will, and subject thereto he devised the same to E. for life; and after the decease of E. he directed that his H. estate should be sold, and fall into his general residuary personalty; and he gave all his real estate (including the St. C. estate) upon strict settlement in favour of G. and her issue; and as to his residue, he gave the same to the general appointment of E. by deed or will, and subject thereto, upon trusts for G. and her children. The testator died. By deed-poll E. appointed all the personalty to herself for life, and after her decease, to go according to the will of the testator. Afterwards, by settlement on the marriage of G., E. revoked the deed-poll, except as to her life estate, and appointed the residuary personal estate to the same trustees as those in the testator's will, upon trust to continue the same in its then investment, or to call it in, at their discretion, and hold 20,000*l.*, part thereof, upon such trusts as she should appoint; and as to the residue, upon trust for G. and her children:—Held, that this appointment of the personalty in the marriage settlement extended only to the same subject matter as what had been previously appointed by the deed-poll; and that that did not include the H. estate. *Walker* v. *Banks*, 1 Jur., N. S., 606.

After the marriage E. made her will, dated in 1851, by which, after alluding to the will of the testator and the marriage settlement, she devised certain real property of her own as therein mentioned, and gave all the rest of her real estate, except her said hereditaments so devised, to her trustees, upon the trusts of the St. C. estate in the will of the testator, *i.e.*, upon strict settlement:—Held, that under the Wills Act, 1 Vict., c. 26, such general devise operated as an execution of the power in the will of the testator; and that the H. estate, being thus placed in strict settlement, could not be sold by the trustees assuming to act in execution of the direction in the testator's will. *Ib.*

5. In 1858 C. wrote to his bankers requesting them to purchase 2,000*l.* consols to be added to the sum "now standing in my name," and the dividends to be received by them with this addition as before. C. was tenant for life under his marriage settlement of consols on which the dividends were received by the bankers under a general power of attorney from the trustees. The bankers wrote stating the names in which the consols stood, and asking if the investment was to be made in his name or the trustees'. He thereupon called and endorsed the letter "Make the investment in the trustees' names." The trustees were never informed of this, but the investment was made and the dividends received by C. till his death in 1870. In 1862 he and his wife executed a joint appointment to children under the settlement, of the original sum of consols, not mentioning the addition:—Held, that the 2,000*l.* consols were included in the settlement, and passed as in default of appointment. *Re Curteis*, 41 L. J., Ch., 631; 14 L. R., Eq., 217; 26 L. T. 863.

As to Additions to Settlement Fund in General.] See SETTLEMENT, IX. v.

IX. POWERS IN NATURE OF TRUSTS.

6. Direction to trustees to cut trees in aid of testator's real and personal estate:—Held, not a trust, but a mere power upon the whole of the will. *Gower* v. *Eyre*, Coop. 156.

7. Construction of an obscure will, whether a trust was created or merely a discretionary power. *Robinson* v. *Smith*, 6 Madd. 194.

8. Power of appointment in grantee for life, though in favour of particular objects, is not a trust, and may be extinguished by a recovery. *Smith* v. *Death*, 5 Madd. 371.

9. Residuary devise and bequest for such of the testator's relations and kindred in such proportions, etc., as his executors should think proper, recommending and advising his said trustees and executors to give the greatest share to such person and persons who in their

opinion and judgment should appear to them to be his nearest relations and most deserving, declaring his intention not to control their discretion, but that everything relative to that disposition, who were his relations, and the proportions, should be entirely in the discretion of the said trustees and executors, and the heirs, executors, and administrators of the survivor of them:—Held, a trust and a power: the ground of the power being personal confidence, it is *primâ facie* limited to the original trustees, not without express words passing to others to whom by legal transmission the same character may happen to belong; and cannot be executed by the devisees and executors, for that specific purpose only, of the surviving trustee; a trust, therefore, executed by the Court for the next of kin at the death of the testator according to the Statute of Distributions. *Cole* v. *Wade*, 16 Ves. 27.

1. A. makes two of his daughters executrixes, and directs them to distribute a sum of 400*l.*, and also the residue of his personal estate, among themselves and their brothers and sisters, according to their needs and necessities, as they in their discretion should think fit. The Court restrained the exercise of this power by decreeing a double share to the eldest son and heir, looking upon him as a necessitous person. *Warburton* v. *Warburton*, 4 Bro. P. C. 1.

2. On a devise of real estate to trustees, immediately upon the happening of an event, the marriage of either of his nieces, to settle such part thereof as the trustees should think proper, on certain trusts, for the nieces or children, etc., with power of appointing such settled part amongst the children by the mothers, and in default of appointment or of children then to a party and her heirs absolutely:—Held, that such power was not in the nature of a trust, but purely discretionary, and that, in default of its being duly executed by the original trustee having remained inactive, the beneficial interest resulted to the heir-at-law. *Lancashire* v. *Lancashire*, 1 De G. & Sm. 288; 11 Jur. 1024. Affirmed 2 Ph. 657.

3. N. devises to his wife all his estate, leases, and interest in his house in A., and all the goods and furniture therein at the time of his death, and also all his plate, jewels, etc., but desired her, at or before her death, to give such leases, etc., unto such of his own relations as she should think most deserving. The wife did not give, at or before her death, the goods in the said house, or her husband's jewels, to his relations:—Held, that the wife took beneficially only during her life, and that so much of the household goods in A. not disposed of by her according to the power given her by the will of N., in case the same remains in specie, or the value thereof, ought to be divided equally among such of the relations as were his next of kin at the time of his death. *Harding* v. *Glyn*, 1 Atk. 469.

4. Held, that a gift to J. W. H., F. R. H., and H. M. H., in such manner as W. H. should appoint, gave an absolute discretion to W. H. as to the share to be given to each, but that he must appoint some part to all three. *White* v. *Wilson*, 1 W. R. 47; 17 Jur. 15; 1 Drew. 298; 22 L. J., Ch., 62.

5. A testator was possessed of leaseholds of tithes held for three lives, and renewable on the dropping of any of the lives. He was in the habit of effecting insurances on the lives, and out of the moneys payable at a death, he renewed the lease, and effected a fresh policy on the new life inserted. By his will he gave all his real and residuary personal estate to trustees to accumulate the same for twenty-one years, and authorised them thereout to keep up the policies, to renew the leases, and to effect fresh policies on the new lives, "on the plan he himself had adopted," and subject thereto, he gave the estate and its accumulations to B. for life, with remainder to her sons and daughters successively in tail. B. married, and had two daughters only, the elder of whom died an infant in her mother's lifetime. One of the *cestuis que vie* died, and there was a large surplus of the sum assured after renewing the lease and effecting a new policy:—Held, that, although the will imported a power only to the trustees to renew the lease, etc., it was one which they were bound to exercise, and was consequently equivalent to a trust, and that therefore a competent part of the fund must be retained for those objects; but that, subject thereto, the policies, being part of the personal estate of the testator, vested absolutely in the first tenant in tail, subject to the life estate of the tenant for life under the will, and were payable to her legal personal representative. *Meller* v. *Stanley*, 10 L. T., N. S., 512.

6. The trustees of a will were directed to raise by mortgage of the devised property moneys not exceeding in the whole 20,000*l.*, and apply the same towards the liquidation of such of the debts of M. as they should think proper:—Held, that any one of M.'s creditors was entitled to file a bill to have the 20,000*l.* raised and distributed for the benefit of the creditors, who stood in the position of *cestuis que trustent* of the fund, subject to a power of selection in the trustees. *Joel* v. *Mills*, *Harvey* v. *Mills*, 3 K. & J. 458.

Precatory Trusts.] See WILL.

Life Interests with Power Superadded.] See III. 3 & IV. *supra.*

Objects of and Implied Gift in Default of Appointment.] See XVII. *post.*

Discretion of Trustees in Executing Powers of Sale.] See XXI. II. *post.*

Discretion of Trustees in General.] See TRUSTS.

III. Acceleration.

Of Future Power.] 7. A testator entitled to a reversion in fee after a life estate in A. devised it to trustees for B. for life, with remainders over in tail, and gave to the trustees a power of sale and reinvestment, with consent of the tenant for life or in tail entitled in possession for the time being, under the limitations of his will. A. survived the testator and surrendered her life estate to B.:—Held, that the power was thereby accelerated, and that the trustees with the consent of B. could make a good title. *Truell* v. *Tysson*, 4 W. R. 409; 20 Jur. 630.

Of Appointment in Remainder.] 1. *Semble*, that the remainders after an estate, which is void by reason of its being an excessive execution of a power, are not void, but are accelerated by the extinction of the intermediate void estate. *Crozier* v. *Crozier*, 2 Con. & L. 294; 5 Ir. Eq. R. 540; 3 Dr. & War. 373.

2. Preceding limitations under an appointment being void, subsequent limitations, though within the power, cannot be accelerated, and are void also, though the objects of the prior limitations never come *in esse*. *Routledge* v. *Dorril*, 2 Ves. J. 357.

An unborn child of a person *in esse* may be made tenant for life; if beyond that, the absolute interest is disposed of. *Ib.*

3. A testator appointed real estate under a power, and devised other real estate, to the use of his wife for life, and after her decease he devised the same estates to his son in fee, with an executory gift over, and with a proviso that if his wife should make or do any matter or thing whereby she should be deprived of the rents and profits so that her receipt alone should not be a good and sufficient discharge, her life estate should cease as on her decease: —Held, that upon her marriage without having settled her life interest, there was a forfeiture, and that the estates in remainder were accelerated. *Craven* v. *Brady*, 36 L. J., Ch., 905; 4 L. R., Eq., 209; 15 W. R. 952.

4. An appointment was made to a person not an object of a power, with remainder to an object. The first appointment being void: —Held, that the second was not accelerated, but failed with the first. *Reid* v. *Reid*, 25 Beav. 469.

IV. Delegation.

5. A power under a settlement for a husband to dispose of a reversionary interest in an estate, in such proportions as he should think fit, among the issue of the marriage; he, by will, delegates it to his wife in such shares as she pleases, between his son and daughter:— Held, to be like a power of attorney, and not transmissible to a third person, but could be executed by the husband only. *Ingram* v. *Ingram*, 2 Atk. 88.

6. On the construction of an appointment, it was held, that an attempt to delegate powers thereby, which the appointor could not transfer, did not invalidate the direction in the same deed, which he had power to give. *Hitch* v. *Leworthy*, 2 Hare 200.

7. An administratrix borrowed money, and secured the repayment by a mortgage of the testator's leasehold property, with a power of sale in case of default. The property was sold under the power, and the purchaser refused to complete on the ground that, though the administratrix herself had power to sell or mortgage, she could not delegate that power to another. In a suit by the mortgagee against the purchaser for specific performance:—Held, that the power of sale was valid; that the right to create this power was incidental to the right of the administratrix to mortgage, and that the purchaser was bound to accept the title. *Russell* v. *Plaice*, 2 Eq. Rep. 1149; 18 Beav. 21.

8. The donee of a power cannot delegate it, notwithstanding it has been acquired under a voluntary settlement made by himself. *Topham* (*Lady*) v. *Portland* (*Duke*), 1 N. R. 496; 32 L. J., Ch., 257; 11 W. R. 507; 8 L. T., N. S., 180.

9. When the donee of a power appointed by will a life interest to M., an object of the power, and then delegated to M. a power to appoint a life interest to a stranger to the power, and subject thereto appointed the property to the children of M., who were objects of the power:—Held, that the delegated power was void, but that the subsequent appointment was good. *Carr* v. *Atkinson*, 14 L. R., Eq., 397; 41 L. J., Ch., 785; 20 W. R. 620; 26 L. T., N. S., 680.

10. M., having an absolute power of appointment, appointed, by will, to her three children, or their respective executors or administrators, in such manner as her husband should by will appoint. The husband, by will, appointed the whole to two of the children:—Held, that this appointment was bad, and that the three children took in equal shares the will of M. *White* v. *Wilson*, 17 Jur. 15; 22 L. J., Ch., 62; 1 Drew. 298.

11. Twenty-five trustees were to meet and to present and elect a clergyman; one dies, the rest are equally divided, half being in favour of A., the rest voting for B. Upon the death of the supporters of the latter, the friends of A. meet and sign a presentation for him. This is void at law, and cannot be supported in equity: there should have been a distinct notice for the meeting of all. A direction that the trustees should meet for such purpose, within "four months" from the death of an incumbent, does not prevent their meeting after that time. Trustees cannot make proxies to vote in such a personal trust as the above; though if a choice were regularly made at a proper meeting, they might for the mere purpose of signing the presentation. Disusage evidence of abandonment by consent, as to part of a constitution which arose from consent. *Att.-Gen.* v. *Scott*, 1 Ves. 413.

12. C., a solicitor, and one of three executors and trustees for sale, acted professionally in the management of the personal estate, and, also, by the authority of his co-trustees, conducted an attempted sale by auction of the real estate. A., another of the trustees, hearing that his son was in treaty for the purchase of the estate, wrote to C. to say that he (A.) would not take any interest either directly or indirectly in the matter; C. then, with the concurrence of the co-trustee, contracted to sell the estate by private contract to another person. On a bill filed by the purchaser to compel performance of this contract:—Held, first, that C. had not derived any general authority to sell by private contract, by reason of his employment as solicitor to the trust estate, or as agent to sell by public auction; and, secondly, that he had derived no special authority from A.'s letter to sell to any one but to A.'s son. *Bulteel* v. *Abinger* (*Lord*), 6 Jur. 410.

Semble, under the circumstances, A. could not have delegated to his co-trustees an authority to sell to his son, without reserving to himself a veto upon the contract. *Ib.*

1. A trustee, resident in England, appointed by the English will of a testator who was resident in England, of lands in British Guiana, may appoint an attorney to act there in the matter of the trust, if the will does not provide to the contrary. *Stuart* v. *Norton*, 9 W. R. 320; 3 L. T., N. S., 602.

Quære, whether such trustee may appoint an attorney to act in matters of discretion connected with the trust in such colony or in a foreign country. *Ib.*

2. An executor is absolute owner of his testator's assets, and may mortgage or sell them, as well to a creditor as to any other person; and a mortgage of the book debts of the testator may contain a power of attorney to collect them. *Vane* v. *Rigden*, 39 L. J., Ch., 797; 5 L. R., Ch., 663; 18 W. R. 1092.

An executrix assigned all the book debts, etc., of her testator to the nominal value of 2,000*l.* to a creditor, to secure a debt of 534*l.* due to him from the testator, and also gave him a power of attorney to collect the debts. The property so assigned amounted substantially to the whole of the assets:—Held, that the mortgage was valid. *Ib.*

3. S. devised and bequeathed his real and personal property upon trust for his wife for her life, and after her death in trust for his children who should be living at her death, and the issue then living of his children, as she should appoint, and in default of appointment, as therein mentioned. The wife having survived her husband, by will appointed two-fifths of the residue of the trust fund in trust for a son, for his life, subject as therein provided, and after his death to his children as he should appoint, so that the benefit of every such appointment should vest before or upon the expiration of twenty-one years from the death of the son; and if there should be no child of his who should acquire a vested interest, then in trust for the son absolutely. Provided that if he should alien or dispose of his share, or should become bankrupt, the trust in his favour should cease and determine, and the property subject to the trust should be held by the trustees for the support, maintenance, or otherwise for the benefit of his wife and children, as the trustees in their discretion should think proper. S. died, and the son became bankrupt. The gift over in the proviso for cesser on his bankruptcy was held void as being in excess of the power, and the prior limitation to his children, as he should appoint, was also held void as being a delegation of a power. *Stockbridge* v. *Story*, 19 W. R. 1049.

Held, also, that the shares of the trust fund appointed in favour of the son became his absolutely under the provisions of his mother's will, and consequently went to his assignee on his bankruptcy. *Ib.*

Transfer and Devolution of Powers of Sale given to Trustees and Others.] See XXI. III. *post.*

Creation of Mortgages with Power of Sale.] See XXI. I. 3 *post.*

V. Extinguishment and Suspension.

I. *In General*, 5722.
II. *Where Purpose Satisfied*, 5723.
III. *By Alienation of Estate*, 5724.
IV. *By Bankruptcy or Insolvency*, 5724.
V. *By Fine or Recovery*, 5726.
VI. *By Successive Executions*, 5727.
VII. *Merger*, 5729.
VIII. *Release*, 5729.
IX. *Suspension by Marriage*, 5732.

I. IN GENERAL.

4. Learning as to what powers of appointment are capable of being extinguished or released. *West* v. *Berney*, 1 Russ. & M. 431. And see *Cunynghame* v. *Thurlow*, *Id.* 436. n.

5. A tenant for life, with a power of appointing the property by will to all or any of the testator's children, may extinguish the power. *Horner* v. *Swann*, T. & R. 430.

6. Power of appointment in tenant for life, subject to condition of her remaining sole and unmarried, which condition was qualified by proviso, that a marriage, with consent of A., B., and C., should not determine that power. Condition held a condition subsequent; and becoming impossible by death of A., B., and C., marriage of tenant for life after their death, without their consent, did not determine the power. *Aislabie* v. *Rice*, 3 Madd. 256.

7. F., having an estate which came to her *ex parte maternâ*, on her marriage conveyed the same to trustees to such uses as she should direct, with remainder to her own right heirs. By will, she directed the estate to be sold, the money to be laid out in the funds, and the trustees to permit the husband to receive the interest for life; then, after the deduction of 3,500*l.*, to uses which vested in the plaintiff A., and after payment of 1,000*l.* to pay the residue of the purchase money to the defendants. By codicil, she gave the plaintiff, her husband, a power of appointing the 3,500*l.* in case A. should marry without his consent. G. died, living the testatrix, before the codicil made, but F., in the codicil, took no notice thereof. First, the 1,000*l.* is real, not personal, and shall not go to the executors of G. (though given to her executors), nor to the personal representative of the testatrix, nor yet to the residuary legatee of the purchase money, but to the heir-at-law *ex parte maternâ* (the side from which the estate came); secondly, the 3,500*l.* is vested in A., and, the trustees having laid out a larger sum by 17*l.*, with intent to appropriate, it is well appropriated; and, A. having married once with her father's consent, his power is gone, and, he consenting to give up his life interest, it was decreed to be paid to the trustees on her marriage settlement. *Hutcheson* v. *Hammond*, 3 Bro. C. C. 128.

8. A sum of stock was held in trust for a lady for life, then for any husband for life in case she should appoint to him, and subject thereto in trust for her children, and in default of children to such uses as she should appoint. The lady, at the age of sixty-eight, having never been married, appointed the fund to herself, and released the power of appointment in favour of her husband and children:—Held, that she was entitled to a transfer of

the capital. *Miles* v. *Knight*, 17 L. J., N. S., Ch., 458; 12 Jur. 656.

1. In 1814 estates were limited to such uses, etc., as A. should appoint, and in default of appointment to him for life, remainder to his son for life, remainder to the son's first and other sons in tail male; and those limitations were followed by powers of leasing, and selling and exchanging, the latter of which was to be exercised during the life of A. and his son, and with their consent. In 1830 A., being desirous of relinquishing his life interest, appointed the estates to his son for life, remainder to the uses, upon the trusts and subject to the powers expressed and contained in the deed of 1814, ulterior to the limitations therein, for the lives of A. and his son:—Held, that though the power of sale and exchange was to operate in derogation of the life estates, it was not destroyed by the deed of 1830. *Morgan* v. *Rutson*, 16 Sim. 234; 17 L. J., N. S., Ch., 419; 12 Jur. 813.

2. The execution of a general power over real estates in settlement not only destroys the existing powers, but also all instruments executed under them. *Walker* v. *Armstrong*, 21 Beav. 284; 2 Jur., N. S., 221; 25 L. J., Ch., 402.

A settlement, dated in 1824, gave a power of appointment over lands to A. and B. by deed, and a power of appointment to B. by deed or will. The donees of the power by a deed, dated in 1825, executed for the purpose of rectifying a mistaken omission of certain limitations in the settlement, made an appointment, and reserved a power of revocation, and of new appointment to B. by deed or will. B., by will dated in 1827, exercised the power of appointment in favour of A. After this it was discovered that a mistake had been made in the deed of 1825, by the omission of certain limitations. Instructions were given to a solicitor to prepare a deed to rectify the same, but he was not informed of the existence of the will. A deed was prepared and executed in 1840, which after exercising the power of revocation, contained the limitations omitted in the deed of 1825, and (with the exception of certain limitations to issue rendered needless by the age of the wife of B.) repeated the limitations of the deed in 1824, including among them the power to appoint by will. B. did not republish:—Held (by Romilly, M. R., 21 Beav. 284; 2 Jur., N. S., 221), that the deed of 1840 rendered the appointment by the will of 1827 inoperative. Upon an appeal from this decree, the Lords Justices gave leave to amend the bill, and to produce evidence as to the error in the preparation of the deed of 1840, and ultimately held that the deed of 1840 should be rectified, so far as it went beyond the correction intended, and beyond the intention of the parties, and therefore established the will. S. C. 2 Jur., N. S., 959; 25 L. J., Ch., 738.

3. By the marriage settlement of A. a sum of 8,000*l.* stock was settled upon himself and his intended wife for their joint lives and the life of the survivor, and then for the benefit of their children, and, if no children, in trust for the settlor, his executors, administrators, and assigns. After his marriage, A. made his will, and thereby gave his real estate to P. and his heirs, upon the same trusts as near as could be, as were declared of the stock by the settlement, and after giving certain pecuniary legacies, he bequeathed all the rest of his moneys and property of any kind to P., his executors, administrators, and assigns, upon trust and for the benefit of the objects of his settlement as he might think best. A. died, leaving his widow, but no issue of the marriage. P. declined to take probate of the will:—Held, that whether the course taken by P. had or had not the effect of depriving him of the discretionary power given to him by the will, he could not, in the events that had happened, exercise that power so as to affect the rights of the parties interested under the will and settlement, and that the effect of these instruments was to give a life interest to the widow in the real and residuary personal estate, impeachable of waste as to the real estate, with the remainder as to the real estate to the testator's heirs, and as to the residuary personal estate to his next of kin. *Ford* v. *Ruxton*, 1 Colly. 403.

4. When a power, coupled with a duty, is conferred upon trustees to be executed by them at a fixed period, and after they have come to a judgment as to the conduct of the individual to be affected, they cannot divest themselves of the power or execute it until the time appointed. Nor can they enter into any anterior compact respecting it. The fact that the individual to be affected by the execution of the power (a youth of twenty-one), married three years before the time appointed for such execution; the fact that the trustees formally approved of the marriage and were made aware of the settlement thereon including a provision out of the trust estate for the intended wife; and the fact, moreover, that they gave no caution or warning, that they might ultimately be obliged to defeat it;—all these facts made no difference in the result: for it was held to be the duty of the trustees (the husband having, in their judgment, subsequently misconducted himself) to execute the power so as to restrict him to a life interest, although the effect was to defeat the provisions for the wife, as well as the other claim founded on a compact expectation that the marriage settlement would not be disturbed. *Per* Lord Cranworth, L.C. Did the trustees by consenting to the marriage, and (as I think I may assume) by consenting to the settlement, deprive themselves of this power? My clear opinion is that they did not. *Per* Lord Chelmsford, All parties knew, or ought to have known, that the provisions of the settlement must depend on the conduct of the son. *Weller* v. *Ker*, 1 L. R., H. L. (Sc.), 11.

II. WHERE PURPOSE SATISFIED.

5. Purchaser not compelled to take a doubtful title, viz., by executing a power of sale, introduced under a direction by decree, establishing a will to the Master to approve a proper settlement: the will not authorising the insertion of such a power; nor could it be sustained under a power by a former settlement; which, if not extinct by the failure of the limitations, and the union of the estate for life with the reversion, could not be duly applied to purposes clearly foreign to its

original object; and though purchasers are not put to exercise a very nice and critical judgment with regard to the purposes for which powers are created, it could never be intended to refer to a perfectly new set of limitations, in a new settlement, at a long subsequent period, under a disposition by the will of the owner of the fee, to be exercised, not for any purpose in the least degree connected with the settlement, but avowedly as an expedient to supply the want of a valid power in that settlement, and enable those whom he had made only tenants for life to dispose of the estate. *Wheate* v. *Hall*, 17 Ves. 80.

1. Where estate is devised in trust for two daughters for life, with remainder in each moiety for their children at twenty-one, and a power of sale is given to trustees, the power of sale subsists, though one daughter is dead, and her children have attained twenty-one. *Trower* v. *Knightley*, 6 Madd. 135.

2. Under a power to lend 2,500*l.* of the trust funds to the tenant for life:—Held, that it was not exhausted by one loan, but that, after repayment, the power might be exercised a second time. *Versturme* v. *Gardiner*, 17 Beav. 338.

3. A trust to raise by sale of a competent part of 3,389*l.* bank annuities, a sum not exceeding 2,000*l.*, and pay the same to the plaintiff:—Held, not to be exhausted or fully performed by raising 1,391*l.* at the plaintiff's request. *Harrold* v. *Harrold*, 3 Giff. 192; 7 Jur., N. S., 1274; 4 L. T., N. S., 699.

4. Where lands were devised on trusts as to one-fifth to the testator's son for life, and on his death to be conveyed, with certain limitations, to his children; and as to another fifth, in trust for his daughter, until she attained twenty-five, or was married, and then to be conveyed and settled to her use as the trustees might think proper:—Held, by the Master of the Rolls, that the events having taken place on which the trusts were to be performed, the trustees having omitted to perform them, the power was at an end by the determination of the trusts as intended by the testator: the trust, although existing, was not a continuance of the trust intended by the will, and reposed in the trustees by the testator: but the Lord Chancellor reversed his decision. *Wood* v. *White*, 2 Keen 664; 7 L. J., N. S., Ch., 203. Affirmed 4 Myl. & C. 460; 8 L. J., N. S., Ch., 209.

5. An estate was devised to trustees for different persons in fifth shares, some of which shares were given to living persons absolutely, and the others to living persons for life, with remainder to their children in fee. An unlimited power of sale over the whole estate was given to trustees:—Held, that this power of sale was valid, and could be exercised over the whole estate, so long as any of the trusts of any of the shares remained to be performed. *Taite* v. *Swinstead*, 26 Beav. 525; 5 Jur., N. S., 1019; 7 W. R. 373; 33 L. T. 712.

6. In pursuance of a power contained in a marriage settlement, lands were appointed, subject to life estates, among the five children of A., one-fifth to each of four as tenants in common, and the remaining fifth to E., the other child, for life, with remainder to the first four. E. was of unsound mind, not so found by inquisition:—Held, that a power of sale contained in the settlement was not destroyed by the appointment. *Re Brown*, 39 L. J., Ch., 845; 10 L. R., Eq., 349; 18 W. R. 945.

III. BY ALIENATION OF ESTATE.

7. *Quære*, whether a power in the tenant for life to advance children out of the capital is taken away by assignment of the life interest. *Whitmarsh* v. *Robertson*, 1 Y. & Coll. C. C. 715; 11 L. J., N. S., Ch., 404; 6 Jur. 921.

8. Where a tenant for life of trust moneys, with a power for appointing part for advancing his children, assigned his whole interest, etc., as security for annuity granted by him, he was held to have precluded himself from exercise of power for advancement, though the annuity was of a much less value than the fund. *Noel* v. *Henley*, M'Clel. & Y. 303.

9. A. tenant in tail with a leasing power, remainder to B. in tail, executed a disentailing deed whereby he conveyed the estate to the use of A. for life, remainder to the use of B. in fee:—Held, that A.'s leasing power was not extinguished. *O'Fay* v. *Burke*, 8 Ir. Ch. R. 225, 511.

10. A testator, having given his daughter a life estate in certain lands, devised them after her death amongst her children as she should by deed or will appoint. It then provided that, in case of alienation or incumbrance by her, her share should go to the persons next in remainder, as if she were actually dead:—Held, that an appointment executed by her was not rendered inoperative by reason of her having previously mortgaged her life estate. *Re Stone*, 3 Ir. R., Eq., 621. Affirmed 18 W. R. 222.

The donee of the power appointed to one of her sons all the lands and premises except the square yard of ground thereinafter mentioned; and to the other, one square yard of the said lands, in such part thereof as his brother should think fit:—Held, that the power was well executed. *Ib.*

See also Succeeding Subdivisions.

See also XXI. IV. 4 *post.*

IV. BY BANKRUPTCY OR INSOLVENCY.

11. There is no equity to compel a bankrupt to execute a general power of appointment for the benefit of his creditors in their favour, or in the favour of a purchaser from them. *Thorpe* v. *Goodall*, 1 Rose 40, 270; 17 Ves. 388, 460. But see 6 Geo. 4, c. 16, s. 77.

Therefore, a bankrupt seised for life with a general power of appointment, with remainder in default of appointment to the heirs of his body, cannot be compelled by decree in equity to execute the power for his creditors. *Ib.*

12. A trader, being seised of an estate for life, with a general power of appointment, with remainder, in default of appointment, to himself in fee, after having committed an act of bankruptcy, upon which he was afterwards declared a bankrupt, executes his appoint-

ment in favour of an appointee:—Held, that all his interest having passed to the assignee by the assignment, such appointment was void; and, therefore, that his assignee under the commission had a sufficient legal estate to maintain an ejectment. *Doe* d. *Coleman* v. *Britain*, 2 B. & Ald. 93.

1. Real estate settled on settlor for life, remainder to trustee for a term, to secure jointure to wife, remainder to use of children, as they jointly, or the survivor, should appoint, remainder to the right heirs of the settlor, who became bankrupt, and then he and wife appointed, and after his death, wife appointed in favour of same children:—Held, first appointment, bad; wife's appointment, good. *Hole* v. *Escott*, 2 Jur. 1059; 4 Myl. & C. 187; 8 L. J., N. S., Ch., 83. Reversing 2 Keen 444; 6 L. J., N. S., Ch., 355; 1 Jur. 424.

2. Upon a settlement to the use of the joint appointment of husband and wife, and in default to the use of the husband for life, remainder to the use of wife for life, remainder to the use of the sons successively in tail, with remainder to the daughters as tenants in common, with cross-remainders in tail, remainder in fee to the husband; the husband subsequently took the benefit of the Insolvent Act, and assigned all his interests to his assignee, and afterwards, with his wife, executed the joint power of appointment to trustees in fee in trust to sell:—Held, that the power was not extinguished by the assignment to the provisional assignee, and that the appointment vested in the trustee the whole inheritance, except as to the portion of it which was vested in such assignee. *Jones* v. *Winwood*, 10 Sim. 150; 10 L. J., N. S., Ch., 165; 5 Jur. 190.

3. Mere power unexecuted in a tenant for life who becomes bankrupt, does not vest in his assignees. *Townshend* v. *Windham*, 2 Ves. 3.

4. R. M. made a settlement of real estate to the use of himself for life, with a power to appoint to any one or more of his sons in fee, or otherwise, and in default of appointment, to his first and other sons in tail, with remainder to himself in fee. He became bankrupt, and subsequently to his bankruptcy appointed to his eldest son in fee:—Held, that the appointment could not enure as an appointment of a base fee, determinable on the extinction of the prior estates tail, because such a limitation would have been bad in the settlement creating the power. *Quære*, whether the power was destroyed by the bankruptcy, the Court considering that the invalidity of the appointment rendered it unnecessary to determine that point. *Badham* v. *Meo*, 1 Myl. & K. 32; 2 L. J., N. S., Ch., 4. And see 7 Bing. 695; 9 L. J., N. S., C. P., 213; 1 M. & Scott 14.

5. Bank stock was settled upon trust for A. and B. successively for life; and after their decease, in trust for one or more of their children, as they or the survivor should appoint; and in default, in trust for all the children equally; but if B. should survive his wife A., and there should be any child or children living at her death, then the trustees were to raise 2,500*l*., and dispose of it as A. should appoint. C. and D. were the only children of the marriage. In 1832, on the occasion of D.'s marriage, A. and B. jointly appointed a portion of the fund, and A. exercised the power given to her as to the 2,500*l*. A. died in January 1844. In July 1843 C. was adjudicated a bankrupt, and assignees were appointed, and on the 10th February, 1844, he obtained his certificate. B., by a deed-poll of the 12th February, 1844, appointed the trust funds, then subject to the indenture of settlement, to and for the use of C., but subject to his own life interest in the income, and subject to the sums already appointed. B. died in March 1855. The assignees of C. claimed to receive the moiety of the funds, to which he would have become entitled in default of appointment:—Held, that during the bankruptcy of C., and before the certificate, all that the assignees had was a defeasible title; and that under the power of appointment executed after the date of the certificate C. became entitled to the whole fund as against the assignees. *Lee* v. *Olding*, 2 Jur., N. S., 850; 25 L. J., Ch., 580; 4 W. R. 398.

6. A fund was settled upon trust to pay the interest to the husband, unless and until he should become insolvent, or until his death, whichever should first happen; and after the happening of either of such events, upon trust to pay the interest of the fund to the wife for her life; and after the determination of the several trusts thereinbefore created, upon trust for the children of the marriage, as the survivor should appoint; and in default of appointment, from and after the several deceases of the husband and wife, or the sooner determination of the interest thereinbefore limited to them respectively, upon trust for the children of the marriage equally. The husband became insolvent, and the wife afterwards died in the lifetime of the husband:—Held (affirming 28 Beav. 26; 6 Jur., N. S., 188; 29 L. J., Ch., 421; 8 W. R. 157; 2 L. T., N. S., 141), that the power of appointment given to the husband was extinguished, and that upon the death of the wife the fund was divisible among the children of the marriage, as in default of appointment. *Haswell* v. *Haswell*, 6 Jur., N. S., 1223; 9 W. R. 129; 3 L. T., N. S., 393; 30 L. J., Ch., 97; 2 De F. & J. 456.

The power of appointment was not extinguished by the insolvency of the husband, but the settlement indicated an intention that the power should be exercised while the husband or wife had an interest in the fund. *Semble*. *Ib*.

7. Devise to A. for life, or until he shall seek relief from any law which shall be in force concerning insolvent debtors, and from and after his decease, or immediately after he shall become insolvent as aforesaid, then to the use of such child or children of A. in such shares and for such estates and interests as he shall by deed or will appoint. A. became insolvent, and then exercised the power by deed:—Held, that the execution of the power was valid. *Haswell* v. *Haswell* (28 Beav. 26; 2 De G. F. & J. 456) considered. *Wickham* v *Wing*, 6 N. R. 21; 2 Hem. & M. 436; 11 Jur., N. S., 424; 34 L. J., Ch., 425; 13 W. R. 650; 13 L. T., N. S., 37.

8. A power given by will to an insolvent to appoint among his children, held to be capable of being exercised after the insolvency. *Re Aylwin*, 42 L. J., Ch., 745; 16 L. R., Eq., 535; 21 W. R. 864; 28 L. T., N. S., 65.

1. S. executed a post-nuptial settlement whereby he conveyed freehold hereditaments, the legal estate in which was outstanding, to a trustee upon trust to pay the rents, issues, and profits to his wife during her life, and after her death to himself during his life, and after the death of the survivor for the benefit of their children. The settlement contained a power to S. during his life, and after his death to the wife during her life, and after the death of the survivor to the trustee, to renew leases for lives, and take fines on renewals, but so that the usual rents were still reserved. And it was declared that the trustee should hold all fines which he might take in trust for the child or children who should be then entitled to the inheritance of the premises. S. subsequently assigned his interest under the settlement to B. by way of mortgage. The trustee of the settlement disputed the right of S. to take the fines for his own benefit, claiming them on behalf of the wife. S. accordingly filed a bill against the trustee and B., praying that he might be declared entitled to take the fines on renewals of leases for his own benefit. S. afterwards became bankrupt, and his assignee obtained a supplemental order to carry on the suit:—Held, first, that S. was entitled to take the fines on renewals for his own benefit. *Simpson* v. *Bathurst*, *Shepherd* v. *Bathurst*, 5 L. R., Ch., 193; 18 W. R. 772; 22 L. T., N. S., 29.

Held, secondly, that inasmuch as the legal estate was outstanding and beyond S.'s control, and the trustee had interfered with his power of granting leases, he was entitled to bring a suit in equity for declaration of his rights. *Ib.*

Held, thirdly, that the power of granting renewed leases was not extinguished or suspended either by the assignment of S.'s interest by way of mortgage or by his bankruptcy, but that such power might be still exercised by him with the concurrence of the mortgagee and assignee. *Ib.*

See also XXI. IV. 4 *post.*

V. BY FINE OR RECOVERY.

2. A bare naked power is not barred by any of the Statutes of Fines; otherwise as to an *interesse termini*. *Willis* v. *Shorrall*, 1 Atk. 476. Neither can a collateral or naked power be barred or extinguished by fine, feoffment, or any other conveyance. *Albany's case*, 1 Co. 111 *a*; *Digge's case*, 1 Co. 174 *a*. *Edwards* v. *Slater*, Hard. 415.

3. Tenant for ninety-nine years, if he so long live, with a power of charging the premises with sums of money, joins in suffering a recovery, and declares the uses thereof; this extinguishes the power of charging the estate. *Savile* v. *Blacket*, 1 P. W. 777.

4. Power of appointment in grantor for life, though in favour of particular objects, is not a trust, and may be extinguished by a recovery. *Smith* v. *Death*, 5 Madd. 371.

5. Learning as to what powers of appointment are capable of being extinguished or released. *West* v. *Berney*, 1 Russ. & M. 431. And see *Cunynghame* v. *Thurlow*, *id.* 436. *nom.*

6. *Semble*, where a tenant for life, having a power to charge the estate after his death for the benefit of his children, levies a fine, the power will be extinguished. By a marriage settlement, lands were limited to the use of the husband for life, remainder to the wife for life, remainder to trustees for a term of four hundred years, to commence from the decease of the survivor of the husband and wife, remainder to the heirs of the body of the wife begotten by the husband, remainder to the heirs of the husband. The trust of the term was, in case there should be issue of the marriage a son and one or more younger child or children, who should live to attain, his, her, or their age or ages of twenty-one years, to raise such sum, not exceeding 200*l.* in the whole, as the husband and wife should by any deed or writing appoint, or in default thereof as the survivor should, by deed or writing or his or her last will or testament, appoint; and in default of such appointment, or subject thereto, after the money so appointed should have been raised, and the costs of the trustees paid, the term was to cease or be assigned in trust to attend the inheritance. There were younger children of the marriage who attained twenty-one. The wife died without having joined in any appointment, and afterwards the husband levied a fine of the premises:—Held, that the power was extinguished by the fine. *Bickley* v. *Guest*, 1 Russ. & M. 440.

7. Feme covert having power to convey her estate after her death, conveys it by lease and release, to take effect after her death; she afterwards joins with her husband in levying a fine to different uses. The lease and release held to have no effect, and the fine operated. *Bramhall* v. *Hall*, Ambl. 467.

8. By a marriage settlement, certain property was conveyed to trustees during the joint lives of the husband and wife, in trust to pay the rents and profits to the wife for life, for her separate use, and after her death to the husband for life, and after his decease to the use of such persons as the husband should by will appoint, and in default of such appointment, to certain uses for the benefit of the children of the marriage, and in default of any such appointment and issue, there was a limitation to the next-of-kin of the husband. By a subsequent deed of 1828, which recited that there were no children of the marriage, the husband and wife released and appointed the property to trustees for sale, and covenanted to levy a fine for the purpose of extinguishing all powers and interest of the wife. It was also declared that the release and fine should operate to extinguish the husband's power of appointment by will, so far only as any such will made in execution of the power should not operate and enure to the use of the trustees, or in confirmation of the indenture of 1828. A fine was accordingly levied, and subsequently, contrary to the expectation of the parties, a child of the marriage was born. The husband then made a will, and executed his power of appointment in favour of the trustees of the deed of 1828, and confirmed that deed in all respects. The trustees contracted to sell the estate; but as the only child of the marriage refused to join in the sale, a bill for specific performance was filed:—Held, that the power of appointment under the marriage settlement was extinguished by

the deed of 1828, except for the special purpose of confirming that deed by will. *Walmsley* v. *Jowett*, 23 L. J., Ch., 425; 2 W. R. 179.

1. On a devise of lands to be purchased with the proceeds of estates sold by the testator, upon trust to pay the rents and profits to testator's daughter for life, and afterwards for such persons and estates as she should appoint, and for default of appointment to the right heirs of his daughter, he also directed that, as to such part of the proceeds as should not be laid out in lands, his trustees should pay her the dividends for her life, and after her decease to such persons as she should by will appoint, and in default thereof to transfer and assign to her executors, etc.:—Held, that as the effect of the limitation of the proceeds, if uninvested, was to give it to the daughter absolutely, the intention was to be inferred the same whether it continued in the shape of money or was invested in land: the words of limitation, therefore, in the latter case, to the daughter's right heirs, were to be considered not as words of purchase but as of a limitation, and gave her a fee, and that she might by fine extinguish the power, and make a good title to the lands purchased. *Webb* v. *Shaftesbury*, 2 Myl. & K. 599.

2. The 19 & 20 Geo. 3, c. 32, incorporated the undertakers of the Lagan Navigation, and enacted that it should be lawful for every subscriber towards completing the navigation, and through whose lands it should pass, to charge his real estate, for the use of his younger children, with the payment of such sums of money and other interest which he might have in the joint stock of the company, as he should assign or bequeath to his heir, any settlement to the contrary notwithstanding. Under a settlement of 1761, A. was tenant for life of lands through which the navigation passed, with powers of joint using and leasing, with remainder to B., his eldest son, in tail. A. was a subscriber to the undertaking by reason of advances made by him before and after May 1792. In 1791 A. and B. suffered recoveries, and declared the uses to be to A. for life, and after his decease as A. and B. should jointly appoint; and until such joint appointment, A. was to be at liberty to exercise all powers given to him by the settlement of 1761. In 1792 A. and B. agreed to resettle the estates for valuable considerations moving from each of them; and by deed of the 17th May 1792, A. and B. appointed the lands, after the decease of A., and subject and without prejudice to his life estate, and to all powers and authorities then vested in or belonging to him, whether appendant or in gross or otherwise, to Z. in fee, in order that he might join in the intended resettlement of the estates; and by another deed of the 19th May, 1792, A., B., and Z., reciting A's powers under the settlement of 1761, and the intention of the parties to resettle the estates, subject to the powers thereinafter mentioned, conveyed the estates to A. for life, remainder to B. for life, remainder to his first and other sons in tail, and new powers of leasing and jointuring were given to A. This deed did not contain any saving of the former powers of A. under the settlement of 1761 or otherwise, and no allusion was made in it to the power of charging under the 19 & 20 Geo. 3, c. 32. A., by his will reciting the Act, devised all his shares in the company to B., his heirs, executors, etc., and charged the settled lands with 30,000*l.* for his only younger child:—Held, first, that the power to charge given by the Act was not destroyed by the recovery of 1791, it not being the intention of the parties to the recovery that the power should be destroyed thereby; secondly, that it was destroyed *quoad* advances made before the 19th May 1792, by the settlement of that date, which amounted to a contract by A. not to exercise the power as to advances then made, but that it existed as to subsequent advances; thirdly, that "heir" in the Act meant heir to the settled estate, and included, as far as the law would permit, all persons claiming in succession under the settlement, and that the power given by the Act was well executed by the will of A.; for that the bequest of the shares to B., his heirs, executors, etc., thereby made, enured, according to the title, for the benefit of the remainderman under the settlement; fourthly, the younger child of A., who was also his executor, having without fraud consented, *quâ* executor, that the company should issue new debentures in lieu of some which had been granted to A., and were lost by the executor:—Held, that the charge on the estate was not affected thereby. *Stewart* v. *Donegal* (*Marquis*), 2 J. & L. 636.

VI. BY SUCCESSIVE EXECUTIONS.

3. By a son's marriage settlement, lands were settled on father for life, with a power for him to make a jointure of such lands as he thought proper, not exceeding 600*l.* per annum; remainder to the son in tail, remainders over. The father afterwards, on his second marriage, conveys an estate of 900*l.* per annum to trustees, in trust, to pay 200*l.* clear as pin-money to intended wife, and, if she survive him, to pay her 300*l.* per annum for her jointure. After marriage, by a second deed, he gave her another 300*l.* per annum clear, as a further jointure. By a third deed, as further provision for the wife, he conveyed all the same lands to same trustees, to raise the further sum of 100*l.* for pin-money, and the net sum of 600*l.* per annum as a provision for her in case she survived him, in bar of all other provisions before made; and he thereby declared that it was the intention of that deed, and of the preceding ones, to secure a jointure to his then wife, not exceeding 600*l.* The son and trustees were decreed to convey a jointure not exceeding 600*l.* per annum, subject to taxes, repairs, etc. *Hervey* v. *Hervey*, 1 Atk. 561.

4. An estate having once borne a charge in favour of legatees or creditors is discharged, though the fund has been misapplied by the trustees. *Omerod* v. *Hardman*, 5 Ves. 736.

5. A power of appointing a fee may be executed at several times, viz., at one time to pass an estate for life, and the fee at another. *Bovey* v. *Smith*, 1 Vern. 85; 2 Ch. Ca. 124.

6. Where there was a joint power to husband and wife, of appointing a sum of money among children, with power, in default thereof, for the survivor to appoint, a partial execution by both of the original power was held to prevent the execution of the secondary power by the

wife, who survived. *Simpson* v. *Paul*, 2 Eden 34.

1. Power to husband and wife to charge a term in lands with a sum of money not exceeding 200*l.* for their daughters A. and B. as the husband and wife should appoint; and in failure of their joint appointment as the survivors should appoint, with interest from such time as the term should commence in possession, and not before. The term was not to commence in possession until after the death of the survivor. The husband and wife, in execution of the power, direct the 200*l.* to be equally divided between the two daughters, six months after the decease of the father and mother; and if either of them die before payment, or the money become due, then the share of her so dying to be laid out for the benefit of her executors; one of the daughters died after the appointment, and before the time of payment:—Held, a good appointment to the daughters themselves, but the appointment to executors is void; but as one of the appointees died before the time of payment her share sinks into the estate. The joint appointment having appointed the whole, the share of the daughter who died is not subject to any further appointment. *Brown* v. *Nisbett*, 1 Cox 13.

2. Testator empowered his executors for the time being to advance to his nephew any sum or sums of money not exceeding 30,000*l.* The executors exercised the power to the extent of 20,000*l.*:—Held, that they were not precluded thereby from making a further advance to the nephew. The case of *Brown* v. *Nisbett* (1 Cox 13) observed upon. *Webster* v. *Boddington*, 16 Sim. 177.

3. By a marriage settlement, the lands of the wife were limited to such uses as she should, notwithstanding her coverture, by deed or will appoint; and in default of appointment, to the use of the children of the marriage. After the husband's death, the wife, by way of appointment under the power contained in the settlement, executed three successive mortgages of the property in fee. Each mortgage deed contained a trust for sale, in default of repayment of the mortgage money; but the language of the two latter deeds differed from that of the former, not only as to the trust for sale, but as to the proviso for reconveyance and in other respects:—Held, that having regard to the construction of the latter deeds taken by themselves, and also in comparison with the former, the wife must be considered as having intended to devote the whole property to purposes beyond those of mere mortgage securities; and consequently, that by the latter deeds, or one of them, the power was exhausted. *Barnett* v. *Wilson*, 2 Y. & Coll. C. C. 407; 12 L. J., N. S., Ch., 428; 7 Jur. 593.

4. Property was settled in trust for the children of a marriage, as the husband and wife should jointly appoint; but if either the husband or the wife should die before any such appointment should be made, then as the survivor should solely appoint:—Held, that notwithstanding a joint appointment of part of the property, a sole appointment might be made of the remainder by the survivor. *Re Simpson's Settlement*, 4 De G. & Sm. 521; 20 L. J., Ch., 415.

5. Under a power to lend 2,500*l.* of the trust funds to the tenant for life:—Held, that it was not exhausted by one loan, but that, after repayment, the power might be exercised a second time. *Versturme* v. *Gardiner*, 17 Beav. 338.

6. Where there is a primary power, and no default of appointment, a secondary power, or partial exercise of the primary power, does not exclude the exercise of the secondary power. *Mapleton* v. *Mapleton*, 4 Drew. 515; 28 L. J., Ch., 785.

Power to a husband to appoint among children and issue of children living at the wife's death; in default of appointment, power to the wife to appoint to children and issue of children living at husband's death. The husband appointed to four children only, leaving a fifth living at his death, with issue. After his death the fifth child died, leaving three children, one of whom, A., was living at the death of the first donee, the other two being born afterwards. The second donee, the wife, then appointed among her four children, and to A., the eldest child of her deceased child:—Held, that although the two others would have been objects of the primary powers, their exclusion by the joint operation of the two powers did not render the execution of either bad. *Ib.*

7. A testator gave his widow E. J. full and complete control in the disposal of the principal moneys of his estate at such times and in such proportions as she might see fit, whether by will or otherwise, for the benefit of his children or grandchildren; but in the event of E. J.'s marriage or death, the trustees of the will were to divide the estate ratably amongst the testator's children, share and share alike. E. J. executed a deed-poll appointing a portion to a child, a portion to a grandchild, and a further portion to trustees in trust for the child:—Held, that all these appointments were valid executions of the power. *Job* v. *Job*, 2 W. R. 25.

8. In a suit to have an appointment under a discretionary power declared invalid, a subsequent appointment *pendente lite* upheld. *Ward* v. *Tyrrell*, 25 Beav. 563.

9. A power may be exercised from time to time by several appointments, to suit convenience and promote advantage, as exigencies arise, or as expediency may suggest. *Cuninghame* v. *Anstruther*, 2 L. R., H. L. (Sc.), 223.

10. Where successive irrevocable appointments are made in favour of the same person, the latter appointment will be held to be in substitution for the former, if such appears to be the intention of the donee of the power, and the person in whose favour the appointments are made will be compelled to elect between them. *England* v. *Lavers*, 3 L. R., Eq., 63; 15 W. R. 51.

A person having a power of appointment, by deed or will, over a fund in favour of his children, upon the occasion of the marriage of one of his daughters, E., appointed one-seventh to her; and upon the marriage of another of his daughters, L., appointed another one-seventh to her. He afterwards executed a deed-poll, by which, without noticing the previous appointments, he gave one-sixth of the fund to E., another sixth to L., three other sixths to other children, and left one-

sixth undisposed of. By his will he disposed of so much of the fund as was not then already appointed in favour of any of his children:—Held, that the appointments to E. and L., made by the deed-poll, were in substitution for those previously made, and raised a case of election, and that the will operated as an appointment of so much of the fund as was not disposed of by the deed-poll. *Ib.*

Of Powers of Revocation and New Appointment.] See XVIII. *post.*

VII. MERGER.

1. Where a donee of a power of charging becomes also entitled to the reversion in fee of the estates subject to the power, the power does not necessarily merge, but there must be an indication of an intention to that effect. *Sing* v. *Leslie*, 10 Jur., N. S., 794; 2 Hem. & M. 68; 33 L. J., Ch., 549; 4 N. R. 17.

A donee of a power to charge estates, of which he was entitled to the reversion in fee, with portions for younger children, by his will, "in exercise of the power, and of all other powers," charged the estates with 10,000*l.*, and directed the shares of the children to be interests vested at his death, and to be payable when the estates fell into possession. The testator died intestate as to the reversion, leaving five children, all of whom had attained twenty-one at the date of his will, but the execution of the power failed by his death before he became entitled to the actual freehold of the estates. None of the children were alive at the time when the reversion vested in possession:—Held, that, notwithstanding the failure of the power, the sum was raisable out of the testator's reversion in fee. *Ib.*

2. Power of appointment does not prevent the fee vesting, subject to be devested by execution of the power. Such a power is a mode which the owner of the estate reserves to himself, or gives to another, through the medium of the Statute of Uses, of raising and passing an estate. *Maundrell* v. *Maundrell*, 10 Ves. 265, 266.

A general power of appointment over the whole estate may subsist in the same person who has the fee simple. *Id.* 10 Ves. 247, overthrowing the principle of *Cross* v. *Hudson*, 3 Bro. C. C. 30. See note there.

3. By a marriage settlement an estate was settled on the husband for life, with a jointure to the wife secured by a term, with remainder to the issue, and, in default, to the husband in fee. The settlement contained a power of sale and exchange vested in trustees to be exercised with the consent of the husband or the person entitled to the rents. The husband died without issue, having devised his estate in trust to sell. The wife was living:—Held, that the power of sale given to the trustees of the settlement had ceased on the union of the estate for life with the immediate reversion in fee, and that it could not be exercised with any consent. *Wolley* v. *Jenkins*, 23 Beav. 53; 5 W. R. 281; 3 Jur., N. S., 321; 26 L. J., Ch., 379.

Merger of Charges.] See MERGER.

VIII. RELEASE.

1. *In General*, 5729.
2. *By Covenant not to exercise the Power*, 5730.
3. *Under Conveyancing Act*, 5732.

1. In General.

4. Learning as to what powers of appointment are capable of being extinguished or released. *West* v. *Berney*, 1 Russ. & M. 431. And see *Cunynghame* v. *Thurlow*, *id.* 436. n.

5. A tenant for life with a power of appointing the property by will to all or any of the testator's children, may release or extinguish the power. *Horner* v. *Swann*, T. & R. 430.

6. By a marriage settlement certain real property was settled upon the husband and wife for life, and afterwards to such of the children of the marriage as they should jointly appoint; in default of joint appointment, as the survivor should appoint, and, in default of such appointment, to the children equally, as tenants in common. The wife died without having joined in any appointment. The husband subsequently executed a deed-poll, by which he absolutely released his power of appointment given by the settlement, and afterwards, by his will, professed to execute the power of selection, without taking notice of the deed of release, and divided the property in unequal shares among his children:—Held, that the deed-poll releasing the power was valid, that the children took as tenants in common, and that the will was inoperative as an execution of the power. *Smith* v. *Plummer*, 17 L. J., N. S., Ch., 145.

7. Where trust funds were settled to the separate use of a married woman for her life, and after her death upon trust for such persons as she should by will appoint, and, in default of appointment, for her executors and administrators, she, having become a widow, applied for a transfer of the funds to herself and her assignees, offering to release her power of appointment:—Held, that she was absolutely entitled to the trust funds, and the order was made accordingly. *Page* v. *Soper*, 11 Hare 321.

8. A father had an exclusive power of appointment in favour of his children over a fund, which, in default, was limited to them equally, and, as representative of a deceased son, he was, in default of appointment, beneficially entitled to one-third of the fund. The father released the power to his mortgagees:—Held, that the power had been effectually destroyed, and the Court declared the rights of the parties consequent on such destruction. *Smith* v. *Houblon*, 26 Beav. 482.

9. By a post-nuptial settlement a settlor in 1837 granted lands to trustees, after the death of the survivor of the settlor and his wife, to such persons and for such uses as the settlor should by will appoint, and in default of appointment for all the children of the settlor. The deed contained an ultimate limitation, if there should not be any child of the existing marriage, for the settlor absolutely. In 1841 the wife died, leaving four children of the marriage. By a re-settlement in 1848, to which the same trustees were parties, after reciting

wife, who survived. *Simpson* v. *Paul*, 2 Eden 34.

1. Power to husband and wife to charge a term in lands with a sum of money not exceeding 200*l.* for their daughters A. and B. as the husband and wife should appoint; and in failure of their joint appointment as the survivors should appoint, with interest from such time as the term should commence in possession, and not before. The term was not to commence in possession until after the death of the survivor. The husband and wife, in execution of the power, direct the 200*l.* to be equally divided between the two daughters, six months after the decease of the father and mother; and if either of them die before payment, or the money become due, then the share of her so dying to be laid out for the benefit of her executors; one of the daughters died after the appointment, and before the time of payment:—Held, a good appointment to the daughters themselves, but the appointment to executors is void; but as one of the appointees died before the time of payment her share sinks into the estate. The joint appointment having appointed the whole, the share of the daughter who died is not subject to any further appointment. *Brown* v. *Nisbett*, 1 Cox 13.

2. Testator empowered his executors for the time being to advance to his nephew any sum or sums of money not exceeding 30,000*l.* The executors exercised the power to the extent of 20,000*l.*:—Held, that they were not precluded thereby from making a further advance to the nephew. The case of *Brown* v. *Nisbett* (1 Cox 13) observed upon. *Webster* v. *Boddington*, 16 Sim. 177.

3. By a marriage settlement, the lands of the wife were limited to such uses as she should, notwithstanding her coverture, by deed or will appoint; and in default of appointment, to the use of the children of the marriage. After the husband's death, the wife, by way of appointment under the power contained in the settlement, executed three successive mortgages of the property in fee. Each mortgage deed contained a trust for sale, in default of repayment of the mortgage money; but the language of the two latter deeds differed from that of the former, not only as to the trust for sale, but as to the proviso for reconveyance and in other respects:—Held, that having regard to the construction of the latter deeds taken by themselves, and also in comparison with the former, the wife must be considered as having intended to devote the whole property to purposes beyond those of mere mortgage securities; and consequently, that by the latter deeds, or one of them, the power was exhausted. *Barnett* v. *Wilson*, 2 Y. & Coll. C. C. 407; 12 L. J., N. S., Ch., 428; 7 Jur. 593.

4. Property was settled in trust for the children of a marriage, as the husband and wife should jointly appoint; but if either the husband or the wife should die before any such appointment should be made, then as the survivor should solely appoint:—Held, that notwithstanding a joint appointment of part of the property, a sole appointment might be made of the remainder by the survivor. *Re Simpson's Settlement*, 4 De G. & Sm. 521; 20 L. J., Ch., 415.

5. Under a power to lend 2,500*l.* of the trust funds to the tenant for life:—Held, that it was not exhausted by one loan, but that, after repayment, the power might be exercised a second time. *Versturme* v. *Gardiner*, 17 Beav. 338.

6. Where there is a primary power, and no default of appointment, a secondary power, or partial exercise of the primary power, does not exclude the exercise of the secondary power. *Mapleton* v. *Mapleton*, 4 Drew. 515; 28 L. J., Ch., 785.

Power to a husband to appoint among children and issue of children living at the wife's death; in default of appointment, power to the wife to appoint to children and issue of children living at husband's death. The husband appointed to four children only, leaving a fifth living at his death, with issue. After his death the fifth child died, leaving three children, one of whom, A., was living at the death of the first donee, the other two being born afterwards. The second donee, the wife, then appointed among her four children, and to A., the eldest child of her deceased child:—Held, that although the two others would have been objects of the primary powers, their exclusion by the joint operation of the two powers did not render the execution of either bad. *Ib.*

7. A testator gave his widow E. J. full and complete control in the disposal of the principal moneys of his estate at such times and in such proportions as she might see fit, whether by will or otherwise, for the benefit of his children or grandchildren; but in the event of E. J.'s marriage or death, the trustees of the will were to divide the estate ratably amongst the testator's children, share and share alike. E. J. executed a deed-poll appointing a portion to a child, a portion to a grandchild, and a further portion to trustees in trust for the child:—Held, that all these appointments were valid executions of the power. *Job* v. *Job*, 2 W. R. 25.

8. In a suit to have an appointment under a discretionary power declared invalid, a subsequent appointment *pendente lite* upheld. *Ward* v. *Tyrrell*, 25 Beav. 563.

9. A power may be exercised from time to time by several appointments, to suit convenience and promote advantage, as exigencies arise, or as expediency may suggest. *Cuninghame* v. *Anstruther*, 2 L. R., H. L. (Sc.), 223.

10. Where successive irrevocable appointments are made in favour of the same person, the latter appointment will be held to be in substitution for the former, if such appears to be the intention of the donee of the power, and the person in whose favour the appointments are made will be compelled to elect between them. *England* v. *Lavers*, 3 L. R., Eq., 63; 15 W. R. 51.

A person having a power of appointment, by deed or will, over a fund in favour of his children, upon the occasion of the marriage of one of his daughters, E., appointed one-seventh to her; and upon the marriage of another of his daughters, L., appointed another one-seventh to her. He afterwards executed a deed-poll, by which, without noticing the previous appointments, he gave one-sixth of the fund to E., another sixth to L., three other sixths to other children, and left one-

sixth undisposed of. By his will he disposed of so much of the fund as was not then already appointed in favour of any of his children:—Held, that the appointments to E. and L., made by the deed-poll, were in substitution for those previously made, and raised a case of election, and that the will operated as an appointment of so much of the fund as was not disposed of by the deed-poll. *Ib.*

Of Powers of Revocation and New Appointment.] See XVIII. *post.*

VII. MERGER.

1. Where a donee of a power of charging becomes also entitled to the reversion in fee of the estates subject to the power, the power does not necessarily merge, but there must be an indication of an intention to that effect. *Sing* v. *Leslie*, 10 Jur., N. S., 794; 2 Hem. & M. 68; 33 L. J., Ch., 549; 4 N. R. 17.

A donee of a power to charge estates, of which he was entitled to the reversion in fee, with portions for younger children, by his will, "in exercise of the power, and of all other powers," charged the estates with 10,000*l.*, and directed the shares of the children to be interests vested at his death, and to be payable when the estates fell into possession. The testator died intestate as to the reversion, leaving five children, all of whom had attained twenty-one at the date of his will, but the execution of the power failed by his death before he became entitled to the actual freehold of the estates. None of the children were alive at the time when the reversion vested in possession:—Held, that, notwithstanding the failure of the power, the sum was raisable out of the testator's reversion in fee. *Ib.*

2. Power of appointment does not prevent the fee vesting, subject to be devested by execution of the power. Such a power is a mode which the owner of the estate reserves to himself, or gives to another, through the medium of the Statute of Uses, of raising and passing an estate. *Maundrell* v. *Maundrell*, 10 Ves. 265, 266.

A general power of appointment over the whole estate may subsist in the same person who has the fee simple. *Id.* 10 Ves. 247, overthrowing the principle of *Cross* v. *Hudson*, 3 Bro. C. C. 30. See note there.

3. By a marriage settlement an estate was settled on the husband for life, with a jointure to the wife secured by a term, with remainder to the issue, and, in default, to the husband in fee. The settlement contained a power of sale and exchange vested in trustees to be exercised with the consent of the husband or the person entitled to the rents. The husband died without issue, having devised his estate in trust to sell. The wife was living:—Held, that the power of sale given to the trustees of the settlement had ceased on the union of the estate for life with the immediate reversion in fee, and that it could not be exercised with any consent. *Wolley* v. *Jenkins*, 23 Beav. 53; 5 W. R. 281; 3 Jur., N. S., 321; 26 L. J., Ch., 379.

Merger of Charges.] See MERGER.

VIII. RELEASE.

1. *In General*, 5729.
2. *By Covenant not to exercise the Power*, 5730.
3. *Under Conveyancing Act*, 5732.

1. In General.

4. Learning as to what powers of appointment are capable of being extinguished or released. *West* v. *Berney*, 1 Russ. & M. 431. And see *Cunynghame* v. *Thurlow*, *id.* 436. n.

5. A tenant for life with a power of appointing the property by will to all or any of the testator's children, may release or extinguish the power. *Horner* v. *Swann*, T. & R. 430.

6. By a marriage settlement certain real property was settled upon the husband and wife for life, and afterwards to such of the children of the marriage as they should jointly appoint; in default of joint appointment, as the survivor should appoint, and, in default of such appointment, to the children equally, as tenants in common. The wife died without having joined in any appointment. The husband subsequently executed a deed-poll, by which he absolutely released his power of appointment given by the settlement, and afterwards, by his will, professed to execute the power of selection, without taking notice of the deed of release, and divided the property in unequal shares among his children:—Held, that the deed-poll releasing the power was valid, that the children took as tenants in common, and that the will was inoperative as an execution of the power. *Smith* v. *Plummer*, 17 L. J., N. S., Ch., 145.

7. Where trust funds were settled to the separate use of a married woman for her life, and after her death upon trust for such persons as she should by will appoint, and, in default of appointment, for her executors and administrators, she, having become a widow, applied for a transfer of the funds to herself and her assignees, offering to release her power of appointment:—Held, that she was absolutely entitled to the trust funds, and the order was made accordingly. *Page* v. *Soper*, 11 Hare 321.

8. A father had an exclusive power of appointment in favour of his children over a fund, which, in default, was limited to them equally, and, as representative of a deceased son, he was, in default of appointment, beneficially entitled to one-third of the fund. The father released the power to his mortgagees:—Held, that the power had been effectually destroyed, and the Court declared the rights of the parties consequent on such destruction. *Smith* v. *Houblon*, 26 Beav. 482.

9. By a post-nuptial settlement a settlor in 1837 granted lands to trustees, after the death of the survivor of the settlor and his wife, to such persons and for such uses as the settlor should by will appoint, and in default of appointment for all the children of the settlor. The deed contained an ultimate limitation, if there should not be any child of the existing marriage, for the settlor absolutely. In 1841 the wife died, leaving four children of the marriage. By a re-settlement in 1848, to which the same trustees were parties, after reciting

that it had been proposed that the settlor should give up his life estate in the premises, and forego the power given to him of appointing by will, the settlor granted the rents and profits during his life to the trustees for the benefit of his four children. He also covenanted with the trustees that he would not make any will whereby the trusts thereby declared should be impeached or defeated, and released the trustees from all the trusts of the former settlement. Shortly afterwards he married again, and had seven children by the second marriage. He died in 1866, having devised and bequeathed all his real and personal estate upon trust for his wife for life, and after her death upon trust to sell, and divide the proceeds among the children of the second marriage:—Held, that the covenant and release in the deed of 1848, though voluntary, operated in equity as an effectual release of the power of appointment by will in the settlement of 1837. *Isaac* v. *Hughes*, 9 L. R., Eq., 191; 39 L. J., Ch., 379; 22 L. T., N. S., 11.

Held, also, that the power was wholly released, and that the release of the power was not confined to the shares of the children of the first marriage, who alone were living at the date of the deed of 1848. *Ib.*

2. By Covenant not to exercise the Power.

1. Three powers by settlement, first to raise 3,000*l.*; secondly, to husband alone; thirdly, to husband and wife jointly, to raise and appoint such sum as would, with the sum before raised, make 5,000*l.*: the wife joining in raising 3,000*l.* under the joint power for the husband, he covenanted not to charge by the power reserved to him alone, or any other power whatsoever, during her life, and so long as said 3,000*l.* should remain unpaid with her consent. After her death he, by deed-poll, did charge with 2,000*l.* more to be paid to his executors for debts, etc., and otherwise in performance of his will, or as he should appoint by it, and died, leaving his second wife executrix, without taking notice by his will of the charge, but the deed-poll was found uncancelled among his papers. The 2,000*l.* well charged, and went to the executrix without a special appointment. *Uxbridge (Earl)* v. *Bayly*, 1 Ves. J. 499; 4 Bro. C. C. 13.

2. The donee of a power, though to be executed by will only, may bind himself not to execute it, or not to do so except under certain restrictions. *Re Chambers*, 11 Ir. Eq. R. 518.

3. A person being seised of a life estate in lands, and being indebted in various sums of money secured by his bonds, filed a bill to restrain proceedings at law on them, on account of usury, and then entered into a consent in the cause with his creditors, whereby it was agreed that a certain sum should be found due on foot of those bonds, and the consent was embodied in the Master's report, and a decree pronounced declaring that the said sum was due and well charged on the lands in the pleadings mentioned:—Held, that the consent was such an act or contract on the part of the debtor, as, when acted on and embodied in the decree of the Court, deprived him of the right of executing a power to charge the life estate with portions for younger children, so as to affect the rights of the creditors under the decree which had attached upon his life estate. *Piers* v. *Twits*, 1 Dr. & Wal. 279.

4. The 19 & 20 Geo. 3, c. 32, incorporated the undertakers of the Lagan Navigation, and enacted that it should be lawful for every subscriber towards completing the navigation, and through whose lands it should pass, to charge his real estate, for the use of his younger children, with the payment of such sums of money and other interest which he might have in the joint stock of the company, as he should assign or bequeath to his heir, any settlement to the contrary notwithstanding. Under a settlement of 1761, A. was tenant for life of lands through which the navigation passed, with powers of joint using and leasing, with remainder to B., his eldest son, in tail. A. was a subscriber to the undertaking by reason of advances made by him before and after May 1792. In 1791 A. and B. suffered recoveries, and declared the uses to be to A. for life, and after his decease as A. and B. should jointly appoint; and until such joint appointment, A. was to be at liberty to exercise all powers given to him by the settlement of 1761. In 1792 A. and B. agreed to resettle the estates for valuable considerations moving from each of them; and by deed of the 17th May, 1792, A. and B. appointed the lands, after the decease of A., and subject and without prejudice to his life estate, and to all powers and authorities then vested in or belonging to him, whether appendant or in gross or otherwise, to Z. in fee, in order that he might join in the intended resettlement of the estates; and by another deed of the 19th May, 1792, A., B., and Z., reciting A.'s powers under the settlement of 1761, and the intention of the parties to resettle the estates, subject to the powers thereinafter mentioned, conveyed the estates to A. for life, remainder to B. for life, remainder to his first and other sons in tail, and new powers of leasing and jointuring were given to A. This deed did not contain any saving of the former powers of A. under the settlement of 1761 or otherwise, and no allusion was made in it to the power of charging under the 19 & 20 Geo. 3, c. 32. A., by his will reciting the Act, devised all his shares in the company to B., his heirs, executors, etc., and charged the settled lands with 30,000*l.* for his only younger child:—Held, first, that the power to charge given by the Act was not destroyed by the recovery of 1791, it not being the intention of the parties to the recovery that the power should be destroyed thereby; secondly, that it was destroyed *quoad* advances made before the 19th May, 1792, by the settlement of that date, which amounted to a contract by A. not to exercise the power as to advances then made, but that it existed as to subsequent advances; thirdly, that "heir" in the Act meant heir to the settled estate, and included, as far as the law would permit, all persons claiming in succession under the settlement, and that the power given by the Act was well executed by the will of A.; for that the bequest of the shares to B., his heirs, executors, etc., thereby made, enured, according to the title, for the benefit of the remainderman under the settlement; fourthly, the younger child of A., who was also his executor,

having without fraud consented, *quâ* executor, that the company should issue new debentures in lieu of some which had been granted to A., and were lost by the executor:—Held, that the charge on the estate was not affected thereby. *Stewart* v. *Donegal* (*Marquis*), 2 J. & L. 636.

1. Property was settled, on the marriage of A. and B., on their children, as A. and B., or the survivor of them, should appoint, and in default of appointment on the children equally, if they survived A. and B.,—and the issue of any who died earlier, to take their parent's share. A., on the marriage of his daughter, promised in writing that neither he nor his wife would exercise the power, on the faith of which promise the daughter's share in the fund in default of appointment was settled; but subsequently A. and B. did execute the power:—Held, that a child of the daughter's marriage, who was prejudiced by the appointment, was entitled, after her mother's death, to have the appointment set aside, although her claim was paramount to her mother's settlement. *Walford* v. *Gray*, 5 N. R. 235.

2. A tenant for life, with a power of charging portions for younger children, mortgaged his life estate, and covenanted that he would not exercise the power without the consent of the mortgagees. He soon afterwards exercised the power in favour of his daughter on her marriage, and appointed the estate to trustees for a term of years to raise the portions. The trustees had notice of the covenant:—Held, that the portions must be postponed to the mortgages. *Hurst* v. *Hurst*, 1 W. R. 105; 22 L. J., Ch., 538; 16 Beav. 372.

3. A testamentary power of appointment may for valuable consideration be released by means of a covenant on the part of the donee of the power. *Davies* v. *Huguenin*, 2 N. R. 101.

Covenant by a father in his daughter's marriage settlement not to exercise a power so as to diminish her portion under the father's settlement:—Held, a release *pro tanto* of the power. S. C. 1 Hem. & M. 730.

By a voluntary settlement D. conveyed freehold estates to trustees, to the use of D. and his wife, successively for their lives, with remainder to the use of their children, as D. should by will, or in default of appointment by him as his wife should by will, appoint, and in default of appointment to the use of trustees for 500 years, with remainder to the use of the first and other sons of D. and his wife successively in tail male; and the trusts of 500 years' terms were declared to be as soon as conveniently might be after the death of the survivor of D. and his wife; in case D. should have issue by his wife one son and also two or more children, then in trust to raise 6,000*l.* for the portion or portions of any child or children of D. and his wife, other than their eldest and only son, equally to be divided between them if more than one. No period was fixed for vesting the portions. D., by a settlement on the marriage of his daughter H., covenanted that he would not execute any appointment, or do any other act to diminish the share to which she might become entitled under the first mentioned settlement; subsequently D., by will, appointed the estate to his second son J., charged with 1,000*l.* in favour of H., and 3,000*l.* in favour of another daughter:—Held, that by the covenant D. had released his testamentary power to the extent of disabling himself from affecting the share of H. by any subsequent exercise thereof (but not to any greater extent), and that she was entitled to the same share in the 6,000*l.* that she would have taken in default of appointment. S. C. 32 L. J., Ch., 417; 11 W. R. 1040; 8 L. T., N. S., 443.

4. An equitable power of appointment may be effectually released by means of a voluntary covenant not to exercise it, entered into by the donee of the power, with the trustees of the fund, subject to the power. *Isaac* v. *Hughes*, 9 L. R., Eq., 191; 39 L. J., Ch., 379; 2 2 L. T. 11.

5. In 1825, D. mortgaged an estate to I. in fee (subject, among other incumbrances, to an existing mortgage for 3,000*l.*) to secure 27,000*l.* payable at the end of twelve months, with interest in the meantime. The mortgage deed contained a power of sale providing that if default should be made in payment of the interest, or any part of it, for a month after any of the days appointed for payment, or in payment of the principal on the appointed day, then at any time thereafter, though no advantage should have been taken of any previous default, I., his heirs or assigns, might sell. In 1830, I. having called for payment, a deed of transfer was executed to K. and R. This deed, after reciting that I. was entitled to the prior mortgage for 3,000*l.*, recited the mortgage of 1825, and that "in the now reciting indenture a power of sale is contained for the better securing of the principal and interest, but the power has not been, and is not intended to be exercised," and recited the calling in of the mortgage moneys, and that D. had applied to K. and R. to discharge them, "which K. and R. have agreed to do on having the said sums so agreed to be advanced as aforesaid secured to them by an assignment of the several securities hereinbefore recited, and generally in the manner hereinafter appearing." Then, in consideration of 30,000*l.* paid to I. by K. and R., I., at the request of D., assigned, and I. confirmed to K. and R., the moneys due on the mortgages, "and all powers and remedies for recovering the same sums respectively, and all benefit of the several indentures of mortgage, and of every covenant and security therein respectively contained." Then I. conveyed and D. confirmed to K. and R. in fee the mortgaged estates, subject to a proviso for redemption if D. should pay the principal of 30,000*l.* on the day therein named, being at the expiration of seven years, and should in the meantime pay interest half-yearly on the days therein named. It was agreed that the money should remain on the security for seven years, D. not to be at liberty to pay it off sooner, and K. and R. not to call for payment sooner, unless default was made in payment of interest, or D. died. There was a power of sale to arise if default should be made in payment of the principal or interest contrary to the terms of the proviso for redemption; and a covenant by K. and R. that no sale of the property should be made without three months' notice. The persons claiming under K. and R. having put up the

property for sale, the purchasers objected that the power of sale in the deed of 1825 was gone, and that the vendors could not make a good title as against mesne incumbrancers:—Held, that the power of sale in the mortgage of 1825 was still subsisting, and capable of being exercised. *Boyd* v. *Petrie*, 7 L. R., Ch., 385; 41 L. J., Ch., 378; 20 W. R. 513; 25 L. T., N. S., 460.

3. Under Conveyancing Act.

1. Section 52 of the Conveyancing Act 1881 does not enable trustees who have confided to them a joint power of appointment over property in the nature of a trust to release such power. The property in such a case can only be made distributable during the lives of the trustees by their jointly executing an irrevocable appointment. *Re Eyre*, *Eyre* v. *Eyre*, 49 L. T. 259.

IX. SUSPENSION BY MARRIAGE.

2. Where a power is given to a woman to dispose of estate by will, and she marries, *semble*, it is a suspension of power. *Sed quære.* *Rich* v. *Beaumont*, 6 Bro. P. C. 152.

3. By a marriage settlement, certain stock in the funds was settled upon the intended husband and wife for their joint lives, and the life of the survivor, and then upon the children of the marriage, with a power to the trustees, with the consent of the wife, to advance part of the fund for the benefit of the children in her lifetime. There were four children of the marriage; the husband died; the wife married again; the second husband assigned the wife's life interest for value; after the assignment the trustees, with the consent of the wife, exercised the power of advancement in favour of the children of the first marriage:—Held, that the power was well executed as against the assignee of the second husband. *Whitmarsh* v. *Robertson*, 1 Colly. 571; 14 L. J., N. S., Ch., 157; 9 Jur. 125. And see S. C. 1 Y. & Coll. C. C. 715; 11 L. J., N. S., Ch., 404; 6 Jur. 921.

4. A *feme sole*, by a settlement made three years before her coverture, declared the trusts of a fund, which she had previously transferred into the names of trustees, to be for such person or persons and for such uses as she should by deed appoint, and in default of such appointment, for herself so long as she should continue sole and unmarried, and in the event of her marriage, for herself for life for her separate use, without power of anticipation, with remainder for all or any one or more of her children, grandchildren, or other issue, as she should by deed or will appoint, with remainder, in default of such appointment, for her children equally, with remainder in default of children who should obtain a vested interest, for her next of kin as therein mentioned:—Held, that, upon the marriage of the settlor, her ability to exercise the general power of appointment reserved in the settlement became suspended, the trust declared of the fund in the event of marriage being inconsistent with the continuance of a general power of appointment reserved in the settlor over the fund. *Gould* v. *Gould*, 2 Jur., N. S., 484; 25 L. J., Ch., 642; 4 W. R. 484

VI. Lapse and Interests Undisposed of.

I. *Death of Donee of Power. Effect on Appointee*, 5732.
II. *Death of Appointee*, 5733.
III. *Interests undisposed of*, 5736.

I. DEATH OF DONEE OF POWER. EFFECT ON APPOINTEE.

5. Legacy to A., with power to appoint principal, if no appointment, then to B. A. dies in lifetime of testator, B. takes remainder immediately on testator's death, though A., had she survived testator, might have defeated remainder in B. *Chatteris* v. *Young*, 6 Madd. 30. Affirmed 2 Russ. 183.

6. A testator gave the residue of his real and personal estate to trustees, upon trust, to pay the income to his wife for life, to her separate use, and after her decease, as to a moiety of the trust funds, for such persons as she should by deed or will appoint, and in default of appointment to her next of kin, as in case of distribution of intestate's estates. The wife died in the testator's lifetime:—Held, that the moiety had not lapsed. *Hardwicke* v. *Thurston* (4 Russ. 380; 6 L. J., Ch., 114) followed. *Edwards* v. *Salaway*, 2 De G. & Sm. 248; 17 L. J., N. S., Ch., 329; 12 Jur. 493. Affirmed 2 Ph. 625; 12 Jur. 487.

7. A legacy was given to the separate use of a married woman during the joint lives of her and her husband, and in case she survived him, to her absolutely; but if she did not survive him, to such persons as she should by will appoint, and in default of appointment, to her next of kin exclusive of her husband. She died in the lifetime of her husband and the testator:—Held, that the legacy lapsed. *Baker* v. *Hanbury*, 3 Russ. 340; 1 L. J., Ch., 78.

8. A gift by will of real and personal estate to L. for life, and then to L.'s husband for life, and then to her appointees by deed or will; and in default, to her "next of kin, according to the statutes of distribution of personal estate, and in the like shares and proportions as if she had died without having been married;" with a direction to L. to appoint trustees, in whom the property was to be vested, upon the above trusts. L. died in the lifetime of the testatrix, leaving the testatrix, who was her mother, and one other person, who was the only child of her only sister, her next of kin, according to the statute:—Held, that the gift to the next of kin had not lapsed. *Nichols* v. *Haviland*, 1 Kay & J. 504; 1 Jur., N. S., 891.

9. A legacy to the testator's daughter, with a gift over, in the event of her dying unmarried, to such of the testator's other children as she should appoint, and, in default of appointment, to and amongst his other children equally, is not an absolute gift, and does not lapse by the death of the daughter unmarried in the lifetime of the testator; and, consequently, the power of appointment not having been exercised, one of the testator's other children was held to be entitled to a distributive share of his sister's legacy; with interest in the absence of laches on his part, from the death of the testator in 1847, according

to the express trust in the will. *Kellett* v. *Kellett*, 5 Ir. R., Eq., 298.

II. DEATH OF APPOINTEE.

1. *Under Special Powers*, 5733.
2. *Under General Powers*, 5734.
3. *Effect of Wills Act, s.* 33, 5736.

1. Under Special Powers.

1. An appointment is made to all and every the daughter and daughters of R., and the heirs of their body and bodies, and in default of such issue to A. There were only two daughters, and one of them died under twenty-one, *sans* issue:—Held, that the surviving daughter was entitled, though there were no cross-remainders between them. *Wright* v. *Cadogan* (*Lord*), 1 Bro. P. C. 486.

2. Appointment by will under a power, void by the death of the appointee in the life of testatrix; and if a power is preferred to be executed by a will, such instrument must have all the qualities of a will. *Oke* v. *Heath*, 1 Ves. 139.

A wife having power to appoint 4,000*l.* to any of her kin, and for want of appointment to go according to the statute, appoints it by will to her nephew, "upon condition" that he paid his mother an annuity of 100*l.* She then bequeathed to her niece, S., all the real and residue of what she had power to dispose of. The nephew dying in her lifetime, the appointment as to him was void; but not so as to the annuitant; and the remainder was held to pass by the above residuary bequest. *Id.* 135.

3. Devise of 30,000*l.* to testator's wife for life, and afterwards to be distributed among his children, as she by deed, will, or instrument in nature of a will, should appoint. She having married again, appoints by will (*inter alia*) unto two of the children, who died in her lifetime:—Held, that their representatives were not entitled, and that the shares so appointed to them lapsed and fell into the residue. *Marlborough* (*Duke*) v. *Godolphin*, 2 Ves. 61.

Appointee under a power must claim also according to nature of the instrument. *Id.* 77.

Appointee takes under the power, as if inserted therein, but not so as to take by relation from creation of the power, as in assignment on commission of bankruptcy, or in bargain and sale enrolled. *Ib.*

Naked powers construed strictly; powers coupled with interest liberally. *Ib.*

4. A testator gave the interest of a fund to his widow for life, with a power of appointment amongst all his children, and in default of appointment amongst all such children, with a gift over to the widow, in case all the children should die before their shares should become payable; the widow appointed the fund to her two children, one of whom died in her lifetime:—Held, that the survivor took the whole fund. *Bielefield* v. *Record*, 2 Sim. 354.

5. The trust of a term limited by marriage settlement, was declared to be in case there should be issue male of the marriage, and one or more younger children, to raise 3,000*l.* for the portions of such younger children, in such shares and proportions as J. C., by any writing, etc., should appoint; and for want of appointment equally amongst the children, the portions of the sons to be paid at twenty-one, and of the daughters at twenty-one or marriage. J. C. by will appointed 1,250*l.*, part of the 3,000*l.*, to one of his younger sons, who, after the making of the will, attained the age of twenty-one, but died in the lifetime of the appointor:—Held, that the sum of 1,250*l.* went as in default of appointment. *Colthurst* v. *Colthurst*, 2 Jones 262.

6. When father has a power to appoint among children, and one died in his lifetime:—Held, that share which lapsed by death should go among all, as in default of appointment, notwithstanding a direction that each receiving a share should release the fund; and there is no presumption of satisfaction or purchase from another provision which was expressly made in satisfaction of different interest. *Burges* v. *Manbey*, 10 Ves. 319.

7. The donee of a power to appoint 5,900*l.* consols among her children, appointed 1,400*l.* to each of her three sons, and then appointed to her daughter the residue which would remain of the consols, after setting apart a sufficient portion to answer and satisfy the appointment made in favour of her sons; and it was provided that the appointment made in favour of the sons should be subject to revocation and new appointment, but that the appointment in favour of the daughter should be irrevocable. Two of the sons died in the lifetime of the mother, the donee of the power:—Held, that the shares appointed to the deceased sons were unappointed, and went as in default of appointment. *Lakin* v. *Lakin*, 11 Jur., N. S., 522; 13 W. R. 704; 12 L. T., N. S., 517; 34 Beav. 443.

8. Trusts in marriage articles to pay certain funds, the property of the wife, to all and every her child and children, in such parts, etc., as she should by will give, etc., and for want of such gift, etc., to all and every her child and children, part and share alike, and for want of such issue, over. By her will she gave ten guineas, part of the fund, to her eldest son, declaring that he was otherwise provided for by the will of his uncle; and the remainder she gave to all her other children, naming them, equally, with survivorship in case of the death of any during minority, and before receipt of his, her, or their shares; and in case of the death of her eldest son before he comes to the possession of his uncle's fortune, she gave her second son only ten guineas. The only provision for the eldest son was a remainder in tail after the life estate of his father, who survived his wife. The Court was of opinion that a share appointed to a child who died in the lifetime of her mother, lapsed. *Vanderzee* v. *Aclom*, 4 Ves. 771.

9. Renewal of a college lease by tenant for life, with a power of appointment in her own name and at her expense, has not the effect of an appointment in her own favour; and therefore, by the death of the appointee in the life of the tenant, there will be a resulting trust by lapse for the representative of the author of the power. *Brookman* v. *Hales*, 2 Ves. & B. 45.

10. By the marriage settlement of A., a sum of 15,000*l.* was to be raised for the portions

of the younger children, in such shares, and payable at such times, as A. should appoint; and in default of appointment, among the children equally; the share of each son to be vested at twenty-one, and of each daughter at twenty-one or marriage; with a *proviso* that the share of any younger child, dying before the time prescribed for the vesting of his or her portion, should go over to the survivors. Afterwards A., by his will, bequeathed unto all and every his daughters who should be living at his death, or born in due time afterwards, 40,000*l.*, share and share alike; but if he should have only one daughter, then unto such only daughter the sum of 20,000*l.*; to be paid to them or her, at such time or times, etc., as the provisions made for them by this marriage settlement was payable. A. died, leaving two daughters, one of whom died under age and unmarried:—Held, that the surviving daughter was entitled to the whole of the 40,000*l.*, if the personalty was sufficient to raise it. *Sandford* v. *Irby*, 4 L. J., Ch., 28.

Quære, whether the surviving daughter would be entitled to such part of 20,000*l.* (moiety of the 40,000*l.*) as it might be necessary to raise out of real estate. *Ib.*

1. The trust of a term limited by marriage settlement was declared to be in case there should be issue male of the marriage, and one or more younger children, to raise 3,000*l.* for the portions of such younger children, in such shares and proportions as J. C., by any writing, etc., should appoint; and for want of appointment equally amongst the children, the portions of the sons to be paid at twenty-one, and of the daughters at twenty-one or marriage. J. C. by will appointed 1,250*l.*, part of the 3,000*l.*, to one of his younger sons, who, after the making of the will, attained the age of twenty-one, but died in the lifetime of the appointer:—Held, that the sum of 1,250*l.* went as in default of appointment. *Colthurst* v. *Colthurst*, 2 Jones 262.

2. Where a definite fund is subject to a special power of appointment by will, and by a will purporting to be made in exercise of the power, one sum, part of the fund, is appointed to one person, and another sum, other part of it, to another, and "all the rest," or "all the remainder" of the fund to a third; the third appointee cannot claim a share which may lapse in consequence of the death of either of the former appointees in the lifetime of the testator. *Re Harries*, 1 Johns. 199.

But if there is upon the will a plain indication of an intention to appoint the whole that may remain strictly in the shape of residue, or to appoint the entire fund charged only with the sums specified in the preceding appointments, then the residuary clause will be read as an appointment, not of the mere balance of the fund after the sums so previously appointed have been deducted from it, but of the entire fund, subject to the preceding appointments, the Court acting upon the manifest intention of the testator to dispose of the entire fund over which he has a power of appointment. *Ib.*

Appointment by will of the residue and remainder of the said moneys (meaning thereby the sums secured by certain policies of assurance and all bonuses and other sums of money which had accrued or should accrue by virtue of the same), after payment of certain sums specified in previous appointments contained in the will:—Held, upon the whole of the will, to pass a sum which had lapsed by reason of the death of an appointee in the lifetime of the testator. *Ib.*

2. Under General Powers.

3. Renewal of a college lease by tenant for life, with a power of appointment, in her own name, and at her expense, has not the effect of an appointment in her own favour; and, therefore, by the death of the appointee, in the life of the tenant, there will be a resulting trust by lapse for the representative of the author of the power. *Brookman* v. *Hales*, 2 Ves. & B. 45.

4. Appointment of a sum of money by will; the appointee to pay an annuity, and give bond for the payment; the appointment lapsing by the death of the appointee in the life of the testator, the annuity is a trust by way of legacy, not a condition. *Taylor* v. *George*, 2 Ves. & B. 381.

5. A married woman having a power, by will gave part of the fund to a person who died in her lifetime, and the residue of the said fund, "after deducting the legacy before mentioned," she gave to A. B.:—Held, that he was entitled to the whole fund. *Carter* v. *Taggart*, 16 Sim. 423.

6. A testatrix having a general power of appointment over a sum of stock under the will of T. S., appointed the stock to her sons Joseph and John and her other children equally, and she left any other sum of money or property to which she then was or might thereafter become entitled under the will of T. S. to be divided amongst such of her children as might be living at her death, and she constituted Joseph her residuary legatee. John died before her:—Held, that Joseph was entitled to the share of the stock intended for John. *Re Spooner's Trust*, 2 Sim., N. S., 129; 21 L. J., N. S., Ch., 151.

7. A lady had a general power of appointing a trust fund by deed or will, and in default half was limited to A., and the other to B. By her will she appointed the fund to her executor, and made it chargeable with her debts and some legacies, and she gave half the residue, composed of the appointed fund and her own property, to A. A. predeceased the testatrix, and the bequest to him lapsed:—Held, that the moiety of the fund, subject to the power thus appointed in favour of A., passed to the appointor's next of kin, as part of her estate undisposed of, and not to the executors of A., as in default of appointment. *Chamberlain* v. *Hutchinson*, 22 Beav. 444.

8. A married woman having, under her marriage settlement, a general testamentary power, by will appointed the settled property to trustees, after specific gifts of chattels, for conversion and payment of debts and legacies, and gave the residue to persons whom she appointed her executors, in equal shares. Of these shares one lapsed and another was forfeited:—Held, that the exercise of the power did not make the appointed property her absolute estate, but that the lapsed and forfeited shares went as in default of appoint-

ment under the settlement. *Hoare* v. *Osborne*, 10 Jur., N. S., 694; 12 W. R. 661; 10 L. T., N. S., 258; 33 L. J., Ch., 586.

1. A testatrix devising property by will by virtue of a power of appointment:—Held, upon the construction of the will, to have made the property her own, so that on the death of the devisee in her lifetime the gift over in default of appointment did not take effect. *Hoare* v. *Osborne* (12 W. R. 661; 33 L. J., Ch., 586) disapproved. *Willoughby Osborne* v. *Holyoake*, 22 L. R., Ch. D., 238; 52 L. J., Ch., 331; 48 L. T. 152; 31 W. R. 236.

2. When a married woman, having a general testamentary power of appointment over personal property, appoints the whole property to trustees in such a manner as to show an intention to make it part of her general personal estate, any undisposed of beneficial interest will belong to those entitled *ab intestato*, not to those entitled in default of appointment. *Bickenden* v. *Williams*, 38 L. J., Ch., 222; 7 L. R., Eq., 310; 17 W. R. 441.

3. A testator directed that, in case of one of his daughters having no child, his trustees should stand possessed of a sum of 3,000*l.*, and the stock upon which it should be invested, including the accumulations of the surplus dividends which should not have been applied in manner in the will mentioned during the daughter's minority, upon such trusts as the daughter should by will appoint, and in default of appointment upon the trusts, by his will declared, of his own residuary estate. The daughter, having no child, by her will, after reciting that the 3,000*l.* and the accumulated dividends had been blended with funds to which she was absolutely entitled, in a sum of 6,700*l.* consols, standing in the names of trustees, proceeded, in express execution of the power, to direct that the 3,000*l.*, and the stock upon which that sum or the surplus dividends should have been invested, should be transferred to certain trustees named in her will, upon trust, as to 2,700*l.* consols for her mother, and as to 250*l.* consols for another person, and as to the residue upon the trusts after declared of her residuary estate. She then proceeded to give what she described as "all the residue of my stock in the public funds, and all my moneys, and securities for money, and all the residue of my estate and effects," to the same trustees, upon certain trusts, which she proceeded to declare. The mother died in the daughter's lifetime:—Held, that the 2,700*l.* consols was not well appointed, and that it was subject to the trusts declared by the testator of his residuary estate. *Easum* v. *Appleford*, 5 Myl. & C. 56; 10 L. J., N. S., Ch., 81. Affirming 10 Sim. 274; 4 Jur. 981.

4. B. had a general power of appointment over stock. By will he appointed the stock in favour of C., who died in B.'s lifetime. B., by a codicil to his will, gave all his personal estate, and also "any interest or dividends that might be due on his decease from the stock," to his wife absolutely:—Held, that the stock passed. *Bush* v. *Cowan*, 9 Jur., N. S., 429; 11 W. R. 395; 9 L. T., N. S., 161.

5. D. bequeathed his residuary estate to his wife for life, with a general testamentary power over one moiety of it. The wife died, having appointed to four persons, two of whom predeceased her, and having directed payments of her debts, and appointed an executor:—Held, that the next of kin of D., and not the next of kin of the wife, were entitled to the shares of the two deceased appointees. *Re Davies*, 41 L. J., Ch., 97; 13 L. R., Eq., 163; 25 L. T., N. S., 785; 20 W. R. 165. This decision was followed and approved in *Re De Lusi*, 3 L. R., Ir., 232.

6. An appointment by a married woman under a general testamentary power of personal property in trust for two persons, which appointment failed partially by lapse through the death of one of the beneficiaries:—Held, to make the lapsed portion of the property the absolute estate of the appointor, so that it was taken out of the settlement and devolved upon the testatrix's next of kin. *Wilkinson* v. *Schneider*, *Re Le Blanc*, 39 L. J., Ch., 410; 9 L. R., Eq., 423.

7. Under a settlement two sums of stock were vested in A., B., and C., as trustees, upon trust as testatrix, a married woman, should by will appoint, and in default of appointment upon other trusts. Testatrix, in exercise of that power, appointed that A., B., and C. should stand possessed of the said two sums in trust to pay a legacy of 2,000*l.* (which lapsed) and other legacies amounting to 6,100*l.* She bequeathed to her husband 2,000*l.*, which she authorised her executors to pay, and bequeathed to him her H. stock not included in the settlement. She directed that her funeral expenses be paid by her said trustees out of her said trust property, and that her legacies be paid free of duty. And as to all the residue of her personal estate whatsoever she bequeathed the same to her nephew, who died in her lifetime. She appointed A., B., and D. her executors. At the date of the will the value of the trust property was about 11,000*l.*, and she had no other property except the H. stock and some small savings of her separate estate:—Held, that the trust property was intended by the testatrix to be taken out of the settlement for all purposes, and that, having regard to s. 27 of the Wills Act, the balance, after payment of all the legacies, duty, and expenses, became part of her personal estate and passed to her husband. *Re Pinèdes Settlement*, 12 L. R., Ch. D., 667; 48 L. J., Ch., 741; 41 L. T. 579; 28 W. R. 178.

8. The effect of a testamentary appointment, either of real or personal estate, to a trustee upon trust for A., who dies in the lifetime of the appointor, is that the appointed property does not revert to the donor of the power, nor to those who would have taken under a gift over (if any) in default of appointment, but remains part of the general estate of the appointor. *Re Van Hagan*, *Sperling* v. *Rochfort*, 16 L. R., Ch. D., 18; 50 L. J., Ch., 1; 44 L. T. 161; 29 W. R. 84. Reversing 49 L. J., Ch., 705.

9. H., by his will dated in 1826, gave his mother, E., a general power of appointment over certain real estate, and provided that in case she died without a will her property should go over to C. E. by her will in 1853 executed the power in these terms: "As to and concerning all the real estate whatsoever and wheresoever of or to which I or any person or persons in trust for me am, is, or are seised or in any way entitled, or over which I have (either under or by virtue of the will of my deceased

son), or over which I shall have any power to dispose. . . . I give, devise, limit, divest, and appoint the same unto and to the use of trustees, their heirs and assigns, in trust for G., his heirs and assigns, for ever." G. predeceased the testatrix two days. She made no residuary devise:—Held, that by exercising the power as she had done, the testatrix had made the property her own; and, therefore, that the trust in favour of G. having failed, the property did not go to C. (as in default of appointment), but that there was a resulting trust in favour of E.'s heir-at-law. *Ib.*

Semble, if the heir-at-law could not be found, the title of the trustees was good as against the Crown. *Ib.*

1. Testator by his will gave a sum of money to his son M. upon trust to invest and to pay the income unto his daughter A. for her separate use for life, and after her death upon trust to pay the principal sum and interest unto such persons as A. should by deed or will appoint, and in default of appointment upon trust for M.'s own benefit. The testator bequeathed to M. his residuary estate, and appointed him sole executor. The money was invested by M. upon mortgages, and the income paid to A. till her death. A., who was not seised or possessed of any other property, by her will gave all her money and securities for money, furniture, and all other her personal estate and effects and property, and all her real estate, if any, unto her two sisters H. and C. in proportion, *i.e.*, one-third part of all her real and personal property and effects to H., and two-thirds of all her real and personal property and effects to C., absolutely, and she appointed C. sole executrix, and charged her property and effects with the payment of her debts and funeral and testamentary expenses. C. died in 1868, and A. in 1880, and H. was appointed administratrix of the will:—Held, that the two-thirds of the moneys, subject to the payment thereout of a proportion of the debts and funeral and testamentary expenses, belonged to the next-of-kin of A., and not to M., the residuary legatee. *Re Ickeringill's Estate, Hinsley* v. *Ickeringill*, 17 L. R., Ch. D., 151; 50 L. J., Ch., 364; 29 W. R. 500.

3. Effect of Wills Acts, s. 33.

2. The provision of 7 Will. 4 & 1 Vict., c. 26, against the lapse of a legacy to a child of the testator dying in his lifetime, leaving issue living at the testator's death:—Held, not to apply to the case of a testamentary appointment. *Griffiths* v. *Gale*, 12 Sim. 327, 354; 13 L. J., N. S., Ch., 286; 8 Jur. 235.

3. The enactment in s. 33 of the 7 Will. 4 and 1 Vict., c. 26, that a bequest to a child of the testator, who dies in the testator's lifetime, leaving issue living at the testator's death, shall not lapse, applies to a testamentary appointment made in exercise of a general power. *Eccles* v. *Cheyne*, 2 Kay & J. 676.

Distinction in reference to this subject between a general and a limited power. *Ib.*

A testatrix, by her will in 1840, in exercise of a general power, appointed proceeds of real estate to a daughter who died in her lifetime, leaving issue living at the testatrix's death:—Held, that the personal representative of the daughter was entitled. *Ib.*

4. A power of charging the inheritance given under a will to a tenant for life who dies before the testator, cannot be exercised by such tenant for life under the Wills Act, 7 Will. 4 & 1 Vict., c. 26, s. 33. *Griggs* v. *Gibson, Maynard* v. *Gibson*, 35 L. J., Ch., 458; 14 W. R. 538.

III. INTERESTS UNDISPOSED OF.

5. A. directs that his estate should be sold after his death, for several purposes, and, amongst others, that 200*l.* should be disposed of as he by note should appoint, and dies intestate, having given no directions. This 200*l.* shall be a resulting trust for the heir-at-law. *Emblyn* v. *Freeman*, Pre. Ch. 541.

6. Upon settlement of lands to be sold in trust for several purposes, the residue is given to B. and his heirs, reserving only 200*l.* to appointee of settlor; settlor died without appointing: the 200*l.* shall go to his heir, and to B. or his assignees. *Anon.*, 1 Com. 345.

7. A., by will, devises his lands to trustees to sell and dispose of the money as he by writing should appoint, and, for want of appointment, to his four nephews, and by writing appoints his trustees to pay several sums to several persons, but not near the value of lands. Decreed the surplus to the heir, and not to the nephews, as an interest resulting and not disposed of. *London (City)* v. *Garway*, 2 Vern. 571.

8. Settlement of wife's estate to such uses as husband and wife, or survivor, should appoint by deed or will, with three witnesses, in default thereof to the heirs of husband; the wife surviving made a disposition by her will to a charity, and therefore void; decreed to the heir of the husband. *Att.-Gen.* v. *Ward*, 3 Ves. 327.

9. A., on settling some estates, had reserved to himself a general power of appointment, which by his will he expressly exercised, but not so as to exhaust the whole interest. The undisposed-of interest was held not to pass under the residuary clause, whereby he gave "all the rest and residue of his real and personal estates of every nature and kind soever." *Morrice* v. *Langham*, 11 Sim. 260; 10 L. J., N. S., Ch., 38; 6 Jur. 334. And see S. C. at law, 8 Mees. & Welsb. 196; 10 L. J., N. S., Exch., 289.

10. Testator bequeathed 12,000*l.* stock to trustees, for his son for life, then for the son's wife for life, then unto and amongst his wife and children in such shares, for such interests, etc., as the son should appoint, and in default of appointment unto the children equally, and if there should be no child then to the son's next of kin in blood, and the testator bequeathed his residue to his son, and his, the testator's, two other children, their executors, etc., equally, and he directed that the share of his son should be held by his trustees, for the benefit of him and his children, upon the same trusts and subject to the same limitations, etc., as the 12,000*l.* stock, but that the son's wife should not take any interest in that share. The son died leaving his wife

surviving, but never having had a child:—Held, that an appointment made by the son of part of the stock to his wife was good, but that the son, in the events that had happened, was not entitled to the share of the residue absolutely, but that his next of kin in blood was entitled to it. *Houstoun* v. *Houstoun*, 4 Sim. 611; 1 L. J., N. S., Ch., 50.

1. Power to appoint among nephews and nieces does not extend to great-nephews, etc.; and if part be appointed, not pursuant to the power, the money so appointed lapses into, and passes under, the appointment of the residue which was properly appointed. *Falkner* v. *Butler*, Ambl. 514.

2. A testatrix having a power over a sum of money, appointed it to A. and B. on certain trusts, and she also gave them, in trust, her residuary personal estate, after payment of her debts. She made no beneficial bequest of her residue, and appointed two other persons her executors. The trusts declared of the appointed fund did not exhaust it:—Held, that the surplus fell into the residue, and did not pass as appointed. *Lefevre* v. *Freeland*, 24 Beav. 403.

3. A. by her will appointed 100*l.* to a stranger to the power, and after making a proper distribution of other parts of the fund, directed that the balance, amounting to 260*l.*, should be appropriated in payment of her debts; and should any surplus remain, she gave it to B., one of the objects of the power:—Held, that, under the ultimate gift, B. was entitled (the charge failing) to the 200*l.*, but not to the 100*l.* *Re Jeaffreson*, 2 L. R., Eq., 276; 12 Jur., N. S., 660; 35 L. J., Ch., 622; 14 W. R. 759.

4. A married woman, to whom a power of appointment by deed or will is reserved in her marriage settlement, by her will in execution of the power, after appointing estates A. and B. to her husband in fee, appoints and devises estate C., "and all other the hereditaments comprised in the settlement not hereinbefore disposed of," to the use of J. S. for life, remainder to his children in tail. By subsequent codicils the testatrix revokes the appointment of A. and B. estates, and devises them to trustees for sale, the proceeds, after paying certain legacies, to be divided between two charitable institutions. This residuary gift to the charities being admittedly void:—Held, that it went, as in default of appointment, to the heirs-at-law of the testatrix, and did not pass to J. S. under the words in the will "all other the hereditaments comprised in the settlement not hereinbefore disposed of. *Re Brown's Will*, 3 W. R. 542; 1 Kay & J. 522.

5. Under a settlement, real estate was limited to such uses as A. and B. should by deed jointly appoint, and subject thereto to the use of A. for life, with remainder to the use of B. for life, with remainder to the first and other sons of B. in tail, with divers remainders over; and there was a power of sale vested in four trustees, and exercisable at the request of A. and B., and the survivor of them. By a deed (which contained a recital that A. and B. were desirous of selling part of the settled property, and with a view to facilitate the sale and conveyance thereof to the respective purchasers had agreed to execute the deed), A. and B., in exercise of the joint power of appointment, appointed part of the settled property to trustees upon trust for sale; and it was declared that the trustees should stand possessed of the proceeds upon the trusts intended to be declared by a deed of even date. No deed declaring the trusts was ever executed, and there was evidence to show that the deed of appointment was executed with the view of avoiding the trouble and expense of an application to the trustees to exercise the power of sale:—Held, that the disposition of the proceeds of sale was a question of intention; and that both on the terms of the deed of appointment (independently of the evidence) and also having regard to the evidence, the proceeds of sale remained subject to the trusts of the settlement. *Biddulph* v. *Williams*, 1 L. R., Ch. D., 203.

6. Under an exclusive power to appoint to children, the children being entitled in default of appointment in equal shares, the donee, by will, appointed the whole fund to trustees, upon trust as to 1,200*l.*, to pay the income to one of her children, J., for life, and after his death, for his children; and if J. should die without leaving children who should attain vested interests, then that the 1,200*l.* should be added to and form part of the residue of the trust estate. The trusts of the residue were in favour of daughters for life, with testamentary powers. J. died leaving children. It being admitted that the gift to J.'s children was excessive:—Held, that on J.'s death the 1,200*l.* was not undisposed of but was well appointed by the residuary gift. *Re Meredith*, 3 L. R., Ch. D., 757.

7. Instruments in exercise of powers of appointment are, as to execution and construction, subject to the law governing instruments of a like nature, disposing of the appointor's own property at the time of the appointment, and this whether or not the law as to execution and construction of such instruments is altered after the date of the instrument giving the power: if then the Wills Act were silent as to appointments, still, as by s. 25 it makes a void devise fall into the residue, it would also make a void devise by way of appointment fall into the residue. *Freme* v. *Clement*, 18 L. R., Ch. D., 499; 50 L. J., Ch., 801; 44 L. T. 399; 30 W. R. 1.

But the word "devise" in the Wills Act generally, unless a contrary intention can be shown, includes a devise by way of appointment under a special or general power, and it is to be so read in s. 25. The Act, therefore, alters the law as to the exercise of powers of appointment, and makes a void devise, as above, pass under the residuary clause. *Ib.*

8. When a married woman, having a general testamentary power of appointment over personal property, appoints the whole property to trustees in such a manner as to show an intention to make it part of her general personal estate, any undisposed-of beneficial interest will belong to those entitled *ab intestato*, not to those entitled in default of appointment. *Bickenden* v. *Williams*, 38 L. J., Ch., 222; 7 L. R., Eq., 310; 17 W. R. 441.

VII. Survivorship.

1. Where feme covert conveys stock to trustees to use of intended husband and self for life, with power to dispose of part, this power survives to wife. *Horner* v. *Bendloes*, 9 Mod. 335.

2. As to survivorship of a discretionary power limited to A. and his assigns, see *How* v. *Whitfield*, 1 Ventr. 338.

3. Residuary devise and bequest for such of the testator's relations and kindred in such proportions, etc., as his executors should think proper, recommending and advising his said trustees and executors to give the greatest share to such person and persons who in their opinion and judgment should appear to them to be his nearest relations and most deserving, declaring his intention not to control their discretion, but that everything relative to that disposition, who were his relations, and the proportions, should be entirely in the discretion of the said trustees and executors, and the heirs, executors, and administrators of the survivor of them:—Held, a trust and a power; the ground of the power being personal confidence, it is *primâ facie* limited to the original trustees, not without express words passing to others to whom by legal transmission the same character may happen to belong; and cannot be executed by the devisees and executors, for that specific purpose only, of the surviving trustee: a trust, therefore, executed by the Court for the next of kin at the death of the testator according to the Statute of Distributions. *Cole* v. *Wade*, 16 Ves. 27.

4. On a devise of personal residue to trustees, their executors, etc., in trust that they or the survivor of them should invest it in land either in England or Scotland, in the former case to be settled as testator's English estates by his will were limited, for life, with remainder in tail; and in the latter, according to a deed of entail by which his Scotch estates were settled, although tending to perpetuity, and should pay the income of the residuary fund, until so invested, to the persons entitled to the rents of the English estates when so purchased, with a power to such person, or in case of minority his guardian, to appoint new trustees, who were to have all the powers of those for whom substituted; the trustees having invested the greater part in Scotch estates, and having all died during the lifetime of the tenant for life, and the representative of the survivor having declined to act, the son of the testator, who was entitled to both the settled properties, executed disentailing deeds, both of the money and also of the English estates, and obtained payment of the fund to himself:—Held, that, as against the next Scotch heir of entail, he was only entitled to the interest of the fund during his life; and that, there being no one by whom new trustees could be appointed, and their discretionary power not being exercisable by any trustees appointed by the Court, the fund became divisible in equal moieties, one to be paid to the personal representatives of the testator, and the other to be invested in Scotch estates to the uses of the Scotch deed. *Fordyce* v. *Bridges*, 2 Ph. 497; 2 Coop. C. C. 326; 17 L. J., N. S., Ch., 185. Varying 10 Beav. 90; 16 L. J., N. S., Ch., 81; 10 Jur. 1020.

5. Where a naked power is given to several, it cannot be exercised by the survivors; but if a power be annexed to an office, any person filling the office may execute it. *Brassey* v. *Chalmers*, 16 Beav. 231; 4 De G. M. & G. 528.

6. A fund was settled for all and every the children of B., in such shares and proportions as the trustees (five in number), their executors, administrators, or assigns, should consider proper or expedient. The five original trustees died, and the legal personal representatives of the survivor appointed three new trustees, one of whom afterwards died, and after his death the two surviving trustees appointed the fund among the surviving children of B.:—Held, that the appointment was valid. *Reid* v. *Reid*, 8 Jur., N. S., 499; 10 W. R. 225.

7. By deed, power was given to the trustees or trustee for the time being, at their or his entire discretion, to pay certain rents for the benefit of one, two, or more of the children of A. B., the tenant for life, and there was a power to the surviving or continuing trustee to appoint new trustees. The trustees all died without appointing new trustees, and new trustees were appointed by the Court:—Held, that they had the discretionary power given to the original trustees. *Bartley* v. *Bartley*, 3 Drew. 384.

8. A. and B., father and son, executed deeds for the settlement of some of their family estates, and for payment of the debts of A. Certain estates were conveyed to trustees, with a power to sell, on the consent, in writing, of A. and B. or the survivor, and to apply the proceeds of the sale in payment of debts therein specified. A. was indebted to D., as trustee for an infirmary, and A. and B. had given joint and separate warrants of attorney to secure the debt. Separate judgments had been entered up against A. and against B. The amount of the sums thus due was stated in the deed. D. had some legal interest in the estates themselves. He was a party to the deed, and executed it:—Held, that this deed created a trust in favour of the infirmary of which he was a trustee. *Montefiore* v. *Browne*, 7 H. L. Ca. 241.

In this deed there was a power of revocation to be exercised by A. and B. A. died without exercising it:—Held, that the power of revocation was then at an end. *Ib.*

9. A testator devised his landed estates in W., with their appurtenances, and all allotments of common now or hereafter to be inclosed, etc., to his daughters, J., M., and S., "to be jointly and equally enjoyed, or divided in the case of the marriage of any of them; and they, or the survivor in case of death, are by this my will fully authorised to dispose of the same by will or assignment, as they shall think proper, giving preference to those of my name and relations, according to behaviour." He also gave personal property "to be equally divided and shared among them," and he expressed a wish that they should live together. None of the daughters married. S. died first, then M., and lastly J. The plaintiffs claimed a moiety of the real property under the will of M., the defendant; the whole of the real property under the will of the survivor, J.:—Held, affirming the decree of the Master of the Rolls, that the last survivor alone had the power of disposing by will; and, *semble*, that the devise

created a joint tenancy in fee. *Cookson* v. *Bingham*, 17 Jur. 1039.

Of Powers to Appoint New Trustees.] See TRUSTS.

Of Powers of Sale.] See XXI. III. *post.*

VIII. Execution. In General.

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XX. *Legacy, Probate, and Succession Duty.* See REVENUE, III. II. 2—IV. I. 2—V.

I. RELATION BACK TO INSTRUMENT CREATING THE POWER.

1. Whosoever takes under a power takes from the grantor and not from the power itself. *Cook* v. *Duckenfield*, 2 Atk. 563.

2. Appointee under a power must claim also according to nature of the instrument. *Marlborough (Duke)* v. *Godolphin*, 2 Ves. 77.

Appointee takes under the power, as if inserted therein, but not so as to take by relation from creation of the power, as in assignment on commission of bankruptcy, or in bargain and sale enrolled. *Ib.*

Naked powers construed strictly; powers coupled with interest liberally. *Ib.*

3. Nothing is more certain in law, than that when any act is done under a power, that act is deemed to be done by the grantor of the power, and to have its validity from him, and not from the person who executes it. *Middleton* v. *Crofts*, 2 Atk. 661.

4. The appointee of a power takes by force of the act of the donor, and not of the donee of the power. *Tatnall* v. *Hankey*, 2 Moo. P. C. 342.

5. A power when executed takes place according to the deed creating it. *Mosley* v. *Mosley*, 5 Ves. 249.

6. The execution of power of appointment operates by way of limitation of a use, under and by the effect of the instrument, reserving the power; the fee vesting in the meantime. *Maundrell* v. *Maundrell*, 10 Ves. 255.

The execution of a power of appointment operates as a limitation of a use, attaching upon the seisin in the feoffees, etc., under the old instrument. *Id.* 264.

7. Execution of a power is a limitation of a use, which must arise, if at all, at the time of execution, and is as if expressed in the original settlement. *Wright* v. *Wakeford*, 17 Ves. 457.

8. Limitations created by the execution of a power must be read as if they were introduced into the deed creating the power. *Re Barker*, 5 L. T., N. S., 206.

9. R. M. made a settlement of real estate to the use of himself and wife, with a power to appoint to any one or more of his sons in fee or otherwise, and in default of appointment to his first and other sons in tail, with remainder to himself in fee. He became bankrupt, and, subsequently to his bankruptcy, appointed to his eldest son in fee:—Held, that the appointment could not enure as an appointment to a base fee, determinable on the extinction of the prior estates tail, because such a limitation would have been bad in the settlement creating the power. *Badham* v. *Mee*, 1 Myl. & K. 32; 2 L. J., N. S., Ch., 4. And see 7 Bing. 695; 9 L. J., N. S., C. P., 213; 1 M. & Scott 14.

10. A power to appoint to any persons by will only is a general power of appointment within the Wills Act, 7 Will 4, and 1 Vict., c. 26, s. 27. And accordingly, a general devise or bequest will operate as an execution of such power. But such a general testamentary power of appointment given to a tenant for life, being a married woman, is not equivalent to ownership, so that as regards the operation of the rule against perpetuities, the interests arising under the execution of the power by the will of the tenant for life, must be considered as created under the deed or will conferring the power. *Re Powell*, 39 L. J., Ch., 188; 18 W. R. 226.

See also PERPETUITY, XVI. *post.*

II. OPERATION, WHETHER AS A CONVEYANCE OR AN APPOINTMENT.

11. Where person having particular estate, and also a power, makes a disposition containing words both of appointment and conveyance, it shall not operate as an appointment, and also as a conveyance against the intention of the party executing the instrument. *Langley* v. *Brown*, 2 Atk. 199.

12. A devise to A., and to such uses as he should appoint, was good before the Statute of Uses; for when he appoints, the *cestui que trust* is in by the feoffor, and not by the appointor. *Cook* v. *Duckenfield*, 2 Atk. 568.

1. A., having both a power and an interest, the estate being conveyed to such uses as he should appoint, and in default of appointment to him in fee, conveys by lease and release, using also words of appointment; deed operates as a conveyance of his interest, not as an execution of his power, especially if the effect of the latter construction will defeat the object. *Cox* v. *Chamberlain*, 4 Ves. 631.

2. Husband having power of appointment, paramount to right of dower, in default thereof to himself for life, remainder to his right heirs, if the power could have effect, yet a purchaser taking by a conveyance, adapted to pass the interest in the estate as a limitation in fee, was held to take in that way, not by way of appointment, and therefore subject to dower. *Maundrell* v. *Maundrell*, 7 Ves. 567. See this case further, 10 Ves. 246.

3. A. and his wife, and B. and C., having a joint power of appointing certain lands which, in default of appointment, stood limited (subject to a life interest reserved to C. in part of them) to A. in fee, by lease and release, being a settlement made in contemplation of the marriage of B., granted, bargained, sold, released, conveyed, directed, limited, and appointed the premises to M., to hold the same to him and his heirs, to the old uses, until the marriage, and after the marriage as to certain parts of the lands to the use of A. and his wife during the life of the longest liver, to be in bar of her dower; and as to other parts to the use of A. for life, and the use of C. for life respectively, remainder to the use of M. during the lives of A. and his wife, and of C. respectively, in order to preserve contingent uses; remainder to the use of B. and her intended husband, during the life of the longest liver of them; remainder to the use of M., to support contingent uses; remainder to the use of M. for a term of 500 years, upon certain trusts; remainder to the use of the first and other sons of the marriage successively in tail; remainder to the use of his daughters in tail; remainder to the use of A. and his heirs:—Held, that the release operated not as an appointment under the power, but as a conveyance of the interest, and therefore that the legal fee did not vest in M. *Wynne* v. *Griffith*, 1 Russ. 283.

4. A trustee for sale had also a beneficial interest in the property as mortgagee:—Held, on the construction of a very informal instrument, that he had effectually exercised his trust for sale, and not merely sold his interest. *Manser* v. *Dix*, 3 Jur., N. S., 252; 8 De G. M. & G. 703.

5. The donee of a power, when executing a deed of appointment, "limited and appointed" not only the lands the subject of the power, but other lands of his which were not subject thereto:—Held, that the words "limited and appointed" operated as a grant of the latter lands. *MacAndrew* v. *Gallagher*, 8 Ir. R., Eq., 490.

III. INTEREST OF APPOINTEE. WHETHER PASSING UNDER APPOINTMENT OR UNDER GIFT IN DEFAULT.

6. A fund stood limited by a will, upon trust for a person for life, remainder to all or such one or more of the children or issue of the testator's deceased brother A., in such shares and in such manner as the tenant for life should appoint, and in default of appointment to the children of A. equally. F., one of the children of A., assigned all his property to a trustee for his creditors, by a deed in the form of Schedule (D.). This deed was duly registered, but F. never obtained an order of discharge. After this, the tenant for life appointed the fund to the children of A. equally. All the children of A. living at the testator's death survived the tenant for life, so that F. took the same share under the appointment as he would have taken in default of appointment:—Held, that the deed did not pass after-acquired property, that F.'s interest, in default of appointment, was defeated by the appointment which gave him an interest liable to be defeated by lapse, and which, therefore, must be considered a new interest, and that consequently his share did not pass to the trustee. *Re Vizard*, 1 L. R., Ch., 588; 12 Jur., N. S., 680; 35 L. J., Ch., 804; 14 W. R. 1000. Affirming 1 L. R., Eq., 667; 35 L. J., Ch., 460; 14 W. R. 496; 14 L. T., N. S., 182.

7. A mother had an exclusive power of appointment over a fund in favour of her children, and which, in default, was divisible equally, the share of the daughters to vest at twenty-one or marriage. She had a son and a daughter, and she appointed 10,000*l.* to her son on his marriage. His marriage settlement recited that he was entitled to the 10,000*l.*, and was also contingently entitled to the other moiety in the event of his sister dying unmarried under twenty-one, and it recited an agreement to settle the 10,000*l.* and "all other his part, share, and interest, as well vested as contingent," in the trust funds. He then assigned his interest in the same terms. The daughter attained twenty-one, and died, and the mother afterwards appointed the residue of the fund to her son:—Held, that such residue did not pass under his settlement. *Childers* v. *Eardley*, 28 Beav. 648.

8. Bank stock was settled upon trust for A. and B. successively for life; and after their decease, in trust for one or more of their children, as they or the survivor should appoint; and in default, in trust for all the children equally; but if B. should survive his wife A., and there should be any child or children living at her death, then the trustees were to raise 2,500*l.*, and dispose of it as A. should appoint. C. and D. were the only children of the marriage. In 1832, on the occasion of D.'s marriage, A. and B. jointly appointed a portion of the fund, and A. exercised the power given to her as to the 2,500*l.* A. died in January 1844. In July 1843 C. was adjudicated a bankrupt, and assignees were appointed, and on the 10th February, 1844, he obtained his certificate. B., by a deed-poll of the 12th February, 1844, appointed the trust funds, then subject to the indenture of settlement, to and for the use of C., but subject to his own life interest in the income, and subject to the sums already appointed. B. died in March 1855. The assignees of C. claimed to receive the moiety of the funds, to which he would have become entitled in default of appointment:—Held, that during the bankruptcy of C., and before the certificate, all that the

assignees had was a defeasible title; and that under the power of appointment executed after the date of the certificate, C. became entitled to the whole fund as against the assignees. *Lee* v. *Olding*, 2 Jur., N. S., 850; 25 L. J., Ch., 580.

1. Under a marriage settlement real estate stood limited to H., the husband, for life, with remainder to the use of such of the children or issue of the marriage as he should by deed or will appoint; and in default of appointment, to the use of the children of the marriage equally as tenants in common in fee. There was issue of the marriage two children only, a son and a daughter. The daughter married, and by her marriage settlement she and her intended husband covenanted with the trustees for the conveyance and settlement of all property which she then was "seised of, or interested in, or entitled to," upon the trusts therein mentioned, including in effect reversionary interests. The daughter survived her husband, and thereupon H. by deed appointed the real estate comprised in the original settlement, subject to his life estate, to his son and daughter equally in fee, the daughter thus taking the same share as she would have taken in default of appointment:—Held, that inasmuch as the reversionary moiety appointed to the daughter constituted a new interest acquired by her subsequently to the date of her settlement, such moiety was not bound by the covenant in her marriage settlement. *Sweetapple* v. *Horlock*, 11 L. R., Ch. D., 745; 48 L. J., Ch., 660; 27 W. R. 865.

2. A father, by his will in 1835, gave his residue to trustees for his daughter for life, and after her death for such of her children as might be living at her death in such shares as she should appoint. The father died in 1836. The daughter had four children, who survived her. In 1851 one of them married a Frenchman, who died in 1857, leaving one child by the plaintiff. In 1870 the testator's daughter appointed 6,500*l.* to the plaintiff for her separate use in case she survived her, which happened. By the French Civil Code, in case of marriage all movable property possessed by the husband and wife at the time of marriage, or which falls to them during the marriage by succession or donation, if the donor has not expressed himself to the contrary, becomes subject to the law of community of goods:—Held, that the 6,500*l.* appointed to the plaintiff did not fall into the community of goods, as her interest commenced from the date of the appointment, which was subsequent to her marriage; also that the donor, by appointing the fund to the plaintiff to separate use, had "expressed herself to the contrary." *De Serre* v. *Clarke*, 31 L. T., N. S., 161; 23 W. R. 3; 43 L. J., Ch., 821; 18 L. R., Eq., 587.

3. A trader, who was entitled under his father's will to a share in his property, subject to a power for the widow to appoint among himself and the other children, on his marriage covenanted to settle his share whether appointed or unappointed. The widow appointed one-third to him and the remainder to other children, and subsequently he became bankrupt:—Held, that the covenant was not void under s. 91 of the Bankruptcy Act 1869. *Re Andrews*, 7 L. R., Ch. D., 635; 26 W. R. 572; 38 L. T., N. S., 137.

IV. FAILURE MADE GOOD OUT OF DONEE'S ESTATE.

4. A power having a power, by marriage articles, to charge an estate of which B. was a tenant for life with intermediate remainders with a contingent fee to himself executed the power. The power afterward becoming merged by accession of the fee:—Held, that the provision made by the will should be served out of the estate in fee, being considered as an interest enabling him to charge the estates. *Cross* v. *Hudson*, 3 Bro. C. C. 30.

5. Contract by trustees under power of sale, though by subsequent events it cannot be executed under the power, shall be made good in equity by the effect of the interest acquired in the estate bound by the contract. *Mortlock* v. *Buller*, 10 Ves. 315. Affirmed 2 Dow 518.

6. E. D. was beneficially entitled, under his marriage settlement, to an estate for his life, and to the ultimate reversion in fee in default of issue male; and the trustees of the settlement had a power to sell at the request and by the direction of the tenant for life. There was issue of the marriage. E. D., acting as absolute owner, entered into a contract by correspondence to sell the estate to T., and the trustees afterwards refused to concur in the sale:—Held, on a bill for specific performance, that there was a binding contract between the vendor and purchaser, and that the vendor was bound to perform it, if he was able; but that the purchaser was not entitled, in such a case, to have the contract performed to the extent of the vendor's interest, by a conveyance of his life estate, and his ultimate reversion. *Thomas* v. *Dering*, 1 Keen 729; 6 L. J., N. S., Ch., 267; 1 Jur. 211, 427.

7. A testator bequeathed a sum of long annuities to trustees, upon trust for his daughter for life, for her separate use, and after her death upon trust for such persons as she should by will appoint. One of the trustees purchased of the daughter and her husband the absolute interest in the long annuities, and took an assignment to himself of the daughter's life interest in them, accompanied by what purported to be an execution by the same instrument of her testamentary power over the reversion, with a covenant by the daughter and her husband for quiet enjoyment and for further assurance:—Held, as against a purchaser from the trustee, that the attempted execution of the power by the wife being a nullity, the transaction, though it might have been valid as to the purchase of the life interest, was void *in toto*, the consideration being entire; the wife offered by her bill to repay the original purchase money. *Scott* v. *Davis*, 4 Myl. & C. 87; 2 Jur. 1057.

8. Estates were settled, after the death of husband and wife, to trustees, for a term, and subject thereto to the husband in fee. The trusts of the term were, in case the wife should die in the lifetime of the husband, leaving children living at her decease, to raise 8,000*l.* for the portions of such children, to be divided between them in such shares as the husband should by deed or will appoint. By his will, the husband dying before the wife, devised part of the settled land to his eldest son, in strict settlement, with powers of jointuring, and charging portions for his

younger children; and other part of the settled lands to his second son in the same manner; and after reciting that he had by his settlement a power of appointing 8,000*l.* among his children, he, in pursuance of the power, and of every other power to him reserved, gave and appointed the 8,000*l.* amongst his children; and he bequeathed to his daughter E. 1,000*l.*, in addition to the sum already appointed to her; and he directed that in case all his younger children should die before their portions became payable, the said sum of 8,000*l.* should sink into the inheritance; and that his personal estate should be applied *pro tanto* in discharge of the 8,000*l.*, in exoneration of the real estate charged therewith. The husband died, leaving his wife and several children him surviving:—Held, that the 8,000*l.* was well charged upon the real estate of the testator. *Mandeville* v. *Roe*, 1 J. & L. 371.

1. Though a contract to lease by a tenant for life with a leasing power cannot be enforced as an execution of the power, it may be partially enforced by decreeing a lease for the life of the tenant for life, if the contract was *bonâ fide*, and more especially if there has been an outlay on the faith of it. *Dyas* v. *Cruise*, 8 Ir. Eq. R. 407; 2 J. & L. 460.

Under a power to lease at the best rent, the highest rent need not be reserved. The question, what is the test that the best rent has been reserved, and the cases on the subject, considered. An authority to let lands may be inferred from the letters and acts of the party. Tenant for life, with power to lease at the best rent, agrees to make a demise for a term warranted by the power, but at a rent which afterwards appears not to be the best rent. There being no fraud in the transaction, the Court will decree a partial performance of the agreement, and direct the tenant for life to execute the agreement as far as his estate enables him to do so. *Hartnell* v. *Yielding* (2 Sch. & Lef. 549) observed upon. *Ib.*

2. A., having a life interest in premises vested in trustees, who had a power of leasing, agreed to grant a lease for twenty-one years to B. The trustees refused to grant a lease to B., on the ground that he was in insolvent circumstances, and that the grant of such lease would be a breach of trust against their *cestuis que trustent*. The Court, being of opinion that B. was entitled to specific performance, and that the trustees had given A. some authority to act, ordered the trustees to execute a lease to B. to the extent of A.'s interest. *Neale* v. *Mackenzie*, 1 Keen 474; 1 Jur. 149.

3. A donee of a power to charge estates, of which he was entitled to the reversion in fee, with portions for younger children, by his will, "in exercise of the power, and of all other powers," charged the estates with 10,000*l.*, and directed the shares of the children to be interests vested at his death, and to be payable when the estate fell into possession. The testator died intestate as to the reversion, leaving five children, all of whom had attained twenty-one at the date of his will, but the execution of the power failed by his death before he became entitled to the actual freehold of the estates. None of the children were alive at the time when the reversion vested in possession:—Held, that, notwithstanding the failure of the power, the sum was raisable out of the testator's reversion in fee. *Sing* v. *Leslie*, 2 Hem. & M. 68; 10 Jur., N. S., 794; 10 L. T., N. S., 382; 4 N. R. 17.

V. OF GENERAL POWER. ASSETS BY.

4. By a post-nuptial settlement, in 1810, R. M. settled the moneys to become payable on three policies of insurance on his life, upon trust for B. M., his wife, for life; and after her decease, upon trust for his appointees; and in default of appointment, in trust for the children of the marriage; and he covenanted to keep up the policies. In 1821 R. M. appointed that after the death of R. M., the moneys should be made over to his executors and administrators. By a subsequent order of this Court, in 1821, the trustees were directed to sell the policies to the insurance office, and to bring the money into court to be invested, the dividends to accumulate during the joint lives of R. M. and B. M. In 1828 R. M. took the benefit of the Insolvent Debtors Act. In 1845 R. M. became bankrupt, and obtained his certificate. In 1847 B. M., the wife, died. In 1850 the children of the marriage presented a petition, praying that they, who were next of kin at the date of the appointment, might be declared entitled to the fund, and for payment, or that it might be accumulated till the death of R. M. An order was then pronounced, by the late Vice-Chancellor of England, in the latter alternative. The assignees in bankruptcy appealed from that order, and the assignee in insolvency, who had not been before the Court presented a petition to discharge that order, and for payment of the fund:—Held, reversing the decision of the Vice-Chancellor, that the effect of the appointment was to make the property a part of the personal estate of R. M., subject to the life interest of B. M.; and that neither the next of kin of R. M. were designed by the appointment, nor were the executors or administrators to take beneficially. *Mackenzie* v. *Mackenzie*, 3 Macn. & G. 559; 21 L. J., N. S., Ch., 465; 15 Jur. 1091.

Observations as to the nature of the interests which the children of the marriage took under the settlement, and the appointment. *Ib.*

5. A. B. was tenant for life of a trust fund, with a general power to appoint by will, and in default, it was settled on the plaintiff. A. B. ordered the trustees to pay over the fund to her on an indemnity, and she afterwards appointed the fund to the plaintiff and others, who filed a bill to make the trustees liable for a breach of trust:—Held, that by the appointment, the fund became assets for answering A. B.'s liabilities, of which the indemnity was one, and that, therefore, the trustees were not liable. *Williams* v. *Lomas*, 16 Beav. 1.

6. By a settlement the trusts of a sum of stock were declared to be for A., B., C., D., E., F., and G., equally, with a proviso added, that the shares of females should not be transferred to them on their attaining twenty-one, but should be invested, and the income be paid to them for life for their separate use; and after the death of each such female, the trustees should stand possessed of her share for such persons as she should by will appoint; and in default of appointment, for the executors or administrators, or other the personal represen-

tative or representatives of such female. On the marriage of one of the *cestuis que trustent*, her share was transferred to trustees, upon trusts declared by deed to be for the wife for life, then for the husband for life, and then for the children of the marriage; and if the wife survived her husband, and there were no children of the marriage, then upon such trusts as the wife should by deed or will appoint. The wife survived her husband, and there being no child she by deed appointed the fund to herself:—Held, that she was entitled to have the same transferred to herself. *St. John* v. *Gibson*, 12 Jur. 373; 17 L. J., N. S., Ch., 95.

1. A., having power to appoint 700*l.*, which was to be raised under the trusts of a term, by her will, appointed that sum, to the persons whom she had made her executors in trust; but she did not declare expressly any trust of that sum. She then bequeathed her personal estate to the same persons, in trust, and subject to the payment of her debts and legacies:—Held, in a suit instituted by the legatees, that the 700*l.* ought to be raised and applied in the same manner as the testator's personal estate. *Goodere* v. *Lloyd*, 3 Sim. 538.

2. A bankrupt, after the issuing of the commission and appointment of the assignees, transferred French stock, his property, to his wife, who afterwards transferred it to her three sisters. Under a settlement, the wife had a power of appointment over a sum of money in the funds in England, which she exercised by will in favour of one of the sisters, and died in her husband's lifetime. The sister, who resided in France, took out administration with the will annexed. An injunction was granted to restrain the trustees, in whom this fund was vested, from transferring it, on the ground that, if the French Stock should be proved to have been the property of the bankrupt, the assignees would have a claim upon the assets of the wife. *Stead* v. *Clay*, 4 Russ. 550.

3. J. S. M. being entitled to the dividends of 4,300*l.* for life, with a power to appoint by any deed or writing the principal after his death, and in default of appointment to his next of kin, and being in prison for debt, and in great distress, is prevailed upon by H. C. to enter into an agreement for sale of the principal after his death, in consideration of 1,000*l.* and other sums therein stated to have been previously lent and advanced to him by H. C. By a subsequent deed, in consideration of 1,854*l.* therein stated to be due from J. S. M., to H. C., and of 1,000*l.* paid by J. S. M. and others, J. S. M., by the direction of H. C., appointed that the principal should, on his death, be transferred to J. S. M. and others, with a proviso that they should assign the same to H. C. on payment of 1,000*l.* and interest, and all further advances. The 1,854*l.*, or any part of it, had not, in fact, been advanced by H. C.:—Held, that the appointment was well executed; that the next of kin of J. S. M. had no claim; that H. C. was a trustee for the personal representatives of J. S. M. for the excess beyond the money received by J. S. M. *Miller* v. *Minet*, Taml. 481.

4. C. bequeathed a leasehold estate called S. H., after the death of his wife, upon the same trusts as his wife should declare with respect to the disposition of her residuary personal estate by her will; and in default of any disposition by his wife of her residuary personal estate, or so far as the same (if any) should not extend, upon other trusts. C.'s wife survived him, and by her will gave to S. and R., whom she appointed her executors, "all her property and estate known as S. H.," in trust for T. for life; and gave all her real and personal estate to S. and R. upon trust for conversion, and upon trust out of the proceeds to pay her debts, funeral and testamentary expenses, and legacies; and gave the residue of her property, as to two-thirds, for charitable purposes:—Held, that the S. H. estate was not by the will of the widow converted into her own estate, and that, subject to the life interest of T., two-thirds of it went to the persons entitled under C.'s will in default of appointment. *Bristow* v. *Skirrow*, 10 L. R., Eq., 1; 39 L. J., Ch., 840; 18 W. R. 719; 22 L. T., N. S., 642.

In Bankruptcy.] See BANKRUPTCY, XVII. xxix.

When Assets for Payment of Debt in Administration.] See EXECUTOR AND ADMINISTRATOR—HUSBAND AND WIFE, XI. xi. 14—XIII. viii.

See also VI. ii. *ante.*

VI. CONSENTS.

5. A., having a power to dispose of land, with consent of trustees, devises the lands by her will; this, being without the consent of the trustees, is void. *Hutton* v. *Simpson*, 2 Vern. 723; Pre. Ch. 439; Gilb. Eq. Rep. 115, 120.

6. If a man by will empowers his wife to dispose of his personal estate, with the consent of the trustees, the wife without such consent cannot, by her will, devise it; and therefore the husband, as to that part, died intestate. *Sympson* or *Simpson* v. *Hornby*, Pre. Ch. 452.

7. Power to trustees to advance to A. 1,000*l.*, with consent of B., under her hand, signed by two witnesses. Trustees advance the sum without consent. Subsequent acquiescence by such deed not sufficient, and trustees ordered to refund. *Bateman* v. *Davis*, 3 Madd. 98.

8. A settlement contained a power which was to be executed by A. with the consent of B., "such consent to be signified by some deed to be duly executed by him, and not otherwise," to release certain estates from charges in favour of the younger children of A., and substitute others in their stead. The donee of the power executed it by deed, which was not, however, executed by B. till nine months after its execution by A., but evidence was produced that a draft of the deed, purporting to be an execution of the power by A., had been shown to B. before it was executed by A., and that B. had given his parol consent thereto:—Held, that the power had been validly executed. *Offen* v. *Harman*, 1 De G. F. & G. 253.

9. By marriage articles a power of disposition was given to the wife, with the consent of the undersigned trustees:—Held, that new trustees appointed by the Court might give the required consent. *Byam* v.

Byam, 3 W. R. 95; 19 Beav. 58; 24 L. J., Ch., 209; 19 Jur., N. S., 79.

Consents to Exercise of Powers of Sale.] See XXI. IV. *post.*

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VII. TIME FOR EXECUTION.

1. *Of Determinable Powers or Powers to be Exercised on a Contingency*, 5744.
2. *Powers arising on a Contingency*, 5745.
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1. Of Determinable Powers or Powers to be Exercised on a Contingency.

1. Under a settlement a fund was held upon trust for such persons as G. and B. should jointly appoint, and subject thereto upon trust for G. for life, with remainder to B. for life, subject to determination as thereinafter mentioned, with remainder to such of a class as B. should by deed or will appoint; and it was provided that if B. should commit any of certain acts his life estate should be determined and the trust fund should go as if B. was actually dead, and all the powers therein contained should thenceforth be exercised as if he was then dead, without prejudice to his right to exercise jointly with G., either before or after the determination of the trust in his favour, the joint power reserved to them. B. committed an act of forfeiture, and afterwards died:—Held, that the sole power of appointment reserved to him was not effectually exercised by a will made prior to the forfeiture. *Potts* v. *Britton*, 11 L. R., Eq., 433; 24 L. T., N. S., 409; 19 W. R. 651.

2. Bequest of personal estate in trust to invest it in stock to accumulate, and to transfer the fund to A. at twenty-one. Power for the trustees to lend 10,000*l.* to B., so long as he carried on the business of banker at H.: B. is not entitled to retain the 10,000*l.* after A. attains twenty-one, though he continue banker at H. *Brown* v. *Sansome*, M'Clel. & Y. 427.

3. A trust disposition and deed of settlement conveyed generally the testator's whole heritage to trustees containing no precept of sasine, but surrogating the trustees in place of the truster, and binding him and his heirs to complete titles, and convey to the trustees; he reserving to himself power to execute entails of parts of his fee simple lands, but declaring them to be suspended during the continuance of the trust, except as to rights of patronage; and he executed such entails with precepts of sasine. After his death, the trustees named in the deed having declined to accept the trust, the first heiress of entail made titles, and was duly infefft heiress of entail. Trustees were afterwards appointed by the Court, with her consent, and with all the powers given to those who declined to act, who raised an action of constitution and declarator against the heiress of line, and called the heiress of entail as defender:—Held, by the Lords, that it was not competent for the heiress of entail to oppose the completion of feudal titles, by the trustees, to the whole of the lands comprised in the trust disposition; and that they (provided they were duly appointed) were entitled to a conveyance of the whole lands, according to the intent of the trust disposition, but without prejudice to the rights of any party. *Preston* v. *Melville (Viscount)*, 8 Cl. & F. 16.

4. A power in a settlement to withdraw funds and lay them out in the purchase of a trade for the benefit of the husband and wife may be exercised after the death of one of them for the benefit of the survivor alone. *Doorly* v. *Arnold*, 18 W. R. 540.

5. Power "when and as soon as they shall respectively become seised of freehold in possession to appoint by deed, etc., to have made upon or previously to their marriage." A., one of the donees, married in 1825, and appointed to his wife and children in 1844:—Held, that this deed was not a valid execution of the power. *Re Borrowes*, 2 Ir. R., Eq., 468.

6. T. and his wife, in exercise of a joint several power contained in their marriage settlement, appointed by deed certain funds to their daughter. This deed contained a power to T. and his wife, or the survivor of them, by deed, from time to time, during their joint lives, to revoke the trusts of the then appointment and to limit new trusts. After the death of the wife, T. executed a deed affecting to revoke the appointment to the daughter, and appointing the funds to trustees, on trust for the daughter for life with remainders over:—Held, that this last deed was inoperative, inasmuch as it was executed during the joint lives of T. and his wife. *Re Twiss*, 15 W. R. 540; 16 L. T., N. S., 139.

7. A testator by his will gave certain property, including the P. H. estate, to trustees to pay the income to his wife for life, with power to them to sell upon her consent, and invest the proceeds, and apply them upon the trusts of his residuary personal estate, which were that, as soon as each and every of his children should have attained twenty-five, or died under that age, leaving issue, the trustees should sell the unconverted portion, with a right of pre-emption to his younger sons according to seniority, and that the produce and all other his personal property should be in trust for his children and other issue as his wife should, before each and every of his children should have attained the age of twenty-five, by any deed or deeds, instrument or instruments, in writing, sealed and delivered, direct or appoint, with a gift over in default of such appointment. He died in 1840, leaving three sons and his widow surviving, and in 1841 she by a deed, which contained a power of revocation, appointed the general residuary fund among her children as tenants in common. By her will, made later in the same year, the widow devised the P. H. estate in specie to her eldest son. The youngest of the testator's children attained twenty-five in 1851; the widow did not die until 1863:—Held, that the time within which the appointment was to be made by the widow was of the substance and essence of the power, and not mere matter of form; that although the

will of the widow was in form a sufficient execution of that power, yet as it had not within the period prescribed by the testator any effect whatever, and (being a will) was of course revocable, the appointment, whatever it purported to make, was invalid; and that as there was no revocation of the deed of 1841, the interests conferred by that deed took effect upon the youngest son attaining twenty-five. *Cooper* v. *Martin*, 17 L. T., N. S., 587; 3 L. R., Ch., 47.

1. By a Scotch settlement, a sum of stock was settled on the husband and wife for their lives, and after the death of the survivor, on their children, and, failing children, on the nearest heirs of the wife; and she was empowered, at any time in her life, and even on her death-bed, to bequeath or dispose of the stock to any person, and in any manner she might think proper:—Held, that the power was not intended to be available except in the event of there being a failure of children of the marriage. *Peddie* v. *Peddie*, 6 Sim. 78.

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3. A *feme covert* having a power under her marriage settlement to create a term and to raise money after the death of her husband, and being in distress, executes that power in the lifetime of her husband, and assigns her interest for a trifling consideration:—Held, a good execution of the power. *Sutherland (Countess)* v. *Northmore*, 1 Dick. 56.

4. When a power is given to a designated person, to be executed upon a contingency, it may be executed before the happening of the contingency, and the execution of it will be valid on the subsequent happening of the event; *à fortiori* where the happening of the contingency cannot be ascertained till the moment of the donee's death. A clause in the instrument executing the power reciting incorrectly that the contingency has already happened will not invalidate the execution. *Wandesforde* v. *Carrick*, 5 Ir. R., Eq., 486.

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2. Powers arising on a Contingency.

5. Testator gave a fund in trust for A. for life, and at her death, if B. should then be unmarried, in trust for B. absolutely; but if married, then upon trust as she should appoint; and in default thereof, for her separate use for life, and subject thereto for her absolutely. B. married after the death of the testator in the lifetime of A., and died also in her lifetime, having appointed the fund:—Held, that the appointment was good. *Ashford* v. *Cafe*, 7 Sim. 641; 5 L. J., N. S., Ch., 109.

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7. A testator bequeathed certain funds in trust for his wife during her widowhood, and after giving her a power to appoint them by deed or will, provided she did not marry again, directed that upon her second marriage, or her death, without having exercised her power, they should sink into the general residue of his estate: the widow executed a deed, purporting to be an appointment of the property to the residuary legatees, in the same proportions in which they would have been entitled to it under the residuary clause, and she and they concurred in assigning the funds upon trust for the residuary legatees. The Court refused to act upon the appointment and assignment during the widow's life. *Goldsmid* v. *Goldsmid*, T. & R. 445.

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also, that it was not an absolute power, but a power dependent upon the event of there being more sons than one of that marriage, and any one of such sons being preferred to the settled lands according to the terms of the primary power. *Cooke* v. *Briscoe*, 1 Dr. & Wal. 596.

1. A testator, after commencing his will with words amounting to a charge of his real estate with the payment of his debts, devised an advowson to trustees, upon trust to present his youngest son to the living when vacant, and subject thereto in trust to sell and apply the produce of the sale for the special purposes therein mentioned, and he devised his residuary real estate upon certain trusts to other trustees, and appointed three executors (who proved his will), one of whom was his youngest son, and another one of the trustees of the advowson. The personal estate being insufficient for the payment of his debts, the trustees of the advowson, one of whom was an executor, at the instance of the other executors, contracted to sell the advowson before any vacancy had occurred in the living. In a suit for specific performance by the plaintiffs, the trustees of the advowson and executors, against the purchaser, it was held that the charge being in effect a devise of real estate in trust to pay debts, a good title could be made by plaintiffs without institution of a suit to ascertain deficiency of personal estate, and that purchaser was not bound either to inquire whether other sufficient property ought first to be applied in payment of debts, or see to the application of purchase money. *Shaw* v. *Borrer*, 1 Keen 559; 5 L. J., N. S., Ch., 364.

2. A testator by his will directed his trustees to purchase a sum of bank annuities, upon trust to pay the dividends to his son John for life, with a proviso against alienation; and he then provided that in case his said son should marry with the consent of his trustees, the annuities should, subject to the life interest of his son, be settled for the benefit of any woman with whom his son should intermarry, and the issue of such marriage in such manner as should be agreed upon with the concurrence of his trustees, and subject to the trusts to be declared in any settlement to be made on the marriage of his son, or in case none should be declared, then the annuities should go as his son should by will appoint; and the testator also provided that in case his son should die unmarried, or, having been married, without leaving issue, and without having exercised the power of appointment thereby given to him, then a moiety of the annuities should go to persons named in the will. The son died without ever having been married, and having by his will appointed a portion of the annuities to two of his brothers:—Held, sustaining this appointment, that in the events which had happened the son had a power of appointment over the annuities. *Sheffield* v. *Coventry* (*Earl*), 2 De G. M. & G. 551; 17 Jur. 289; 22 L. J., Ch., 498.

3. By a deed of entail certain estates were settled upon J. K. and the heirs whatsoever of his body, remainder to several successive heirs substitutes, it being declared that the eldest heir female and the descendants of her body, so often as the succession should devolve upon heirs female, should exclude all other heirs portioners; but it was to be lawful for the heir of entail in possession, so often as his apparent or presumptive heirs were female, so far to alter the destination of succession as to settle the estate upon a younger daughter in preference to an elder. W. K., the heir of entail in possession in 1837, being a bachelor and having four sisters, of whom, according to the original settlement, upon the death of W. K. without issue, the eldest would have inherited, executed a deed calling E. K. the youngest, and the heirs of her body first in succession, failing heirs of his own body. He died in 1844, a bachelor; E. K. thereupon obtained enfeoffment:—Held, that the power of altering the destination was not confined to the case of lineal or apparent heirs portioners, but extended to the collateral or presumptive heirs portioners, of the heir substitute in possession; and therefore the appointment by W. K. of his youngest sister E. K. was good:—Held, also, that the heirs of the heir substitute in possession being females, the power arose when exercised by him in altering the destination, and was not postponed, and to arise only in case the heirs were females when the succession opened; and that no subsequent alteration among the persons of the heirs portioners could have any effect upon the operation of the power:—Held, further, that the power might properly be executed by a deed *inter vivos*; and might be exercised by E. K. herself when her apparent or presumptive heirs were females. E. K., under the provisions of Lord Rutherford's Act, with the concurrence of the three persons next entitled in possession, barred the entail:—Held, that the bar was not rendered nugatory by the possibility that subsequently other persons might come into *esse* whose rights as heirs of entail would override those of the parties who barred the entail. *Ex. gr.*, an heir of the heir in tail in possession who altered the destination by deed *inter vivos*. *Martin* v. *Kelso*, 5 W. R. 440.

4. By a settlement upon the marriage of A. with B., a widow with three infant children, the trusts of the property were declared to be, after the life interests, for such of the children then living of B., and such children of the marriage, as should attain twenty-one or marry; and if there should be no object of the preceding trust who should acquire a vested interest, then for A. absolutely. The settlement subsequently conferred upon A. a general power of appointment over the property, in case there should be no child of the intended marriage who should attain a vested interest. A., by will, charged all his estate with payment of his debts, and referring to his power under the settlement, gave all his estate and effects equally between the two children of his marriage with B., to be paid to them respectively at twenty-one. These two childen being still infants:—Held, that there was no repugnancy between the trusts of the settlement and the power, which was well exercised by the will; and, consequently, that two of the children of B. who had attained twenty-one were entitled to their shares of the fund, subject to the contingency of the children of the marriage dying under twenty-one. *Bradley* v. *Bury*, 10 Jur., N. S., 937; 10 L. T., N. S., 868.

5. A testator gave a life interest in his residuary estate to his nephew, and in the event of his leaving any children, he gave him

a general power of appointment by will; but if his nephew should die without leaving any children, and he should not make any such appointment as aforesaid, then over. The nephew made a will, purporting to be in exercise of the power, and died without having any children:—Held, that the power to appoint failed, and that the gift over took effect. *Barker* v. *Young*, 10 Jur., N. S., 163; 9 L. T., N. S., 704.

1. A power of appointment among a class cannot be well exercised at a time when, though all the persons who may be included in the class are known, it is uncertain whether they will, in fact, be included in it. A. purported to exercise by will a power of appointment given her by B.'s will, before the annuities and mortgages were satisfied, and therefore before the class of grandchildren was finally ascertained, though the extreme limits of the class were ascertained:—Held, that the power was baldy exercised. *Re Blight*, *Blight* v. *Hartnoll*, 19 L. R., Ch. D., 294; 51 L. J., Ch., 162; 45 L. T. 524; 30 W. R. 513.

See also XXI. VII. 2 (*o*) *post*.

VIII. PENDING SUIT.

2. The Court will not, on the motion of a creditor coming in under a decree directing a sale of lands devised for payment of debts, set aside a lease obtained *pendente lite* from the devisee under the will, with a leasing power. *Moore* v. *M'Namara*, 2 Ball & B. 186. See *Walker* v. *Smallwood*, Ambl. 676.

3. The institution of a suit against trustees for the administration of the trust estate under the direction of the Court, does not preclude the exercise of the discretion given to the trustees by the will of the testator, as to the appointment of new trustees, or the management of the trust; but the trustees are required, after the institution of the suit, to act under the control of the Court. *Cafe* v. *Bent*, 3 Hare 245; 13 L. J., N. S., Ch., 169; 8 Jur. 141.

4. J. S. gave and devised all his real and the residue of his personal estate to trustees upon trust (subject to the power after mentioned) for his widow for life, and after her death upon certain trusts for the benefit of his daughter. The testator empowered his trustees at their discretion to apply, during the life of his wife, any part not exceeding one moiety of the annual income of the trust estate for or towards the maintenance and education of his daughter, or otherwise for her benefit in such manner as the trustees should think proper. The daughter having married and having attained twenty-one, and difficulties having arisen as to the execution of the trusts of the will, a bill was filed by the trustees to have the trusts administered under the direction of the Court:—Held, that notwithstanding such bill, and notwithstanding that the daughter was of age, the trustees might still exercise their discretion, and might pay part of the income of the trust fund to the daughter. *Sillibourne* v. *Newport*, 3 W. R. 653; 1 Kay & J. 602; 1 Jur., N. S., 608.

5. Where, under a will, the income of a fund is payable for the maintenance of T., the trustee, by paying the fund into Court, relinquishes his discretionary power. *Re Tegg*, 15 W. R. 52; 15 L. T., N. S., 236.

6. In a suit to have an appointment, under a discretionary power, declared invalid, a subsequent appointment *pendente lite* upheld. *Ward* v. *Tyrrell*, 25 Beav. 563.

7. After a decree in a suit for administration of trust funds the Court will not without reason control a discretionary power given to the trustees by the instrument creating the trust. *Brophy* v. *Bellamy*, 43 L. J., Ch., 183; 8 L. R., Ch., 798; 29 L. T., N. S., 380.

8. After an administration decree has been made all powers of management of the estate which may be vested in trustees are subject to the control of the Court; and the judge who exercises such control must be personally satisfied of the propriety of the course proposed to be adopted by the trustees. *Bethell* v. *Abraham*, 17 L. R., Eq., 24; 43 L. J., Ch., 180; 22 W. R. 179; 29 L. T., N. S., 715.

Trustees having power to invest certain moneys belonging to a testator's estate at their discretion, and having also power to continue or change securities from time to time, as to the majority should seem meet, applied to the Court in a suit for the administration of the trust estate for liberty to invest the moneys in and to convert securities into American funds or railway stocks. Infants were interested in the trust estate:—Held, that if the trustees had the discretion they claimed (which was doubtful), the Court ought not, in a case where infants were interested, to permit them to exercise that discretion in the way they proposed. *Ib.*

Exercise of Power of Sale.] See XXI. VIII. 9 *post*.

IX. BY CONTINGENT PERSON.

1. *In General*, 5747.
2. *By Survivors*, 5748.

1. In General.

9. Stock was transferred to trustees in trust for such persons as A. and his wife should jointly appoint; and in default of appointment in trust, during their joint lives, for the separate use of the wife; and in case A. should die first, in trust for his wife absolutely, but if she should die first, in trust for him for life, and subject thereto in trust for such persons as his wife, notwithstanding her coverture, should by will appoint; and in default of such appointment in trust for her next of kin. The wife, in A.'s lifetime, made a will in exercise of the last-mentioned power. A. died before her. On her death her will was admitted to probate, but the probate was limited to the property which she had power to dispose of:—Held, that the will was inoperative. *Price* v. *Parker*, 16 Sim. 198; 17 L. J., N. S., Ch., 398.

10. Trust funds were limited to a married woman absolutely if she survived her husband; but, if she predeceased him, she was to have a general power of appointment by will. The wife survived her husband:—Held, that the power had not arisen, and that therefore her will, made during the coverture, was inopera-

tive. *Trimmell* v. *Fell*, 16 Beav. 537; 22 L. J., Ch., 954.

1. A wife having separate estate, and having under her marriage settlement a power of appointment in the event of her dying in the lifetime of her husband, made a will with the assent of her husband, and survived her husband:—Held, that though the will passed the separate estate, it did not execute the power of appointment, nor pass property acquired by the wife after the death of her husband. *Noble* v. *Willock*, 8 L. R., Ch., 778; 42 L. J., Ch., 681; 21 W. R. 711; 29 L. T., N. S., 194. Reversing 42 L. J., Ch., 321; 21 W. R. 353.

2. By Survivors.

By Will.] 2. Where a power to appoint among children was in default of any joint appointment by the husband and wife, to be exercised by the survivor after the death of the other:—Held, that a will made during their joint lives by the one who survived did not speak at his death, so as to be an execution of the power. *Cave* v. *Cave*, 8 De G. M. & G. 131.

Personalty was settled upon such trusts as the survivor of A. and B. should at any time or times after the decease of the other of them by deed or will appoint. In 1846, A., during the life of B., made a will, purporting to exercise this power. A. survived B., and died without having republished his will:—Held, that the will did not operate as an execution of the power, and that the 24th section of the 7 Will. 4 and 1 Vict., c. 26, had no bearing on the case. S. C. 2 Jur., N. S., 295.

The argument whether the will was a good execution of the power was allowed to proceed, though the will had not been proved, the claimants undertaking to propound it for probate if the decision should be, that if testamentary it was a good execution. *Ib.*

3. A general power of appointment over equitable estates given to the survivor of two, can be well exercised by the will, made during the lives of both, of the person who turns out to be the survivor. *Thomas* v. *Jones*, 1 N. R. 138; 2 John. & H. 475; 8 Jur., N. S., 1124; 31 L. J., Ch., 732; 10 W. R. 853; 7 L. T., N. S., 154. Affirmed 1 De G. J. & Sm. 63; 9 Jur., N. S., 161; 32 L. J., Ch., 139; 7 L. T., N. S., 610.

Therefore, where a general power was vested in the survivor of A., B., and C. (a married woman with testamentary capacity), and C. ultimately became the survivor:—Held, that the power was well exercised by a residuary devise in the will of C., made while under coverture, and during the life of B. *Ib.*

The circumstance that the devise contained a limitation for the life of B.:—Held, not to be a conclusive indication of an intention not to exercise a power which would only come into existence in the event of B. predeceasing the testatrix. *Ib.*

4. A sum of money was settled, after the death of A. and B., in trust for their children according as A. and B., during their joint lives, by deed, or as the survivor, by deed or will, should appoint, and in default of appointment for the children absolutely. During the joint lives of the parties, A. made a will, whereby, after certain bequests, he gave all the real estate and the residue of the personal estate of or to which he was or should at his decease be possessed or entitled, or have power to dispose of by will, to his wife; but in case (which happened) she should die in his lifetime, then upon trust for his son for life, remainder for testator's grandson, an infant; and if his grandson should die under twenty-one without issue, then for a stranger to the power, with executory devises over. Upon the question being raised as to whether the will operated as a valid exercise of the power of appointment contained in the settlement:—Held, that the power, being special and given to the survivor of two persons, was not well exercised by a will made during the lives of both the persons by that individual who afterwards proved to be the survivor; and that even had the testator at the date of his will been actually survivor, the words of the will were not sufficient to include property over which he had only a special power of appointment. *Re Moir's Settlement Trusts*, 46 L. T. 723.

By Deed.] 5. Power to the survivor of husband and wife to appoint among children, not well executed by a deed by both. *M'Adam* v. *Logan*, 3 Bro. C. C. 310.

6. By the settlement made on the marriage of A. and B., certain real estates were conveyed to trustees upon trust to pay the rents to A. for life, and after his death to B. for life, and, after the death of A. and B., upon trust for such one or more of the children of the marriage as A. and B. should by deed jointly appoint; and, in case of the death of A. in the lifetime of B., before any such appointment should be made, as B. should by deed appoint. A. and B. jointly appointed two-fourths of the estate to two of their children. A. died; B. appointed the other two-fourths to two other of the children:—Held, that the appointments made by B. alone were valid. *Re Simpson's Settlement*, 20 L. J., N. S., Ch., 415; 4 De G. & Sm. 521.

X. BY RESERVATION OF EQUITY OF REDEMPTION.

7. A tenant in tail, under his brother's will, with remainders over, suffers a recovery to such uses as he should appoint by deed or will, and subject thereto to the uses of the will. He afterwards makes a mortgage of part of the estate in fee, and limits the equity of redemption to the prior uses. He then joins in a transfer of the mortgage, and reserves the equity of redemption to himself in fee:—Held, that the equity of redemption did not revert to the old uses. *Anon* v. *Lee*, 4 Sim. 364. And see *Thorne* v. *Thorne*, 1 Vern. 141. And *Perkins* v. *Walker*, *id.* 97. n.

8. By a marriage settlement, the lands of the wife were limited to such uses as she should, notwithstanding her coverture, by deed or will appoint, and in default of appointment to the use of the children of the marriage. After the husband's death, the wife, by way of appointment under the power contained in the settlement, executed three successive mortgages of the property in fee; each mortgage deed contained a trust for sale in default of repay

ment of the mortgage money, but the language of the two latter deeds differed from that of the former, not only as to the trust for sale, but as to the *proviso* for reconveyance, and in other respects:—Held, that having regard to the construction of the latter deeds taken by themselves, and also in comparison with the former, the wife must be considered as having intended to devote the whole property to purposes beyond those of mere mortgage securities, and consequently, that by the latter deeds, or one of them, the power was exhausted. *Barnett* v. *Wilson*, 2 Y. & Coll. C. C. 407; 12 L. J., N. S., Ch., 428; 7 Jur. 563.

1. Where lands are in settlement, and husband and wife join in mortgage of them; if deed creating the security is no more in effect than a simple charge on lands, and does not alter limitations further than is necessary to create the charge, the right of redemption, although reserved by deed to husband and wife or either of them, their or either of their heirs, etc., belongs only to those who are entitled under settlement, and not to heirs of husband if he survives wife. But where lands of wife, on marriage, were settled to use of husband and wife successively for life, remainder in strict settlement, remainder to wife and her heirs, with power of revocation and appointment of new uses, and she joined with him in mortgage, and by deed, to lead uses of fine afterwards levied by them according to covenant, the lands after determination of term, created to secure repayment of money borrowed, were limited to husband and wife, and survivor for life, remainder in tail special, remainder for default of such issue to right heirs of survivor of husband and wife; wife having died without issue, leaving husband surviving:—Held, husband and his heirs, and not heirs of wife, were entitled to equity of redemption. *Jackson* v. *Innes*, 1 Bligh. 104. See 16 Ves. 356.

2. By indentures, dated in December 1826, an estate was conveyed to C. by way of mortgage, for the term of 2,000 years, and subject thereto to such uses as A. and B. should jointly appoint, with remainder, in default of such appointment, to A. for life, with remainder to B. in fee. By indentures, dated in December 1839, A., B., and C. conveyed the estate to D. (who had paid off the mortgage debt created by the deeds of 1826) in fee, by way of mortgage, with a proviso that if A. and B., or either of them, their or either of their heirs, should pay the mortgage debt, D. would convey the estate to A. and B. and their heirs; and a declaration, that as between A. and B. the mortgage debt should be considered as a charge on the estate, and that A. should pay the interest in his lifetime. B. died in the lifetime of A.:—Held, that notwithstanding the proviso for redemption contained in the deed of December 1839, the estate, subject to A.'s life-estate, was vested in B. absolutely. *Hipkin* v. *Wilson*, 19 L. J., N. S., Ch., 305; 14 Jur. 1126.

3. A limitation of the equity of redemption in a mortgage, under a general power by tenants for life, to the mortgagor in fee, does not afford evidence of intention to destroy the remainder. *Eyton* v. *Knight*, 2 Jur. 8.

4. Real estate was settled on A. for life, remainder to his wife for life, remainder to the heirs of the body of the wife, remainder to the right heirs of A. A. and his wife barred the wife's estate tail; and by that and other deeds it was settled to such uses as A. should appoint. A. appointed, by a deed of July 1817, to such uses as he and his wife should jointly appoint, and in default to himself for life, remainder to his wife for life, remainder to his son in fee. A. and his wife made several mortgages, all except one limiting the equity of redemption upon or consistently with the uses of the deed of 1817. In 1832 they made, under the power in the deed of 1817, another mortgage, which limited the equity of redemption to A. and his wife, "their heirs or assigns, or to such other persons, etc., as they should direct;" and by a deed of even date certain terms were assigned to attend the inheritance according to the uses of the mortgage deed of even date. The wife having died, the husband, claiming to be seised in fee, sold. On a bill filed against the purchaser, by parties claiming under the son to redeem:—Held, that the proviso for redemption in the deed of 1832 was not intended to vary the limitation of the equity of redemption, and did not defeat the limitation of the fee in the deed of 1817. *Whitbread* v. *Smith*, 3 De G. M. & G. 727; 18 Jur. 475; 23 L. J., Ch., 611; 1 Eq. Rep. 392; 1 Drew. 531; 17 Jur. 725.

A. and his wife, by deed, limited the estate to such uses as A. alone should by deed or will appoint. On the next day, A. by deed poll appointed to such uses, etc., as he and his wife should jointly appoint, with remainder, in default of appointment, to the son in fee; and on the day after, by a deed, A. and his wife appointed the estate by way of mortgage: after this last deed had been engrossed, it was considerably altered and interlined, the wife not having been originally made a party to it:—Held, under the circumstances, that the three deeds must be presumed to have formed but one transaction. *Ib.*

5. Lands of a wife were settled to such uses as she and her husband should appoint, and subject thereto to the use of the husband for life, with remainder to the wife for life, with remainder to the children of the marriage. Two days afterwards, the husband and wife, in exercise of the power, appointed the lands to the use of trustees upon such trusts as the husband alone should appoint, and subject thereto in trust for the husband for his life, until his bankruptcy, with remainder in trust for the wife for life, and after her death on the trusts declared by the former deed. Some months afterwards the husband executed a mortgage, reciting merely an agreement for a loan, and thereby appointed that the trustees should hold the lands upon trusts for sale, and securing the repayment of the mortgage money, and subject thereto upon trust for the husband and his heirs:—Held, that the equity of redemption was effectually unsettled, and belonged to the husband in fee. *Heather* v. *O'Neill*, 2 De G. & J. 399; 4 Jur., N. S., 557; 27 L. J., Ch., 513.

XI. EXECUTION BY WILL. PERSONS TO ADMINISTER.

6. Where a married woman who was the donee of a general power of appointment

executed it by will, and appointed as executors persons who were neither appointees, nor the trustees of the settlement:—Held, that it was the duty of the executors, and not of the trustees of the deed conferring the power, to distribute the property appointed among the appointees. *Quære*, whether this would be so in the case of any donee of a power. *Platt* v. *Routh* (6 M. & W. 756) observed upon. *Re Philbrick*, 5 N. R. 502; 11 Jur., N. S., 558; 34 L. J., Ch., 368; 13 W. R. 570; 12 L. T., N. S., 261.

1. A. bequeathed a fund to trustees in trust for the children of his daughter B., in such shares and in such manner as B. should by will appoint, and gave his trustees usual powers of maintenance and advancement. B. by will appointed the fund to her children in certain proportions, and further appointed that the share of any minor should be paid to the trustees of her will, with powers of maintenance and advancement. B.'s children being infants, the question arose whether the appointed fund should be retained by A.'s trustees or handed over to B.'s trustees:—Held, that A.'s trustees were the proper parties to hold the fund and to administer the trusts of B.'s testamentary appointment. *Busk* v. *Aldam*, 44 L. J., Ch., 119; 19 L. R., Eq., 16; 23 W. R. 21; 31 L. T. 370.

2. A married woman having, under a settlement, a general power of appointment by will, appointed the fund, in pursuance of the power, to be divided among five persons, and appointed executors. The trustees of the settlement paid the money into court under the Trustee Relief Act, and the *cestuis que trustent* presented a petition for payment out, establishing their right to the fund by evidence:—Held, that the trustees should have paid the fund over to the executors of the will for distribution, and they were ordered to pay the costs; but, as the executors were the proper persons to present the petition, the trustees were exempted from payment of so much of the costs as were occasioned by the production of evidence by the *cestuis que trustent*. *Re Hoskin*, 5 L. R., Ch. D., 229; 46 L. J., Ch., 274; 35 L. T. 935.

Semble, on appeal, that the decision of Malins, V.-Ch., on the question of law was right, and that the executor of the donee of the power was the proper person to give a discharge. S. C. 6 L. R., Ch. D., 281; 46 L. J., Ch., 817; 25 W. R. 779.

3. Under a settlement a sum of 10,000*l.*, secured by mortgage, was vested in trustees for the wife of S. for her life, and after her death for S. for his life, and subject as aforesaid, for such persons as the wife should by deed or will appoint, and in default of appointment for S. The wife made a will, by which she directed that her husband should enjoy the income of the fund during his life, subject to payment of two annuities; and she directed certain pecuniary legacies to be paid, after his death, out of one moiety of the fund, and she gave the other moiety of the fund and the residue of her property to her husband, whom she appointed executor. The trustees of the settlement paid over the whole trust fund to the husband; and part of the 5,000*l.* applicable to the payment of the pecuniary legacies was lost by him:—Held, that the payment to him was proper, and that the trustees were not answerable for the loss. *Hayes* v. *Oatley*, 14 L. R., Eq., 1; 41 L. J., Ch., 510; 26 L. T. 26.

XII. REVOCATION OF TESTAMENTARY APPOINTMENT.

4. Execution of power by will is revoked by subsequent conveyance upon a sale, by the tenant for life having obtained the legal estate; and that not being an execution within the intent of the power, the estate passed under a general residuary devise against the purchaser. *Reid* v. *Shergold*, 10 Ves. 370.

5. A covenant to levy a fine to H. for 1,000 years by way of mortgage: remainder as A. should appoint; fine levied. A. devises to H.; afterwards, for 10*s.*, covenants that the fine should enure to H. in fee:—Held, a revocation of the will. *Hick* v. *Mors*, Ambl. 215; 2 Ken. Ch. 117.

At law, an imperfect conveyance is a revocation; it depends on intention. *Ib.*

"Intent" does not mean intent to revoke, but to make a different disposition. *Ib.*

6. Appointment (under a power) by will is revocable by a subsequent appointment by deed, though no power of revocation is reserved by the will. *Lisle* v. *Lisle*, 1 Bro. P. C. 533.

7. J. H., having settled his real estate in trust for himself for life, and afterwards to such uses as he might by deed or will appoint, and, in default of appointment, to sole use of the heirs of his body, by his will noticing the settlement, after giving several legacies, devised all the rest of his real and personal estate to J. P. (who was not his heir) and the heirs of his body, etc. By lease and release, subsequent to the will, J. H. conveyed the real estate to a trustee for himself for life, and afterwards for such uses as he should by deed or will appoint, with power to raise, etc., for debts, etc., and, in default of appointment, for J. H., his heirs and assigns. J. H. died without altering will, or making any other appointment:—Held, that the latter conveyance was a revocation of will. *Huband* v. *Huband*, 7 Bro. P. C. 433.

8. By deed of 4th November, 1800 (being the settlement made on the marriage of A. and B.), the intended wife, B., in exercise of a general power of appointment vested in her by a previous deed of the 4th May, 1799, appointed certain freehold houses to the use of trustees during the joint lives of herself and her husband, for her separate use, with the remainder, in the event of her dying in the lifetime of her husband (which happened), as she should appoint by will attested by three witnesses, with limitations over. Shortly after her marriage, B., by will duly attested by three witnesses, devised the houses to her husband in fee; afterwards, in 1811, she and her husband executed a deed attested by two witnesses, by which, after reciting the indenture of the 4th May, 1799, but not mentioning the marriage settlement, B., in exercise of the power given her by the deed of 1799, and of all other powers, etc., appointed the messuages to the use of her husband for life, remainder to the use of herself for life, remainder to the use of the children of the marriage as she should appoint; and, in default of appointment, to all the children

equally in tail, remainder to her husband in fee:—Held, that the deed of 1811 did not operate as a revocation of the previous will. *Kilbeck* v. *Wood*, 1 Russ. 564; 5 L. J., Ch., 61.

1. Where there was some doubt as to the validity of a power, and a deed was executed by A., the donee of the power, and those who together with her were interested in the capital of the fund, supposing that the power either was not valid or not executed, which deed it was held was intended only to take effect on one of the two events last stated, and the donee of the power then by will executed such power (which was in fact valid), and after that, in pursuance of a power given by the deed, appointed a new trustee of such deed:—Held, that this appointment was not a revocation of the appointment by the will. *Phipson* v. *Turner*, 9 Sim. 227; 2 Jur. 414.

2. A. devised all his estates to widow for life, remainder to nephew, he paying 2,000*l.* to appointee of widow, and made her executrix and residuary legatee. The estates were held under church leases, which testator renewed after will. *Quære*, if a revocation. The widow, by will, "in pursuance of power," appointed plaintiff, and devised estates, "so given by her said husband's will, and all her interest, etc., therein," to trustees, for nephew, on his paying the said 2,000*l.*, "according to the true intent, etc., of husband's will; but not before or otherwise." Supposing the renewal of leases a revocation, the widow shall be presumed to have designedly given effect to real intent of husband. *Penrice* v. *Garnons*, 3 Anstr. 821.

3. A disposition by will, since the 7 Will. 4 and 1 Vict., c. 26, can be revoked only by ademption of the property devised, or by a declaration of intention to revoke, or words equivalent thereto; and therefore a will executing a power of appointment is not revoked by deeds subsequently executed, and making a different disposition of the property appointed. *De Pontes* v. *Kendall*, *Ford* v. *De Pontes*, 8 Jur., N. S., 323; 31 L. J., Ch., 185; 10 W. R. 69; 5 L. T., N. S., 515; 30 Beav. 572.

4. Two wills of different dates, each purporting to be the last will, but the second containing no revoking clause, were admitted to probate as together constituting the last will of a testatrix. Each will bequeathed a number of legacies, all the legatees in the first, except two, being also named in the second. The legacies for the most part differed in amount, and there were other slight differences; but five legacies, and the residuary bequest, were the same in both. Some plate was specifically given by each will. The first will contained an appointment of a sum of money under a special power; by the second will the power was not exercised, but a pecuniary legacy was given to the appointee:—Held, that the legacies given by the second will to legatees named in the first was substitutional for the legacies given to them by the first, except that the appointment under the power was not revoked, and the legacy to the appointee was therefore cumulative. *Tuckey* v. *Henderson*, 11 W. R. 1013.

5. B., by a will made in 1858, specifically devised and bequeathed freehold, copyhold, and leasehold property, and gave all other real and personal estate, of which he should die possessed or should have power to dispose, upon certain trusts. By a voluntary settlement in August 1862, B. conveyed all his freehold property upon trust, after his own death, for E. for life, with remainder as B. should by his last will, or any codicil thereto, appoint, and in default of appointment in trust for E. in fee; and by the same settlement he disposed of all his leasehold and personal property. In November 1862, B., by an instrument purporting to be his last will, and not mentioning any former will, appointed under the power in the settlement an annuity to be raised out of his freehold property, and devised all his copyhold property, but made no other disposition of freehold or personal property. Probate of both wills was granted:—Held, that having regard to the terms of the power, the testator had indicated an intention that the will of 1862 alone should operate as an execution of the power, and that consequently the specific and residuary devises in the will of 1858 were not in due execution of the power. *Pettinger* v. *Ambler*, *Bunn* v. *Pettinger*, 1 L. R., Eq., 510; 14 L. T., N. S., 118.

6. A testator, having executed a will, completely disposing of his own property, and also of other property over which he had a disposing power, subsequently, and after some changes had taken place in the investment of the property, and having the former will before him, executed a later will complete in form, having no word of a codicillary character, and no reference to the former—by which he fully disposed of his own property, but not of that over which he had the power, although on comparing the two together it was plain that he intended to dispose of both; and the effect of admitting the former will to probate would be the retention, contrary to the intention of the testator, of a certain appointment:—Held, that the latter will alone should be admitted to probate. *Shiel* v. *O'Brien*, 7 Ir. R., Eq., 64.

7. Under a marriage settlement the husband had a power of appointment by will, and the trustees a power to sell and reinvest in land to the old uses. The husband made a will appointing the settled property to W. and N., and giving the residue of his real and personal property to his wife. Afterwards the trustees entered into a contract for sale. After the conveyance had been executed by the husband and one trustee, and before payment of the purchase money, the husband died:—Held, that the purchase money went to the wife under the residuary clause. *Gale* v. *Gale*, 4 W. R. 277; 21 Beav. 349.

8. Under a settlement of real estate made in 1825, the husband and wife had a joint power of revocation and new appointment, and, after other limitations, the wife had an absolute power of appointment by will. In 1827 the wife made her will under the power. In 1840 it was discovered that limitations for the lives of the husband and wife had been accidentally omitted from the settlement of 1825. A new deed was executed solely for the purpose of supplying the omission. By this instrument the former settlement was revoked under the joint power, and the estates were settled as before, except that the limitations to children were omitted, there being then no issue of the marriage, and the wife having reached an advanced age, and a power of appointment by will was again given to the wife:—Held, that

the deed of 1840 annulled the will of 1827. Held, also, that extrinsic evidence of the purpose with which the deed of 1840 was executed was not admissible. *Walker* v. *Armstrong*, 4 W. R. 280; 21 Beav. 284; 2 Jur., N. S., 221; 25 L. J., Ch., 402. See S. C. on appeal 2 Jur., N. S., 959; 25 L. J., Ch., 738.

But on appeal:—Held, that the parties claiming under the original limitations were entitled to have the second deed rectified. S. C. 4 W. R. 770.

1. A general clause in a will revoking all former wills revokes a prior testamentary appointment. *Merritt, In Goods of* (1 Sw. & Tr. 112), and *Joys, In Goods of* (4 Sw. & Tr. 214), considered. *Sotheran* v. *Dening*, 20 L. R., Ch. D., 99.

A married woman having a general power of appointment by will over real estate executed a will appointing the estate. After the death of her husband she made another will revoking all former wills and containing a general devise and bequest of all her real and personal estate. She afterwards made a third will, also revoking all former wills, and bequeathing her personal estate, but not devising or appointing her real estate. She had no real estate except that subject to her power of appointment:—Held, that the testamentary appointment under the first will was revoked by the second will, and the second will by the third, and that the real estate went as in default of appointment. *Ib.*

2. A widow, having power of appointment among her children by deed or will over real estate, appointed it to her two children, a son and daughter, in moieties by will. She afterwards executed another will, revoking all former wills made by her (without special reference to the former will and appointment), and devised and bequeathed all her real and personal estate to her daughter absolutely. Her son died in her lifetime, leaving issue one child, a son:—Held, that the second will revoked the first, but did not amount to an execution of the power of appointment. *Harvey* v. *Harvey*, 32 L. T., N. S., 141; 23 W. R. 478.

Married Woman.] 3. Stock was, in contemplation of a marriage, vested in trustees for the separate use of the wife for life, and with full power for her to dispose of it by will. She made her will during coverture. She survived the husband, and afterwards took a transfer of the stock into her own name. This does not operate as a revocation of the will, or an ademption of the bequest of the stock. *Dingwell* v. *Askew*, 1 Cox 427.

4. Feme covert, under a power, makes a will; afterwards becoming discovert, she takes a conveyance from the trustees to her own use. This is a revocation of the will. *Lawrence* v. *Wallis*, 2 Bro. C. C. 319.

5. A married woman, having a power to appoint personal estate, held in trust for her, by her last will and testament, notwithstanding her coverture, made a will in exercise of her power during the life of her husband. She survived her husband, and afterwards took an assignment from her trustee of the personal estate to herself. This assignment does not operate as a revocation of the will. *Clough* v. *Clough* 3 Myl. & K. 296.

6. A woman being about to marry, enters into an agreement with the future husband (without seal or stamp), by which her property is settled upon the survivor for life, with power to the wife to dispose by will made after the marriage; she then immediately makes a will, by which she gives her property to the intended husband; and afterwards (on the same day) she marries; the articles resting in agreement give the husband an equitable estate for life, but the will is revoked (not being protected by the power) by the subsequent marriage. *Hodsden* v. *Lloyd*, 2 Bro. C. C. 534.

XIII. RE-EXECUTION AFTER INVALID APPOINTMENT.

7. A. having a power to appoint 10,000*l.* amongst his younger children, appoints it to them equally, reserving to himself a power of revocation as to 5,000*l.*, which he afterwards irrevocably appoints to E., one of the children, in consideration of her having agreed to apply part of it in payment of his debts. Afterwards, A., by a deed, to which E. is also a party, revokes, with her consent, the last appointment as to 2,500*l.*, and in pursuance of all powers, appoints that sum to a child by a second marriage, and confirms E.'s title to the remainder under the former appointment:—Held, that the appointment of the 5,000*l.* being void, the appointment of the 2,500*l.* must also fail. *Farmer* v. *Martin*, 2 Sim. 502.

8. A father had a power of appointing to any of his children. Having, in breach of trust, obtained possession of part of the trust funds, he, in 1834, appointed that part of his daughters, in exclusion of his son, under an agreement that that part should afterwards be conveyed to him, in exchange for an estate of less value. In 1844 he executed a second appointment, reciting the previous dealing with the fund, and he thereby appointed the remaining portion of the trust property, "and all other" the property comprised in the settlement, to his daughters:—Held, that the first appointment was void; and, secondly, that the portion of the property comprised therein was not appointed by the second deed. *Askham* v. *Barker*, 12 Beav. 499.

9. A father executed a power of appointment, under which his four younger children, B., C., D., and E., became entitled, subject to his life interest, to 30,000*l.* in equal shares. The father afterwards, by several instruments of appointment, affected to appoint the whole fund to B., C., and D., in the following shares; viz., to B. 13,000*l.*, to C. 5,000*l.*, and to D. 12,000*l.* E., who was a son, died in his father's lifetime intestate and without issue; whereupon his share devolved to the father. After E.'s decease, the father, with a view to support the subsequent appointment, executed a deed-poll, declaring that the original appointment, under which the children took equally, was made by mistake:—Held, that though the subsequent appointments were invalid, so far as related to the shares of B., C., and D., yet, as regarded the share of E., the father was bound by the statement in the deed-poll; and that E.'s share, amounting to 7,500*l.*, must be

apportioned between B. and D., in satisfaction *pro tanto* of the losses which, through the invalidity of the subsequent appointments, had been sustained by their respective shares. *Armytage* v. *Armytage*, 1 Y. & Coll. C. C. 461; 6 Jur. 790.

1. In 1813 a married woman, who was entitled for life to estates, including the L. estate, with a power of appointing them after her death to all or any of her children, appointed them by deed to her eldest son in fee. This appointment was made upon a bargain between the husband and wife, and the eldest son, that the estates should be settled, subject to the wife's life estate, to the use that the husband should receive a rent charge for his life, and subject thereto to the use of all or any of the children of the marriage as the husband and wife should jointly appoint, or as the wife, if she survived, should by deed or will appoint; and the estates were so settled accordingly. In 1820 the husband and wife made a joint appointment of the estates among their children, by which they gave the L. estate to the eldest son, and they made slight variations of these dispositions in 1826, reserving on each occasion a power of revocation and new appointment to them jointly and to the wife if surviving. In 1827 the husband died. In 1829, the widow, who had not married again, by a deed not noticing the invalidity of the appointment of 1813, and expressed to be made in exercise of the powers given her by the deeds of 1820 and 1826, or by the deeds recited in them, and of all other powers vested in her, made some slight variations of the dispositions made by the deeds of 1820 and 1826, and subject thereto, confirmed the dispositions of those deeds:—Held, that although the appointment of 1813 was invalid as being made on a bargain for the benefit of the husband, and the appointments of 1820 and 1826 were therefore invalid, as made under a power which was ill created, the original power of the wife was well exercised by the appointment of 1829, and that the title of the eldest son to the L. estate was good. *Carver* v. *Richards*, 1 De G. F. & J. 548; 6 Jur., N. S., 410; 29 L. J., Ch., 357; 8 W. R. 349; 2 L. T., N. S., 161; 27 Beav. 496.

2. Where the donee of a power to appoint among children had given an unmarried child a power to make appointments to take effect only in case of the child's marriage, and after the child's marriage he executed a further deed, in the operative part of which he was expressed to confirm the prior appointment:—Held, that this second deed operated as a new appointment, and gave the child a valid general power of appointing exercisable immediately. *Morgan* v. *Gronow*, 42 L. J., Ch., 410; 16 L. R., Eq., 1; 28 L. T., N. S., 434.

3. When an appointment has been set aside on the ground that, though not based on any actual agreement between the appointor and the appointee, it was made in reliance on a sense of moral obligation known to be operating on the mind of the appointee, which would lead her to carry out the appointor's wishes, nothing short of a distinct declaration by the appointor that he considers the appointee relieved from such obligation, can make a fresh appointment to the same person valid. *Topham* v. *Portland* (*Duke*), 38 L. J., Ch., 513; 17 W. R. 911. Affirmed 39 L. J., Ch., 259; 5 L. R., Ch., 40; 18 W. R. 235; 22 L. T., N. S., 847. And see *Jackson* v. *Jackson*, Dru. 99.

XIV. IN OTHER CASES.

4. Trustee of a settlement not entitled by an agreement with the husband before the marriage, to a lien on the fund, settled to the separate use of the wife during the joint lives of the husband and wife, with remainder to the survivor, in opposition to a joint appointment made by them, under a power reserved to them in the settlement. *Morris* v. *Clarkson*, 1 Jac. & Walk. 107.

5. Married woman being entitled to annuity of 200*l.* out of dividends of 10,500*l.* 4 per cent. stock, which, subject to the annuity, was divisible among the children of herself and her husband as he should appoint. Husband appointed 2,500*l.* to eldest son. Court refused to transfer this sum to son, though the remainder was much more than sufficient to pay the annuity. *Breton* v. *Clifden* (*Lord*), 1 Sim. & S. 363.

See also FOLLOWING DIVISIONS.

IX. Execution. By Particular Persons.

I. *By Infant*, 5753.
II. *By Lunatic*, 5754.
III. *By Married Woman*, 5754.

I. BY INFANT.

6. *Semble*, there is no precedent either in a court of law or equity where it has been held that a power over real estate executed by an infant is good. *Hearle* v. *Greenbank*, 3 Atk. 695; 1 Ves. 298.

7. Although a power simply collateral may be exercised by an infant, a devise to an infant and others upon a discretionary trust for sale cannot be exercised by them. *King* v. *Bellord*, 1 Hem. & M. 343; 32 L. J., Ch., 646; 11 W. R. 900; 8 L. T., N. S., 633; 2 N. R. 442.

Devisees on a discretionary trust for sale (one of whom was an infant) having contracted to sell:—Held, on a bill by the purchaser for specific performance, that the contract was void, and bill dismissed accordingly. *Ib.*

8. An infant cannot exercise a power over personal property (though authorised to do so by the instrument creating the power) which goes to defeat his or her own interest therein. *Re Armit*, 5 Ir. R., Eq., 352.

9. An infant can exercise a power not simply collateral, where it may be plainly inferred from the instrument creating the power that such an exercise was in contemplation of the persons executing the instrument. *Re Cardross*, 38 L. T., N. S., 778; 7 L. R., Ch. D., 728; 26 W. R. 389; 47 L. J., Ch., 327.

By a marriage settlement, where the intended wife was an infant ward of court "of

the age of seventeen years and upwards," funds, the property of the lady, were settled, with power to change investments, "with the consent of Lady C. and her husband":—Held, that the lady, though still a minor, could give a valid consent to a change of investment of the settled funds. *Ib.*

1. By a settlement made on the marriage of a lady then and therein described as "an infant of the age of nineteen years and upwards," it was agreed that, after the marriage, as soon as the case would admit, certain personal estate standing in the names of the trustees of her father's will in which the lady would take a vested interest on her marriage, subject to an annuity for her mother's life, should be assigned to trustees, in trust for investment with the consent of the husband and wife, and to pay the income to the wife for her separate use, and after her death to her husband till bankruptcy or alienation; and then to hold the capital on trusts for the issue of the marriage; and, in default of such issue, in trust for such person or persons as the wife should by will or deed appoint. The wife appointed the fund by deed to her husband, and died without issue, being still an infant. An action having been brought by the trustee in the husband's bankruptcy, who was also the legal personal representative of the wife, against the next of kin of the wife, claiming the property:—Held, by a majority of the judges, that the appointment by the wife while still a minor was valid. *Re D'Angibau, Andrews* v. *Andrews*, 15 L. R., Ch. D., 228; 49 L. J., Ch., 756; 43 L. T. 135; 28 W. R. 930. Affirming 49 L. J., Ch., 182; 41 L. T. 645; 28 W. R. 311.

Held, also, by the whole Court, that whether the appointment was valid or not, the wife's next of kin, being volunteers, could not claim under the settlement in opposition to her legal personal representative. *Ib.*

II. BY LUNATIC.

2. The Court has jurisdiction to decide upon the validity of the execution of a testamentary power over personalty with reference to the state of the donee's mind at the time of the alleged execution. *Morgan* v. *Annis*, 3 De G. & Sm. 461.

3. In a suit to set aside an appointment, on the ground of the unsoundness of mind of the appointor, who was the tenant for life of the estate, parties who would be entitled in remainder in default of appointment cannot, either by joining as plaintiffs in a supplemental suit, or by offering in their answer to convey their interests for the plaintiff's benefit, enable the plaintiff to sustain the suit in respect of any relief beyond the duration of his own life estate. *Price* v. *Berringlon*, 7 Hare 394.

4. A power of limiting a rent charge by way of jointure was given to tenants for life, when and as they should severally and successively be in possession of the subject property. Previously to his becoming entitled in possession, A. by his marriage settlement covenanted, in that event, to exercise the above power in favour of his then intended wife. Upon his accession to the estate, he executed a deed of appointment accordingly. After his death the validity of such appointment was disputed by the remainderman, upon the ground that A. was of unsound mind at the date of its execution, and during the whole time that he was in possession as tenant for life:—Held, that the effect of the covenant to execute the power did not depend upon the continuance of mental capacity in the covenantor: and that the estate was bound by his covenant. *Affleck* v. *Affleck*, 5 W. R. 425; 26 L. J., Ch., 358; 3 Jur., N. S., 326; 3 Sm. & G. 394.

Revocation of Power of Attorney.] See POWER OF ATTORNEY, IV.

See also SETTLED ESTATES ACTS—TRUSTS.

III. BY MARRIED WOMAN.

1. *Capacity. General Principles*, 5754.
2. *During what Coverture or Widowhood* 5755.
3. *Divorce. Effect*, 5755.
4. *Undue Influence. Effect*, 5756.
5. *By Deed during Coverture*, 5756.
6. *By Will*, 5757.
7. *Other Cases*, 5759.

1. Capacity. General Principles.

5. There is a diversity between a naked power and a power which flows from an interest, for where a bare power is given to a feme by will to sell lands, though she afterwards marries, she may sell the lands, and may sell to her husband; but where a feme, upon a settlement of her own estate, reserves a power which flows from an interest, that power ought to be executed by the feme whilst sole, and yet it is said such powers ought to be taken liberally, though formerly they were taken strictly. *Antrim* (*Marquis*) v. *Buckingham* (*Duke*), 1 Ch. Ca. 17; 3 Salk. 276; 2 Freem. 168.

Where a reversioner, upon an estate for life, made a settlement on herself for life, with power for her, being sole, to make leases for three lives in possession, and she and her husband, in the lifetime of the tenant for life, made a lease for twenty-one years, *habendum* from the date, it was held not pursuant to her power; for, by the marriage, she put herself under the control of her husband. S. C. 1 Ch. Ca. 17. In this case, Ld. K. took a diversity between a naked power and a power which flows from an interest.

6. Where a wife has a power to dispose of her separate estate, her disposition of it must be by acts strictly pursuing the power. *Ross* v. *Ewer*, 3 Atk. 160; *Burnet* v. *Mann*, 1 Ves. 157.

7. Feme covert may execute a power. *Peacock* v. *Monk*, 2 Ves. 191.

8. A woman entitled to the trust of a reversion in fee of lands, reserves to herself, by articles previous to her marriage, a power of disposing of all her estate to such uses as she shall think proper. She afterwards makes an appointment in favour of her husband and children. This appointment was held good, although no conveyance of the reversion was ever executed. *Wright* v. *Cadogan* (*Lord*), 1 Bro. P. C. 486.

1. An agreement by feme covert to execute a power of leasing over lands settled to her separate use:—Held, to be a valid execution of the power, without deciding whether the married woman was personally bound by the agreement. *Dowell* v. *Dew*, 1 Y. & Coll. C. C. 345; 12 L. J., N. S., Ch., 158; 7 Jur. 117.

2. A devise of real estate to trustees, for the sole and separate use of a married woman and her heirs, gives her the same power of disposition by deed or will over the equitable fee as she would have had if she were a feme sole. *Taylor* v. *Meads*, 11 Jur., N. S., 166; 13 W. R. 394; 34 L. J., Ch., 203; 5 N. R. 348; 12 L. T., N. S., 6; 4 De G. J. & S. 597. Reversing 10 Jur., N. S., 1012; 12 W. R. 846; 10 L. T., N. S., 475; 4 N. R. 203.

3. The Wills Act, 7 Will. 4 and 1 Vict., c. 26, does not enlarge the testamentary capacity of a married woman, but enlarges the subject matter over which she, having testamentary capacity, can operate by will. *Noble* v. *Willock*, 8 L. R., Ch., 778; 42 L. J., Ch., 681; 21 W. R. 711; 29 L. T., N. S. 194. Reversing 42 L. J., Ch., 321; 21 W. R. 353.

The death of a husband operates as a revocation of his assent to the will of his wife. *Ib.*

Suspension of Power by Marriage.] See V. IX. *ante.*

2. During what Coverture or Widowhood.

4. Where feme sole conveys stock to trustees to use of intended husband and self for life, with power to dispose of part, this power survives to wife. *Horner* v. *Bendloes*, 9 Mod. 335.

5. A trust term created by a marriage settlement, to raise a sum of money on the decease of the survivor of the husband and wife, in case there should be no issue of the marriage living at her death, and to be paid as the wife, at any time or times during her coverture, and notwithstanding the same, by any deed or writing, etc., should appoint or devise. The power cannot be exercised during widowhood, or a second marriage. *Horseman* v. *Abbey*, 1 Jac. & Walk. 381.

6. A trust was created by a marriage settlement to raise 1,000*l.*, on the decease of the survivor of the husband and wife, in case there should be no issue of the marriage living at her death, and to pay the same to such person or persons as the wife, "at any time or times thereafter during her coverture," should by deed or will appoint; and, in default of appointment, to the executors, administrators, and assigns of the wife's mother. There was no issue of the marriage, and the wife survived the husband without having exercised the power of appointment during the first coverture. She afterwards married a second time, and had issue by her second husband, and died leaving such issue, her second husband and mother surviving. The mother afterwards bequeathed her residuary estate and died:—Held, that the power given by the settlement to appoint the 1,000*l.* could not be exercised during the widowhood of the donee, or during any other than the first coverture: and that the executors of the mother were entitled to take the 1,000*l.* and interest, as part of her residuary personal estate. *Morris* v. *Howes*, 4 Hare 599; 9 Jur. 966. Affirmed 16 L. J., N. S., Ch., 121; 10 Jur. 955.

7. By a marriage settlement, the wife has power, notwithstanding "her coverture," to appoint to the children of the marriage; and in default of such children, she has a power, "during and notwithstanding" her coverture, to appoint to other persons. The latter power cannot be exercised during her widowhood. *Quære*, whether the former can. *Burnham*, v. *Bennett*, 2 Colly. 260; 9 Jur. 888. See S. C. 1 De G. & Sm. 513.

8. Settlement on wife for life, with power for her, during the intended coverture, to appoint by will, and in default, over:—Held, on the context, that an appointment by will, after the coverture, was invalid. *Holliday* v. *Overton*, 14 Beav. 467; 21 L. J., N. S., Ch., 769; 16 Jur. 346. Affirmed 16 Jur. 751.

By a marriage settlement, reciting that the rents, issues, and profits of the property to be thereby settled should be to the separate use of the intended wife for life, and after her decease, for the further purpose of making of the reversion and principal thereof a provision for the children of her former marriage, certain real and personal property then belonging to the intended wife was conveyed to trustees, in trust to pay the income to the intended wife for life; and after her decease, in trust for such persons and in such manner as she, "in and by her last will and testament, or instrument testamentary, or in the nature of a will, in writing, to be signed and published by her in the presence of three or more credible witnesses, upon testamentary considerations only, during her intended coverture, should direct or appoint":—Held, that the words, "during her intended coverture," applied to the whole clause, and that an appointment made by the wife after the death of the husband was an invalid execution of the power. S. C. 16 Jur. 751.

9. Stock was transferred to trustees in trust for such persons as A. and his wife should jointly appoint; and in default of appointment in trust, during their joint lives, for the separate use of the wife; and in case A. should die first, in trust for his wife absolutely; but if she should die first, in trust for him for life, and subject thereto in trust for such persons as his wife, notwithstanding her coverture, should by will appoint; and in default of such appointment in trust for her next of kin. The wife, in A.'s lifetime, made a will in exercise of the last-mentioned power. A. died before her. On her death her will was admitted to probate, but the probate was limited to the property which she had power to dispose of:—Held, that the will was inoperative. *Price* v. *Parker*, 16 Sim. 198; 17 L. J., N. T., Ch., 398.

10. A power enabling a married woman to dispose of settled property, in the event of her dying in the lifetime of her husband, is satisfied by her surviving him, and becoming absolutely entitled to the property; and a will executed by her during their joint lives was held to be inoperative as an appointment. *Trimmell* v. *Fell*, 22 L. J., Ch., 954; 16 Beav. 537.

3. Divorce. Effect.

11. By a marriage settlement, the incom

of a trust fund was to be paid during the joint lives of husband and wife, as they should appoint, "but not so as to deprive themselves of the benefit thereof, by charge or otherwise, in the way of anticipation." Upon a divorce *a mensâ et thoro*, they appointed the income between themselves in equal moieties. The Court held the appointment valid, and acted upon it. *Re Linzee*, 23 Beav. 241.

1. By a settlement in 1840, on the marriage of C. (the wife) and B. (the husband), a fund was settled upon the children of C. by B., and in default as C. should appoint. In 1860 the marriage was dissolved, there being then no issue to take:—Held, that the power of appointment arose, notwithstanding the possibility of a marriage and future issue. *Bond* v. *Taylor*, 2 John. & H. 473; 8 Jur., N. S., 1090; 31 L. J., Ch., 784; 10 W. R. 169; 5 L. T., N. S., 445.

2. A married woman under a general power of appointment exercisable during coverture, by deed of appointment executed after marriage, appointed the property to trustees during the joint lives of herself and her husband for her sole and separate use; and if she should survive her husband, for herself absolutely; but in case she predeceased him, as she should appoint; and in default of her appointment to her next of kin. There were no children, and the marriage having been dissolved by a final decree of dissolution on account of the husband's misconduct:—Held, that the wife was absolutely entitled. *Jessop* v. *Blake*, 3 Giff. 639.

4. Undue Influence. Effect.

3. Deeds of gift, by a wife to her husband, of property over which she has a power of appointment, are regarded by the Court with jealousy, and inquiries will be directed as to the circumstances under which they were executed. Where a wife makes a deed of gift to her husband, of property over which she has a power of appointment, and the deed is afterwards impeached by her, the burden lies on her of showing that the circumstances were such as to invalidate it, and the burden does not lie on the husband of showing that the circumstances were such that it ought to be supported. Property was settled on A., a married woman, for her life, with remainder to such uses as she should by deed appoint; A., by deed dated in 1821, appointed the reversion to B., her husband, and in 1836 filed a bill to have the deed set aside. The circumstances relied on by A. were, that the deed had been prepared by B.'s solicitors; that it had not been read over at the time of the execution; and the evidence of one of the attesting witnesses, that she was agitated and distressed at the time of the execution, and signed it in a reluctant manner:—Held, that these circumstances were not such as to invalidate the deed. *Nedby* v. *Nedby*, 21 L. J., N. S., Ch., 446; 5 De G. & Sm. 377.

An appointment made, in exercise of a power by a wife, in favour of her husband, is to be considered good, unless the wife shows that it was executed under circumstances sufficient to invalidate it. The *onus probandi* lies on the party impeaching the instrument. *Ib.*

4. An estate was settled on husband and wife for life, with a limitation to their issue, and in default a power of appointment was given to the wife. There was one child only of the marriage, who died an infant. The wife survived her husband, and appointed the estate to G. D. F., who was the releasee to uses, and had possession of the settlement. G. D. F. shortly after his wife's death made a feoffment, and levied a fine with proclamations. After the expiration of the five years, the heirs of the child claimed the estate, insisting that, under the terms of settlement, the child took the estate in fee, and that the power of appointment had never arisen. He filed a bill against G. D. F. to avoid the fine, alleging that it had been levied with full knowledge of the plaintiff's rights, and with a fraudulent view to bar them:—Held, that the act of G. D. F. did not constitute a fraud; that G. D. F. stood in no fiduciary relation towards the plaintiff, and the bill was dismissed with costs. *Langley* v. *Fisher*, 9 Beav. 90; 15 L. J., N. S., Ch., 73.

5. Where a feme covert having separate property joins in a security for money advanced to her husband, the Court acts upon it, not as an agreement to charge her separate property, but as an equitable appointment under the settlement, to be satisfied from the rents and profits of that property, and not by sale or mortgage. If the feme covert insists upon the exercise of undue influence by the husband, she must prove it, and it is not for the plaintiff to prove a negative. *Field* v. *Sowle*, 4 Russ. 112.

5. By Deed during Coverture.

6. Money vested in trustees, in trust for husband and wife successively for life, and remainder to the children, and in default thereof to such person as the wife should appoint; a deed of the wife, conveying this contingent interest, was established. *Guise* v. *Small*, 1 Anstr. 277.

7. A feme covert, described as such in the will of the testator, may, during the coverture, execute, by deed, a power of disposition given her by the will, over real and personal estate. *Downes* v. *Timperon*, 4 Russ. 334.

8. A., entitled to the interest of money for life, with power of appointment as to the principal, receives for her support a part of the principal, and appoints to her husband; the husband cannot claim his part of the principal. *Randal* v *Hearle*, 2 Anstr. 363.

9. A woman entitled to the trust of a reversion in fee of lands, reserves to herself, by articles previous to her marriage, a power of disposing of all her estate to such uses as she shall think proper. She afterwards makes an appointment in favour of her husband and children. This appointment was held good, although no conveyance of the reversion was ever executed. *Wright* v. *Cadogan* (*Lord*), 1 Bro. P. C. 486.

10. A sum of stock was settled upon trust to pay the income to C. D. (then single), for her separate use, without power of anticipation; and after C. D.'s decease, upon trust, as to the principal sum, for A. B. (subject, however, to

the proviso, that the trustees should, on the requisition of C. D., to be signified by deed at any time within ten years, if C. D. should so long live, notwithstanding the restrictions placed on her life interest, raise the sum of 5,000*l.* out of the trust fund, and pay the same to her, or to such persons as she should by any deed direct): C. D. afterwards married, and then executed a deed-poll, directing the trustees to raise that sum, and pay it to her:—Held, that notwithstanding her coverture she might make the requisition, and that she was entitled to have the money raised. *Green* v. *Campbell*, 8 L. J., N. S., Ch., 172.

1. Money invested in trust for a married woman, to pay her interest for life to her separate use, and after her decease to such person, and subject to such powers, etc., as she should, by any instrument in writing, from time to time, or by will appoint (during the present coverture). She cannot dispose of the principal at once by deed, but by a revocable act only. *Sockett* v. *Wray*, 4 Bro. C. C. 483.

2. A feme covert having an interest for life, to her separate use, and a power of appointment of the fund by deed, to take effect after her death, assigned her life interest, and appointed the fund after her death to trustees, upon trust, to invest the fund in the immediate purchase of an annuity for her life. The Court ordered a transfer of the fund to the new trustees accordingly. *Lynn* v. *Ashton*, 1 Russ. & M. 188; Taml. 328.

3. Feme covert having power to convey her estate after her death, conveys it by lease and release, to take effect after her death; she afterwards joins with her husband in levying a fine to different uses. The lease and release held to have no effect, and the fine operated. *Bramhall* v. *Hall*, Ambl. 467.

4. A sum of money in the public funds being given by will to trustees for the separate use of a feme covert, and to be subject to her appointment after her death, the wife made an appointment of this money to her husband; and on bill filed by husband and wife against the trustees to transfer this fund, the Court, on examination of the wife, decreed the same accordingly. *Frederick* v. *Hartwell*, 1 Cox 193.

5. A married woman having a general power of appointment over a reversionary trust fund, subject to a previous life estate in another person, appointed it by way of mortgage, with a power of sale under which it was afterwards sold. Her husband became bankrupt, and after the determination of the life estate, the trustees paid the fund into court, under 10 & 11 Vict., c. 96. The purchasers thereupon presented a petition for a transfer of the fund to them. The petition was only served upon the trustees. The Court made the order, subject to a direction that it should not be drawn up for a fortnight, and that the husband's assignees should be served with notice that the fund would be transferred, if no objection were made within that period. *Exp. Stutely*, 1 De G. & Sm. 703.

6. A general power of appointment was given to a feme sole under a settlement of her property, with subsequent trusts in default of appointment, for herself and any future husband, and a power of appointment among children, and with a provision that her after-acquired property should be subject to the same trusts:—Held, that the power could be exercised during coverture, and that an appointment made in exercise of it after marriage in favour of the donee of the power and her husband was valid. *Wood* v. *Wood*, 10 L. R., Eq., 220; 39 L. J., Ch., 790; 18 W. R. 819; 23 L. T., N. S., 295.

6. By Will.

(*a*) *Capacity*, 5757.
(*b*) *By Devise or Bequest in General Terms*, 5758.
(*c*) *Revocation of Testamentary Appointment by.* See VIII. XI. *ante.*

(*a*) *Capacity.*

7. A feme covert may make a will by virtue of a power. Where a feme covert has a power to dispose of her estate by will, the writing she leaves ought first to be propounded as a will in the Spiritual Court; and if no executor is appointed, they will grant administration to the husband, with the will annexed. *Ross* v. *Ewer*, 3 Atk. 160.

8. Power in feme covert to dispose by writing purporting to be a will, does not give it authority as one in Ecclesiastical Court, and husband must be examined to his consent before it can be proved. *Henley* v. *Philips*, 2 Atk. 48.

9. Appointment pursuant to a power good, though executed by will of a feme covert. *Burnet* v. *Mann*, 1 Ves. 156.

10. Writing, in nature of a will, by feme covert, under a power, is not a proper will, and the appointees take under the power coupled with the writing, yet it has effect of a will to three intents; the words have the same liberal construction; it is ambulatory until testator's death, whom appointee might survive and appointee can take only from testatrix's death. *Southby* v. *Stonehouse*, 2 Ves. 612.

11. If a wife has a power to dispose of money in the life of her husband, she may dispose of it by a writing in nature of a will, though not so provided. *Sawyer* v. *Bletsoe*, 2 Vern. 329.

A man settles land of 6*s.* per annum to the use of himself for life, then to his wife for life, and agrees she shall hold the land until 100*l.* shall be paid by his heir to her executors, etc. She, by a writing purporting to be her will, disposes of this 100*l.*, and dies in the lifetime of her husband. A good appointment in equity. *Id.* 244.

Feme covert may, in life of husband, dispose of money laid up out of her separate maintenance. *Ib.*

12. A woman, by marriage articles, reserves a power of disposing of her present or any future estate, real or personal, by deed or will; a devise is a good execution of her power, the legal estate being in trustees. *Wright* v. *Englefield*, Ambl. 468; 2 Eden. 239.

13. A devise of real estate to trustees for a married woman for her sole and separate use in fee gives her the same power of disposition by deed or will over the equitable fee as if she were a feme sole. *Taylor* v. *Meads*, 11 Jur., N. S., 166; 13 W. R. 394; 34 L. J., Ch., 203; 5

N. R. 348; 12 L. T., N. S., 6; 4 De G. J. & Sm. 597. Reversing 10 Jur., N. S., 1012; 12 W. R. 846; 10 L. T., N. S., 475; 4 N. R. 203.

1. The 7 Will. 4 and 1 Vict., c. 26, s. 8, which provides that no will of a married woman shall be valid, except such as might be made before the Act, is intended as a qualification of s. 3, and has for its purpose the preservation of a married woman's general incapacity to devise, not the withdrawal of a married woman's will from the law as constituted by the 7 Will. 4 and 1 Vict., c. 26. *Thomas* v. *Jones*, 2 John. & H. 475; 8 Jur., N. S., 1124; 31 L. J., Ch., 732; 10 W. R. 853; 7 L. T., N. S., 154; 1 N. R. 138. Affirmed 1 De G. J. & Sm. 63; 9 Jur., N. S., 161; 32 L. J., Ch., 139; 7 L. T., N. S., 610.

Consequently the rule of law that a general devise by a will executed since the statute operates as an execution of a power which came to the devisor after the date of the will (7 Will. 4 and 1 Vict., c. 26, ss. 24, 27), operates, whether the devisor be a man or a married woman devising under a power. *Ib.*

2. The Wills Act, 7 Will. 4 and 1 Vict., c. 26, does not enlarge the testamentary capacity of a married woman, but enlarges the subject-matter over which she, having testamentary capacity, can operate by will. *Noble* v. *Willcock*, 8 L. R., Ch., 778; 42 L. J., Ch., 681; 21 W. R. 711; 29 L. T., N. S., 194. Reversing 42 L. J., Ch., 321; 21 W. R. 353. Affirmed 7 L. R., H. L., 580; 44 L. J., Ch., 345; 23 W. R. 809; 32 L. T., N. S., 419.

A wife having separate estate, and having under her marriage settlement a power of appointment in the event of her dying in the lifetime of her husband, made a will with the assent of her husband, and survived her husband:—Held, that though the will passed the separate estate, it did not execute the power of appointment, nor pass property acquired by the wife after the death of her husband. *Ib.*

The death of a husband operates as a revocation of his assent to the will of his wife. *Ib.*

3. By a marriage settlement personal property was assigned to trustees to pay the income to the wife for her separate use for life, without power of anticipation, and after her death, in case her husband should survive, to pay him so much of the income as she should by deed or will appoint for his life, and subject thereto for the children of the marriage; and in case there should be no children, then upon trust, in case the wife should survive her husband, for her, her executors, administrators, and assigns, for her sole and separate use; but if she should not survive her husband, then for such of her relations as she should, notwithstanding coverture, by deed or will appoint. The wife made a will in exercise of the power during coverture, and survived her husband without having had issue of the marriage:—Held, that the will, made during coverture, was a good disposition of all the property. *Bishop* v. *Wall*, 3 L. R., Ch. D., 194; 45 L. J., Ch., 194; 25 W. R. 93.

(*b*) *By Devise or Bequest in General Terms.*

4. Testator gave 1,000*l.* stock to a married woman for her separate use, and whenever she should die, to be absolutely in her own power to dispose of, by will or writing purporting to be her will, to any person or persons, purpose or purposes, she should think proper, but in case of failure of any such disposition or appointment to go over; this is not a power, but an absolute gift, qualified only to exclude the husband, upon the death of his wife; therefore it passed by general words in her will. *Hales* v. *Margerum*, 3 Ves. 299.

5. A married woman, by her will, appointed and devised certain property and all other "hereditaments (if any) which she had any power to appoint or devise." She afterwards, when a widow, by codicil confirmed the will:—Held, that the will, as confirmed, only passed such hereditaments as were subject to her power. *Du Hourmelin* v. *Sheldon*, 19 Beav. 389.

6. A testatrix having by her marriage settlement power by will or deed to appoint certain funds, but it not appearing that she was possessed of any other property, by her will, dated in 1822, not referring in terms to the power, gave "all her property and estate whatsoever and wheresoever, and of what nature, kind, and quality soever the same might be," to her husband, his executors, administrators, and assigns, for his and their own use and benefit absolutely:—Held, an execution of the power. *Att.-Gen.* v. *Wilkinson*, 2 L. R., Eq., 817; 14 W. R. 910; 14 L. T., N. S., 725; 12 Jur., N. S., 593.

Semble, the *onus probandi* in cases where a question arises whether a general bequest operates as an exercise of a power, is not upon the party who alleges that there is no property on which the bequest can operate except that subject to the power, but upon the party who seeks to show that the bequest does not operate as an exercise of the power. *Ib.*

7. A will by feme covert, containing a devise of all the property, real and personal, of which the testatrix was possessed, and of all her reversionary interest in any property or properties:—Held, to be a good execution of a power given by settlement to the wife to appoint freehold estates in default of issue of the marriage, and subject to the life interest of the husband. *Curteis* v. *Kenrick*, 9 Sim. 443; 4 Jur. 934. See S. C. 3 Mees. & Welsb. 461.

8. If a married woman having a testamentary power of appointment makes a will, it must be intended to be an exercise of the power, though it contains no reference to it. *Churchill* v. *Dibben*, 9 Sim. 447. n.

9. A married woman, having freehold estates which were settled on her marriage to her separate use, with a testamentary power of appointment over them, made a will, by which, without referring to the power, she disposed of certain of the estates *nominatim*, and then gave all the rest of her goods, chattels, estate, and estates to R. C.:—Held, that the residuary clause was a good execution of the power as to all the estates not previously mentioned. *Ib.*

10. By a marriage settlement, power was given to the wife, if the husband survived her, to dispose by will, immediately, of 3,000*l.*, part of certain funds, and, after the husband's death, of the residue of the funds; powers were also given to her to dispose, by will, of certain household furniture, and there was a covenant by the husband that she should have power to dispose, by will, of certain shares, of her jewels, and of her savings. She died in her husband's lifetime. By her will

expressed to be by virtue of the power and authority of the settlement, after reciting that she had power to dispose of 3,000*l.*, she gave certain legacies and annuities. She then disposed of the shares and of certain jewels, and then gave the household furniture. She then directed, appointed, gave, and bequeathed all the rest, residue, and remainder of her moneys and of her personal estate, after payment of debts and funeral expenses, to certain persons: —Held, that the will operated as an execution of her power as to the residue of the funds. *Harvey* v. *Stracey*, 1 Drew. 73; 16 Jur. 771; 22 L. J., N. S., Ch., 23.

1. A married lady, having power under her settlement to dispose of real and personal property to which her husband was entitled for his life, and her husband having agreed subsequently to the marriage that certain other personal property should be disposed of by her in such manner as she thought proper, made a will, commencing as follows:—"I, Ann B., the wife of W. B., by the authority of my marriage articles, do make this my last will and testament: whereas my husband is entitled to the whole of the rents and profits of my estates, both real and personal, during his life, from and after the decease of myself and my husband I do hereby give," etc. The testator then proceeded to dispose of the property comprised in her settlement, and after appointing executors she gave all the rest, residue, and remainder of her property, both real and personal, to G. H.:—Held, that the will was an appointment of the property comprised in the post-nuptial agreement as well as of that comprised in the settlement. *Harrington* v. *Harrington*, 13 Sim. 318; 12 L. J., N. S., Ch., 354.

2. A married woman having power to dispose of property, by her will, executed as required by the power, but not referring to it, and gave to her husband all the property which she might die possessed of, or have in reversion or expectation:—Held, not to be an execution of the power. *Lempriere* v. *Valpy*, 5 Sim. 188.

3. A married woman having power to appoint leaseholds and stock, by her will, executed and attested as required by the power, but not referring to it, gives to her husband the whole of her property, both real and personal, and whatsoever she might possess at her decease:—Held, not to be an execution of the power. *Lovell* v. *Knight*, 3 Sim. 275; 8 L. J., Ch., 44. Affirmed 1 L. J., N. S., Ch., 47.

4. A feme covert having a limited testamentary power of appointment over personalty, made her will in 1848, whereby, without referring either to her power, or to the property subject to it, she professed to dispose "of the property and income I am now or may become possessed of," and she then gave "her property" to her husband and her children. She died in 1854, at which time she had (independently of the property subject to the power) 93*l.* in arrears of income, and a contingent reversionary interest in some trust moneys:—Held, that the will did not operate as an execution of the power. The decision of *Lovell* v. *Knight* (3 Sim. 275) followed. *Evans* v. *Evans*, 23 Beav. 1; 3 Jur., N. S., 7; 26 L. J., Ch., 193.

5. A will must be taken to be an execution of a power, where the words of it would, otherwise, have nothing to operate upon. *Shelford* v. *Acland*, 23 Beav. 10; 3 Jur., N. S., 8; 26 L. J., Ch., 144; 5 W. R. 170.

A married woman, donee of a power which could be exercised only during coverture, made her will in these terms: "I do by this my will give to T. S. 2,600*l.*" This sum was about the value of the fund over which she had a power. She had no other property in her own right: —Held, to be a valid execution of the power. *Ib.*

6. The 27th section of the 7 Will. 4 and 1 Vict., c. 26, applies to married women having testamentary powers of appointment exercisable during coverture, equally with persons *sui juris*. *Bernard* v. *Minshull*, 1 Johns. 276; 5 Jur., N. S., 931; 28 L. J., Ch., 649.

Under the 27th section, a general bequest by a married woman, will include property over which she has a power of appointment. *Ib.*

7. A testatrix, having under the will of her husband a testamentary power to appoint to any one or more of his children property, which, in default of appointment, was to go upon trust for all his children equally, and under her marriage settlement a general power of appointment over other property, by her will, which was expressed to be made in pursuance of every power, authority, direction, estate, or interest in any wise enabling her in that behalf, made an invalid appointment of a part of such first-mentioned property, and then proceeded to appoint, devise, and bequeath all her real and personal estate not thereinbefore specifically and absolutely appointed and bequeathed, unto and to the use of her daughter absolutely for her own sole and separate use:—Held, that all the property over which she had any power of appointment, whether under the settlement or under the will, was absolutely and well appointed to her daughter. *Wallinger* v. *Wallinger*, 18 W. R. 274; 22 L. T., N. S., 259.

8. A feme sole having a limited power of appointment, made her will, whereby, after making certain specific bequests of jewellery without referring either to the power or to the property subject to it, she "bequeathed the residue of her personal estate" amongst certain persons, all of whom (except one) were objects of the power. At the time of her death, she had (independently of the property subject to the power) the jewellery specifically bequeathed, and a reversionary interest in some trust moneys:—Held, that the will did not operate as an execution of the power. *Humphery* v. *Humphery*, 36 L. T., N. S., 91.

7. Other Cases.

9. Feme covert not relieved, after husband's death, from improvident execution of power, but in this case conditional redemption allowed. *Sutherland* (*Countess*) v. *Northmore*, Dick. 56.

10. Where feme sole conveys stock to trustees to use of intended husband and self for life, with power to dispose of part, this power survives to wife. *Horner* v. *Bendloes*, 9 Mod. 335.

11. A married woman with an absolute power of appointment over property settled to her separate use having, by her acts, induced the

N. R. 348; 12 L. T., N. S., 6; 4 De G. J. & Sm. 597. Reversing 10 Jur., N. S., 1012; 12 W. R. 846; 10 L. T., N. S., 475; 4 N. R. 203.

1. The 7 Will. 4 and 1 Vict., c. 26, s. 8, which provides that no will of a married woman shall be valid, except such as might be made before the Act, is intended as a qualification of s. 3, and has for its purpose the preservation of a married woman's general incapacity to devise, not the withdrawal of a married woman's will from the law as constituted by the 7 Will. 4 and 1 Vict., c. 26. *Thomas* v. *Jones*, 2 John. & H. 475; 8 Jur., N. S., 1124; 31 L. J., Ch., 732; 10 W. R. 853; 7 L. T., N. S., 154; 1 N. R. 138. Affirmed 1 De G. J. & Sm. 63; 9 Jur., N. S., 161; 32 L. J., Ch., 139; 7 L. T., N. S., 610.

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4. Testator gave 1,000*l.* stock to a married woman for her separate use, and whenever she should die, to be absolutely in her own power to dispose of, by will or writing purporting to be her will, to any person or persons, purpose or purposes, she should think proper, but in case of failure of any such disposition or appointment to go over; this is not a power, but an absolute gift, qualified only to exclude the husband, upon the death of his wife; therefore it passed by general words in her will. *Hales* v. *Margerum*, 3 Ves. 299.

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7. A will by feme covert, containing a devise of all the property, real and personal, of which the testatrix was possessed, and of all her reversionary interest in any property or properties:—Held, to be a good execution of a power given by settlement to the wife to appoint freehold estates in default of issue of the marriage, and subject to the life interest of the husband. *Curteis* v. *Kenrick*, 9 Sim. 443; 4 Jur. 934. See S. C. 3 Mees. & Welsb. 461.

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10. By a marriage settlement, power was given to the wife, if the husband survived her, to dispose by will, immediately, of 3,000*l.*, part of certain funds, and, after the husband's death, of the residue of the funds; powers were also given to her to dispose, by will, of certain household furniture, and there was a covenant by the husband that she should have power to dispose, by will, of certain shares, of her jewels, and of her savings. She died in her husband's lifetime. By her will

expressed to be by virtue of the power and authority of the settlement, after reciting that she had power to dispose of 3,000*l.*, she gave certain legacies and annuities. She then disposed of the shares and of certain jewels, and then gave the household furniture. She then directed, appointed, gave, and bequeathed all the rest, residue, and remainder of her moneys and of her personal estate, after payment of debts and funeral expenses, to certain persons: —Held, that the will operated as an execution of her power as to the residue of the funds. *Harvey* v. *Stracey*, 1 Drew. 73; 16 Jur. 771; 22 L. J., N. S., Ch., 23.

1. A married lady, having power under her settlement to dispose of real and personal property to which her husband was entitled for his life, and her husband having agreed subsequently to the marriage that certain other personal property should be disposed of by her in such manner as she thought proper, made a will, commencing as follows:—"I, Ann B., the wife of W. B., by the authority of my marriage articles, do make this my last will and testament: whereas my husband is entitled to the whole of the rents and profits of my estates, both real and personal, during his life, from and after the decease of myself and my husband I do hereby give," etc. The testator then proceeded to dispose of the property comprised in her settlement, and after appointing executors she gave all the rest, residue, and remainder of her property, both real and personal, to G. H.:—Held, that the will was an appointment of the property comprised in the post-nuptial agreement as well as of that comprised in the settlement. *Harrington* v. *Harrington*, 13 Sim. 318; 12 L. J., N. S., Ch., 354.

2. A married woman having power to dispose of property, by her will, executed as required by the power, but not referring to it, and gave to her husband all the property which she might die possessed of, or have in reversion or expectation:—Held, not to be an execution of the power. *Lempriere* v. *Valpy*, 5 Sim. 188.

3. A married woman having power to appoint leaseholds and stock, by her will, executed and attested as required by the power, but not referring to it, gives to her husband the whole of her property, both real and personal, and whatsoever she might possess at her decease:—Held, not to be an execution of the power. *Lovell* v. *Knight*, 3 Sim. 275; 8 L. J., Ch., 44. Affirmed 1 L. J., N. S., Ch., 47.

4. A feme covert having a limited testamentary power of appointment over personalty, made her will in 1848, whereby, without referring either to her power, or to the property subject to it, she professed to dispose "of the property and income I am now or may become possessed of," and she then gave "her property" to her husband and her children. She died in 1854, at which time she had (independently of the property subject to the power) 93*l.* in arrears of income, and a contingent reversionary interest in some trust moneys:—Held, that the will did not operate as an execution of the power. The decision of *Lovell* v. *Knight* (3 Sim. 275) followed. *Evans* v. *Evans*, 23 Beav. 1; 3 Jur., N. S., 7; 26 L. J., Ch., 193.

5. A will must be taken to be an execution of a power, where the words of it would, otherwise, have nothing to operate upon. *Shelford* v. *Acland*, 23 Beav. 10; 3 Jur., N. S., 8; 26 L. J., Ch., 144; 5 W. R. 170.

A married woman, donee of a power which could be exercised only during coverture, made her will in these terms: "I do by this my will give to T. S. 2,600*l.*" This sum was about the value of the fund over which she had a power. She had no other property in her own right: —Held, to be a valid execution of the power. *Ib.*

6. The 27th section of the 7 Will. 4 and 1 Vict., c. 26, applies to married women having testamentary powers of appointment exercisable during coverture, equally with persons *sui juris*. *Bernard* v. *Minshull*, 1 Johns. 276; 5 Jur., N. S., 931; 28 L. J., Ch., 649.

Under the 27th section, a general bequest by a married woman, will include property over which she has a power of appointment. *Ib.*

7. A testatrix, having under the will of her husband a testamentary power to appoint to any one or more of his children property, which, in default of appointment, was to go upon trust for all his children equally, and under her marriage settlement a general power of appointment over other property, by her will, which was expressed to be made in pursuance of every power, authority, direction, estate, or interest in any wise enabling her in that behalf, made an invalid appointment of a part of such first-mentioned property, and then proceeded to appoint, devise, and bequeath all her real and personal estate not thereinbefore specifically and absolutely appointed and bequeathed, unto and to the use of her daughter absolutely for her own sole and separate use:—Held, that all the property over which she had any power of appointment, whether under the settlement or under the will, was absolutely and well appointed to her daughter. *Wallinger* v. *Wallinger*, 18 W. R. 274; 22 L. T., N. S., 259.

8. A feme sole having a limited power of appointment, made her will, whereby, after making certain specific bequests of jewellery without referring either to the power or to the property subject to it, she "bequeathed the residue of her personal estate" amongst certain persons, all of whom (except one) were objects of the power. At the time of her death, she had (independently of the property subject to the power) the jewellery specifically bequeathed, and a reversionary interest in some trust moneys:—Held, that the will did not operate as an execution of the power. *Humphery* v. *Humphery*, 36 L. T., N. S., 91.

7. Other Cases.

9. Feme covert not relieved, after husband's death, from improvident execution of power, but in this case conditional redemption allowed. *Sutherland* (*Countess*) v. *Northmore*, Dick. 56.

10. Where feme sole conveys stock to trustees to use of intended husband and self for life, with power to dispose of part, this power survives to wife. *Horner* v. *Bendloes*, 9 Mod. 335.

11. A married woman with an absolute power of appointment over property settled to her separate use having, by her acts, induced the

trustees to lend the fund, on an unauthorised security, so that it was lost, and conceiving herself unable to maintain a suit to charge the trustees for loss, executed an appointment of the fund after it had been lost in favour of her infant children, to enable them to file a bill to charge the trustees, the Court dismissed the bill. *Brewer* v. *Swirles*, 2 Sm. & G. 219; 18 Jur. 1069.

1. A feme covert was entitled to a reversionary interest in a sum of money vested in her husband and another as trustees. By deed, expressed to be made between the tenant for life of the one part and the trustees (including the husband) of the other part, the tenant for life, who alone executed the deed, declared that the trustees should hold the fund on certain modified trusts, whereby the wife's reversionary interest was made subject to her power of appointment by deed or will. The wife died, leaving her husband surviving, having appointed the reversionary interest away from her husband. The husband afterwards died, and the reversionary interest subsequently came into possession. The Court considered that, under the circumstances, the husband ought to be deemed to have acquiesced in the arrangement, and accepted the trusts for the benefit of the wife's appointees; and held that the appointees of the wife were entitled as against the representatives of the husband. *Inman* v. *Whitley*, 7 Beav. 337.

2. Subject to the life estate of her husband, a wife had the absolute power of appointing a trust fund, which, in default of appointment, was limited to her next of kin, and there was a proviso that if the husband became bankrupt the dividends should no longer be paid to him. The wife died first, and appointed the fund to her husband:—Held, that he became entitled thereto, absolutely, and had a right at once to have a transfer thereof. *Neale* v. *Hodgson*, 5 Beav. 159.

3. By a settlement, the husband and wife had a joint power of appointment over part of the property in favour of the children; the wife had, in one event, a general power to appoint by deed or will, and in another event, by will only, over the other part. The ultimate remainder, in default of issue, etc., was to the wife's heir and next of kin. The deed contained a proviso of forfeiture of the husband's interest, in case he should do, or attempt to do, any act which would prevent or hinder the wife executing her power, or prevent the property devolving on her heir. The husband and wife appointed a part of the fund nominally to a child, but really for the husband's benefit, which was set aside:—Held, that the husband's interest had not been thereby forfeited, and that the proviso pointed to the separate power of the wife and not to the joint power of husband and wife. *Wade* v. *Hopkinson*, 19 Beav. 613.

4. A husband and wife being donees of a joint power to be exercised by deed or writing, the husband drew up written instructions for a solicitor to prepare a proper deed. There was evidence from other sources of the wife's consent to the instructions, but none on the document itself; nor was there any written authority by the wife. The husband died before the draft could be prepared:—Held, that as the power required a joint authority during the coverture, the instructions could not be made to operate as a valid execution. *Hawke* v. *Hawke*, 26 W. R. 93.

See also HUSBAND AND WIFE, XI. v.

X. Execution. By what Instrument.

I. *By Deed. Of Power to be Executed by Deed (Formalities)*, 5760.
II. *By Deed. Of Power to be Executed by Will*, 5762.
III. *By Will. Of Power to be Executed by Deed or Writing under Seal*, 5762.
IV. *By Will. Of Power to be Executed by Will*, 5764.
V. *By Two Deeds*, 5767.
VI. *By Other Instruments*, 5767.

I. BY DEED. OF POWER TO BE EXECUTED BY DEED (FORMALITIES).

5. Where a power is reserved to be executed by deed, in the presence of three witnesses, it is by marriage settlement executed, but the deed is attested by only two; this shall be supplied. *Wade* v. *Paget*, 1 Bro. C. C. 364. For the judgment, see S. C. 1 Cox 74.

A power to be executed by writing, in the presence of three witnesses; it is executed in consideration of marriage, in the presence of two witnesses only: this defective execution shall be supplied. *Id.* 368.

6. Equity aids a defective execution of a power, if for a valuable consideration, and this against a remainderman, or one not claiming under the power. *Cotter* v. *Layer*, 2 P. W. 623.

Where there is a power to declare a use by writing attested by three witnesses, and such use is declared by a writing only attested by two, if for a valuable consideration equity will help it. *Ib.*

7. Power of appointment by deed, to be signed and sealed in the presence of witnesses: the attestation applying only to sealing and delivery, though the deed purported to be signed, sealed, and executed, it was presumed that the signature was in the presence of the witnesses. *M'Queen* v. *Farquhar*, 11 Ves. 467.

Under a power to alter uses, the new use will not arise except in the very circumstances prescribed by the contract. *Id.* 475.

8. Where the instrument conferring the power required it to be executed "by any deed or deeds under the respective hands and seals (of the donees), to be by them executed in the presence of and attested by two or more credible witnesses," and the form of attestation was "sealed and delivered in the presence of," nothing being said about signing:—Held, that by reason of such omission the execution was invalid. *Waterman* v. *Smith*, 9 Sim. 629; 4 Jur. 672.

9. A wife, in the event of her surviving her

husband, and not having younger children, had a power to dispose of 4,000*l.* by deed or will, executed in the presence of three witnesses; and this sum was a charge on the real estate of the husband. Before her second marriage, she, by articles executed in the presence of two witnesses only, appointed 2,000*l.* out of the 4,000*l.* to be for the use of her intended husband, and the remaining 2,000*l.* she disposed of by will, but did not execute it in the presence of three witnesses:—Held, that the articles were a good appointment of the 2,000*l.* for the benefit of her second husband; for, though the appointment was inaccurately and informally expressed, yet, being executed for a valuable consideration, equity will supply the defect; but the will, under which the 2,000*l.* was given, being a voluntary disposition, and not pursuing the power, was held a void appointment, and the 2,000*l.* shall sink into the real estate. *Sergeson* v. *Sealey*, 2 Atk. 414; 9 Mod. 370.

1. By fine and deed declaring the uses, the estate of a feme covert is conveyed to a trustee, to discharge certain specified debts, and "other sums borrowed or to be borrowed by the husband and wife for the like or other purposes," and subject thereto, "to such uses as the wife should appoint by deed under hand and seal." A joint bond and warrant to confess judgment executed by husband and wife, was a good execution of the particular power given to both, or, *semble*, of the general power given to the wife. *Dillon* v. *Grace*, *Hearn* v. *Cavanagh*, 2 Sch. & Lef. 456.

2. Husband and wife having a joint power to appoint by formal deed over wife's estate, agree in writing to sell it. Specific performance refused, as the agreement was invalid against a married woman. *Martin* v. *Mitchell*, 2 Jac. & Walk. 425.

3. Where, on marriage, a settlement is made of the wife's property to herself for life to her separate use, with remainder as she should appoint, by any writing signed by her and attested by two witnesses, and for default of appointment to the children of the marriage, and the trustees part with the trust fund upon the joint application of the husband and wife, by letter not attested by any witness, the trustees, after the death of the wife, must make good the trust fund for the children. *Hopkins* v. *Myall*, 2 Russ. & M. 86.

4. Where a seal is required by the power, an appointment among children without seal is bad: as to supplying the want of due execution of such a power for favoured objects, *quære*. *M'Adam* v. *Logan*, 3 Bro. C. C. 310.

5. Held, that a stamp was equal to a seal in the execution of a power which requires sealing. *Sprange* v. *Bernard*, 2 Bro. C. C. 585.

6. A bond was vested in a trustee in trust, as to income, for a married woman, for her life, for her separate use, with remainder; as to the corpus, in trust for her issue, and in default of issue, in trust for such persons as the married woman alone, notwithstanding coverture, should, by deed or instrument in writing, to be by her sealed and delivered in the presence of, and to be attested by, two credible witnesses, appoint. The husband being indebted to his bankers on the balance of an account current, the married woman deposited the bond with the bankers, with a letter signed by her, to the effect that in consideration of the bankers paying, or having already paid, the cheques of the husband, or otherwise advancing him sums of money, she thereby guaranteed the repayment thereof; and that she deposited, as a collateral security, the bond, which she undertook to assign to the bankers on request:—Held, that the consideration was sufficient, and that the separate life interest of the wife was effectually charged; but that, the letter not having been executed and attested as required by the power, the Court would not, under the circumstances, give effect to it as an appointment. *Thackwell* v. *Gardiner*, 5 De G. & Sm. 58; 21 L. J., N. S., Ch., 777; 16 Jur. 588.

7. A married woman having a life estate, with power to dispose of the same in trust for such person or persons, for such estate or interests, or upon or subject to such powers, provisions, charges, and limitations as she should at any time during her life, by deed attested by two or more subscribing witnesses, or by her last will, attested by three witnesses, direct, limit, and appoint, joined her husband in executing a joint and several bond, attested by one witness only, upon which joint and several judgments were entered; and subsequently, by deed, attested as prescribed by the power, she conveyed the lands to a mortgagee, who had notice of the judgment:—Held, that as against the mortgagee, the bond was not a due execution of the power, and that the judgments did not affect the lands in the hands of the mortgagee. *O'Callaghan* v. *Comyn*, Ll. & G. *temp.* Plunk. 484.

8. Where, by the terms of a power, the instrument by which it is executed is to be sealed and delivered in the presence, and attested by two or more credible witnesses, it is sufficient *primâ facie* evidence of attestation if on the instrument there appears an indorsement to the effect that it has been sealed and delivered in the presence of two persons, although such two persons are not named as witnesses either in the body of the instrument or the attestation. *Ricketts* v. *Loftus*, 4 Y. & Coll. 519.

9. No memorandum of attestation to a deed, made in execution of a power, stating the observance of all the particulars required by the deed creating the power, is needed to establish that the power has been, as to the forms required, duly executed. *Newton* v. *Ricketts*, 9 H. L. Ca. 262; 31 L. J., Ch., 247; 7 Jur., N. S., 953; 10 W. R. 1; 5 L. T., N. S., 62. Affirming 1 John. & H. 70; 6 Jur., N. S., 976; 29 L. J., Ch., 712; 8 W. R. 389.

A power authorised a deed to be made by two persons, "under their hands and seals, in the presence of, and attested by, two witnesses." The attestation of the deed exercising the power was in these words, "signed, sealed, and delivered in the presence of" two witnesses:—Held, a sufficient attestation. *Ib.*

10. Under a power of sale, with a consent of parties, testified by any writing, etc., under their and his hands, etc., attested by two or more witnesses; the attestation going only to sealing and delivery:—Held, not sufficient, nor a subsequent attestation that they also signed, but a case was directed. *Wright* v. *Wakeford*, 17 Ves 454. But see *Burdett* v. *Spilsbury*, 10 Cl. & F. 340; and *Vincent* v. *Sodor and Man*

(*Bishop*), 4 De G. & Sm. 294; 20 L. J., N. S., Ch., 433; 15 Jur. 365.

Power to be executed by a deed, signed and sealed in the presence of witness, and the deed expressed to be so executed, though the attestation appeared to be only to the sealing and delivery, signature in the presence of the witnesses presumed. *Id.* 458.

II. BY DEED. OF POWER TO BE EXECUTED BY WILL.

1. A bill by the heir of mortgagor for redemption, dismissed; it appearing that he was not then entitled to the equity of redemption. Testator empowered his wife to appoint an estate among her sons; and in case of her intestacy, then to be divided equally among all then alive. She appointed it, by deed, to her son A.; and afterwards, by her will (which did not take effect until after A.'s death), she confirmed all her former deeds and assignments:—Held, that the power could only be exercised by will; and that the deed and will could not be incorporated in favour of A.'s son and heir. *Brown* v. *Chambers*, Hayes 597.

2. By a marriage settlement, certain properties, to which A., the intended wife, was entitled, were settled upon the husband and wife for their lives, and for the life of the survivor, and after the decease of the survivor, to the use of the issue of the marriage; and in default of issue, to the use of such person as A. should by will appoint. There was no issue of the marriage; and, by an instrument in the form of a deed-poll, reciting the antecedent deeds, A., in pursuance of the power by the previous deed given to her, appointed, that in case she should die without issue, all the said properties should, after her decease, go to her husband absolutely. This instrument was stamped and attested as a deed, and a memorial of it was lodged in the Registry Office:—Held, that the instrument was a deed both in form and substance, and, therefore, an invalid execution of the power. *Marjoribanks* v. *Hovenden*, Dr. 11; 6 Ir. Eq. R. 238.

3. A testator bequeathed 2,000*l.* consols to trustees, upon trust to pay the interest to his daughter S., to her separate use during her life, the principal to go to her heirs, or any other she might choose to will it to. S. married, and by a deed in the Scotch form, and executed in Scotland reciting the will, she granted and assigned the 2,000*l.* consols, from and after her decease, to and in favour of her husband and his son by a former marriage:—Held, that the words "to will it," meant to dispose of it by will, and that the disposition of the fund by the deed in the Scotch form was not a valid execution of the power. *Paul* v. *Hewetson*, 2 Myl. & K. 434.

4. By Mr. and Mrs. P.'s marriage settlement, estates in Kent and other counties, the lady's property, were settled on her for life, remainder to Mr. P. for life, if she should so appoint, remainder to their children, remainder as Mrs. P., by deed, under her hand and seal attested, etc., or by her will signed and published, in the presence of three witnesses, should appoint; remainder to Mrs. P. in fee, with a power of sale, and directions for re-investing the proceeds in other estates, and in the usual security in the interim, and that upon the re-investment the uses of the settlement should cease as to the sold estates. Mrs. P., by deed, not attested as to her signature (at the foot of which she had written, without date, directions for the burial), appointed the estates, after her decease, to her husband for life, and in default of children to him in fee, and she revoked a prior deed of appointment. The estates were afterwards sold, and the proceeds invested in securities, but were never re-invested in lands, although their liability to be so was recognised by the parties. There was no issue of the marriage. Mrs. P. survived her husband, and applied part of the proceeds to her own use. At her death she was seised (exclusive of the settled property) of a mansion-house, buildings, etc., opposite to it, let to tenants, and was possessed of some personal estate, no part of which was in the name of a trustee. She devised the mansion house, with its appurtenances, and all other her real estates, to C., and bequeathed all her personal estate, whether in the name of herself or of any trustee, subject expressly to her debts and legacies, to other persons. After her death, the deed of appointment was found in her house, with the title deeds of the mansion-house, but the revoked deeds could not be found. Her debts and legacies greatly exceeded her assets:—Held, that the former deed was not a testamentary instrument, and that Mrs. P.'s receiving part of the proceeds of the settled estate was not an entry or claim within the 54 Geo. 3, c. 168, but that the statute remedied the defects of attestation; that the remaining proceeds remained as real estate, but did not pass either to the devisee or the residuary legatees in the will; that Mr. P.'s co-heirs in gavelkind were not entitled to any part, but that the whole belonged to his heir-at-law, under the appointment. *Houghan* v. *Sandys*, 2 Sim. 95; 6 L. J., Ch., 671.

5. S. made his will, containing a specific bequest of property. He subsequently settled that property, reserving to himself a power of appointment by will; after which he executed a voluntary deed, attested by one witness, by which he covenanted that his devisees and executors should, after his death, convey, assign, and pay over, all the real and personal estate in which he had any beneficial interest, or which he should then have disposed of by his will, to trustees for certain purposes:—Held, that this instrument was a pure deed, and not a will, and was valid, though voluntary, and was not a revocation of the will. *Patch* v. *Shore*, 9 Jur., N. S., 63; 32 L. J., Ch., 185; 11 W. R. 142; 7 L. T., N. S., 554; 2 Dr. & Sm. 589; 1 N. R. 157.

Held, also, that the specific bequest in the will operated in exercise of the power subsequently reserved, and that the appointed property was assets to satisfy the debt created by the voluntary deed. *Ib.*

III. BY WILL, OF POWER TO BE EXECUTED BY DEED OR WRITING UNDER SEAL.

6. Power to make provision for children by deed is well executed by will. *Sneed* v. *Sneed*,

Ambl. 64 ; Cowp. 264 cited. *Smith* v. *Ashton*, 1 Ch. Ca. 264.

1. A wife, in the event of her surviving her husband, and not having younger children, had a power to dispose of 4,000*l.* by deed or will, executed in the presence of three witnesses ; and this sum was a charge on the real estate of the husband. Before her second marriage, she, by articles executed in the presence of two witnesses only, appointed 2,000*l.* out of the 4,000*l.* to be for the use of her intended husband, and the remaining 2,000*l.* she disposed of by will, but did not execute it in the presence of three witnesses :—Held, that the articles were a good appointment of the 2,000*l.* for the benefit of her second husband ; for, though the appointment was inaccurately and informally expressed, yet, being executed for a valuable consideration, equity will supply the defect ; but the will, under which the 2,000*l.* was given, being a voluntary disposition, and not pursuing the power, was held a void appointment, and the 2,000*l.* shall sink into the real estate. *Sergeson* v. *Sealey*, 2 Atk. 414 ; 9 Mod. 370.

2. *Quære*, whether a power to revoke uses "from time to time during his natural life," such revocations and re-appointment "to be sealed, signed, and delivered in the presence of, and attested by, two or more credible witnesses," can be executed by will. *Edwards* v. *Edwards*, 3 Madd. 197.

3. A power of revocation is reserved to A., by any writing under hand and seal, and of appointing new uses, by the same or any other deed. A., by his will, without taking any notice of power, devised to B. :—Held, a good execution. *Roscommon* v. *Fowke*, 6 Bro. P. C. 152.

4. Power of appointment in such shares and proportions as husband and wife should by any deed in writing direct, and well executed by appointment by the will of the husband, with a written endorsement thereon, made by the wife after his death, expressing her approbation ; nor would it have been better if the wife had ratified it at the time of the execution, it being revocable by the husband during his life. *Bushell* v. *Bushell*, 1 Sch. & Lef. 96.

5. By a deed made since the Statute of Wills, 7 Will. 4, and 1 Vict., c. 26, certain trust funds were appointed to trustees in trust for such person or persons, for such intent or intents, and chargeable with such sum or sums of money, and for such intents and purposes and in such manner in all respects as the appointor should, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of, and attested by, one witness or more, direct or appoint. The appointor afterwards made her will, which was duly executed and attested according to the Statute of Wills, and thereby bequeathed part of the trust funds :—Held, that the will was writing within the terms of the power. *Buckell* v. *Blenkhorn*, 5 Hare 131.

6. Where a power of appointment is to be exercised by a writing under the hand and seal of the donee, it cannot be exercised by a will executed with only the formalities required by the 1 Vict., c. 26, because the essential requisition of the power is, that it should be exercised under hand and seal, and the statute applies to a power of which the essential question is that it should be exercised by will, and the formalities are comparatively unimportant. The reason that such a power would have been held duly exercised before the new Wills Act by a will under hand and seal was because, under the general word "writing," it was indifferent by what kind of instrument the power was exercised, provided the essential solemnities were complied with. *Buckell* v. *Blenkhorn* (5 Hare 131) not followed. *West* v. *Ray*, 1 Kay 385 ; 23 L. J., Ch., 447 ; 2 Eq. Rep. 431 ; 2 W. R. 319.

7. Held, by the Master of the Rolls, governed by the case of *Buckell* v. *Blenkhorn* (5 Hare 131), that a will, not sealed but executed according to the formalities of the last Wills Act, was a due execution of a power required to be executed by writing under hand and seal. But, held by the Lords Justices, that the title was too doubtful to force on a purchaser. *Collard* v. *Sampson*, 17 Beav. 543 ; 17 Jur. 641 ; 22 L. J., Ch., 729 ; 4 De G. M. & G. 224 ; 1 Eq. Rep. 262.

8. If a power is created, to be executed by deed or instrument in writing, it may be well executed by will. *Taylor* v. *Meads*, 4 De G. J. & S. 597.

Under a power created either before or since the Wills Act 1837, to appoint real estate by deed or will to be respectively signed, sealed, and delivered in the presence of, and attested by three credible witnesses, a will executed in manner prescribed by that statute is a good execution of the power. *Ib.*

But where a power was created after the Wills Act, to be executed by any instrument in writing, signed, sealed, and delivered in the presence of, and attested by, two credible witnesses :—Held, that a will duly executed in conformity with the statute, but not sealed, was not an instrument by which the power could be duly exercised. *Ib.*

A testator, by his will, made since 7 Will. 4, and 1 Vict., c. 26, gave real estate to trustees, upon trust for M., a married woman, her heirs and assigns, and to be conveyed by her to such person as she, notwithstanding her coverture, should direct or appoint by any instrument in writing to be by her signed, sealed, and delivered in the presence of, and attested by, two or more credible witnesses, and in default for E. M., her heirs and assigns, for her separate use. M. devised the estate to her husband by a will, duly executed in conformity with the 7 Will. 4 and 1 Vict., c. 26, but not sealed :—Held, that the power was not well executed. S. C. 11 Jur., N. S., 166 ; 34 L. J., Ch., 203 ; 13 W. R. 394 ; 5 N. R. 348 ; 12 L. T., N. S., 6. Reversing 10 Jur., N. S., 1012 ; 12 W. R. 846 ; 10 L. T., N. S., 475 ; 4 N. R. 203.

Held, also, that the equitable fee to which, in default of appointment, she was entitled to her separate use, was well devised by her will. *Ib.*

9. A power to appoint by an instrument in writing with formalities may be exercised by a will with those formalities. *Smith* v. *Adkins*, 41 L. J., Ch., 628 ; 20 W. R. 717 ; 27 L. T., N. S., 90 ; 14 L. R., Eq., 402.

A power given to A. to appoint by any deed or instrument in writing, with or without power of revocation, to be by her signed

sealed, and delivered in the presence of two or more credible witnesses, is well exercised by an appointment by her will not expressed to be delivered, but stated in the attestation clause to be "signed, sealed, published, and acknowledged and declared to be her last will," in the presence of the attesting witnesses. S. C. 14 L. R., Eq., 402.

1. A testator bequeathed certain property to A. for life, with remainder to such persons as A. should by any deed or deeds, instrument or instruments in writing, to be by her signed, sealed, and delivered in the presence of, and attested by, two or more witnesses, appoint. A. made a will, dated after the operation of the Wills Act:—Held, that the will was an execution of the power. *Turner* v. *Turner*, 21 L. J., Ch., 843.

2. A power, to be executed by any deed or instrument in writing, with or without power of revocation, to be sealed and delivered in the presence of two or more credible witnesses, could be well executed before the 7 Will. 4 and 1 Vict., c. 26, by a will sealed and delivered in the presence of three witnesses. *Orange* v. *Pickford*, 4 Jur., N. S., 649; 27 L. J., Ch., 808; 6 W. R. 738; 4 Drew. 363.

By a marriage settlement, power was given to the wife to appoint certain real property at any time or times during her life, by any deed or instrument in writing, with or without power of revocation, to be sealed and delivered in the presence of and attested by two or more witnesses. The wife executed the power by will, dated before the 7 Will. 4 and 1 Vict., c. 26; and it was expressed in the attestation clause to be signed, sealed, published, and declared, and also sealed and delivered in the presence of and attested by three witnesses:—Held, that the power was well executed. *Ib.*

The will was thirty years old from the date of execution; it came from the custody of the person in whose favour it was executed:—Held, that this was sufficient evidence of the fact of due execution. *Ib.*

IV. BY WILL. OF POWER TO BE EXECUTED BY WILL.

1. *In General*, 5764.
2. *Where Special Formalities Necessary*, 5764.
3. *By Foreign Will*, 5766.

1. In General.

3. Power to appoint a use of land by deed or will; a will attested by two witnesses not a good appointment, because in such case, "by a will" must be intended such a will as is proper to dispose of land; so, though the words are, "or other writings in nature of a will." *Longford* v. *Eyre*, 1 P. W. 742.

4. Will to pass lands by virtue of a power, must be executed according to the Statute of Frauds. *Marlborough* (*Duke*) v. *Godolphin*, (*Lord*), 2 Ves. 76.

5. A trust is limited to A., his heirs and assigns, or to such as he or they may appoint: A. devises these lands by a will, attested but by two witnesses; the will void, and shall not operate as an appointment. *Wagstaff* v. *Wagstaff*, 2 P. W. 258.

6. Father tenant for life, and two sons, article to charge with a sum for younger children after father's death, as he by will duly executed should direct; he directs by will with two witnesses only: good execution of the power, nothing passing from the father; otherwise, if by owner of the estate. *Jones* v. *Clough*, 2 Ves. 365. *Sed quære*, see Belt's Supp. 360.

7. Will made under a power, but not duly attested, to pass real estate, a good execution of the power *quoad* the personalty. *Duff* v. *Dalzell*, 1 Bro. C. C. 147.

8. Power over land by deed or will "duly" executed, requires three witnesses; but where will is to operate by way of appointment, taking no effect from the statute, such defect may be cured in equity. *Wilkes* v. *Holmes*, 9 Mod. 485.

9. A. had a power to appoint "by his will, or any writing in the nature of or purporting to be his will, or any codicil thereto." On his death, the third and fourth sheets of a will were alone discovered, and which were in the handwriting of and signed by A., and were attested by two witnesses; one of them contained, in words, a perfect appointment, probate having been refused:—Held, that this was not a valid execution of the power to appoint by writing purporting to be a will. *Gullan* v. *Grove*, 26 Beav. 64.

2. Where Special Formalities Necessary.

10. Baron and feme seised in fee, in right of the feme by deed and fine, settled the premises to the use of the baron and feme for their lives, remainder to the first, etc., sons in tail, remainder to daughters in tail, remainder to the husband and wife and their heirs, with power to the baron, during the joint lives of him and his wife, by his last will, or any writing purporting to be his last will, under hand and seal attested by three witnesses, if baron dies before his wife, to charge the premises with 2,000*l.*; the like power (*mutatis mutandis*) to his wife if she died first, to charge the premises with the like sum: husband by will under his hand, attested by three witnesses, but not sealed, charges the premises with 2,000*l.*:—Held, void, being without a seal. *Taylor* v. *Johnston*, 2 P. W. 506. See note *id.* 511.

11. Wife, having a power to dispose, by will signed and sealed by her, of 300*l.* in the hands of trustees, having made a will, agreeably to the power, afterwards makes a testamentary paper, by which she gives it to her husband, but so much as shall be remaining at his death, etc., to her brother and sisters. This paper is not sealed, found annexed to the will by a wafer, and is on a stamp. His Honour held the annexation by the wafer immaterial, and that the stamp was equivalent to a seal; secondly, that it vested absolutely in her husband, and it was decreed to be paid to him, the property not being sufficiently certain to raise a trust. *Sprange* v. *Barnard*, 2 Bro. C. C. 585.

12. By settlement before marriage, 3,000*l.* stock belonging to the wife was vested in trustees, who were to transfer one moiety to

such person, etc., and for such uses, etc., as she should by her last will in writing, or other writing under hand and seal, to be attested by two or more credible witnesses, appoint, etc., and for want of such appointment, etc., then in trust to transfer all such stocks to her executors or administrators. After death a paper was found in her closet of her handwriting, by which she gave different sums to different persons, but not signed or sealed by her, nor attested by witnesses. Lord H. held, that the words "under her hand and seal, to be attested by two or more credible witnesses," are referable to the will, as well as to the other writing; and for want of the ceremony of sealing and attestation by witnesses, this paper was not a good execution of the power. *Ross* v. *Ewer*, 3 Atk. 156.

1. *Quære*, whether power given to be executed by will "signed and published in presence of, and attested by, two or more credible witnesses," is executed by will, signed by testatrix, and attested generally: "witness A. B. and C. D.":—Held, not, by Court of C. P., 2 Madd. 156. *Moodie* v. *Reid*, 1 Madd. 516.

2. Power to A. to dispose of estate by will duly executed and attested, and in default of appointment, to A.'s executorsor administrators to their own benefit; will not signed, sealed, nor attested:—Held, no execution of power, and no executor being named in such will, A.'s administratrix entitled beneficially. *Sanders* v. *Franks*, 2 Madd. 147.

3. Where power was to be executed by will, signed and published in the presence of and attested by three witnesses:—Held, that a will concluding with this declaration, "this is my last will and testament," and expressed to be signed by the testatrix in the presence of the three attesting witnesses, was not a good appointment, because the publication was not attested. *Stanhope* v. *Keir*, 2 Sim. & S. 37; 2 L. J., Ch., 166.

4. A power over personal property was required to be executed by a will signed and published in the presence of, and attested by, two witnesses. The donee professed to exercise the power by a will which was signed by her, and she acknowledged her signature to the two witnesses, but did not sign it in their presence, and the witnesses at different times signed an attestation that the testatrix had signed and delivered the will in their presence:—Held, that though delivery was equivalent to publication, the power was not well exercised. *Simeon* v. *Simeon*, 4 Sim. 555.

5. Where a power was to be executed by deed or by will, signed and published by donee in the presence of and attested by two credible witnesses, a will expressed to be signed and sealed only, omitting the word published, and attested by three witnesses, was held to be a good execution. *Mackinley* v. *Sison*, 8 Sim. 561; 1 Jur. 558.

And where the property subject to the power was stock in the 3 per cents., and the donee, who had no other stock, gave legacies to be paid out of the moneys invested in her name in the 4 per cents.:—Held, that this was an appointment of the 3 per cents. *Ib.*

6. A power, to be executed by writing under the hand and seal of the donee, attested by two witnesses, or by will, signed, etc., in the presence of three witnesses:—Held, not to be executed by will signed and sealed in the presence of two witnesses, the testator having himself drawn the distinction between testamentary and other writings. *Bainbridge* v. *Smith*, 8 Sim. 86; 5 L. T., N. S., Ch., 300.

7. A power to appoint by deed or will "signed, sealed, and delivered," is well executed by a will expressed to be "signed, sealed, published, and declared." *Mason* v. *Heywood*, 7 L. J., N. S., Ch., 145.

8. A married woman, having power, under her marriage settlement, to dispose of personal estate by a will to be signed and published by her in the presence of two or more credible witnesses, made her will in pursuance of the power, and signed her name at the foot of it. Then followed the signatures of the witnesses, and below those signatures was a memorandum, in the handwriting of the testatrix, to the effect that the will had been signed and sealed by her in the presence of the above three witnesses. Upon the examination of the witnesses after the death of the testatrix, two of them deposed to the testatrix having signed the will in the presence of all the witnesses, but the third stated her belief that the will had been signed before the witnesses entered the room:—Held, that coupling the memorandum with the testimony of the witnesses, there was sufficient evidence of signing in the presence of the witnesses, or two of them, to satisfy the requisition of the power in that respect:—Held, also, that the testatrix calling the witnesses to attest her will, sealing it, and declaring it to be her act (which circumstances were given in evidence), thereby published her will within the meaning of the power:—Held, further, that as no attestation clause was required by the power, the omission of any statement as to publication in the memorandum (considered as an attestation clause) was immaterial:—Held, therefore, under all the circumstances of the case, that the will was a due execution of the power. Where an attestation clause is not required, the mere circumstance that there is an attestation clause specifying certain things, does not exclude evidence that other things were done besides those which are attested. *Warren* v. *Postlethwaite*, 2 Colly. 108; 14 L. J., N. S., Ch., 422; 9 Jur. 721.

9. By a marriage settlement, a freehold estate, held for lives, was limited, after the death of the husband, to the use of such persons as married lady, notwithstanding coverture, should, by will, "to be by her signed and published in the presence of and attested by" two witnesses, appoint. The lady, by will, devised "the estate comprised in the said settlement," after her husband's death, to certain persons, and signed and sealed the will, which purported to be "signed and sealed" in the presence of "two witnesses":—Held, that a will cannot be made without being published, that it is not necessary to mention the word "published" in the attestation, and that the power was validly executed. *Vincent* v. *Sodor and Man (Bishop)*, 4 De G. & Sm. 294; 20 L. J., N. S., Ch., 433; 15 Jur. 365. And see S. C. at law 5 Exch. 683.

Semble, that *Wright* v. *Wakeford* (17 Ves. 454) cannot be considered to be in force since *Burdett* v. *Spilsbury* (10 Cl. & F. 340). *Ib.*

10. A will, in order to be a good exercise of

a power, was required to be signed and published by the donee in the presence of and attested by two or more credible witnesses. The donee made a will, which was signed by him, and was attested thus: "We the undersigned attest to have seen the above testator sign the above will":—Held, that that clause was in effect an attestation to the publication as well as the signature of the will, and, consequently, that the power was well exercised. *Bartholomew* v. *Harris*, 15 Sim. 78; 15 L. J., N. S., Ch., 106.

1. Power to appoint by will, "to be signed and published by testator in the presence of and attested by three or more credible witnesses." Testator made and published his will, which was signed by him in the presence of and attested by the three witnesses; but the attestation took no notice of the publication:—Held, that the power was well executed. *Re Wrey's Trust*, 17 Sim. 201; 19 L. J., Ch., 183.

2. By a settlement of 1813, stock was settled upon trust, in the events which happened, for such persons as a married woman should, during and notwithstanding coverture (among other modes), by her last will and testament in writing, or any writing purporting to be or in the nature of a will, to be by her duly signed, sealed, and delivered, in the presence of, and to be attested by, two or more credible witnesses, give, direct, limit, and appoint. The husband of the donee died in 1819, and the donee in 1840. After the death of the donee of the power, a writing was found, in the form of a letter, and sealed on the outside only, purporting to bear date August 20th, 1816, and to be made in execution of the power, and concluding thus: "As witness my hand and seal," with a signature purporting to be that of the donee, and two other names in other handwritings, but with no memorandum of attestation. On a reference to the Master, in 1847, as to the form and manner of the execution of this paper, no evidence could be produced but such as was afforded by the document:—Held, that the document was not shown to be a due execution of the power. *Burnham* v. *Bennett*, 1 De G. & Sm. 513.

Effect of Grant of Probate.] 3. Where, in a marriage settlement, a power of appointment by will, signed, sealed, published, and declared, in the presence of two witnesses, is given to the wife, notwithstanding her coverture, and an instrument, afterwards executed by the wife, is proved as a will, this Court is concluded by the decision of the Ecclesiastical Court, that the instrument propounded is a will, and is bound to consider it as a valid execution of the power, if the instrument be proved in this court to have been executed with the formalities prescribed by the power. *Douglas* v. *Cooper*, 3 Myl. & K. 378.

4. The Prerogative Court refused probate to a will of a feme covert, made in pursuance of a power, because it was, upon the face of it, not executed according to the requisites of the power:—Held, that such will was entitled to probate, the Ecclesiastical Courts having no jurisdiction to inquire as to the due execution of the power, but simply to grant probate, leaving it to a court of equity to determine the question of the due execution of the power. *Barnes* v. *Vincent*, 5 Moo. P. C. 201.

5. A married woman, having a power to appoint a sum of money by will, or by any writing in the nature thereof, signed, sealed, and published in the presence of two witnesses, by her will made in 1837, and signed in the presence of two witnesses, but not sealed, assumed to appoint the sum in question and other property, and nominated an executor, who proved her will in the Diocesan Court. The husband survived the wife, and after his death his representative obtained letters of the estate of the wife from the Prerogative Court, and procured the Diocesan Court to recall the grant of probate to the executor of the wife, so far as related to the sum in question. In a suit by the appointee of the wife against the representative of the husband, and the trustees of the fund:—Held, that the Court could not treat the probate of the Diocesan Court, which excluded from the grant the sum in question, as probate of a testamentary instrument executing the power, and that a probate sufficient to cover the sum in question was necessary in order to enable the party claiming under the appointment to sustain the suit. Whether in such case, if the party claiming under the appointment, by appealing from the Court of Probate, had shown that the probate had been refused by the Court of ultimate jurisdiction in such cases, upon principles not recognised in this court, this Court would consider the question of the execution of the power independently of the probate, *quære*. *Goldsworthy* v. *Crossley*, 4 Hare 140.

3. By Foreign Will.

6. A will, disposing of personal estate, situate in this country, made in pursuance of a power of appointment, and executed in compliance with the requisites of the power, is entitled to probate, though not executed according to the testamentary law of the domicil of the party making it. *Tatnall* v. *Hankey*, 2 Moo. P. C. 342.

7. An appointment of personal estate in England, made by a person who died domiciled abroad, by a will not attested as required by the law of England, but valid according to the law of the country of the testator's domicil, and consequently admitted to probate in England, is a valid execution of a power, created, by an English will, to appoint by will duly executed. *D'Huart* v. *Harkness*, 11 Jur., N. S., 633; 34 L. J., Ch., 311; 13 W. R. 513; 5 N. R. 440.

Personal property was held, under an English will, in trust for such person as an English lady should by her last writing duly executed appoint. She afterwards married a Frenchman, and died domiciled in France, having appointed the property by an unattested will, valid according to the law of her domicil, and admitted to probate in this country:—Held, that this will was a valid execution of the power. S. C. *nom. De Huarte* v. *Harkness*, 34 Beav. 324.

8. A testamentary instrument, signed, but invalid for want of attestation, is not a good execution of a power to appoint by writing signed or by will. *Re Daly*, 25 Beav. 456; 4 Jur. N. S., 525; 27 L. J., Ch., 751; 6 W. R. 525.

A married woman had power to appoint a fund by writing under her hand or by will, "notwithstanding her coverture, and as if she were sole and unmarried." *Ib.*

For thirty years previous to and up to the time of her death she resided in Paris separate from her husband, but there was no legal divorce or separation. Her husband was domiciled in England. She disposed of the fund by testamentary papers, valid according to the law of France, but not witnessed so as to be valid in this country:—Held, not to be a good execution of the power, either as a will or as a writing under her hand. *Ib.*

V. BY TWO DEEDS.

1. Two deeds, though executed at an interval of nine years from each other, may be treated as constituting one disposition. And what is done under a power of appointment is to be referred to the deed creating the power. *Braybrooke* (*Lord*) v. *Att.-Gen.*, 9 H. L. Ca. 150.

2. Property was settled, subject to an estate for life to the parents, to the use of all and every the child and children of the marriage, as the parents should by deed appoint, and in default equally. There were nine children, and one-eighth was duly appointed to one of such children, who afterwards died. After the death of four of the other children, the remaining seven-eighths were appointed to the surviving four children:—Held, that this appointment was good; and, secondly, that the property having been appointed by two deeds, formed no objection to the due execution of the power. *Colston* v. *Pemberton*, 5 L. J., N. S., Ch., 181.

VI. BY OTHER INSTRUMENTS.

1. *By Covenants or Agreements to Execute*, 5767.
2. *By Recitals*, 5769.
3. *By Transfer of Stock*, 5770.
4. *Other Cases*, 5771.

1. By Covenants or Agreements to Execute.

3. H. settled lands on himself and wife for life, remainder to his son in tail, with a covenant to raise 500*l.* apiece to his younger children, to be raised and paid as he should appoint. He died without making any appointment, and left several younger children. This covenant is a charge on the land, and shall bind the remainder in tail, and is an execution of the power of appointment. *Sarth* or *Garth* v. *Blanfrey*, Gilb. Eq. Rep. 166.

4. By a marriage settlement of 1791, estates at B. were charged with 10,000*l.* for portions of the children of the marriage in equal shares, and power was given to substitute other estates of equal value for those charged. In 1811 the settlor covenanted to charge estates at H., as soon as they were disencumbered, in place of the estates at B., with 10,000*l.* for portions, as stipulated by the settlement, and with 30,000*l.* for the younger children, in such shares as settlor should appoint. The estates at H. were afterwards conveyed to trustees for the purpose, among other things, of raising the 10,000*l.*, and also of raising the 30,000*l.* for all the younger children, excluding J., the eldest:—Held, that the power contained in the deed of 1811 was thereby completely executed, and that the younger children who were then living were entitled to the 30,000*l.* in equal shares. *Armytage* v. *Armytage*, 1 Y. & Coll. C. C. 461; 6 Jur. 790.

5. J. A. devised his estates to R. A. for life, remainder to his nephew G. A. for life, remainders over, and declared that it should be lawful for G. A., when and as he should be in possession of the estates, by any deed, to grant to the use of any woman whom he might marry, for her life, an annual sum, by way of rent-charge (as a jointure, and in lieu of dower), not exceeding 30*l.* for every 1,000*l.* which he should receive with such wife as her portion, so that such jointure should not exceed 300*l.* per annum; and the portion to be received was to be settled for the benefit of younger children. Upon the death of the testator, R. A. became tenant for life, and entered into possession of the estates. In his lifetime a marriage was agreed upon between G. A. and E., whose fortune of 10,000*l.* was vested in trustees for the benefit of the husband for life, with remainder to the wife for life, with remainder to the younger children, and in default, to the survivor of the husband and wife; and G. A. covenanted that if he should come into or be entitled to the possession of the estates, he would grant, limit, and appoint to the use of E. the annual sum of 300*l.* There was no issue of the marriage. R. A. died, and G. A. succeeded to the estates, and executed the deed of appointment. Upon the death of G. A. in 1854 the defendant entered into possession of the estates, and subsequently objected to pay the rent-charge, on the ground that E. had become entitled to the 10,000*l.* settled on her marriage, and that G. A. was, when he came into possession of the estates, and up to the time of his death, of unsound mind, and incapable of performing any legal act; but:—Held, that the operation of the covenant was independent of any subsequent mental incapacity of the covenantor, and that the estates were bound by the covenant. *Affleck* v. *Affleck*, 3 Jur., N. S., 316; 26 L. J., Ch., 358; 5 W. R. 525; 3 Sm. & G. 394.

6. Where a testator bequeathed a share of property upon certain trusts, and amongst them upon such trusts as one should appoint by deed or will, "after attaining the age of twenty-five years and not before;" and the donee of the power, on reaching the age of twenty-three, entered into a covenant to exercise the power on her reaching the prescribed age, which age she reached, but died without exercising the power:—Held, that the covenant was an equitable exercise of the power. *Johnson* v. *Touchet*, 16 W. R. 71; 17 L. T., N. S., 191; 37 L. J., Ch., 25.

7. A bill was pending to enable the Corporation to construct a new street: the Metropolitan Railway Act 1862, passed in the same session, authorised the Metropolitan Railway Company, in the event of the bill becoming law, to buy any lands which the Corporation might take: the bill did become law, under the title of The Metropolitan Meat and Poultry Market Act 1862, incorporating the provisions of the

London City Improvement Act 1847, which authorised the Corporation to take and use any lands which they might deem necessary and expedient. On the eve of the bill receiving the Royal assent, the Corporation agreed with the company that, if the bill passed, they would take certain scheduled lands, and then re-sell them to the company:—Held, by the Lords Justices, reversing the decision of the V.-Ch. Wood, that the Corporation had in effect incapacitated themselves from forming a just judgment as between themselves and the owner of the scheduled lands, and that consequently their agreement with the company was improper. *Semble*, per Wood, V.-Ch. (p. 422), that, if such agreement had been entered into subsequently to the passing of the Act, the corporation would not have been thereby incapacitated from exercising the powers of the Act. *Galloway* v. *London (Mayor)*, 4 N. R. 77, 422; 10 Jur., N. S., 552; 12 W. R. 891; 10 L. T., N. S., 439.

1. By a marriage settlement made in 1831, the plaintiff assigned all the personal estate to which she then was, or to which she or her intended husband in her right might during their intended coverture become, entitled, whether in possession or expectancy, to trustees upon the trusts of the settlement. The father of the plaintiff, by his will, gave to her, subject to a life interest in her mother, a power of appointment over his personal estate. By a deed poll made in 1844, the plaintiff appointed that after the death of her mother, which event subsequently happened, 1,000*l.* should be paid to her own separate use, and also an annuity of 100*l.* during her life, and the residue of the income of the trust property to herself for life, without power of anticipation:—Held, that the assignment made by the settlement did not amount to a covenant to execute the power; that the plaintiff was bound to bring the 1,000*l.* appointed to herself into settlement; and that the annuity of 100*l.* and remainder of the income of the property were not subject to the trusts of the settlement. *Ewart* v. *Ewart*, 1 W. R. 466; 1 Eq. Rep. 536; 11 Hare 276; 17 Jur. 1022.

2. A married woman having under a settlement a general power of appointment by will among her children over a fund, which, in default of appointment, was, after her death, to be divided among her children, covenanted by deeds with one of her sons and third parties, that (as a security for goods to be supplied by such third parties to her son upon credit) she would appoint in favour of such son not less than a certain sum out of the fund; and by the same deeds the son mortgaged to such third parties all his interest in the fund, whether by appointment, or in default of appointment. She, by her will, appointed in favour of such son the amount of the fund she had covenanted to appoint, and expressly declared that the sums she had by two deeds, being securities executed by her as a guarantee for her son and at his request, and for his sole benefit, covenanted to appoint or leave to him by her will, were to be paid by him to the parties thereto as soon as might be after her decease:—Held, that the appointment, notwithstanding the covenants in the deeds, was good. *Coffin* v. *Cooper*, 2 Dr. & Sm. 365; 34 L. J., Ch., 629; 13 W. R. 571; 12 L. T., N. S., 106; 5 N. R. 459.

3. A father, who had a limited power of appointment over a fund by will only, among his children, made a will by which he appointed a sum of 5,000*l.* to his son J., and the remainder among his other sons. A few weeks afterwards he executed a bond binding himself that his son J. should receive, either out of his own property or out of the fund subject to the power, the sum of 5,000*l.* at the least. The father died without revoking his will:—Held, that the appointment was valid. *Coffin* v. *Cooper* (2 Dr. & Sm. 365) followed. *Palmer* v. *Locke* 15 L. R., Ch. D., 294; 50 L. J., Ch., 113; 43 L. T. 454; 28 W. R. 926.

Held, also, by Brett, L. J. (*dubitante* Cotton, L. J.), that a bond or covenant by the donee of a limited testamentary power that he will exercise it in a particular way is entirely void. *Ib.*

Agreements not Under Seal.] 4. Under a settlement lands stood limited to such uses as D. should by deed appoint, and subject thereto to the use of D. and the heirs of his body, with remainders over. D. was also absolutely entitled in fee to other lands. A railway company required part both of the settled estate and of the lands to which D. was absolutely entitled. By an agreement not under seal made between D. and two of the directors of the company, after reciting that D. was owner of certain lands, part of which, being those specified in the schedule thereto, were required by the company, and that the purchase money and compensation to be paid to D. in respect of the taking of such lands had not been ascertained, and that it had been agreed to refer these matters to arbitrators and an umpire therein named, the parties thereto bound themselves to abide by the determination of the arbitrators and umpire. The schedule comprised the lands required by the company, without any distinction as to the titles under which they were held: and a single sum was awarded to D. as the purchase money for the whole thereof. Before any conveyance was executed, D. died:—Held, that the agreement operated in equity as an execution of the power of appointment in the settlement: and that the purchase money was payable to the legal personal representatives of D. as part of his personal estate. *Re Dykes*, 7 L. R., Eq., 337; 17 W. R. 658; 20 L. T., N. S., 292.

5. M. married E.'s daughter; after some years the daughter eloped, and then E. left by will 6,000*l.* in trust to dispose of the principal and interest as his daughter should by deed or will appoint. M. afterwards met and took possession of his wife, when she agreed that if M. would permit her to live separate, she would pay him 1,000*l.* and settle 200*l.* per annum on him for life, and articles were accordingly executed. On a bill to set aside the articles and that M. should elect to take the 200*l.* per annum: decreed, that the articles were a good execution of the power created by the will of E., and that M. was not bound to elect. *Moore* v. *Freeman*, Bunb. 205; 3 Bro. P. C. 378.

6. A testator devised his property as follows: "I give and bequeath all my property, real and personal, of whatever nature or kind

wheresoevever to be found in possession, reversion, or expectancy, to which I am legally or equitably entitled, unto my dear wife, absolutely, and to be by her willed to any or either of my children in any manner suitable to her wishes, to hold to her for ever; and I appoint her executrix of this my will, revoking all other wills":—Held, that the wife took the property absolutely, but that a trust was engrafted on it for the benefit of the children who might survive her, with a power for her to appoint it among them by will, as she might think fit. *Evans* v. *Evans*, 33 L. J., Ch., 662; 12 W. R. 508; 10 L. T., N. S., 59.

The widow made a will, by which she devised part of his real estate to a son of his, in liquidation of a debt due to him from the testator; and she afterwards made an agreement with that son and another, that the latter should have the property on the terms of his paying the debt due to the former, and also stipulating for certain benefits for herself:—Held, that neither the will of the widow, nor the agreement, was an exercise of the power in the testator's will. *Ib.*

1. By marriage settlement it was covenanted that a term shall be vested in trustees, to secure portions for the younger children of the marriage, as the father should appoint by deed or will. On the marriage of one of his younger sons, he wrote a letter, promising to appoint a portion of the fund in his favour. On the marriage of another of his younger sons, the father made a regular appointment, by deed, in his favour:—Held, that the former, though but a contract to appoint, being prior in date, should be preferred to the subsequent regular appointment. *Re Jennings*, 8 Ir. Ch. R. 421.

See also XX. II. 1 *post.*

2. By Recitals.

2. A widow of a freeman of London who left children and died intestate, was entitled to four-ninths of his personal estate, and having, by deed, assigned over four-ninths for her separate use, in case of marriage, and to such person as she should appoint, and for want of such appointment then to her children; the widow intending to marry a second husband, by another deed, to which the husband was a party, in consideration of the intended marriage, and of a settlement made on her by him, recites that if she did not dispose of her four-ninths, the husband would be entitled thereto, and then assigns it over to trustees, in trust for the intended husband, during their joint lives, subject to her control and disposal by writing; after which she dies, without disposing of it. Decreed, the second husband is as a purchaser, and the recital, that he would be entitled to it, if the wife should not dispose of it, was a gift. *Poulson* v. *Wellington*, 2 P. W. 533.

3. The recital, in an instrument capable of operating as an execution of a power, of a past transaction, which would by itself have been inadequate, is a sufficient execution of such power. *Lees* v. *Lees*, 5 Ir. R., Eq., 549.

4. On marriage 4,000*l.* was settled in trust after the decease of the husband and wife, to pay among all and every the child and children other than an eldest or only son, at such time and in such proportions as he or she, or the survivor, should appoint by deed or will, for want of appointment among such child and children, other than, etc., equally to be divided, if but one, to that one, payable at twenty-one or marriage, or as soon after as the life interest should drop, the shares of any dying before payable in the 4,000*l.*, or so much as should not be appointed, to go to the survivors at the same time. There were four children; the marriage settlement of one recited that she was entitled to 1,000*l.* part of this fund; one-fourth of it was appointed to another on his marriage, and to a third 1,000*l.* as her share of that portion; the fourth died above twenty-one before his father, who survived his wife and died without any further appointment:—Held, that 3,000*l.* was well appointed, and that the remainder vested in all equally, according to the direction for want of appointment. *Wilson* v. *Piggott*, 2 Ves. J. 351.

5. A testator had a power to appoint a fund, and his son (A.) and grandson (B.) were objects. Having by deed appointed part to his son, he, by will, reciting that the son could, under the hotch-pot clause, be obliged to bring in the appointed part, proceeded, "and then as I make no further appointment," the whole settled fund must be equally divided between A. and B. He made A. his residuary legatee. It turned out that the hotch-pot clause did not apply:—Held, first, that the will did not operate as an appointment; and, secondly, that no case of election arose. *Langslow* v. *Langslow*, 21 Beav. 552; 2 Jur. 1057; 25 L. J., Ch., 610.

6. Decree for raising money under deed of appointment, though the only copy produced appeared not executed, upon recitals of it in two settlements as a subsisting effectual deed, and evidence from books of a deceased solicitor of charges for the preparation and execution of it. *Skipworth* v. *Shirley*, 11 Ves. 64.

7. A married woman, having a power of appointment over property, joined in a deed of compromise, in which she recited that she had previously executed a deed of appointment in favour of certain of the parties to the compromise, but had destroyed it:—Held, in a suit instituted after her death, and nearly forty years after the execution of the deed of compromise, that the recital was conclusive evidence against her personal representative of the execution and destruction of the deed of appointment. *Dyne* v. *Costabadie*, 1 W. R. 315; 1 Eq. Rep. 116.

8. By a deed of 1817, the sum of 1,000*l.* was settled on the death of A. and B., his wife, to and amongst their children, as they or the survivor should by deed or writing or will appoint. B.'s father, who had this 1,000*l.*, by his will gave her a power of appointing amongst her children by will 4,000*l.*, with a gift to her children equally in default of appointment; and he gave 1,000*l.* to be held by his trustees on the trusts of the deed of 1817. B., by her will in 1842, reciting her power over the 4,000*l.*, and her power in conjunction with her husband, to dispose of the 1,000*l.*, appointed 500*l.* to each of her eight daughters out of the two sums of 4,000*l.* and 1,000*l.* After B.'s death, a settlement was made in

1845, on the marriage of C., one of the daughters, to which A. was a party. It recited B.'s will, and that C. was, under the will and appointment therein made, entitled to 500*l.*: that A. had agreed to secure by bond and warrant a further sum in addition to, and to be settled with, the 500*l.*; and C. assigned the 500*l.* for herself, her husband, and their issue. B.'s will was afterwards declared to be an invalid appointment of both the sums of 4,000*l.* and 1,000*l.* A. died:—Held, that C.'s settlement did not operate as an execution of the power by A. as the survivor of B. over the 1,000*l.*, nor as a contract to guarantee the 500*l.*, which could be enforced against him, and which the Court would aid as a defective execution of his power. *Minchin* v. *Minchin*, 5 Ir. R., Eq., 178. Affirmed 19 W. R. 993.

3. By Transfer of Stock.

1. A gift of personal estate to the wife for life, with a direction that, after her death, one moiety thereof shall be at her entire disposal, either by will or otherwise, amounts only to an estate for life in the wife, with a power of appointment. The sale by the widow of a sum of 3 per cent. stock, which constituted nearly the whole of the residue, and the investment of the proceeds in the purchase of long annuities in her own name, does not amount to an exercise of her power. *Reith* v. *Seymour*, 4 Russ. 263; 6 L. J., Ch., 97.

2. Shares were settled on trust for such person as A. might by deed or will appoint. A. took a transfer of the shares into her own name in the ordinary way, executing the transfer under hand and seal:—Held, this amounted to an appointment by A. in her own favour. *Marler* v. *Tommas*, 43 L. J., Ch., 73; 17 L. R., Eq., 8; 22 W. R. 25.

3. By a marriage settlement moneys in the funds, moneys lent on mortgage, and other property, were assigned to trustees, upon trust to pay and transfer the same unto such persons, for such estates or interests, either absolutely or conditionally, and in such parts, shares, and proportions, manner and form, and under and subject to such powers, provisoes, etc., either for the benefit of the issue of the intended marriage, or of any other persons whomsoever, as the wife, notwithstanding her coverture, at any time or times, and from time to time, during the joint lives of herself and her husband, should, by and with the consent and approbation of her husband, testified in writing under his hand and seal, or as the wife alone, after the decease of the husband, in case she should survive him, should by any deed or writing, to be sealed and delivered by her in the presence of and attested by two or more witnesses, direct or appoint; and in default of such direction or appointment, and in the meantime, and until such direction or appointment should be made and executed, and subject thereto, and as to so much of the said trust moneys, etc., whereof no such direction or appointment should be made, upon trust to receive the annual proceeds due, and to grow due, for or in respect of the same, and pay the same to such persons as the wife, during her life, notwithstanding her coverture, and whether sole or covert, should, from time to time, by any writing or writings under her hand, direct or appoint to receive the same, and in default of such direction or appointment into the proper hands of the wife for her separate use. The moneys in the funds were transferred to the husband by virtue of powers of attorney, under the hand and seal of the wife, with the consent of the husband under his hand and seal, and attested by two witnesses; and the mortgage money was received and a receipt given by the husband and wife, and the premises reconveyed, and the receipt and reconveyance also so attested:—Held, that the powers of attorney were not directions, but were merely authorities to the bankers by the wife to assign the stock to her husband, and only enabled the banks to do for her what she might have done for herself, with their intervention. That, as the directions must follow on the authorities before the authorities could be acted on, it still remained to make the appointment after the execution of the powers of attorney, and that the transfers made subsequently to such executions, being unaccompanied by any of the formalities required by the settlement, could not have the effect of converting instruments of substitution into instruments of alienation, and could not operate as executions of the power of appointment. That the wife had no power to dispose of the trust funds otherwise than by a perfect appointment. That in order to constitute a purchaser, in whose favour a defective execution of a power will be aided in equity, there must be a consideration and an intention to purchase, either proved or to be presumed; and the maintenance of his household and establishment by the husband does not furnish such consideration to the wife. That if the transfer of a wife's legacy to herself by the husband be a consideration, it does not show any intention to purchase. That if a wife thinks proper to keep up an establishment against the wishes of the husband, what is supplied for the establishment will be a consideration for payments out of her estate on that account. That the proceeds of the settled funds having been placed to the wife's account at her banker's, and applied principally to the current expenses of the establishment of her husband and herself, by the order and direction of the wife, the husband being the agent in their application, as to moneys so applied there was a defective appointment, which ought to be aided by the Court. *Hughes* v. *Wells*, 9 Hare 749; 16 Jur. 927.

If the husband have not in any degree influenced the acts or conduct of the wife, there is no reason why (the wife having been constituted a feme sole by the settlement) her assets, including the trust funds which have become her assets by the exercise of her power, should not be bound to the same extent as the assets of any other person, not under the disability of coverture, would be bound in the same circumstances. *Ib.*

The rights of married women may be barred, and their estates affected, by active participation in breaches of trust, and if, their powers having been exercised by will, the trust funds become their assets, they must be liable for those breaches of trust. *Semble.*

But the fact of a married woman having permitted her husband to receive the trust funds, does not preclude a right to relief by her or her appointee, for that would be to defeat the purpose for which the trust was created, the protection of the wife against the husband. *Ib.*

4. Other Cases.

1. Devise to A., the testator's wife, for life, and then to be at her disposal, provided it be to any of his children, gives an estate for life, with a power to dispose of the fee; and where such devisee with an after taken husband did by lease and release, and fine, convey the premises to a trustee and his heir, to the use of the wife, for life, without impeachment of waste: remainder to her daughter by her first husband, and the heirs of her body; remainder to the son by the first husband and his heirs. This adjudged a good execution of the power. *Tomlinson* v. *Dighton*, 1 P. W. 149; Salk. 238; 10 Mod. 31; Com. Rep. 194.

2. Imperfect execution of power to jointure by articles completed by words of request in a codicil. *Vernon* v. *Vernon*, Ambl. 3.

3. Power executed by will, but afterwards discharged and a new power created. A subsequent codicil will not, by the mere effect of republishing the will, be an execution of the power. *Holmes* v. *Coghill*, 7 Ves. 499.

4. What shall be said to be a will, and what a deed of appointment. See *Potter* v. *Layer*, 1 Barn. K. B. 256.

5. B., by an instrument, attested by one witness, covenanted with trustees, that his devisee, or heirs, executors, or administrators, should after his death, on being satisfied that all his debts were paid, convey and assign to them all the realty and personalty to which he, or any one in trust for him, should at the time of his death be seised, possessed, or entitled for any beneficial estate or interest, or which he should then have disposed of by his will. By the same instrument the trustees declared that they would stand possessed of the property to pay debts, and convert in their discretion, and transfer the remainder to B.'s wife, if she should be living, and if not, to his next of kin:—Held, that this instrument was a valid deed, and not a will. *Patch* v. *Shore*, 9 Jur., N. S., 63; 32 L. J., Ch., 185; 7 L. T., N. S., 554; 11 W. R. 142; 1 N. R. 157; 2 Dr. & Sm. 589.

6. Where, on marriage, a settlement is made of the wife's property to herself for life to her separate use, with remainder as she should appoint, by any writing signed by her and attested by two witnesses, and for default of appointment to the children of the marriage, and the trustees part with the trust fund upon the joint application of the husband and wife, by letter not attested by any witness, the trustees, after the death of the wife, must make good the trust fund for the children. *Hopkins* v. *Myall*, 2 Russ. & M. 86.

7. Decree for raising money under deed of appointment, though the only copy produced appeared not executed, upon recitals of it in two settlements as a subsisting effectual deed, and evidence from books of a deceased solicitor of charges for the preparation and execution of it. *Shipwith* v. *Shirley*, 11 Ves. 64.

8. Deeds of appointment of a sum of 30,000*l.* for younger children's portions having been properly executed, and being found in the custody of the family solicitor:—Held, that the onus was thrown upon the party disputing them, to prove their invalidity as escrows. *Rowley* v. *Rowley*, 1 Kay 242; 18 Jur. 306; 23 L. J., Ch., 275.

9. Renewal of a college lease by tenant for life, with a power of appointment in her own name and at her expense, has not the effect of an appointment in her own favour; and therefore, by the death of the appointee in the life of the tenant, there will be a resulting trust by lapse for the representative of the author of the power. *Brookman* v. *Hales*, 2 Ves. & B. 45.

10. Bill by husband and wife, who had a power of appointment for her separate use, submitting that the subject of it should be applied in payment of his debts, by mortgage and otherwise, for which a decree passes, tantamount to an actual appointment. The heir, therefore, although in being at the time, and not made a party to the original suit, was not permitted to unravel the accounts taken under that decree, but only to surcharge and falsify. *Allen* v. *Papworth*, 1 Ves. 163. See observation on this case, 4 Ves. 138. n.; and Belt's Supp. 88.

11. A testator, excluding his son John from all share in his property, gave to his trustees and the survivor of them, and the executors and administrators of such survivor, power to give him an equal share with the other children. One only of the trustees, who were also executors, proved, and an administration suit having been instituted, John was employed under the Court, together with one of his brothers, to carry on the testator's business, and the trustee stated in a statement of facts that John in that capacity had acted to his satisfaction, and he had also made him advances out of the estate; John died:—Held, that the sole executor had power to appoint, and had well appointed, a share to John. *Eaton* v. *Smith*, 2 Beav. 236.

12. Legacy in trust to be laid out in stock, the dividends as they come due to A. for life, and after her decease to pay the principal according to her appointment by will or otherwise, with power to her to purchase with it an annuity, with the approbation of the trustees, but not to sell it. A. has an absolute power of disposition, and her bill was held a sufficient indication of her intention to take the whole, making a formal appointment or writing unnecessary. *Irwin* v. *Farrar*, 19 Ves. 86.

13. Bequests to females, some of whom were married and some single, for their separate use for their respective lives, and after their decease to such persons as they should respectively appoint, and in default of appointment to their respective executors, administrators, and assigns:—Held, that each of the legatees, whether married or unmarried women, was entitled, upon petition, without executing any formal appointment, to an immediate transfer or payment to herself of the corpus or her share of the fund. *Holloway* v. *Clarkson*, 2 Hare 521; 6 Jur. 923.

14. Money in court stood limited to a widow for life, and afterwards as she should by deed

or will appoint. The Court directed payment to her, without requiring an appointment. *Cambridge* v. *Rous*, 25 Beav. 574.

1. Trust moneys settled on such trusts as the plaintiff should by deed or will appoint, ordered to be paid to the plaintiff. *Watts* v. *Campbell*, 2 Giff. 112.

2. Power of appointment among three persons, executed by a transfer of one-third to one under an order on petition, stating that the person having the power was desirous that the fund might be equally divided; that person dying without any farther execution, the Court gave the two remaining thirds respectively to another of the objects, and to the administratrix of the third, who was dead, but had survived the person having the power. *Fortescue* v. *Gregor*, 5 Ves. 553.

3. Whether an answer is such a defective execution of a power as a court of equity would make good in favour of a daughter. *Carter* v. *Carter*, Mos. 369.

4. Lands were settled to such uses as A. and B. should, by a joint deed, executed in the presence of witnesses, appoint, and, in default of appointment, to uses in strict settlement, A. and B. being the first tenants for life in succession. In 1845 the South Western Railway Company contracted with A. and B. for the sale of land, but the price was not fixed. In 1846 the company advanced part of the consideration money to them, on their joint receipt, in which it was stated that the money was "in respect of the lands, part of our estates, required for the purpose of the South Western Railway Company." Before any formal exercise of their joint power by A. and B., A died. Afterwards other parts of the settled lands were contracted to be sold to the company:—Held, first, that this was not such a contract as could be enforced against B.; secondly, that the receipt was not such a defective execution of the power as would be aided in equity. *Morgan* v. *Milman*, 16 Jur. 755. Affirmed 17 Jur. 193; 1 W. R. 134; 22 L. J., Ch., 897; 3 De G. M. & G. 24.

5. A bequest of personal property to the three trustees, A., B., and C., "upon trust to dispose of the same in whatever way A. shall, by any deed or deeds, instrument or instruments, or by his will, appoint, provided that no such deed, instrument, or will shall be taken to be an execution of the power, unless the said deed, instrument, or will be executed after my decease;" and, subject thereto, upon trust for A. for life:—Held, to be a power exercisable by any instrument in writing, whether a deed or not, if such instrument sufficiently referred to the power, or to the property subject to it, or if it made a general gift, and the appointor had no property of his own to which he could refer. *Brodrick* v. *Brown*, 1 Kay & J. 328.

A written order directed to the trustees of the fund would be a good exercise of this power. *Ib.*

If the donee of the power was also the sole trustee of the fund, a cheque upon a banker where the fund was lying would be a good appointment if he had no money of his own there. *Ib.*

So also would a letter from him, referring to the power or to the property, and accompanying a gift of money, which it stated to be in pursuance of the power or out of the property. *Ib.*

Various examples of this last kind of appointment. *Ib.*

In the case of a series of appointments of this kind, one letter stated only that the payment which it accompanied was "in fulfilment of the known wishes" of the donor of the power:—Held, that this was an ambiguity that might be explained by reference to other documents, which showed that the gift was intended to be in exercise of the power. *Ib.*

6. A testatrix gave her residue to A. B., her executor, in trust for such of the children or grandchildren of X. as he should think it most acceptable to, etc. The will was contested, and in answer to a letter from his proctor, requesting, in the event of his releasing his interest, the names of the persons most interested, or one of them, in order that they might appoint a proctor, and make the affidavit of scripts, A. B. stated, by name, "the children whom it is desired may benefit," and that he presumed that having thus determined, their father should make the affidavit:—Held, that this amounted to a valid app tment of the residue. *Bailey* v. *Hughes*, 19 Beav. 169.

A power to appoint personalty amongst a class may, if no formality be required, be executed by merely naming the parties to be benefited, *semble*. *Ib.*

7. By marriage settlement it was covenanted that a term shall be vested in trustees, to secure portions for the younger children of the marriage, as the father should appoint by deed or will. On the marriage of one of his younger sons, he wrote a letter, promising to appoint a portion of the fund in his favour. On the marriage of another of his younger sons, the father made a regular appointment, by deed, in his favour:—Held, that the former, though but a contract to appoint, being prior in date, should be preferred to the subsequent regular appointment. *Re Jennings*, 8 Ir. Ch. Rep. 421.

8. A. having a power, by deed or will, to appoint the lands of D. (which were held with other lands, and were subject to a proportioned rent of 19*l.*) to the use of such child or children of his marriage, in such shares, or the whole to one of such children, for such estates, and with such conditions, and limitations over, for the benefit of some or one of such children, and subject to such charges for the other or others of such children as he should appoint, purchased the reversion of the lands of D., and afterwards, by a settlement on the marriage of B., his eldest son, reciting that he was seised in fee of the lands of D., and that it had been agreed that an annuity, to be thereby granted and charged on the lands of D., should be assigned upon the trusts of the settlement, granted an annuity of 100*l.*, to be charged on the lands of D. for 100 years, upon trust, after the death of the survivor of A. and his wife, to pay the same to B. for life, and after his decease to C. (B.'s intended wife), so long as there should be issue of the marriage, and she should remain a widow; and after the death of the survivor, or in case C. should survive B., and there should have been no issue of the marriage, or she should marry again, in trust for the executors, etc., of A. By will, A. reciting his power, devised all his

right to the lands of D. to his three sons, in trust by sale, etc., to raise a sum for his younger children:—Held, first, that the settlement was an execution of the power, and that the annuity was charged on the entire interest in the lands of D., and not on the reversion only. *Irwin* v. *Irwin*, 10 Ir. Ch. R. 29.

Held, secondly, that the settlement operated as an appointment to B., and a settlement by him on C., and that she was therefore, though not an object of the power, entitled to the annuity after B.'s death. *Ib.*

1. By a settlement, dated the 19th April, 1815, made on the marriage of Sir J. W. with Miss J. D., certain personal property, consisting of money in the funds and money out on mortgage, etc. (all belonging to the lady), were settled to the general appointment, by deed attested by two witnesses, of the lady herself, during the joint lives of herself and her husband, with his consent, and after his decease to her general appointment; and subject to this power, the trusts were for the lady for life, to her separate use, but without any restraint on anticipation; with remainders over. The marriage took place, and in the same year Sir J. W. made his will, bequeathing and devising all his property, real and personal, to his wife, Lady W., and making her his sole executrix. The trustees of the settlement never acted in any way previous to the institution of this suit, and the funds were never transferred into their names, but continued standing in Lady W.'s name. After the marriage, Lady W., who resided with her husband at a distance from London, executed several powers of attorney to enable her bankers in London to sell out various parts of the funds in settlement, which were sold out accordingly, and paid in to Sir J. W.'s name. The bank powers of attorney required to be executed with the same ceremonies as were required by the marriage settlement to be observed in executing the power of appointment there. Various sums of mortgage money, also in the settlement, were from time to time paid off, and the amounts paid in to his name, invested also in his name in the purchase of consols; and in this manner about 8,000*l.* worth of different stock was in 1821 standing in the name of Sir J. W., and all cheques for current expenses were drawn by Sir J. W., which, in accordance with Lady W.'s written request, were honoured by her London bankers out of her separate account. On the other hand, Sir J. W. suffered a legacy of 2,000*l.* to be received and placed to the separate account of his wife:—Held, that the power of appointment was not well exercised by Lady W. in the powers of attorney, nor by the assignments of mortgage. *Hughes* v. *Wells*, 16 Jur. 927; 9 Hare 749.

2. A testator had a power to appoint the produce of a policy on his life amongst his children, by writing or will. By will he bequeathed all his personal estate to his daughter F. By a contemporaneous writing, unattested, and headed "memorandum," he gave directions to F. as to his property, and said, "The money from the Equitable Insurance Office I would have equally divided between my daughters F. G. and A.," and it also expressed his wish that his two sons should have certain interests out of his own property:—Held, first, that he must be assumed to have known that his will did not operate on the policy fund. *Proby* v. *Landor*, 28 Beav. 504; 30 L. J., Ch., 593; 6 Jur., N. S., 1278; 9 W. R. 47.

Held, secondly, that the memorandum was an execution of the power. *Ib.*

Held, thirdly, that the words "I would have" were imperative, and not mere instructions to F. *Ib.*

Held, fourthly, that F., who was not shown to have obtained the benefits under the will, on the faith of any promise to distribute the testator's property according to the memorandum, was not bound to do so. *Ib.*

3. The execution of a bond, by the donee of a power in favour of the object thereof, operates as an exercise of that power. *Burke* v. *Lambert*, 15 W. R. 913.

4. A husband and wife, who jointly had a limited power of appointment over settled personalty, executed a deed purporting to appoint to persons not objects of the power. By the death of the husband, the wife became absolutely entitled to the property comprised in the settlement. She appointed a new trustee, and more than once wrote to the mother of the intended appointees about the settled property, and describing the deed of appointment as still standing. It was not shown that she knew of the invalidity of the deed of appointment:—Held, that she had sufficiently declared a trust of the settled property in favour of the intended appointees. *Re Bennett*, 16 W. R. 331.

5. A husband and wife being donees of a joint power to be exercised by deed or writing, the husband drew up written instructions for a solicitor to prepare a proper deed. There was evidence from other sources of the wife's consent to the instructions, but none on the document itself; nor was there any written authority by the wife. The husband died before the draft could be prepared:—Held, that, as the power required a joint authority during the coverture, the instructions could not be made to operate as a valid execution. *Hawke* v. *Hawke*, 26 W. R. 93.

6. A lady, having power to appoint a fund by deed to be sealed and delivered and attested by one witness, in January 1870 signed an unattested memorandum, stating her wish that if she died suddenly her eldest son should have the fund, and that her intention was to make it over to him legally if her life was spared. She died in March 1870, after two days' illness:—Held, that her intention to appoint the property by this memorandum was sufficiently clear, and that the Court would give effect to the memorandum as an execution of the power. *Kennard* v. *Kennard*, 42 L. J., Ch., 280; 8 L. R., Ch., 227; 21 W. R. 206; 28 L. T., N. S., 83.

7. A. having in the events that happened power to appoint funds amongst her children by deed, or by her last will in writing, or any writing purporting to be or being in the nature of her last will, or any codicil thereto, to be signed and published in the presence of, and to be tested by, two credible witnesses, died intestate; but left in an envelope, addressed to her son, an unattested memorandum (signed by herself, and dated eight years before her death), "for my son and daughters. Not having made a will, I leave this memorandum,

and hope my children will be guided by it, though it is not a legal document. The (funds) I wish divided as follows":—(amongst her children, followed by bequests out of another fund, and a gift of the residue, and concluding), "this paper contains my last wishes and blessings upon my dear children, and thanks for their love to me":—Held, that this memorandum showed no intention to execute the power, and, consequently, that the Court could not remedy any defects in the execution so as to give validity to it as an appointment. *Garth* v. *Townsend*, 7 L. R., Eq., 220.

1. The donee of a power, when executing a deed of appointment, "limited and appointed," not only the lands the subject of the power, but other lands of his which were not subject thereto:—Held, that the words "limited and appointed" operated as a grant of the latter lands. *MacAndrew* v. *Gallagher*, 8 Ir. R., Eq., 490.

2. By a deed of entail certain estates were settled upon J. K. and the heirs whatsoever of his body, remainder to several successive heirs substitutes, it being declared that the eldest heir female and the descendants of her body, so often as the succession should devolve upon heirs female, should exclude all other heirs portioners; but it was to be lawful for the heir of entail in possession, so often as his apparent or presumptive heirs were females, so far to alter the destination of succession as to settle the estate upon a younger daughter in preference to an elder. W. K., the heir of entail in possession in 1837, being a bachelor and having four sisters, of whom, according to the original settlement, upon the death of W. K. without issue, the eldest would have inherited, executed a deed calling E. K. the youngest, and the heirs of her body first in succession, failing heirs of his own body. He died in 1844, a bachelor; E. K. thereupon obtained enfeoffment:—Held, that the power might properly be executed by a deed *inter vivos*; and might be exercised by E. K. herself when her apparent or presumptive heirs were females. *Martin* v. *Kelso*, 5 W. R. 440.

3. Under a settlement, jewels were assigned upon trust for such person as G. (a married woman) should by writing direct or appoint, and in default of such appointment, upon trust for her during her life for her separate use, and to be at her absolute disposal, and her receipt or that of the person to whom she should direct the jewels to be delivered, to be a good discharge. G., without any direction in writing, delivered the jewels as an absolute gift to V., who retained them in her possession. After the death of G. the question arose as to the validity of the gift to V.:—Held, that G. had power to dispose of her whole interest in the jewels without any direction in writing, and that under the gift and manual delivery V. was absolutely entitled to them. *Farrington* v. *Parker*, 4 L. R., Eq., 116; 16 L. T., N. S., 258.

4. A., by his will in 1809, gave his wife a power of appointment over real estate; she survived him, and in 1829 married again. On her second marriage a settlement of personalty was made for her separate use for life, with power for her to dispose of it by deed, will, or otherwise. In 1829 she made a will appointing the real estate under A.'s will, and disposing of the personalty settled on her second marriage. By a codicil made in 1830 she revoked the appointment in her will, and after appointing the real estate in a different manner bequeathed part of the personalty, settled as aforesaid, to her daughter C., who was an attesting witness to the codicil:—Held, that the gift to C. was valid. *Wilkins* v. *Charretton*, 22 W. R. 598.

5. A testator bequeathed 2,000*l.* consols to trustees, upon trust to pay the interest to his daughter S., to her separate use during her life, the principal to go to her heirs, or any other she might choose to will it to. S. married, and by a deed in the Scotch form, and executed in Scotland, reciting the will, she granted and assigned the 2,000*l.* consols, from and after her decease, to and in favour of her husband and his son by a former marriage:—Held, that the words "to will it," meant to dispose of it by will, and that the disposition of the fund by the deed in the Scotch form was not a valid execution of the power. *Paul* v. *Hewetson*, 2 Myl. & K. 434.

As to Powers whether to be Executed by Deed or by Will only.] See II. III. *ante*.—XVIII. XI. 1 *post*.

XI. Execution. By Devise or Bequest in General Terms and Reference to Power.

I. *Reference to Power. General Principles*, 5774.
II. *Error in Reference to Power*, 5776.
III. *Where Several Powers*, 5777.
IV. *Evidence as to State of Testator's Property*, 5778.
V. *Where Will Executed before Creation of Power*, 5779.
VI. *General Powers before the Wills Act*, 5781.
VII. *Execution of General Powers under the Wills Act*, 5784.
VIII. *Execution of Special Powers*, 5788.
IX. *By Married Woman.* See IX. III. 6 (*b*) *ante*.

I. REFERENCE TO POWER. GENERAL PRINCIPLES.

6. If a person, in the execution of a power, sufficiently describes the estate he had a power to charge, the estate is bound, though there is no reference to the deed out of which the power arises. *Probert* v. *Morgan*, 1 Atk. 441.

7. A man may execute a power without reciting it; but he should mention the estate he disposes of. *Exp. Caswall*, 1 Atk. 559; *Molton* v. *Hutchinson*, *id.* 558.

8. Three powers by settlement, first to husband and wife jointly, to raise and appoint 3,000*l.*; secondly, to writing under hand and seal, and of appointing new uses, by the same or any other deed. A., by his will, without taking any notice of power, devises to B.:—Held, a good execution. *Roscommon* v. *Fowke*, 6 Bro. P. C. 158.

9. Power reserved by the owner of an

estate to be construed liberally, and no occasion to refer to the power, if it is done in substance. *Maddison* v. *Andrew*, 1 Ves. 61.

1. Power attempted to be executed by invalid instruments:—Held, not executed by the general words of will containing no reference to it. *M'Leroth* v. *Bacon*, 5 Ves. 159.

2. Power of appointment not executed by will having no reference to the power or the subject of it, and the Court will not inquire into the circumstances of the property. *Nannock* v. *Horton*, 7 Ves. 391.

3. Though to effect the execution of a power by will a direct reference to the power is not necessary, the intention must distinctly point to the subject of it, as if something is included which the testator had not otherwise than under the power; and part of the will, unless applied to it, would be wholly inoperative. *Bennet* v. *Barrow*, 8 Ves. 609.

4. It is not necessary to recite an intention to execute a power, if the act can be done only by that authority, but where the act purports to pass the interest, it shall be considered so intended and not to exercise an authority. *Maundrell* v. *Maundrell*, 10 Ves. 257.

5. Power may be executed by will applying to the subject, without an express reference to the power. *Bradley* v. *Westcott*, 13 Ves. 445.

6. On the execution of a power it is not requisite to refer to a power; it is sufficient if reference be had to the subject of it. *Dillon* v. *Dillon*, 1 Ball & B. 92.

7. A general gift, to operate as an execution of a power, must either refer to the power, or to the subject of it; and a reference to part of the subject, or to some of many subjects of the power, will not be sufficient to make a will operate as an execution of the power, where there is no other indication of an intention to execute it. *Hughes* v. *Turner*, 3 Myl. & K. 666; 4 L. J., N. S., Ch., 141.

8. Although a will does not state that it is made in execution of a power, yet if it plainly refer to and comprise the subject of the power, it will be deemed a good execution. *Hunloke* v. *Gell*, 1 Russ. & M. 515.

9. To execute a power over personal estate, it is not necessary to refer to it, but there must be very clear internal evidence of the intention. *Webb* v. *Honnor*, 1 Jac. & Walk. 357.

10. A will is deemed a good execution of a power if it dispose of the subject of the power, although it does not refer to the power. The subject of the power will pass by the words of "all other my property," if it be plain, from other expressions in that will, that under these general words she considered the property under the power to be included. *Walker* v. *Mackie*, 4 Russ. 76.

11. Whether a testator intended by his will to execute a power, is to be collected from the whole instrument, and not from the force of any particular expression. In this case, the testator devised his estates, and made disposition of part of the fund to be produced by the sale of the estates, to purposes not warranted by the power; but still, upon the whole will, the Court held that he intended to execute the power. The recital of a deed is a key to the construction, where the operative art is doubtfully expressed, and not otherwise. *Bailey* v. *Lloyd*, 5 Russ. 330; 7 L. J., Ch., 98.

12. The recital of a power is not necessary to the due execution of it. *Blake* v. *Marnell*, 2 Ball. & B. 44; 4 Dow P. C. 248.

13. Where the intention of a donee of a power to pass the property comprised in the power is clearly established, the Court will give effect to the intention, even although the donee, in making the appointment, does not profess to do so in exercise of the power. *Carver* v. *Richards*, 5 Jur., N. S., 1412. And see S. C. 6 Jur., N. S., 410; 29 L. J., Ch., 357; 8 W. R. 349; 2 L. T., N. S., 161; 1 De G. F. & J. 548.

14. A marriage settlement comprised a sum of 20,000*l.* South Sea Annuities; 7,000*l.*, 3*l.* per cent. reduced, and 3,150*l.* new 4*l.* per cent.; also certain shares in a company, and 54,000 French rentes. These were settled on trust to raise an annuity of 500*l.* for the life of the wife for her separate use, subject thereto for the husband and wife for their joint lives; if the wife should predecease her husband, then on trust to raise 3,000*l.*, over which a general power of appointment was given to the wife; and as to the rest, after the death of the wife so predeceasing her husband, for him for life; and after his death, in trust for all and every or such one or more exclusively of the other or others of the relations in blood to the said Sarah Harvey (the wife) at the time of her decease, within the eighth degree of consanguinity to her, at such age, day, or time, or respective ages, days, or times; and if more than one, in such shares and proportions, and with such annual sums of money and future or executory or other trusts (such annual sums of money and future or executory or other trusts being for the benefit of the said relations in blood of the said Sarah Harvey within the degree aforesaid, or some or one of them), and in such manner as the said Sarah Harvey should, notwithstanding her coverture, by her last will and testament in writing or any codicil or codicils in writing, or any writing or writings in the nature of or purporting to be a will or codicil, to be signed and published by her in the presence of and to be attested by two or more credible witnesses, direct or appoint; and in default of such direction or appointment, and so far as any such direction or appointment should not extend, in trust for such person or persons as, under the Statute for the Distribution of the Effects of Intestates, would at the decease of the said Sarah Harvey have become entitled thereto as her next of kin in case the said Archibald Morrison (the husband) had died in her lifetime, and she had died possessed thereof his widow, and intestate. The settlement also comprised certain plate, linen, china, etc., over which a general power of appointment was given to the wife, to take effect after the death of her husband. It comprised also certain shares in a public library, and tickets of admission to a theatre, and jewellery, etc.; and, as to these, the settlement gave to the wife a general power of gift and appointment, either during her life or after her death, as well as over what she should save out of her separate income. The wife died many years before her husband. By her will she said:—"I do, by virtue of the power

and authority reserved to me in and by the deed of settlement, made, etc., hereby make, publish, and declare this my last will and testament in manner and form following, that is to say." She then referred particularly to the power to dispose of 3,000*l.*, and made a disposition of a great part of it. She gave to her husband for life all the benefit of her shares in the public library, of her admission to the theatre, and of her books. After his death she disposed of these things to various persons; she disposed also of her jewels, china, and other things; and her will concluded as follows:—"And after payment of my just debts, funeral expenses, the charges of proving this my will and of carrying the trusts thereof into execution, I direct and appoint, give and bequeath, after the decease of my said husband, all the rest, residue, and remainder of my moneys and other my personal estate, of whatever description the same may be, unto and amongst all and every the daughters of my said brother, John Harvey, the said Charles Day and Louisa Day, the children of my deceased niece, and the two daughters of my said brother Charles Saville Onley, or to such of them as shall be living at my said husband's death, and to the issue of such of them as shall then happen to be dead, to be equally divided amongst them, share and share alike. But it is my will that the said Charles Day and Louisa Day, and the children of any other of my nieces who may be dead, shall only be entitled to the share in the said residue which his or her mother would have had if living at the death of my said husband. And further, it is my will that the shares of each of my said nieces of the residue of my personal estate shall be placed and continue out at interest by my surviving executor, his executors or administrators, on Government or real security during the respective lives of my said nieces; and the dividends or interest on each share, as the same shall from time to time become due, shall be paid to each of my nieces during her life, on her own receipt, for her own sole and separate use, and not to be subject to the debts or control of her present or any future husband. And as to the share of my niece Caroline Onley, I will and desire that the same shall, after her decease, be paid to all my other nieces who shall be living at the decease of the said Caroline Onley, and to the issue of such of them as shall then happen to be dead, equally share and share alike; but the issue of any deceased niece is only to be entitled to the share which his or their mother would have had if living at the decease of the said Caroline Onley; and after the death of each of my other nieces, I direct that the dividends and interest of her share shall, if she die married, be paid to her husband during his life for his own use. And I further will and direct that, after the several deceases of my said last-mentioned nieces, or their respective husbands, that the share of each of the said last-mentioned nieces shall be paid to her child, children, or grandchildren, or any other relation in blood to my said niece, in such parts and proportions, manner and form, as she may by her last will and testament, duly executed, and which she shall have power to make, notwithstanding her coverture, give and bequeath the same; and in default thereof, then unto the next of kin in blood of my said niece, according to the Statute for Distribution of Intestates' Personal Estates": —Held, first, that the will was an execution of all the powers; that is, of the power to appoint each portion of property comprised in the settlement. Secondly, that the appointment in favour of the daughters of John Harvey was not void *ab initio*, because it might comprise persons not living at the death of the testatrix, and within the eighth degree; nor did it become void *in toto*, because it did, in fact, at the time of distribution, include such persons; but that it was good *pro tanto*. Thirdly, that the attempted limitation to the husbands of the nieces was bad, as they were strangers; and the limitations to their children, grandchildren, or other relations in blood, was void for remoteness. Fourthly, that the attempt to cut down the estate given to the nieces, in the first instance, failing the attempted remainders over, did not go as unappointed, to the next of kin, but failed wholly, and left absolute interests subsisting in the nieces. *Harvey* v. *Stracey*, 1 Drew. 73; 16 Jur. 771; 22 L. J., N. S., Ch., 23.

1. The Court may look at surrounding circumstances, and if it can gather from them a clear intention on the part of a settlor to take property comprised in the deed out of a will of prior date, it will not hold the general devise in the will an execution of a general power to appoint by deed or will contained in the settlement. *Re Ruding*, 20 W. R. 936; 14 L. R., Eq., 266; 41 L. J., Ch., 665.

2. Vague and general words of reference to all powers found among words of a general gift and bequest of a testator's own property, where the words are justified by the existence of a power as to property in which he had an interest, cannot be extended to operate as an exercise of a special and limited kind over property derived from another source. *Hope* v. *Hope*, 5 Giff. 13.

Semble, that a new power over property acquired after the will requires a clear manifestation of a new intention to exercise it, and a mere republication of the will by a codicil made after the acquisition of such new power is not a sufficient manifestation of intention. *Ib.*

3. The donee of a power may execute it without referring to it, and without taking the slightest notice of it, provided the intention to execute the power really appears. *Smith* v. *Adkins*, 41 L. J., Ch., 628; 20 W. R. 717; 27 L. T., N. S., 90; 14 L. R., Eq., 402.

In Case of Married Woman.] See IX. III. 6 (*b*) *ante.*

II. ERROR IN REFERENCE TO POWER.

4. A testator, after reciting that under the settlement in 1819, on his second marriage, he had power to charge 5,000*l.* amongst the children of his second marriage, proceeded to appoint it. The settlement of 1819 contained no such power, but a re-settlement of 1839 contained a power to appoint that sum to his younger children:—Held, that the will was a valid execution of the power. *Re Wilmot*, 29 Beav. 644.

1. A testator being entitled to one-sixth of leasehold lands under the will of T. J., and having a power of appointment over another sixth under the will of C. J., both wills being nearly of the same date, devised all his property in the lands bequeathed by the will of C. J., speaking of it for purposes in common with other property, which he owned absolutely:—Held, merely a *falsa demonstratio*, and to apply only to the property he was entitled to under T. J.'s will. *Lendrick* v. *Russell*, 10 Ir. Eq. R. 269.

2. By articles of agreement of the 19th November, 1812, purporting to be made in contemplation of a then intended and soon after solemnised marriage, it was declared that 600*l*., portion of the wife's fortune, should be secured by the bond and warrant of her father, L. On the 19th January, 1826, L. made his last will and testament, wherein he (correctly) recited that he was tenant for life on the lands of Aggard, which, by the terms of his marriage settlement, were charged with 4,000*l*. for his daughters in such shares as he should by will or other writing appoint, and he thereby further (erroneously) recited that the sum of 600*l*. was on the marriage of his daughter charged for her on the lands, and he thereby directed the said last-mentioned sum, together with other sums amounting to 1,100*l*., to be for her, his married daughter's portion, and he then also appointed three several sums of 900*l*. each to his third, fourth, and fifth daughters, which, with sums charged on other lands, made 1,100*l*. each:—Held, that the will sufficiently indicated an intention on the part of the testator to appoint the 600*l*. to his married daughter, notwithstanding that he had not therein made any appointment to her by name. *Burke* v. *Lambert*, 15 W. R. 913.

See also Next Subdivision.

III. WHERE SEVERAL POWERS.

3. R. P., being entitled to one-third share of real and personal estates, settled it, on her marriage, with power of appointment to herself (in events that happened) over one-third part thereof by deed or will, and over two-thirds by will, subject to the husband's life interest therein, and in default of issue of the marriage. R. P., becoming entitled to a moiety of another one-third of same estate, settled it to such uses as she should appoint, subject to the husband's life interest. There was one child of the marriage. R. P., by her will, devised, bequeathed, and appointed "all that one-third part of her real and personal estates, over which she had a disposing power," upon trust, immediately after her death to raise a sum of 500*l*.; and "as to the residue of the said one-third part, and the remaining two-third parts," she gave the same to her husband for life, remainder to her infant son, and his heirs; but in case he should die under twenty-one without issue, she directed the residue of the said one-third part to be sold, for payment of an annuity and legacies given by her will, the annuity to be payable upon the son's death, and the legacies as soon as the said one-third part could be sold; and as to the remaining two-third parts, subject to her husband's life interest, she gave and appointed them to her sister absolutely. The son survived the testatrix, and died under twenty-one without issue:—Held, first, that the appointment of the "one-third" part for payment of the annuity and legacies, extended only to one-ninth of R. P.'s original third share, and to one-third of her moiety of the other third share; secondly, that the annuity and legacies became payable on the death of the son, with interest on the legacies from that time; thirdly, that the will did not affect the husband's rights under the settlement, and no case of election was raised against him. *Saward* v. *M'Donnell*, 2 H. L. Ca. 88; 12 Jur. 685. Affirming 3 Jur. 682.

4. A testatrix, having a power of appointing a sum of 10,000*l*. secured by a term of 500 years, and having also a power of appointing the fee of the lands on which the money was secured by her will, devised her lands to A. for life, with remainder to B. in tail, and gave to A. all the residue of her personal estate:—Held, that the 10,000*l*. passed under the residuary gift of the personal estate. *Clifford* v. *Clifford*, 9 Hare 675.

5. Where husband, having, by articles, power to appoint wife's real estate, and by other articles to appoint his own real estates, by will, reciting power over his own estates, in exercise of that power, and all other powers, appointed his own real estates, and all other real estates over which he had power in trust, etc., making no mention, in any part of will, of wife's estates, or of his power over them, and expressing that all persons taking under his will should be bound by doctrine of election:—Held, wife's estate was included in appointment by will. *Trollope* v. *Linton*, 1 Sim. & S. 477; 2 L. J., Ch., 3.

6. A power to husband alone to appoint a sum of 4,000*l*., which in default of appointment was limited in a particular way, was not well executed by an appointment by husband and wife of 6,000*l*. given in lieu of the 4,000*l*. by a subsequent deed, and which 6,000*l*. was to go differently in default of appointment. *Hamilton* v. *Royse*, 2 Sch. & Lef. 315.

7. An "advancement" means that a certain portion of the fund is actually taken out of the settlement altogether, and paid over to the object of the power; but an "appointment" deals only with the reversion of the fund, leaving the previous life interests untouched. Therefore, when there are a power of advancement and a power of appointment, and the rights of the parties under the two are different (for instance with respect to hotchpot), so that the question arises which power the payment of certain sums out of the trust fund to one of the objects is to be referred to, the Court must attribute it to that power to which it is *primâ facie* applicable, viz., to the power of advancement. Power to appoint among children. After marriage of a daughter, settlement made to which the donees of the power and the daughter and her husband were parties, and whereby part of the fund was appointed (subject to the life estates of the donees of the power) in trust for the daughter and her husband successively for life, and afterwards for their issue:—Held, a valid appointment and settlement, not merely with respect to the daughter's life interest, but with

and authority reserved to me in and by the deed of settlement, made, etc., hereby make, publish, and declare this my last will and testament in manner and form following, that is to say." She then referred particularly to the power to dispose of 3,000*l.*, and made a disposition of a great part of it. She gave to her husband for life all the benefit of her shares in the public library, of her admission to the theatre, and of her books. After his death she disposed of these things to various persons; she disposed also of her jewels, china, and other things; and her will concluded as follows:—"And after payment of my just debts, funeral expenses, the charges of proving this my will and of carrying the trusts thereof into execution, I direct and appoint, give and bequeath, after the decease of my said husband, all the rest, residue, and remainder of my moneys and other my personal estate, of whatever description the same may be, unto and amongst all and every the daughters of my said brother, John Harvey, the said Charles Day and Louisa Day, the children of my deceased niece, and the two daughters of my said brother Charles Saville Onley, or to such of them as shall be living at my said husband's death, and to the issue of such of them as shall then happen to be dead, to be equally divided amongst them, share and share alike. But it is my will that the said Charles Day and Louisa Day, and the children of any other of my nieces who may be dead, shall only be entitled to the share in the said residue which his or her mother would have had if living at the death of my said husband. And further, it is my will that the shares of each of my said nieces of the residue of my personal estate shall be placed and continue out at interest by my surviving executor, his executors or administrators, on Government or real security during the respective lives of my said nieces; and the dividends or interest on each share, as the same shall from time to time become due, shall be paid to each of my nieces during her life, on her own receipt, for her own sole and separate use, and not to be subject to the debts or control of her present or any future husband. And as to the share of my niece Caroline Onley, I will and desire that the same shall, after her decease, be paid to all my other nieces who shall be living at the decease of the said Caroline Onley, and to the issue of such of them as shall then happen to be dead, equally share and share alike; but the issue of any deceased niece is only to be entitled to the share which his or their mother would have had if living at the decease of the said Caroline Onley; and after the death of each of my other nieces, I direct that the dividends and interest of her share shall, if she die married, be paid to her husband during his life for his own use. And I further will and direct that, after the several deceases of my said last-mentioned nieces, or their respective husbands, that the share of each of the said last-mentioned nieces shall be paid to her child, children, or grandchildren, or any other relation in blood to my said niece, in such parts and proportions, manner and form, as she may by her last will and testament, duly executed, and which she shall have power to make, notwithstanding her coverture, give and bequeath the same; and in default thereof, then unto the next of kin in blood of my said niece, according to the Statute for Distribution of Intestates' Personal Estates":—Held, first, that the will was an execution of all the powers; that is, of the power to appoint each portion of property comprised in the settlement. Secondly, that the appointment in favour of the daughters of John Harvey was not void *ab initio*, because it might comprise persons not living at the death of the testatrix, and within the eighth degree; nor did it become void *in toto*, because it did, in fact, at the time of distribution, include such persons; but that it was good *pro tanto*. Thirdly, that the attempted limitation to the husbands of the nieces was bad, as they were strangers; and the limitations to their children, grandchildren, or other relations in blood, was void for remoteness. Fourthly, that the attempt to cut down the estate given to the nieces, in the first instance, failing the attempted remainders over, did not go as unappointed, to the next of kin, but failed wholly, and left absolute interests subsisting in the nieces. *Harvey* v. *Stracey*, 1 Drew. 73; 16 Jur. 771; 22 L. J., N. S., Ch., 23.

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See also Next Subdivision.

III. WHERE SEVERAL POWERS.

3. R. P., being entitled to one-third share of real and personal estates, settled it, on her marriage, with power of appointment to herself (in events that happened) over one-third part thereof by deed or will, and over two-thirds by will, subject to the husband's life interest therein, and in default of issue of the marriage. R. P., becoming entitled to a moiety of another one-third of same estate, settled it to such uses as she should appoint, subject to the husband's life interest. There was one child of the marriage. R. P., by her will, devised, bequeathed, and appointed "all that one-third part of her real and personal estates, over which she had a disposing power," upon trust, immediately after her death to raise a sum of 500*l*.; and "as to the residue of the said one-third part, and the remaining two-third parts," she gave the same to her husband for life, remainder to her infant son, and his heirs; but in case he should die under twenty-one without issue, she directed the residue of the said one-third part to be sold, for payment of an annuity and legacies given by her will, the annuity to be payable upon the son's death, and the legacies as soon as the said one-third part could be sold; and as to the remaining two-third parts, subject to her husband's life interest, she gave and appointed them to her sister absolutely. The son survived the testatrix, and died under twenty-one without issue:—Held, first, that the appointment of the "one-third" part for payment of the annuity and legacies, extended only to one-ninth of R. P.'s original third share, and to one-third of her moiety of the other third share; secondly, that the annuity and legacies became payable on the death of the son, with interest on the legacies from that time; thirdly, that the will did not affect the husband's rights under the settlement, and no case of election was raised against him. *Saward* v. *M'Donnell*, 2 H. L. Ca. 88; 12 Jur. 685. Affirming 3 Jur. 682.

4. A testatrix, having a power of appointing a sum of 10,000*l*. secured by a term of 500 years, and having also a power of appointing the fee of the lands on which the money was secured by her will, devised her lands to A. for life, with remainder to B. in tail, and gave to A. all the residue of her personal estate:—Held, that the 10,000*l*. passed under the residuary gift of the personal estate. *Clifford* v. *Clifford*, 9 Hare 675.

5. Where husband, having, by articles, power to appoint wife's real estate, and by other articles to appoint his own real estates, by will, reciting power over his own estates, in exercise of that power, and all other powers, appointed his own real estates, and all other real estates over which he had power in trust, etc., making no mention, in any part of will, of wife's estates, or of his power over them, and expressing that all persons taking under his will should be bound by doctrine of election:—Held, wife's estate was included in appointment by will. *Trollope* v. *Linton*, 1 Sim. & S. 477; 2 L. J., Ch., 3.

6. A power to husband alone to appoint a sum of 4,000*l*., which in default of appointment was limited in a particular way, was not well executed by an appointment by husband and wife of 6,000*l*. given in lieu of the 4,000*l*. by a subsequent deed, and which 6,000*l*. was to go differently in default of appointment. *Hamilton* v. *Royse*, 2 Sch. & Lef. 315.

7. An "advancement" means that a certain portion of the fund is actually taken out of the settlement altogether, and paid over to the object of the power; but an "appointment" deals only with the reversion of the fund, leaving the previous life interests untouched. Therefore, when there are a power of advancement and a power of appointment, and the rights of the parties under the two are different (for instance with respect to hotchpot), so that the question arises which power the payment of certain sums out of the trust fund to one of the objects is to be referred to, the Court must attribute it to that power to which it is *primâ facie* applicable, viz., to the power of advancement. Power to appoint among children. After marriage of a daughter, settlement made to which the donees of the power and the daughter and her husband were parties, and whereby part of the fund was appointed (subject to the life estates of the donees of the power) in trust for the daughter and her husband successively for life, and afterwards for their issue:—Held, a valid appointment and settlement, not merely with respect to the daughter's life interest, but with

respect to the whole of the corpus of the fund settled. *Re Gosset's Settlement*, 19 Beav. 529.

1. An appointor, having various powers of appointment over certain property, executed a deed of appointment, in general terms, reciting only the power which included a particular portion of the property:—Held, that the appointment was valid only as to that particular part of the property. *Cooper* v. *Martin*, 12 Jur., N. S., 887; 15 W. R. 5; 15 L. T., N. S., 268.

A testator, by his will, gave his wife several powers of appointment by deed or will, and a power of appointment by deed or deeds, instrument or instruments in writing, sealed and delivered, over a particular estate if converted. She executed a deed of appointment in general terms, reciting only the power of appointment by "deed or deeds," etc., which included only that particular estate:—Held, that the particular estate was duly appointed, but that certain other properties, subject to the powers of appointment by deed or will, did not pass. *Ib.*

The same person having afterwards made a will, in which she purported to appoint the particular estate so previously appointed by deed (which was never, in fact, converted):—Held, that the will did not revoke the appointment by deed, but was entirely inoperative as to that particular estate. *Ib.*

IV. EVIDENCE AS TO STATE OF TESTATOR'S PROPERTY.

2. The testator having a power over 3,000*l.* originally the property of his wife, gave several legacies, and then after the death of his wife the residue to the defendant: his estate was not sufficient to pay the legacies, yet held that the will was not an execution of the power, the same not being referred to, nor anything by which an intention appeared in testator to execute it. Evidence to show the testator's own estate was insufficient for the purposes of his will without the 3,000*l.*, rejected. *Andrews* v. *Emmot*, 2 Bro. C. C. 297.

3. C., by will, gave the produce of 1,000*l.* stock to F. for life, with a power to dispose of 400*l.* thereof by writing, signed in the presence of three witnesses; and if F. made no appointment, then the 400*l.* to go to a charity; F. by will gave several legacies, and then the residue among his nearest relations:—Held, no execution of the power, and that the 400*l.* would not pass by the bequest of the residue, neither could parol evidence be admitted of the intent; decreed, the 400*l.* to go according to the will of C., the first testator. *Molton* v. *Hutchinson*, 1 Atk. 558.

4. Devise of real estate to be sold, and the produce, with the personal estate, to testator's wife for life, with power to appoint a moiety by deed or will with two or more witnesses; the estate was not sold; the wife, having no other real estate, by will with three witnesses, gave specific legacies, some described to have been her husband's, and all the rest, residue, and remainder of her estate and effects of what nature or kind soever, and whether real or personal, and all her plate, china, linen, and other utensils which she should be possessed of, interested in, or entitled to at her decease: the power is executed by the residuary clause. Evidence of conversations with the person who drew the will, to show the testatrix had no other real estate, rejected. *Standen* v. *Standen*, 2 Ves. J. 589. And see S. C. *nom.* *Standen* v. *Macnab*, 6 Bro. P. C. 193.

5. On a question, whether a power has been executed by a will, evidence of the state of the property is admissible, so far as it is material to the question, whether a particular part of such property is or is not described by the will; but unless the circumstances of the property, when known, are found to exclude the primary and strict sense of the words which the testator has used, such strict sense must be adhered to; and the mere probability, however strong, that the words were used in a secondary sense, does not authorise the Court so to construe them. *Innes* v. *Sayer*, 7 Hare 377; 18 L. J., N. S., Ch., 274; 13 Jur. 402.

A. B. was, at the date of her will, entitled for life under her marriage settlement to the dividends of a sum of consols, with a power of appointment over a portion of such consols, which in default of appointment was to go to her next of kin living at her death. She was also entitled for life, under the will of her husband, to the dividends of 10,000*l.* consols, and of various other stocks, with a power of appointment by deed or will, attested by two witnesses, over one-third part of such sums, and in default of appointment the stock was limited to other parties. By an unattested will not referring to the powers, she gave four several sums (amounting to 3,000*l.* consols), "in the 3*l.* per cent. consols," to four charities, and "the remainder in the 3*l.* per cents.," and in the other stocks in the settlement, naming them, to other parties:—Held, that the will operated as an execution of the power under the will of the husband; and also, that the words "the remainder in the 3*l.* per cents." sufficiently showed that the legacies previously given were part of a large amount of stock in that specific fund, and whether the specific stock referred to might mean stock which the testatrix might purchase between the date of her will and her death, or stock existing at the date of her will, still the gifts were specific. S. C. 3 Macn. & G. 606; 16 Jur. 21; 21 L. J., Ch., 190.

Where a gift is *primâ facie* specific evidence of the state of the property at the date of the will, it is admissible. *Ib.*

6. A., having power to appoint by will certain funds in such manner as he should think fit, he by his will, so executed and attested as required by the power, gives and bequeaths to his relations sums of money, amounting in the whole to precisely the sum of which he had the power to dispose, but without any reference or allusion in his will to the power, or any words indicative of his intention to execute it:—Held, that the will was a good execution of the power. *Quære*, if the Court, in deciding whether a will is a good execution of a power, can look at the state of the testator's property at the time of making his will as a guide to his intention. *Lownds* v. *Lownds*, 1 Y. & J. 445.

7. A testator having a general power over a sum in the funds, limited in default of appointment to his children, and having no other funded property, bequeaths all his personal estate, "consisting of money invested

in any of the public funds, household furniture, etc." This is not an execution of the power. The circumstance of his having no other funded property is not to be adverted to, on the question, whether he was or was not executing the power. *Webb* v. *Honnor*, 1 Jac. & Walk. 352.

1. The circumstances that a testatrix had not nearly sufficient property of her own to satisfy the legacies bequeathed by her, and that the legacies added together exactly amounted to a sum over which she had a power of appointment by will:—Held, not sufficient ground for deciding that the will (executed before the Wills Act of 1837 came into operation) was a good execution of the power, there being no reference to the power in it. *Davies* v. *Thorns*, 3 De G. & Sm. 347; 18 L. J., N. S., Ch., 212; 13 Jur. 383.

2. M. gives to the defendant all her freehold and copyhold estates upon trust to permit E. to receive the rents, etc., during her life, and after her death to sell, and out of the produce to pay 100*l.* to such person as she should by will appoint: E. by will, without reference to the power, gives 100*l.*, and the whole of her household furniture, to the plaintiff; it was charged by the bill and not denied that the testatrix had no personal property at the time of her death besides some household furniture to very small amount in value, but no evidence was gone into, and an inquiry was asked as to the state of the property at the time of making the will, with the view of ascertaining that the testatrix must have intended the gift of the 100*l.* as in execution of her power. But the inquiry was refused, and the bill dismissed. *Jones* v. *Tucker*, 2 Meriv. 533.

No inquiry as to the quantum of personal property to determine whether gift is or is not in execution of a power, as to an inquiry whether there be anything but copyhold to answer a devise of land; the question there being whether there was anything for the will to operate upon at the time when it was made; whereas a will of personalty speaks at the death. *Ib.*

3. *Semble*, the *onus probandi* in cases where a question arises whether a general bequest operates as an exercise of a power, is not upon the party who alleges that there is no property on which the bequest can operate except that subject to the power, but upon the party who seeks to show that the bequest does not operate as an exercise of the power. *Att.-Gen.* v. *Wilkinson*, 12 Jur., N. S., 593; 2 L. R., Eq., 817; 14 W. R. 910; 14 L. T., N. S., 725.

4. The Court may look at surrounding circumstances, and if it can gather from them a clear intention on the part of a settlor to take property comprised in the deed out of a will of prior date, it will not hold the general devise in the will an execution of a general power to appoint by deed or will contained in the settlement. *Re Ruding*, 14 L. R., Eq., 266; 41 L. J., Ch., 665; 20 W. R. 936.

5. By voluntary deed A. settled property, including 1,000*l.* due to him from his son-in-law B.; such sum to be allowed to remain owing during A.'s lifetime, but not after his death, except on the terms of obtaining security by the assignment of a policy upon B.'s life; upon such trusts as A. should by will or deed appoint, and, in default of appointment, on trust to pay the interest to A. for life, and after his death on trusts for his daughters and their children, under which the interest of daughters ceased on their death without issue. By a subsequent will A. bequeathed his residuary estate on trusts for his daughters and their children, under which daughters dying without issue had power by will to appoint their shares. By a codicil, after reciting that he had advanced to B. other sums besides the 1,000*l.*, and that under the settlement and under the will, or one of them, his daughter, B.'s wife, would be entitled for her life, and their children would be entitled in remainder to a certain share in the property comprised in the settlement, A. declared that such share under the settlement or will, or either of them, should be taken to be satisfied out of the moneys owing to him by B. other than the 1,000*l.* On the day following the execution of this codicil, B. assigned to A. a policy of assurance on his life as security for 2,000*l.* then owing by him to A.:—Held, that no contrary intention had been shown within the meaning of the Wills Act, s. 27; and, accordingly, that the residuary gift in the will was an execution of the general power reserved by the settlement. *Maddick* v. *Marks*, *Re Clark's Estate*, 14 L. R., Ch. D., 422; 49 L. J., Ch., 586; 43 L. T. 40; 28 W. R. 753. Affirming 49 L. J., Ch., 205; 28 W. R. 342.

Held, also, that the execution of the assignment of the policy was not one of the surrounding circumstances which could be looked at for the purpose of ascertaining the testator's intention. *Ib.*

Whether a codicil can be read with a will for the purpose of ascertaining the intention of the testator in the will—*quære*. *Ib.*

In ascertaining whether a testator has shown an intention not to execute a general power of appointment by a residuary gift, it makes no difference whether the settlement creating the power was made by the testator himself or by a stranger. *Ib.*

Observations on *Moss* v. *Harter* (2 Sm. & Giff. 458) and Lord St. Leonards' comments upon it (Sugden on Powers, 8th ed., p. 306). *Ib.*

V. WHERE WILL EXECUTED BEFORE CREATION OF POWER.

6. A., being entitled to a share of a testator's residuary estate, bequeathed all the effects due to him from the estate to his nine children. The estate was then unadministered, but it was afterwards administered, and certain debts due to it were allotted to A. as his share of the residue; after which he settled the debts in trust for himself for life, remainder in trust for his sons and daughters, or any of them, or any of their children, as he from time to time, by deed or writing, to be by him duly executed and attested, or by his will, should appoint:—Held, that, under the combined operation of the 24th and 27th sections of the late Wills Act (7 Will. 4 and 1 Vict., c. 26), the will, though made before the power was created, was a good execution of it. *Stillman* v. *Weedon*, 16 Sim. 26; 18 L. J., N. S., Ch., 46; 12 Jur. 992.

1. T. in 1852 bequeathed all the residue of her estate and effects, consisting of moneys at interest, shares in a company, and household furniture, to trustees, in trust for H. for life, and after his death for the children of her brothers and sisters. In 1856 T. executed a settlement in anticipation of her marriage with H., whereby 250 shares in the company, and certain money out at interest, were settled for the benefit of T. for life, with remainder to H. for life; and after the death of the survivor, in trust for all and every the person or persons, child or children, as T. should appoint; and in default, for her next of kin. The marriage took place, but H. being a married man, it was invalid:—Held, that the residuary gift in the will was a good execution of the power contained in the subsequent settlement. *Cofield* v. *Pollard*, 3 Jur., N. S., 1203; 5 W. R. 774.

2. B., by a will made in 1858, specifically devised and bequeathed freehold, copyhold, and leasehold property, and gave all other real and personal estate, of which he should die possessed or should have power to dispose, upon certain trusts. By a voluntary settlement in August 1862, B. conveyed all his freehold property upon trust, after his own death, for E. for life, with remainder as B. should by his last will or any codicil thereto, appoint, and in default of appointment in trust for E. in fee; and by the same settlement he disposed of all his leasehold and personal property. In November 1862, B., by an instrument purporting to be his last will, and not mentioning any former will, appointed under the power in the settlement an annuity to be raised out of his freehold property, and devised all his copyhold property, but made no other disposition of freehold or personal property. Probate of both wills was granted:—Held, that having regard to the terms of the power, the testator had indicated an intention that the will of 1862 alone should operate as an execution of the power, and that consequently the specific and residuary devises in the will of 1858 were not in due execution of the power. *Pettinger* v. *Ambler*, *Bunn* v. *Pettinger*, 1 L. R., Eq., 510; 14 L. T., N. S., 118; 33 Beav. 321; 35 L. J., Ch., 389.

3. In contemplation of a marriage of a lady with her deceased sister's husband, personal property belonging to her was settled, upon trust, in default of issue, for herself absolutely, if she survived her intended husband; but if she predeceased him, for such person as she should by deed or will appoint. The form of marriage was gone through between the parties. The lady, in the lifetime of the husband, made a will, in which, reciting the settlement, and the power of appointment, she confirmed the settlement, and in exercise of such power, and of all other powers enabling her in that behalf, appointed and bequeathed the property comprised in the settlement, after the death of the intended husband, and in default of issue, among certain persons. She survived the husband, and died without issue, and without having made any other disposition of her property:—Held, that the will did not operate to pass the property comprised in the settlement. *Jones* v. *Southall*, 32 Beav. 31; 11 W. R. 247; 9 Jur., N. S., 93; 32 L. T., N. S., 103; 32 L. J., Ch., 130; 1 N. R. 152. Reversing 7 Jur., N. S., 1180; 30 L. J., Ch., 875; 9 W. R. 546; 4 L. T., N. S., 231; 30 Beav. 187.

4. Vague and general words of reference to all powers found among words of a general gift and bequest of a testator's own property, where the words are justified by the existence of a power as to property in which he had an interest, cannot be extended to operate as an exercise of a special and limited kind over property derived from another source. *Hope* v. *Hope*, 5 Giff. 13.

Semble, that a new power over property acquired after the will requires a clear manifestation of a new intention to exercise it, and a mere republication of the will by a codicil made after the acquisition of such new power is not a sufficient manifestation of intention. *Ib.*

5. S., by will, in 1855, disposed of all his property, and by an indenture dated in February 1860, settled 5,072*l.* upon trust for his wife for life with remainder to himself for life, reserving to himself power to appoint the same by will. In December 1860, he by a voluntary instrument attested by one witness, and reciting the settlement of February 1860, covenanted that his devisees or executors would, after his decease, on being satisfied that all his debts were paid, convey, transfer, and pay over to the trustees therein named all the real and personal estate to which he should be then entitled, or which he should then have disposed of by his will. He died in his wife's lifetime:—Held, that the will, though dated prior to the deed of February 1860, operated as an execution of the power of appointment contained in that deed. *Patch* v. *Shore*, 2 Dr. & Sm. 589; 1 N. R. 157; 11 W. R. 142; 9 Jur., N. S., 63; 32 L. J., Ch., 185; 7 L. T., N. S., 554.

Held, also, that the instrument of December 1860 was a deed and not a will, and that the covenant that the executors should pay over the residue was a valid covenant. *Ib.*

Held, also, that the deed of December 1860 was not a revocation of the will, but created a debt for which the testator's assets were liable, and that the 5,072*l.*, settled by the deed of February 1860, having been appointed by the will, constituted assets to satisfy the voluntary debt due under the covenant in the deed of December 1860. *Ib.*

6. A testatrix, by her will made in 1860, devised real estate upon trust, in case her personal estate should prove insufficient to pay her debts, legacies, etc., by sale or mortgage to raise a sum to make good the deficiency; subsequently, upon the marriage of her son, she put the estate into strict settlement, reserving to herself a power to charge it with 1,000*l.* in priority to all the uses declared by the settlement; and lastly, she made a codicil bequeathing a legacy, and stating that, in all other respects, she confirmed the will:—Held, that the power to charge was well exercised to the extent of 1,000*l.* *Meredyth* v. *Meredyth*, 5 Ir. R., Eq., 565.

7. In 1845 a testator disposed of his real estate by will. In 1849 real estate was settled to such uses as he should by will appoint. The testator made a subsequent will, which did not pass real estate:—Held, that upon the true construction of the Wills Act, 7 Will. 4 and 1 Vict., c. 26, ss. 24, 27, the disposition by the prior will was a good execution of the power contained in the subsequent settlement. *Hodsdon* v. *Dancer*, 16 W. R. 1101.

1. By a settlement certain real estate was conveyed to trustees upon trust to sell, and to pay the proceeds of sale to such persons as A. should by deed or will appoint. By a second deed of settlement A. appointed that the trustees of the first settlement should stand possessed of the sale moneys in trust for such persons as she should by will appoint. By her will, made previous to the second settlement, A., "in pursuance of" the power contained in the first settlement, appointed the property comprised therein (describing it as real estate) to her three sons. *Semble*, that the will was revoked by the second settlement:—Held, that the will, if not revoked, did not operate as an execution of the power contained in the second settlement. *Thompson* v. *Simpson*, 50 L. J., Ch., 461; 44 L. T. 710.

2. By a settlement of the 6th January, 1858, the settlor declared that a sum of money should be held on trust as he should by deed or will appoint, and in default of appointment in trust as therein mentioned. A will made by the settlor five weeks before the settlement contained a general residuary bequest:—Held, that although a general residuary bequest would operate as an execution of a power in a subsequent settlement, still the Court had power in construing both instruments to consider the surrounding circumstances, which showed that the settlor never intended the settlement to be revoked by a prior will; and that consequently the will was not an execution of the power. *Re Ruding*, 14 L. R., Eq., 266; 41 L. J., Ch., 665; 20 W. R. 936.

3. By a separation deed A. settled his property, reserving to himself a general power of appointment by will over one-third of it, and declaring the trusts of the remaining two-thirds for his wife and children. By his will, executed several months previously to the separation deed, A. devised and bequeathed all his property to trustees upon trust for his wife and children:—Held, that the will was a good execution of the power: and that the settlement and the circumstances under which it was executed could not be looked at to show a contrary intention. *Re Ruding* (14 L. R., Eq., 266) questioned. *Boyes* v. *Cook*, 14 L. R., Ch. D., 53; 49 L. J., Ch., 350; 42 L. T. 556; 28 W. R. 754.

VI. GENERAL POWERS BEFORE THE WILLS ACT.

1. *Powers Over Personal Property*, 5781.
2. *Powers Over Real Estate*, 5783.

1. Powers Over Personal Property.

4. Power not executed by general words in a will. *Langham* v. *Nenny*, 3 Ves. 467. S. P. *Croft* v. *Slee*, 4 Ves. 59.

5. The will (attested by three witnesses) of a person having a power to dispose of a fund consisting partly of real estates, and partly of household furniture, with linen and plate, containing a gift of "all my estates and effects of whatsoever denomination," and of "my household furniture, with linen and plate," is not an execution of the power. *Jones* v. *Curry* or *Currey*, 1 Swan. 66; 1 Wils. 24.

6. Power to charge a particular sum reserved by owner of the inheritance, not executed in his lifetime:—Held, to be executed in substance by his will, charging debts and legacies on all his real and personal estate, though it did not refer to the power. *Maddison* v. *Andrew*, 1 Ves. 58.

7. A., by a voluntary deed, assigned all his personal estate, upon trust to pay the interest to himself for life, and after his decease to such persons as he should appoint by will for their lives, and subject thereto, to pay the principal to his next of kin, who should be living at his decease, his, her, or their executors, etc. Soon afterwards the testator by his will gave some legacies, and gave the residue to the persons by name who were his next of kin at the execution of the deed, and at his death:—Held, that the power was not executed by the will. *Griffin* v. *Nanson*, 4 Ves. 343.

8. Power not executed by general bequest of "my estate and effects," which will pass only what the testator has an interest in, not what he has an authority over. *Roach* v. *Haynes*, 8 Ves. 588.

9. Testatrix gave a fund over which she had a power to appoint, etc., to trustees, in trust for her residuary legatee after named, and gave the general residue to A. By codicil she revoked the bequest of the residue and gave it to A. and B. A. was held solely entitled to the fund under the appointment. *Roach* v. *Haynes*, 6 Ves. 153. Affirmed 8 Ves. 584.

10. Power of appointment not executed by general words in a will, "all my personal estate, etc., and all my estate and interest therein." *Bradley* v. *Westcott*, 13 Ves. 445.

Power of appointment not executed by appointing an executor. *Id.* 452.

11. General bequest of personalty, with a reference to all property over which the testator had a power of appointment:—Held, to operate as an execution of a power. *Pidgely* v. *Pidgely*, 1 Colly. 255; 8 Jur. 529.

12. Where a testatrix having personal estate of her own (and of considerable amount), and a power of appointment over certain stock standing in the names of trustees, after directing speedy payment of her debts and testamentary expenses out of her personal estate, and giving certain legacies out of the funds standing in the trustees' names, being only part thereof, and without any reference to the power, she bequeathed all the residue of her estate, "after payment of the before-mentioned legacies," to two persons equally:—Held, that the legacies being an appointment of part, the residuary clause applied also to the part undisposed of. *Elliot* v. *Elliot*, 15 Sim. 321; 15 L. J., N. S., Ch., 393; 10 Jur. 730.

13. A testator had a power of appointment over a sum of money. He gave certain portions of this sum to various legatees, referring at the same time to the power, but without exercising it by technical words. His will contained a residuary bequest which made no reference to the power:—Held, that the residuary bequest operated as an exercise of the power with respect to the remainder of the sum subject thereto. *Re Comber*, 11 Jur., N. S., 968; 14 W. R. 172; 13 L. T., N. S., 459.

1. By deed, certain personal property was limited, upon the determination of the life interests, to go as A. B., by deed or will, should appoint. By her will, she gave and bequeathed one moiety or half part of her property which she might be possessed of or entitled to at the time of her decease:—Held, to be a valid exercise of her power of appointment. *Frankcombe* v. *Hayward*, 9 Jur. 349.

2. Testator gave 3,000*l.* to trustees for C. S. for life; remainder to such persons as she should appoint. C. S. by her will disposed of all her personal estate, and then gave all sums, messuages, etc., and other interest to which she was entitled under the testator's will:—Held, that the latter gift was a good execution of the power. *Maples* v. *Brown*, 2 Sim. 327.

3. A., having a power of appointment, by will, of a sum of 4,000*l.*, bequeathed several pecuniary legacies, which greatly exceeded the amount of her estate, exclusive of the 4,000*l.*, and then bequeathed to L. all other her personal estate, and over which she had any disposing power. The will did not contain any reference to the 4,000*l.*, or to any power of appointment:—Held, that the power was well executed by the residuary bequest; and that L. was entitled to the whole sum of 4,000*l.*, to the exclusion of the legatees. *Lowe* v. *Pennington*, 10 L. J., N. S., Ch., 83.

4. A testator gave his widow the power of appointing his residuary estate. By her will, after reciting the power, she declared that, in pursuance of the power and all other powers enabling her, for the purpose of disposing of her husband's and her own estate, she made her will as follows. She then directed her debts to be paid and gave some legacies, and, as to all the rest "of her personal estate," she bequeathed it to A. and B. on trust:—Held, that she, having died in 1832, had thereby appointed the residuary estate of her husband. *Davies* v. *Fisher*, 5 Beav. 201; 11 L. J., N. S., Ch., 338; 6 Jur. 248.

5. A testatrix having, under the will of her mother, a power of appointing by will to a sum of 2,000*l.*, and also an interest in the residue of her mother's personal estate, gave legacies of 1,000*l.*, 500*l.*, and 500*l.* She then gave 21*l.* to each of her executors, and proceeded as follows:—"Forasmuch as the amount of my property is not yet ascertained, the same awaiting the settling of my late mother's affairs, my will is, that, if my money and personal estate should not be sufficient to pay the said legacies in full, the legatees shall make an abatement." She then disposed of her furniture, plate, etc., and of the residue of her money and personal estate:—Held, that the testatrix's will was not an execution of her power. *Buxton* v. *Buxton*, 1 Keen 753.

6. The widow, by her will, alluding at the opening to her husband's will, but not referring in any way to the power of appointment given to her, gave personal estate to one of her sons, and only a small pecuniary legacy to two of the others:—Held, that her will was inoperative as an appointment. *Jones* v. *Jones*, 10 Jur. 960.

7. In a partnership deed, it was stipulated that the testator's interest in the partnership concern after his death, and during the term of the partnership, should go to such persons as he should by will name or appoint, and in default of appointment that it should devolve to his wife; in case of her death to his children in equal shares, and in case of the death of all his children to his executors or administrators:—Held, that the true construction of this is, not to create a technical power of appointment, but to reserve to the testator an absolute power of disposition by will. The testator made a will, not containing any allusion to the power, by which he gave all his estates and effects to one of his children:—Held, that his interest in the partnership passed by his bequest. *Ponton* v. *Dunn*, 1 Russ. & M. 402.

8. A testator gave to his wife the residue of his personal property, with a proviso that, if not disposed of by her in her life or by her will, it should go over. It passed as part of her property by her will, although not specifically noticed. *Bourn* v. *Gibbs*, 1 Russ. & M. 614; Taml. 414; 8 L. J., Ch., 151.

9. Where under a settlement a testator had, in a certain event, the fee of an estate subject to a term, and had under the same settlement a power, in the particular event, to appoint the fee subject to the term by deed or will, and by his will he devised the estate in fee without reference to his power, the will takes effect as a devise of his interest, and not as an execution of his power. By the same agreement he had, in the events which happened, a power to appoint a sum of 1,000*l.*, which was to be raised after his death, by the term to which the fee of the same estate was subject, but his will took no notice whatever of this power; the devise of the estate does not operate as an execution of the power to appoint the 1,000*l.* *Farmer* v. *Bradford*, 3 Russ. 354; 5 L. J., Ch., 157.

10. A. having a power to appoint by will certain funds in such manner as he should think fit, he by his will, so executed and attested as required by the power, gives and bequeaths to his relations sums of money, amounting in the whole to precisely the sum of which he had the power to dispose, but without any reference or allusion in his will to the power, or any words indicative of his intention to execute it:—Held, that the will was a good execution of the power. *Quære*, if the Court, in deciding whether a will is a good execution of a power, can look at the state of the testator's property at the time of making his will, as a guide to his intention. *Lownds* v. *Lownds*, 1 Y. & J. 445.

11. The sum of 1,000*l.* was given by will to trustees, upon trust (after a life interest given to A.) for such persons as A. should by will appoint. A. made a will, whereby she gave legacies amounting exactly to 1,000*l.*, but did not notice either the power or the property subject to it. A. had no property of her own at the date of her will, or at her death:—Held, that A.'s will was not an execution of the power. *Davies* v. *Thorns*, 18 L. J., N. S., Ch., 212; 13 Jur. 383.

12. A. B. was at the date of her will entitled for life under her marriage settlement to the dividends of a sum of consols, with a power of appointment over a portion of such consols, which, in default of appointment, was to go to her next of kin living at her death. She was also entitled for life under the will of her husband to the dividends of 10,000*l.* consols,

and of various other stocks, with a power of appointment by deed or will attested by two witnesses over one-third part of such sums, and in default of appointment the stock was limited to other parties. By an unattested will not referring to the powers, she gave four several sums (amounting to 3,000*l.* consols), "in 3*l.* per cent. consols," to four charities, and "the remainder in the 3*l.* per cents." and in the other stocks in the settlement, naming them, to other parties:—Held, that the will operated as an execution of the power under will of the husband. *Innes* v. *Sayer*, 3 Macn. & G. 606; 16 Jur. 21; 21 L. J., Ch., 190. Affirming *Sayer* v. *Sayer*, *Innes* v. *Sayer*, 7 Hare 377; 18 L. J., N. S., Ch., 274; 13 Jur. 402.

1. A testatrix having by her marriage settlement power by will or deed to appoint certain funds, but it not appearing that she was possessed of any other property, by her will, dated in 1822, not referring in terms to the power, gave "all her property and estate whatsoever and wheresoever, and of what nature, kind, and quality soever the same might be," to her husband, his executors, administrators, and assigns, for his and their own use and benefit absolutely:—Held, an execution of the power. *Att.-Gen.* v. *Wilkinson*, 2 L. R., Eq., 817; 14 W. R. 910; 14 L. T., N. S., 725; 12 Jur., N. S., 593.

2. A., being entitled under B.'s will to a considerable sum of personalty, settled thereout 3,000*l.* on the marriage of his daughter; and on his own second marriage in October 1823, he settled thereout a further sum of 2,500*l.* on his wife for life, with remainder to the children of the marriage; and, in default of issue, it was declared that the trustees should, after the death of the survivor of the husband and wife, pay the money to such persons as A. should appoint by will, and in default of appointment, to such persons as should then be the next of kin of A., according to the statute. A. made his will in April 1824, and after reciting that under B.'s will he was entitled to considerable sums of personalty, and that he had settled 3,000*l.*, part, upon his daughter, and 2,500*l.*, other part, upon his wife upon his marriage, he ratified and confirmed the settlements made by him upon his daughter and his wife, and as to all the residue and remainder of the moneys to which he was entitled under B.'s will, he gave them upon trusts, under which his wife eventually became entitled. He died in 1829, and his wife died in 1869:—Held, that he had not, by the residuary gift in his will, exercised the power of appointment conferred on him by the settlement; and that the 2,500*l.* went, as in default of appointment, to A.'s next of kin, who were to be ascertained at the death of his wife. *Re Bringloe*, 26 L. T., N. S., 58.

2. Powers Over Real Estate.

3. Copyhold conveyed in trust to sell, the money to be deemed part of testator's personal estate, and in trust for such uses as he should by deed or will appoint, and in default for his right heir. A will executed on the same day, but not referring to the deed, directing a sale of particular property, and disposing of personal estate in general terms:—Held, not applicable to the estate conveyed by the deed which went to the heir, no use being by the subsequent instrument declared if the estate was converted. *Lowes* v. *Hackward*, 18 Ves. 168.

4. A., being possessed of two freehold houses, and having power of appointment over lands, and money to be laid out in land, by her will devises "all and every her freehold messuages, lands, tenements, and hereditaments" for sale:—Held, not an execution of the power. *Hoste* v. *Blackman*, 6 Madd. 190.

5. A testator having a power of appointment over certain freehold and copyhold estates, and being seised of other freehold estates, devises all his freehold and copyhold estates, without reference to the power:—Held, an execution of the power as to the copyhold estates, but not as to the freehold estates, which were subject to the power. *Lewis* v. *Llewellyn*, T. & R. 104.

6. Where husband having in articles power to appoint wife's real estate, and by other articles to appoint his own real estate, by will, reciting power over his own estates in exercise of that power and all other powers, appointed his own real estates and all other real estates over which he had power in trust, and making no mention in any part of will of wife's estates or of his power over them, and expressing that all persons taking under his will should be bound by the doctrine of election:—Held, that wife's estate was included in the appointment by will. *Trollope* v. *Linton*, 1 Sim & S. 477; 2 L. J., Ch., 3.

7. A general devise of all lands of which the testatrix had power to dispose, is not a good execution of a power to appoint moneys which were to arise from the sale of lands. *Adams* v. *Austen*, 3 Russ. 461.

8. A testator makes a general devise of all his lands in nine parishes; in five of them he had only lands in fee; in three others he had only lands over which he had a power of appointment; in the other he had lands in fee, and also lands over which his power extended: all the lands pass by his will, except the lands in the latter parish, which were subject to his power. *Napier* v. *Napier*, 1 Sim. 28; 5 L. J., Ch., 65.

9. The will (attested by three witnesses) of a person having a power to dispose of a fund consisting partly of real estates, and partly of household furniture, linen, and plate, containing a gift of "all my estates and effects of whatsoever denomination," and of "my household furniture, with linen and plate," is not an execution of the power. *Jones* v. *Curry*, 1 Swan. 66; 1 Wils. 24.

10. A tenant in fee of one undivided moiety, being tenant for life of the other undivided moiety with power of appointment in fee, devised as follows: "I give and devise all my freehold estates in the city of London and county of Surrey, or elsewhere, to my nephew, John Roake, for his life, on condition that out of the rents, he do from time to time keep such estates in proper and tenantable repair":—Held, that was not an execution of the power. *Roake* v. *Denn* d. *Nowell*, 1 Dow & Cl. 437; 4 Bli. N. S. 3.

VII. EXECUTION OF GENERAL POWERS UNDER THE WILLS ACT, s. 27.

1. *What Powers are Within the Act*, 5784.
2. *What Amounts to an Appointment Under the Act*, 5784.
3. "*Contrary Intention*," 5787.
4. *Direction as to Debts*, 5788.

1. What Powers are Within the Act.

1. A power to appoint by will is a general power within the scope of the Wills Act, 7 Will. 4 and 1 Vict., c. 26, s. 27, so that where a person having a power to appoint real or personal estate by will makes a residuary disposition of his property without reference to the power, the will will be construed as an execution of the power. *Re Powell*, 18 W. R. 228; 39 L. J., Ch., 188.

But such a general power does not constitute ownership; so that, for the purpose of considering the question whether the exercise of the power be or be not void for remoteness, the real or personal estate subject to the power will be deemed to be the property of the donor, and not of the donee of the power. *Ib.*

P. bequeathed sums amounting to 5,000*l.* after the deaths of certain persons mentioned, upon trust, for H. for life, and after her death upon trust for such person or persons as H. should, by her last will and testament, appoint. H. made a will not referring in any way to the power, but leaving the residue of her property in trust for her daughter L. for life, for her separate use, without power of anticipation, and after her death in trust for the children of L., who, being a son or sons, should attain the age of twenty-one, or, being a daughter or daughters, should attain that age or marry. L. was born after the death of P.:—Held, first, that the will of H. must be construed as an execution of the power created by the will of P. according to s. 27 of the Wills Act. *Ib.*

Held, secondly, that the exercise of the power was void for remoteness. *Ib.*

2. By a voluntary settlement in 1848, a settlor transferred a debt to a trustee, in trust for such persons and purposes as the settlor should by any deed or instrument in writing appoint, and in default to pay the income to the settlor for his life, and on his death to distribute the amount among specified persons. He afterwards executed an appointment by deed of part of the fund, and confirmed the trusts of the settlement as to the remainder. By his will, made in 1852, the settlor gave certain legacies, and then gave "all his personal estate not otherwise effectually disposed of" to trustees:—Held, first, that the settlor had sufficiently expressed his intention not to affect the unappointed property comprised in the settlement of 1848; and secondly, that even if no such intention appeared, the Wills Act (7 Will. 4 and 1 Vict., c. 26, s. 27) applied only to cases where the power of appointment was equivalent to absolute property. *Moss* v. *Harter*, 2 Sm. & G. 458; 18 Jur. 973; 2 W. R. 540.

Semble, that the power of appointment contained in the deed did not authorise an appointment by will. *Ib.*

It is not the duty of the Court to strain the words of a power of appointment in order to bring them within the 27th section of the Wills Act, but to ascertain whether the power is in the widest and most general terms. *Ib.*

3. A power to appoint amongst children is not within the 27th section of the Wills Act, and a mere general devise or bequest to a child will not operate as an execution of such a power. *Clowes* v. *Awdry*, 12 Beav. 604.

4. A power of appointment by will among the "relations or friends" of the donee of the power, is a special power in favour of any relations, and as such cannot be exercised by a general disposition. In default of appointment, there being no gift over, the Court will imply a trust in favour of the next of kin. *Re Caplin*, 6 N. R. 17; 11 Jur., N. S., 383; 34 L. J., Ch., 578; 13 W. R. 646; 12 L. T., N. S., 526; 2 Dr. & Sm. 527.

5. A., having a power to appoint real estate and 4,000*l.*, to all or any, or one or more of the children, or more remote issue of his marriage, made his will before any child was born, but while his wife was *enceinte*, was bequeathing all his property on trust in the event of his leaving one child, that he or she should inherit all his landed and personal property; but in case of his leaving a son and daughter, he devised and bequeathed all his landed and personal property to his son, save and except 4,000*l.* to his daughter. He afterwards died, having no real estate except what was the subject of the power, but considerable personal estate, and having two sons and two daughters:—Held, that the will did not operate as an execution of the power over the real estate, as the devise was either void for uncertainty, or conditional on events which had not happened. *Russell* v. *Russell*, 12 Ir. Ch. R. 377.

Held, also, that the will did not operate as an execution of the power over the 4,000*l.*, the 7 Will. 4 and 1 Vict., c. 26, s. 27, applying to general powers, and not to special powers in favour of particular objects. *Ib.*

6. A. bequeathed her residue to such person as B. should, by deed or will, appoint, and in default to his next of kin. B. died in the life of A.:—Held, that his will could not operate as an execution of the power under the 7 Will. 4 and 1 Vict., c. 26, s. 27, and that his next of kin were entitled to the residue. *Jones* v. *Southall*, 32 Beav. 31; 9 Jur., N. S., 93; 32 L. J., Ch., 130; 11 W. R. 247; 8 L. T., N. S., 103; 1 N. R. 152. Reversing 30 Beav. 187; 7 Jur., N. S., 1180; 30 L. J., Ch., 875; 9 W. R. 546; 4 L. T., N. S., 231.

The 27th section of the Wills Act applies only to powers actually created at the death of the testator; and does not enable a testator to execute an inchoate power of which he was the intended donee under the will of a person who survives him. *Ib.*

2. What Amounts to an Appointment Under the Act.

7. Certain houses were assigned by the settlement upon the marriage of J. and M. to trustees upon trust, to pay the rents to M. for her life, for her separate use, and after M.'s death, upon trust for such person or persons, etc., as J. by deed or will should appoint, or

give the same, and in default of appointment, and subject thereto, if any, upon trust for such persons as under the Statute of Distributions might be or become entitled thereto. J., by his will, after certain bequests to S., his son by a former marriage, gave all his residuary estate whatsoever and wheresoever (subject to the payment of the above-mentioned legacies, and also subject to such parts thereof respectively as were comprised in the settlement to the trusts, thereby declared, which indenture he ratified and confirmed in all respects), and every part thereof to M., her executors, administrators, and assigns absolutely:—Held, that this general residuary bequest to M. operated as an execution of the power of appointment by will reserved to J. by the settlement. *Hutchins* v. *Osborne*, 6 W. R. 426; 4 K. & J. 252; 27 L. J., Ch., 421; 3 De G. & J. 142.

1. A donee of a general power of appointment over some consols, by will gave various specific and pecuniary legacies, including a gift of Indian stock, and appointed executors, but the will did not contain any general gift or reference to the power:—Held, not an execution of the power under 7 Will. 4 and 1 Vict., c. 27, s. 27. *Hurlstone* v. *Ashton*, 11 Jur., N. S., 725.

2. G. B. devised all his real estate to such uses as E. should by deed or will appoint; in default of appointment, he devised the same to E. for life, and after her death he directed the H. estate to be sold, the proceeds to fall into his general residuary personal estate, and, as to the S. estate, and all other his real estate, he devised it to G. and her issue in strict settlement. He then gave the residue to such persons as E. should by deed or will appoint, and in default and subject thereto he gave the same upon trusts for G. and her children. After the death of the testator, E. applied the whole of the personal estate to herself for life, and after her decease, to the trustees of the will to be held upon the trusts thereof. On the marriage of G., E. revoked her own life estate, and appointed the personal estate to the trustees of the will to hold 20,000*l.* on such trusts as she, E., should appoint; and as to the remainder, upon trust for G. and her children. After the marriage of G., E., by her will, gave all her real estate to trustees upon the trusts of the S. estate:—Held, that the appointment of the personalty did not include the H. estate, and that the general devise contained in the will of E. operated as an execution of the power over the S. estate. *Walker* v. *Banks*, 1 Jur., N. S., 606.

3. A testatrix, having a general power of appointment over a sum of stock under the will of T. S., appointed the stock to her sons Joseph and John and her other children equally, and she left any other sum of money or property to which she then was or might thereafter become entitled under the will of T. S. to be divided amongst such of her children as might be living at her death, and she constituted Joseph her residuary legatee. John died before her:—Held, that Joseph was entitled to the share of the stock intended for John. *Re Spooner's Trust*, 2 Sim., N. S., 129; 21 L. J., N. S., Ch., 151.

4. A. having a power of appointment over a sum of consols, some leasehold ground rents, and some shares in an insurance company, made a will, by which she bequeathed all her real estate, money, and securities for money to B., and all the rest, residue, and remainder of her personal estate to C.:—Held, that all the property subject to the power passed by the will, and that B. was entitled to the consols, and C. to the shares and ground rents. *Turner* v. *Turner*, 21 L. J., Ch., 843.

5. A testator appointed a leasehold estate to such uses as his wife, if surviving, should declare with respect to the disposition of her residuary personal estate. The wife, by her will, gave the leasehold estate to C. for life, and all the residue of her personal estate, subject to the payment of some legacies, she gave to certain charities:—Held, to be a valid exercise of the power. *Bristow* v. *Skirrow*, 5 Jur., N. S., 1379; 1 L. T., N. S., 180.

6. A testator was under covenant to pay 2,000*l.* to the trustees of his settlement, for his wife for life, with remainder to his general appointees by deed or will. By his will he directed the executors to pay the 2,000*l.* to the trustees, in order that they might invest it, and pay the income to the wife for life; and then bequeathed his residuary estate, subject to certain legacies, to the wife absolutely:—Held, that the residuary bequest was a good execution of the power. *Soriven* v. *Sandom*, 2 John. & H. 743.

7. A will must be taken to be an execution of a power, where the words of it would, otherwise, have nothing to operate upon. *Shelford* v. *Acland*, 23 Beav. 10; 3 Jur., N. S., 8; 26 L. J., Ch., 144; 5 W. R. 170.

A married woman, donee of a power which could be exercised only during coverture, made her will in these terms: "I do by this my will give to T. S. 2,600*l.*" This sum was about the value of the fund over which she had a power. She had no other property in her own right:—Held, to be a valid execution of the power. *Ib.*

8. A testatrix, having a power of appointing a sum of 10,000*l.*, secured by a term of 500 years, and having also a power of appointing the fee of the lands on which the money was secured, by her will devised her lands to A. for life, with remainder to B. in tail, and gave to A. all the residue of her personal estate:—Held, that the 10,000*l.* passed under the residuary gift of the personal estate. *Clifford* v. *Clifford*, 9 Hare 675.

A general pecuniary legacy with no particular fund indicated for the payment is "a bequest of personal property described in a general manner," within the meaning of the Wills Act, s. 27; and therefore where the proper assets of the testator are inadequate for the payment of the legacy, without resort to personal estate, over which the testator has a general power of appointment, the personal estate which is subject to the power must be applied in satisfaction of the legacy.

Semble, that the mere nomination of executors where there is no general gift of the personal estate will, in favour of legatees, extend the operation of the will to personal property, over which the testator has a general power of appointment.

9. *Quære*, whether this mode of construction would be applied in favour of creditors, even if there was a direction to the executors to

pay debts. *Hawthorne* v. *Shedden*, 25 L. J., Ch., 833; 2 Jur., N. S., 749; 3 Sm. & G. 293.

1. When a testatrix has a general power of appointment over sums of money, a bequest of pecuniary legacies operates as an execution of the power under 7 Will. 4 and 1 Vict., c. 26, s. 27. *Re Wilkinson*, 4 L. R., Ch., 587; 17 W. R. 839. Affirming 8 L. R., Eq., 487.

2. Under his marriage settlement, A. had power to appoint the reversion in fee of the settled real estate, and the trustees had a power of sale, with his consent. He, by his will, appointed it to trustees, to sell and stand possessed of the produce in trust for a class; and he gave all his real and personal estate, "not thereinbefore specifically disposed of, to his widow." Subsequently the trustees, with A.'s consent, sold the estate; but at his death, the conveyance had not been executed by one of the trustees, and the purchase money had not been received:—Held (notwithstanding the 7 Will. 4 and 1 Vict., c. 26, ss. 19, 23), that the gift to the class was inoperative, and that the purchase money passed, under the residuary gift, to the widow. *Gale* v. *Gale*, 21 Beav. 349; 4 W. R. 277.

3. A testator had a general power of appointment over the reversion in fee of settled real estate, which the trustees had power to sell with his consent. During his lifetime, and with his consent, part of the real estate was sold and another part contracted to be sold, leaving some of the real estate unsold. Subsequently he made his will, whereby, after reciting that the real estate was subject to such uses as he should appoint, he directed that the same should remain to the use of trustees for a term of 500 years, and subject thereto to the use of A. and his heirs. And subject and without prejudice to the appointment already made, he gave all the real and personal estate of or to which he was seised or possessed, or over which he had a power of appointment, to B. absolutely:—Held, that the proceeds of sale of real estate passed to B. under the residuary gift, and not to A. under the appointment. *Gale* v. *Gale* (21 Beav. 349) followed. *Blake* v. *Blake* 15 L. R., Ch. D., 481; 49 L. J., Ch., 393; 42 L. T. 724; 28 W. R. 647.

4. By A.'s marriage settlement, dated in 1832, her father settled certain real estate to the use of A. for life, and after her death, and in default of issue of the marriage, to the use of such persons as she should by will appoint. The settlement contained a power for the trustees to sell the real estate, with a direction to lay out the proceeds, with A.'s consent, in the purchase of other hereditaments to be settled to the like uses, with a power of interim investment, with the like consent, in Government securities. By his will, dated [illegible] 1831, and confirmed, subject to the settlement, by a codicil executed in 1832, shortly after the settlement, A.'s father devised the property, subject to the settlement, and all other his real estate, to the use of A. for life, and, in default of her having any issue, to such uses as she should by will appoint. Some years afterwards, A.'s father and husband both having died and there having been no issue of the marriage, the trustees of the settlement, at A.'s request, sold all the settled real estate for a sum of 24,226*l.* 2*s.* consols, which they transferred to her. A. died a widow in 1879, having by her will, dated in 1875, shortly after the transfer to her of the consols, after appointing executors and bequeathing pecuniary legacies amounting to upwards of 30,000*l.*, bequeathed "all the residue of my personal estate and effects whatsoever" to two persons absolutely. The personal estate to which A. was entitled at the date of her will and of her death, independently of the 24,000*l.* 2*s.* consols, did not amount to more than 6,000*l.*:—Held, that, having regard to s. 27 of the Wills Act 1837 (1 Vict., c. 26), and the interpretation clause, s. 1 ("personal estate"), A.'s will should be read as an appointment of "all the Government and other funds and all personal property over which I shall, at the time of my death, have a general power of appointment by will;" and that the will operated as an execution of the powers of appointment over the real estate given to her by her marriage settlement and her father's will, and passed the consols. *Chandler* v. *Pocock*, 15 L. R., Ch. D., 491; 49 L. J., Ch., 442; 45 L. T. 112; 28 W. R. 806.

5. By a marriage settlement executed in March 1823, real estate was conveyed to trustees in fee, to their use during the life of the wife, on trust to pay the rents to her for her life, and after her death to such uses as the husband should by deed or writing, to be by him executed and delivered in the presence of and attested by two witnesses, appoint, and, in default of appointment and subject thereto, to the common dower uses in favour of the husband. There was a power for the trustees to sell the property with the consent of the husband and wife during their joint lives, and the money to arise from any sale was to be laid out in the purchase of other land, to be settled in the same uses, and until the reinvestment should be made the money was to be invested in (*inter alia*) the public funds, and the income was to be payable to the persons to whom the rents of the land to be purchased would go. During the joint lives of the husband and wife, and before the date of the husband's will, the land was sold, and the proceeds of the sale were invested in new 3 per cents. in the names of the trustees. No purchase of land was ever made, but the income of the stock was paid to the wife during her life. In October 1844 the husband made his will (which was signed by him and sealed, and attested by two witnesses). The will contained the following bequest: "I also give and bequeath all the money and moneys that I die possessed of, whether in the public funds or in the care of W., or elsewhere, after my funeral expenses are paid, unto the sole use and behoof of my children hereinbefore named, share and share alike." W. was one of the trustees of the will, and at the time of the testator's death he had in his hands some money belonging to the testator. The testator had no money of his own in the funds, nor has he any power of appointment other than that contained in the settlement. The testator died on the 28th December, 1851. After the death the question arose whether the testator had by his will exercised the power of appointment contained in the settlement, or whether the sum of stock passed as unappointed to his heir-at-law:—Held, that inas-

much as the wife had a right to call for the reinvestment of the stock in land it must be considered as having been land at the time of the testator's death, and that the will did not operate as an exercise of the power of appointment, and that consequently the stock passed to the testator's heir-at-law. *Re Greaves' Settlement Trusts*, 23 L. R., Ch. D., 313; 52 L. J., Ch., 753; 48 L. T. 414; 31 W. R. 807.

3. "Contrary Intention."

1. Estates A. and B. were so settled that the testator had no power to deal with A., but had a power of appointment over B. By his will, made after the 1 Vict., c. 26, he referred to the settlement and confirmed it, and then, reciting that he had considerable freehold estates, and might become possessed of more, he devised all his real estates of which he might die possessed to certain persons as trustees for purposes totally different from those of the settlement. He had not, at the date of his will or his death, any other estates besides A. and B.:—Held, that the testator must be taken to have known that he had a power of appointment over estate B., that the confirmation of the settlement operated only upon the estate A., and that the devise was a good execution of the power. *Lake* v. *Currie*, 2 De G. M. & G. 536; 16 Jur. 1027.

Held, also, that the Wills Act, 7 Will. 4, and 1 Vict., c. 26, has not, by making the will speak as from the date the death of the testator, and thereby passing real estate of which he was not possessed at the date of the will, assimilated the doctrine as to the execution of powers over real estate to that of the execution of powers over personal estate. *Ib.*

A testator, who in his will refers to a settlement, must, in the absence of something to show the contrary, be taken to know the general effect of that settlement. *Ib.*

2. A testamentary power of appointment over realty was given to the survivor of A., B., and C. (a woman). B. died; C. married, and by her will, executed since the 7 Will. 4 and 1 Vict., c. 26, made a general devise of residuary real estate, giving a life interest to A. Afterwards A. died, living C.:—Held, that the will of C. operated as an execution of the power, and that the gift of a life estate to A., whom the testatrix must necessarily survive before the power could vest in her, was not a sufficient expression of a contrary intention to take the case out of the statute. *Thomas* v. *Jones*, 1 De G. J. & Sm. 63; 9 Jur., N. S., 161; 32 L. J., Ch., 139; 7 L. T., N. S., 610; 1 N. R. 138. Affirming 2 John. & H. 475; 8 Jur., N. S., 1124; 31 L. J., Ch., 732; 10 W. R. 853; 7 L. T., N. S., 154.

3. By a marriage settlement leaseholds were assigned to trustees, upon trust for the wife for life, for her separate use; and after her death, upon such trusts as the husband should by deed or will appoint; and subject thereto, upon trust for the next of kin under the Statutes of Distribution. The husband did not exercise the power by deed, but by his will, dated in 1850, after providing for his only child, he made a general residuary bequest of all the rest of his property which he was possessed of, or interested in, or entitled to at his death (subject, as to such parts as were comprised in the settlement, to that settlement, and the trusts thereby declared, which indenture he ratified and confirmed in all respects), to his wife absolutely:—Held, that the general residuary bequest operated as an execution by will of the power of appointment reserved to the testator by the settlement. *Hutchins* v. *Osborne*, 4 Kay & J. 252; 4 Jur., N. S., 830; 27 L. J., Ch., 421; 3 De G. & J. 142; 6 W. R. 246.

4. The sum of 15,000*l.* having been placed by G. W. in the hands of J. M., a stranger in the blood, G. W., by voluntary settlement of the 30th March, 1848, assigned the 15,000*l.* and interest to J. W., in trust for such persons, etc., as G. W. should at any time thereafter, by any deed or deeds, instrument or instruments in writing, direct or appoint, and in default, etc., to permit the said sum to remain upon its then investment, and to pay the interest, etc., to G. W. for life, and after his death to collect and get in the 15,000*l.*, giving to J. M., in case the sum or any part should remain in his hands, twelve months' notice in writing to pay in the amount; and in trust to pay a part thereof to J. M. and various members of his family, and other persons, as in the deed mentioned, and the residue thereof in trust for J. W. By deeds poll dated the 30th October, 1851, and the 13th January, 1853, the trusts of the settlement were slightly varied in one or two instances, by G. W. directing that out of the residue of the trust moneys an annuity of 100*l.* should be paid to R. W. for life. J. W. died in 1852. G. W., who was one of his executors, acquired a large increase of property by his death. G. W., by his will of the 2nd August, 1852, after making various bequests, bequeathed to trustees "all his personal estate not otherwise effectually disposed of," upon trust for the benefit of certain persons, other than those mentioned in the deed of 1848, to which no direct reference was made. G. W. died in 1853. On a bill by J. M. against the executors and the persons interested under the will:—Held, that there was distinct evidence upon the face of the will that the testator did not intend to touch the property settled by the deed of 1848; that the deed of settlement and the deeds poll were unaffected by the will, or by the 7 Will. 4 and 1 Vict., c. 26; and that upon no construction of the words of the power could it be held to be within the description of power to which the Act applied. *Moss* v. *Harter*, 18 Jur. 973; 2 W. R. 540; 2 Sm. & G. 458.

5. By voluntary deed A settled property, including 1,000*l.* due to him from his son-in-law B.; such sum to be allowed to remain owing during A.'s lifetime, but not after his death, except on the terms of obtaining security by the assignment of a policy upon B.'s life; upon such trusts as A. should by will or deed appoint, and, in default of appointment, on trust to pay the interest to A. for life, and after his death on trust for his daughters and their children, under which the interests of daughters ceased on their death without issue. By a subsequent will A. bequeathed his residuary estate on trusts for his daughters and their children, under which daughters dying without issue had power by will to appoint their shares. By a codicil, after re-

citing that he had advanced to B. other sums besides the 1,000*l.*, and that under the settlement and under the will, or one of them, his daughter, B.'s wife, would be entitled for her life, and their children would be entitled in remainder to a certain share in the property comprised in the settlement, A. declared that such share under the settlement or will, or either of them, should be taken to be satisfied out of the moneys owing to him by B. other than the 1,000*l.* On the day following the execution of this codicil, B. assigned to A. a policy of assurance on his life as security for 2,000*l.* then owing by him to A.:—Held, that no contrary intention had been shown within the meaning of the Wills Act, s. 27; and, accordingly, that the residuary gift in the will was an execution of the general power reserved by the settlement. *Maddick* v. *Marks, Re Clark's Estate*, 14 L. R., Ch. D., 422; 49 L. J., Ch., 586; 43 L. T. 40; 28 W. R. 753. Affirming 49 L. J., Ch., 205; 28 W. R. 342.

Held, also, that the execution of the assignment of the policy was not one of the surrounding circumstances which could be looked at for the purpose of ascertaining the testator's intention. *Ib.*

Whether a codicil can be read with a will for the purpose of ascertaining the intention of the testator in the will—*quære*. *Ib.*

In ascertaining whether a testator has shown an intention not to execute a general power of appointment by a residuary gift, it makes no difference whether the settlement creating the power was made by the testator himself or by a stranger. *Ib.*

Observations on *Moss* v. *Harter* (2 Sm. & Giff. 458) and Lord St. Leonards' comments upon it (Sugden on Powers, 8th ed., p. 306). *Ib.*

See also IV. *supra.*

4. Direction as to Debts.

1. A testatrix, having a general power of appointment over personal property, by her will, made after the Wills Act, directed that her debts and funeral and testamentary expenses should be fully paid by her executor out of her personal estate; she then gave several pecuniary legacies, with a direction that they should abate ratably if, after payment of her debts and funeral and testamentary expenses, there should not be sufficient to pay them all in full, and she gave all the residue of her estate to certain persons:—Held, that the will operated as an execution of the power in favour of the executor for the purpose of paying the testatrix's debts, funeral and testamentary expenses, and legacies, and that only so much of the property, the subject of the power, as remained after making those payments, passed by the residuary bequest. *Wilday* v. *Barnett*, 6 L. R., Eq., 193; 16 W. R. 961. And see *Re Keown's Estate*, 1 Ir. R., Eq., 372.

2. A married woman with a general power of testamentary appointment over a settled fund, after by her will directing payment of her debts, etc., gave, bequeathed, limited, and appointed, in pursuance of all powers and authorities, etc., all her clothes and ready money unto W. The testatrix was possessed at the time of her death of a sum of 697*l.* in ready money. Out of this sum her debts were paid by her executor:—Held, that W. was entitled to the 697*l.* without any deduction for debts, and that the amount must be made good out of the settled fund. *Laing* v. *Cowan*, 24 Beav. 112.

VIII. EXECUTION OF SPECIAL POWERS.

1. *Reference to Power*, 5788.
2. *Effect of Charge of Debts*, 5793.

1. Reference to Power.

3. A testator, having a power of appointment over certain real estates among his children, devised all the real estates to which he was entitled, or of which he had the power to dispose or to appoint by will, to trustees upon trust to sell, and hold the produce in trust for his children equally; but if they should die under the age of twenty-one without issue, then in trust for persons not objects of the power:—Held, that the devise in trust for the children was an execution of the power. *Banks* v. *Banks*, 1 W. R. 511; 17 Beav. 352.

4. Marriage articles carried into execution, by limiting estates in strict settlement to A. and B. respectively, with cross-remainders between B. and the issue of A., with power to A. to appoint both estates among his children. The will of A. referring to the estate, but not to the power, declared a good execution of the power, to the extent of limiting estates tail to the children; the excess reformed to effectuate the general intention of the articles. *Dillon* v. *Dillon*, 1 Ball. & B. 77.

5. B., by will, gave all the residue of his estate that he might die possessed of, including the funds which shall be in the names of the trustees of his marriage settlement, which he directed should be considered part of his residuary personal estate, to trustees for his wife for life, and afterwards to his daughter, her husband and children. The testator had a power of appointment by deed or will, and was entitled at his death to a moiety of his settlement funds as representative of a deceased child who had attained a vested interest:—Held, that he did not intend to exercise the power or put his daughter to her election, but to dispose only of the moiety to which he was himself entitled. *Re Bidwell*, 11 W. R. 161; 8 L. T., N. S., 107; 1 N. R. 176; 9 Jur., N. S., 37; 32 L. J., Ch., 71.

6. A testator, having power to appoint to his children in remainder, after his brother's death, made his will, by which he left all property of every kind he died possessed of, or was entitled by reversion or otherwise, to his wife, giving her the power of dividing his property among his children as she might think proper; and by a codicil reciting that he had, on the marriage of his eldest son, executed a deed conveying over his interest in other lands, over which he had also a power of appointment, he desired the trustees of his will to hand over to his eldest son the reversionary property of every kind to which he was entitled after the death of his brother, the son binding himself to pay 3,000*l.* to his

younger brother and sisters; and he appointed the eldest son joint executor with his wife. The testator had no other property on which the codicil could operate, which would be sufficient to pay the charge of 3,000*l.*:—Held, that the codicil was a good execution of the power. *Jones* v. *Jones*, 13 Ir. Ch. R. 409.

1. A. B., by his will of the 12th August, 1824, devised certain estates in trust for all and every the children or child of his son, S. H., subject to such charges, powers, and dispositions, etc., and in such manner and form as S. H., by any deed or writing properly attested, should direct and appoint; and in default of appointment, in trust for all and every the children and child of S. H. equally, share and share alike. A. B. died on the 20th March, 1827. S. H., by will of the 3rd June, 1826, being at that time and at the time of his death in possession of considerable property, devised, bequeathed, etc., and appointed all his real estates, and all the residue of his personal estate, and all such estate, property, and effects in or to which he was in any way interested, or of which he had any power to dispose or appoint, in trust, after paying an annuity to his wife, and providing for the maintenance and education of his children, to distribute the residue amongst his children as his wife should appoint; and in default, etc., to distribute it equally amongst them. This will was republished by S. H. on the 25th April, 1829. By a codicil of the 17th March, 1827, S. H., after increasing the annuity to his wife, and giving her a power of disposition over 50,000*l.*, directed that the residue should be divided so "that his sons should have as much as, and one-half more than, each of his daughters," etc. S. H. died on the 15th October, 1837, leaving his widow and three sons and seven daughters him surviving. On bill praying for a declaration that the power given to S. H. had been effectually exercised by him, and that no daughter of S. H. was entitled to any share or interest in the estates made subject to the power of appointment by the will of A. B.:—Held, that the equal distribution under the will of A. B. could only be disturbed by an appointment which should afford clear evidence of S. H.'s intention to execute the power; that no words in the will of S. H., importing an unequal distribution of his own property among his children, should be strained to extend to the property given to them by the will of A. B., unless upon sufficient manifestation of intention; and that as there had been no express reference by S. H. to, or to the property which was the subject of, the power of appointment and distribution given him by A. B., it had not been validly exercised. *Hope* v. *Hope*, 18 Jur. 823; 2 W. R. 674.

2. S. bequeathed to trustees 5,000*l.* stock, upon trust for the benefit of his daughter C. and of her husband (if any) during their joint lives and the life of the survivor, and after the death of the survivor, for the children of C.; and if there should be no child, upon trust for such person of the blood or kindred of C. as she should by will appoint; and in default of appointment, in trust for such person as at the decease of C. should be her next of kin. S. also gave to trustees 8,000*l.* stock, in trust for C., and he directed that it should be held upon the like trusts, and subject to the same powers, as declared concerning the 5,000*l.*, except as to the ultimate trust declared in the event of C. having no child, in default whereof he directed that the 8,000*l.* should, after the decease of C. and of her husband (if any), remain upon trust as to one moiety, for such person of her blood or kindred as she should by her will appoint, and as to the other moiety, in trust for such person as she should by will appoint; and in default of appointment of either or both moieties, in trust for such person as at her decease should be her next of kin. S. declared that C. might direct the trustees to invest the moiety of the 8,000*l.*, over which she had an absolute power of appointment by will, in the purchase of an annuity for her own life. By a codicil, S. empowered C. to direct the trustees to sell the moiety of the 8,000*l.* over which she had a general power of appointment, and to pay the proceeds to herself for her own use; and by a further codicil he empowered C. to direct the trustees to sell any part of the moiety of the 8,000*l.* which she was authorised to appoint to any person of her blood or kindred, and to pay the proceeds to herself. S. died in March 1855. C., by her will, dated in May 1855, after bequeathing legacies to persons of her blood or kindred, strangers, and charities, said, "I appoint as my executors A., B., and C., requesting these my executors will see this my last will and testament be fully and duly carried into effect." C. died in June 1855. The personal estate of the testatrix amounted to about 1,000*l.* sterling, and the legacies given by her will amounted, as alleged, to not less than 6,970*l.* sterling. C. did not exercise the power she possessed of requiring the trustees to apply any part of the 8,000*l.* stock in the purchase of an annuity, and never, except by her will, attempted to execute the power to dispose of any portion of that legacy. On a bill praying for a declaration that the will of C. was a valid execution of the powers given her of appointing the legacies of 5,000*l.* and 8,000*l.*, so far as might be necessary for giving effect to the legacies bequeathed by her will:—Held, that the will of C. operated as an execution of the power as to the moiety of 8,000*l.* subject to the general power, so as to make the fund available for the payment of legacies; but as to the other moiety of the 8,000*l.*, and the 5,000*l.*, the power to appoint these legacies amongst persons of C.'s blood or kindred was not sufficiently referred to, and the language of s. 27 of the 7 Will. 4 and 1 Vict., c. 26, could not be extended to a power so limited in its objects. *Hawthorn* v. *Shedden*, 2 Jur., N. S., 749; 25 L. J., Ch., 833; 3 Sm. & G. 293.

3. Testamentary power to appoint a trust fund among all or any of donee's children. Bequest by donee, as follows: "All my personal estate upon trust to pay all just debts and funeral expenses; to pay to E. 19*l.*, and to my daughter J., the whole of my furniture and household effects; and as to my money in the funds, and all my residue of my personal estate" upon further trusts for the benefit of J. At the date of the will and of the death, the testator had no money in the funds, and the trust fund consisted of consols:—Held, that the will was not an appointment. *Re Mattingley*, 2 John. & H. 496.

1. A father, on his son's marriage, conveyed a farm to the use of himself and his wife successively for life, with remainder to the children of the son. A power was reserved to the father by deed or will, to charge all or part of the hereditaments settled, with any sums or sum not exceeding 500*l.* for the portions of his younger children, and to create a term for securing the same. The father, by will, devised the farm to his son in fee, charged with the payment of legacies of 200*l.*, 200*l.*, and 100*l.* to the testator's three daughters. The will contained no reference to the settlement, and no limitation of any term, nor did the father otherwise exercise the power:—Held, that the will operated as an execution of the power of appointment of which the father was donee under the settlement. *Davies* v. *Davies*, 4 Jur., N. S., 1291; 28 L. J., Ch., 102.

2. A testator being entitled to personal property, derived indirectly through the wills of A. and his father, settled part of it on his marriage with a power of appointment among his children, leaving a fractional part in himself. He made his will, giving all the personal estate that he derived through the will of his father to his two daughters, exclusively of his other children:—Held, that the fractional part reserved to himself, satisfied the language of the gift, and that it was not an execution of his special power. *Noel* v. *Noel*, 4 Drew. 624.

3. Gift of residue after death of testator's widow to the brothers and sisters of testator's wife, and to their descendants in such proportions as testator's wife by her last will and testament may appoint. Testator's widow made a will, reciting the power, and disposing of the property of herself and her late husband. She afterwards revoked this will and made another, dated in 1851, not referring to the power whereby she gave part of the property which passed by her late husband's will to a son of one of her own sisters then living, and a further part thereof to a daughter of one of her late husband's brothers then living. On the question whether the will of the testator's widow operated as an appointment under the power:—Held, that it did not; and the Court declared that the persons to take were those brothers and sisters of the husband and wife who were living at the death of the tenant for life, and if any were dead, then the children of such as were dead were entitled to take by way of substitution. *Tucker* v. *Billing*, 2 Jur., N. S., 483.

4. A., a testator, having a power of appointment of a fund consisting of 3½ per cent. reduced annuities, unto and amongst such of the children of a prior testator as should be living at the death of A., in such shares and proportions as A. should by will appoint, gave by will two legacies to two of the three children of the original testator out of this stock; and as to all the residue of my property to be found in 3½ reduced (now reduced to 3½ per cent.), and all other property, to D. (the other child of the original testator) absolutely during her life, and to be disposed of as she shall think fit at her death":—Held, that the power did not justify the exclusion of any of the three children of the original testator, nor had the testator done so; and that it was a good execution of the power, and the third child took the residue. *Re David*, 1 L. T., N. S., 130; 1 Johns. 495; 6 Jur., N. S., 94; 29 L. J., Ch., 116.

5. By marriage articles, it was agreed that the interest of the amount of a policy of assurance, effected on the husband's life, should be applied, first, in payment of an annuity to the wife, and that the remainder of the interest should be paid among the issue of the marriage, in such shares as the husband and wife, or the survivor of them, should by deed or will appoint; and in default of appointment, share and share alike; and that the principal, after the death of the wife, should remain to the use of the issue of the marriage, in such manner and in such shares and proportions to and amongst the issue as the husband and wife, or the survivor of them, should by deed or will appoint, and for want of such appointment, share and share alike. The articles contained a covenant to execute all acts necessary to carry them into execution. The husband survived the wife; but by a codicil to his will, made in 1854, and in her lifetime, he willed and devised that whatever property he should die possessed of, or be entitled to, either freehold or otherwise, after the payment of his debts and funeral expenses, should be equally divided amongst his sons and daughters which he then had, or might have by his marriage; and that on the death of either of his sons or daughters by his marriage, before they arrived at twenty-one, the share or shares of him or her should be equally divided amongst the survivors. And he declared it to be his will and desire that, in the event of his being entitled to any property not named in his will, which contained an exclusive, and therefore invalid, appointment of the principal of the policy, his wife should be his residuary legatee:—Held, that the will and codicil did not amount to a valid execution of the power. *Cronin* v. *Roche*, 8 Ir. Ch. R. 103.

Held, also, that if a settlement had been executed, it should have contained a clause that, in the event of any of the children dying under age and unmarried, the share of the child so dying should go to the survivors. *Ib.*

6. Under the marriage settlement of a testator a fund was settled upon trust as he should appoint, and in default of appointment, upon trust, in the events which happened, for his son and his grandson equally. The testator appointed to his son a portion of the property. He afterwards made his will as follows: "I give and bequeath to my dear son the proceeds of all the policies of insurance on my life, and all other property which I may have at the time of my death. He will have to bring into hotchpot that portion of the fund settled on the marriage of his mother which has been already received by him; and then, as I make no further appointment under the power for that purpose, the whole settled fund will be equally divided between him and my little grandson":—Held, that the will did not operate as an appointment under the power in the settlement, and that the son was not bound to elect whether he would take under the will. *Langslow* v. *Langslow*, 2 Jur., N. S., 1057; 25 L. J., Ch., 610; 21 Beav. 522.

7. By a marriage settlement the husband had a power to appoint 1,800*l.* (invested in 3*l.* per cent. annuities) among the children of the marriage. By his will, without referring

to the power, he bequeathed to three of his children a third part of the money which he had in the 3*l.* per cent. consols and 3*l.* per cent. annuities. He likewise bequeathed to his grandson, who was not an object of the power, 100*l.* out of his money in the Government funds, the same to be made up by each of his three children. The testator had eight children; two of them had died, and to one of these he had taken out administration for property sworn under 200*l.* He had no money in the funds at the time of his death:—Held, that the will was a good execution of the power, but that the bequest of the 100*l.* to the grandson was void. *Rooke* v. *Rooke*, 2 Dr. & Sm. 38; 31 L. J., Ch., 636; 10 W. R. 435; 6 L. T., N. S., 527.

1. A testatrix, having property of her own, and a power to appoint to her children other property of which she was tenant for life, gave the whole of the residue of her property, "except her freehold property," disposed of by a contemporaneous codicil, to A. The excepted freehold property was part of the subject of the power:—Held, in consequence of the exception, that the residue of the property, subject to the power, passed. *Reid* v. *Reid*, 26 Beav. 469.

A testatrix had ground-rents of her own, and ground rents of which, under the will of her husband, she was tenant for life, with power to appoint to her children. By her will she gave a son an annuity, payable "out of my ground rents." The Court having held, on another clause of her will, that "my property" included the husband's, also came to the conclusion that "my ground rents" also included the husband's. *Ib.*

2. A testatrix bequeathed all moneys belonging to her in the 3*l.* per cent. consols to two children and her son's widow. The only consols she was interested in were settled on her for life, with power to appoint amongst her children:—Held, that the will operated as an execution of the power as regarded the two-thirds to the two children, although it contained no other reference to the power or to the subject of it. *Re Gratwick*, 35 Beav. 215; 11 Jur., N. S., 919.

3. On the marriage of P. certain lands were vested in trustees for a term of years upon trust, in the events, which happened, to raise 4,000*l.* for the children of the marriage, payable as he, or, in default, his widow, should by deed or will appoint, and, in default of appointment by either parent, equally, in the usual mode. P. by his will directed all his lands, including all those comprised in the term, to be sold, and out of the produce gave portions to his five sons, and 1,000*l.* each to three of his daughters. By a codicil he further gave 1,000*l.* each to his two remaining daughters, and then added:—"I hereby direct that no part of the produce of my lands shall be paid to any of my sons until the sums of 1,000*l.* each shall have been paid to each of my five daughters, or 5,000*l.* among the survivors of them, over and above and in addition to the equal distributive share of the 4,000*l.* mentioned in my marriage settlement, which each of them are (*sic*) entitled to":—Held, that P. had not thereby executed the power. *Pennefather* v. *Pennefather*, 7 Ir. R., Eq., 300.

4. A feme sole, having a limited power of appointment, made her will, whereby, after making certain specific bequests of jewellery, without referring either to the power or to the property subject to it, she "bequeathed the residue of her personal estate" amongst certain persons, all of whom (except one) were objects of the power. At the time of her death, she had (independently of the property subject to the power) the jewellery specifically bequeathed, and a reversionary interest in some trust moneys:—Held, that the will did not operate as an execution of the power. *Humphrey* v. *Humphrey*, 36 L. T., N. S., 91.

5. A testatrix having willed property to her daughter M. A. C. absolutely, in a codicil said, "All I have given my daughter M. A. C. I give her for her life only and at her disposal by will into my surviving family as she may think proper. In case she dies without will then I request her property may be divided to the females in Mrs. L.'s, Mr. W. C.'s, and Mr. J. C.'s families share and share alike." M. A. C. by her will, without referring to her mother's will or codicil, gave her property to a niece, being a grandchild of the testatrix:—Held, that M. A. C.'s will was not a good execution of the power contained in the codicil, and that Mrs. L.'s, Mr. W. C.'s, and Mr. J. C.'s daughters were entitled. *Elgood* v. *Cole*, 17 W. R. 953; 21 L. T., N. S., 80.

6. A testatrix, having power to appoint certain funds by will in favour of A., B., C., D., and E., in such parts, shares, and proportions as she might think fit, and having no other power, by her will gave legacies of 5*l.* each to A., B., and C., and all the residue of her property, of whatever kind and wheresoever situate, and over which she had any power of appointment, to D. and E., and died leaving some personal estate of her own:—Held, that the will was a valid execution of the power. *Gainsford* v. *Dunn*, 17 L. R., Eq., 405; 43 L. J., Ch., 403; 30 L. T., N. S., 283; 22 W. R. 499.

7. A testatrix, having a special power of appointment over two several funds, by a will dated 1826, after reciting her power of appointment over one of the funds and appointing such fund accordingly, and after devising her real estate to trustees, to sell and to stand possessed of the proceeds upon the trusts therein mentioned, gave and bequeathed, "and also in exercise of all powers and authorities" vested in her, appointed all her personal estate to trustees upon the same trusts as were thereinbefore declared concerning the proceeds of the sale of her real estate, which trusts were in favour of persons some of whom only were within the scope of the special power of appointment:—Held, that such residuary gift was an exercise of the special power of appointment. *Maunsell* v. *Maunsell*, 19 W. R. 1003; 24 L. T., N. S., 698.

8. A testator gave his estate by will to trustees in the following words:—"I give, devise, and bequeath all my property over which I have any disposing power." The trusts of the will were for his wife for life for her separate use, and after her death for all his children who should attain twenty-one in equal shares, and upon failure of children for the brothers and sistsrs of his wife:—Held, that the will must be read *reddendo singula singulis*, and operated as an appointment under

two special powers, one of which was a power to appoint among his children subject to a life interest in his wife during widowhood; and the other was a power to appoint a life interest to his wife in a fund which, subject to such power, was held on trust for his children at twenty-one in equal shares. *Thornton* v. *Thornton*, 20 L. R., Eq., 599.

1. G. having a life interest in a fund, with a power to appoint the fund among her children, appointed by her will, which recited the power and the testatrix's intention to exercise it, a part of the fund to persons who were objects of the power; and then, without any reference to the power, proceeded to bequeath legacies to persons who were not objects of the power. She then directed payments of her debts and legacies, and after the payment thereof bequeathed the residue of her estate not specifically bequeathed, or over which she had a general power of appointment, to J. E. G., an object of the power:—Held, that the will of G. was not, as to the residue of her share in the fund, an exercise of the power of appointment. *Butler* v. *Gray*, 18 W. R. 193; 5 L. R., Ch., 26; 39 L. J., Ch., 291.

2. A devise and bequest of all a testator's property, both real and personal, will not operate to pass property over which he has only a limited power of appointment, though the devise and bequest are confined to objects of the power; but such property will go as in default of appointment. *Wildbore* v *Gregory*, 19 W. R. 967.

Under a marriage settlement, power was reserved to the husband to appoint, after the death of his wife, if she should survive him, so much of a particular freehold estate settled by him "as shall not exceed the annual income of 300*l.*," to the use of the children of the marriage; the same to be, in default of appointment, for the use of the children equally. The residue of the estate to be to the use of the husband absolutely. By his will he gave, devised, and bequeathed "the whole of my property, real and personal, consisting of a farm" (describing the freehold estate above mentioned), "and whatever may devolve to me by virtue of the marriage settlement," to a trustee upon trust after the death of his wife, for his five children, in unequal shares. He further gave to the trustee a discretionary power either to divide the income of "my entire property," according to the provisions before made, or to sell the whole, and divide the proceeds:—Held, that the will did not operate as an exercise of the power of appointment. S. C. 12 L. R., Eq., 482; 41 L. J., Ch., 129.

3. A widow, having power of appointment among her children by deed or will over real estate, appointed it to her two children, a son and daughter, in moieties by will. She afterwards executed another will, revoking all former wills made by her (without special reference to the former will and appointment), and devised and bequeathed all her real and personal estate to her daughter absolutely. Her son died in her lifetime, leaving issue one child, a son:—Held, that the second will revoked the first, but did not amount to an execution of the power of appointment. *Harvey* v. *Harvey*, 32 L. T., N. S., 141; 23 W. R. 478.

4. Under an exclusive power to appoint to children, the children being entitled in default of appointment in equal shares, the donee, by will, appointed the whole fund to trustees, upon trust as to 1,200*l.*, to pay the income to one of her children, J., for life, and after his death, for his children; and if J. should die without leaving children who should attain vested interests, then, that the 1,200*l.* should be added to and form part of the residue of the trust estate. The trusts of the residue were in favour of daughters for life, with testamentary powers. J. died leaving children. It being admitted that the gift to J.'s children was excessive:—Held, that on J.'s death the 1,200*l.* was not undisposed of, but was well appointed by the residuary gift. *Re Meredith*, 3 L. R., Ch. D., 757; 25 W. R. 107.

5. Under his marriage settlement a testator had a power of appointment by deed or will over personal estate among his children. He had no other power of appointment. By his will he devised and bequeathed all the real and personal estate of or to which he might be at the time of his death seised or entitled, or over which he might have "any beneficial power of disposition" (save such as were by his will otherwise devised or bequeathed) to trustees, upon trust for sale and conversion, and out of the proceeds to pay his funeral and testamentary expenses, debts, and legacies, and as to the residue of the proceeds, upon trust, as to one-third, for his eldest son; as to another third, for his younger sons in equal shares; and, as to the remaining third, upon trust for his daughters in equal shares, their shares to be settled for the benefit of themselves, their husbands, and children:—Held, that the power was not exercised by the will. *Ames* v. *Cadogan*, 12 L. R., Ch. D., 868; 48 L. J., Ch., 762; 27 W. R. 905; 41 L. T. 211.

6. A testator having a special power of appointment over certain real estate under an instrument dated prior to the Wills Act, made his will, which he declared should be an exercise of any power of appointment vested in him, and thereby devised such real estate in a manner which was held to be invalid. The will contained a general residuary devise in favour of a person who was an object of the power:—Held, that the residuary devise operated as an appointment under the power, and that the property passed to the residuary devisee. *Freme* v. *Clement*, 18 L. R., Ch. D., 499; 50 L. J., Ch., 801; 44 L. T. 399; 30 W. R. 1.

7. Instruments in exercise of powers of appointment are, as to execution and construction, subject to the law governing instruments of a like nature, disposing of the appointor's own property at the time of the appointment, and this whether or not the law as to execution and construction of such instruments is altered after the date of the instrument giving the power: if then the Wills Act were silent as to appointments, still, as by s. 25 it makes a void devise fall into the residue, it would also make the above void devise by way of appointment fall into the residue. *Ib.*

But the word "devise" in the Wills Act generally, unless a contrary intention can be shown, includes a devise by way of appointment under a special or general power, and it is to be so read in s. 25. The Act, therefore,

alters the law as to the exercise of powers of appointment, and makes a void devise, as above, pass under the residuary clause. *Ib.*

1. C. P. had under his first marriage settlement, as the survivor of himself and his first wife, a power of appointment of certain funds by deed or will among the children of his first marriage: and had also under his second marriage settlement a power of appointment, after the death or second marriage of his second wife, of a fund settled on her for life or widowhood. By his will C. P. referred to and confirmed his first marriage settlement, and directed the trusts thereof to be fully carried out; and he also referred to and confirmed his second marriage settlement, and directed a fund to provide his second wife's life annuity to be invested. He then made certain other bequests, and as to all the rest, residue and remainder of his real and personal estate, and which he should in any way have power to dispose of or appoint by will, he gave, devised, and bequeathed the same unto and to the use of his executors and trustees, upon trust for conversion, and out of the proceeds to pay his funeral and testamentary expenses, and debts and legacies, and to divide the residue thereof among such of the children of his first marriage as should be living at his death, but as to the shares of his daughters therein, he settled them on his daughters for life, then on their husbands for life, and then on the issue of the daughters as they should appoint, and in default of such appointment then to his daughters' children, as to sons at twenty-one, as to daughters at twenty-one or marriage, and in default of daughters' children, then as his daughters should generally appoint, and in default of such appointment, then for his daughters' next of kin:—Held, that the will of C. P. operated as an exercise of the power to appoint among the children of his first marriage the fund settled on that marriage, which was vested in him under his first marriage settlement as being the survivor of himself and his first wife, notwithstanding that first, the testator had described the residue which he was giving as the residue of "my estate;" secondly, he had directed it to be converted; thirdly, he had directed payment out of it of his funeral and testamentary expenses, debts, and legacies; and fourthly, he had settled his daughters' shares for the benefit of their respective husbands and children. *Price* v. *Price*, 46 L. T. 228.

2. Effect of Charge of Debts.

2. Whether a testator intended by his will to execute a power, is to be collected from the whole instrument, and not from the force of any particular expression. In this case, the testator devised his estates, and made disposition of part of the fund to be produced by the sale of the estates to purposes not warranted by the power; but still, upon the whole will, the Court held that he intended to execute the power. The recital of a deed is a key to the construction, where the operative part is doubtfully expressed, and not otherwise. *Bailey* v. *Lloyd*, 5 Russ. 330; 7 L. J., Ch., 98.

3. Where a testatrix having personal estate of her own (and of considerable amount), and a power of appointment amongst her brothers and sisters over certain stock standing in the names of trustees, after directing speedy payment of her debts and testamentary expenses out of her personal estate, and giving certain legacies out of the funds standing in the trustees' names, being only part thereof, and without any reference to the power, she bequeathed all the residue of her estate, "after payment of the before mentioned legacies," to two persons equally who were objects of the power:—Held, that the legacies being an appointment of part, the residuary clause applied also to the part undisposed of. *Elliott* v. *Elliott*, 15 Sim. 321; 15 L. J., N. S., Ch., 393; 10 Jur. 730.

4. Testatrix having a testamentary power of appointment, in favour of her children, over certain sums of stock standing in the names of A. and B. as trustees, gave, bequeathed, and, by virtue of every power enabling her in that behalf, appointed all the property of or to which she was then, or at the time of her death should or might be possessed or entitled, or have power to dispose, to A. and B. upon trust, after payment of her debts and funeral and testamentary expenses, to invest the residue thereof in their names in the funds, or upon Government or real security; and she then declared trusts in favour of her children. She died possessed of personal estate more than sufficient to pay her debts and funeral and testamentary expenses:—Held, that her will was not an exercise of the power. *Clogstoun* v. *Walcott*, 13 Sim. 523; 7 Jur. 616.

5. Realty was settled to such uses as A. should appoint, so only that every such appointment should be made in favour of a child or children or other issue of A. to be born in his lifetime. A., by will, devised all his real and personal estate, whereof he had power to dispose, to trustees, upon trust to sell (with power to give receipts and to discharge purchasers), and apply the proceeds in payment of his debts, funeral and testamentary expenses, and, subject thereto, to stand possessed of the proceeds in trust for his children, in certain shares:—Held, that the will amounted to an execution of the power of appointment, notwithstanding the invalid attempt to throw the burden of the testator's debts on the settled property. *Cowx* v. *Foster*, 1 John. & H. 30; 6 Jur., N. S., 1051; 29 L. J., Ch., 886.

Held, also, that the trustees could give a valid discharge to a purchaser. *Ib.*

6. A husband, having a power to appoint the income of a fund to his wife for life, and no other power of appointment, by his will directed payment of his debts, and then, by a separate clause, devised all property, of whatever description, belonging to him, "or over which he might at his decease have any power, disposition, or control," to his wife, her heirs and legal representatives, in full property for ever absolutely:—Held, that the will operated an an exercise of the power. *Re Teape*, 43 L. J., Ch., 87; 16 L. R., Eq., 442; 28 L. T. 799; 21 W. R. 780.

7. A testatrix having a general power to appoint 500*l.* and a special power to appoint the residue of property, gave all her real and personal estate whatsoever and wheresoever, and of which she had any power to appoint or

dispose of, to trustees, in the first place to pay her debts, funeral and testamentary expenses, and then to divide the residue between the objects of the special power:—Held, that the special power was well executed. *Forrior* v. *Jay*, 10 L. R., Eq., 550; 39 L. J., Ch., 686; 18 W. R. 1130; 23 L. T., N. S., 302.

1. H. bequeathed 1,000*l.*, in case his daughter S. should die leaving issue, to be at her disposal unto such issue, and directed that that sum should be paid and payable to such issue, being a son or sons, at the age of twenty-one, and being a daughter or daughters at the age of twenty-one or marriage, in such proportions as S. should by deed or will appoint. S., having two daughters, M. and A., the latter being the wife of F., bequeathed all her property, including that over which she had any disposing power, to trustees, as to one moiety, for M., her heirs and assigns, and as to the other moiety, upon trust to pay the dividends to A. for her life, for her separate use without power of anticipation, and on the death of A. in the lifetime of F., upon trusts, in default of appointment by A., in favour of her children as therein mentioned, and upon other trusts as therein mentioned. The trustees of H.'s will having paid the money into court, M., F., and A. petitioned the Court as to its disposal. Ordered, that one moiety of the residue of the fund should be transferred to M., and the other moiety carried to the account of A.'s moiety, and the dividends paid to her separate use, without prejudice to any question. *Re Harris*, 20 W. R. 742.

XII. Execution. Shares and Proportions.

I. *Property included in Appointment*, 5794.
II. *Abatement and Priority*, 5795.
III. *Shares in Unappointed Residue and Hotchpot*, 5798.
IV. *Payment Postponed. Interim Income*, 5800.
V. *Illusory Shares.* See XIV. II. *post.*

I. PROPERTY INCLUDED IN APPOINTMENT.

2. A testatrix, after reciting a power of appointment given to her by her deceased father's will, over certain personal property, and stating that she computed such property to be of the value of 18,000*l.*, or thereabouts, appointed that sum, whether the same should be the whole or parcel only of the amount of such property, to trustees upon certain trusts:—Held, that the appointment extended only to the sum of 18,000*l.* *Young* v. *Martin*, 2 Y. & Coll. 582; 7 Jur. 1147.

3. *Semble*, that by an appointment duly made of a whole estate to the uses of a marriage settlement by a party thereto, who thereby also granted and released a moiety only of the estate to the same uses, the entirety of the estate passed. *Farmer* v. *Farmer*, 1 H. L. Ca. 724.

4. Testatrix, after reciting a power of appointment over 10,000*l.* given to her by her father's will, in exercise of the power appointed "the said sum of 10,000*l.* then secured on mortgage, and any other moneys representing the same," to trustees in certain shares and proportions in trust. The 10,000*l.*, by changes of investment, now amounted to 11,463*l.* 14*s.* 7*d.*:—Held, that the whole 11,463*l.* 14*s.* 7*d.* was well appointed. *Lefevre* v. *Freeland*, 24 Beav. 403.

5. A testator bequeathed certain shares of the residue of his estate to trustees, upon trust to accumulate for such of his issue as his widow should by deed or will appoint. The widow by her will referring to the power, appointed certain definite sums to the issue, on the express supposition that the shares would realise a certain sum per share; but if not, then she directed that the legatees should receive in proportion to their respective bequests:—Held, that the appointment extended to the accumulations of the shares. *Thompson* v. *Teulon*, 22 L. J., Ch., 243.

6. Bonuses on bank stock are capital. A. had a power of appointment over 7,150*l.* stock: certain bonuses accrued thereon, which were laid out upon stock, upon the trusts and subject to the appointment; and after the accretion of these, A. exercised his power, but only noticed the original stock and the first bonus thus: "And also the said sum of 715*l.* 5 per cent., etc., together with all such further additions, in the nature of profit, to be made to the said bank stock in my lifetime":—Held, that all the bonuses passed under the appointment. *Carver* v. *Bowles*, 9 L. J., Ch., 91.

7. A. and B. his wife, resident abroad, had a life interest in Government stock, with a joint power of appointment by deed in favour of their children; and B. was tenant for life of other stock, with remainder to the children of the marriage. The dividends on both sums of stock were transmitted through the banking firm of C. & Co. to A. and B., who had no other account with that firm. In 1830 A. and B. appointed by deed one-half of the first fund to their eldest son, and the remainder among their younger sons equally, reserving a power of revocation as to the shares of the younger sons. In 1839 and 1843, on the respective marriages of two of the younger sons, A. and B. executed joint instruments (unattested), by which they deposed that the two sons respectively should receive from the survivor of them a capital property of 7,000 dollars, "which stands in the English Bank of C. & Co.":—Held, that, in point of construction, the words "which stand in the English bank of C. & Co." described both funds, and that each of the two sons was entitled, under the two latter instruments, to receive only from the fund over which the power of appointment extended so much money as with the share he was entitled to out of the other fund would make up the sum thereby provided for him. *Sheffield* v. *Von Donop*, 7 Hare 42; 17 L. J., N. S., Ch., 481; 12 Jur. 672.

8. E. S., having a power of appointment over 10,000*l.* stock, by her will appointed 150*l.* a year, part of the interest thereof, or the stocks, etc., into which the same should be changed at her death, to I. S. for life; and after his death she appointed so much of the 10,000*l.* or of the

stocks, etc., into which the same might be then changed, from which the 150*l.* should have arisen, to A. B.; and as to so much of the 10,000*l.*, or the stocks, etc., into which the same should be changed at her death, which should not be necessary to answer the annuity, she appointed the same to I. B. After E. S. made her will the trustees sold the stock, and invested the proceeds (6,600*l.*) on mortgage, which after her death was paid off, and under a decree of the Court invested in 7,143*l.* consols:—Held, that A. B. was entitled to 5,000*l.* consols, as being the capital of the 150*l.*, and I. B. to the residue. *Bullock* v. *Thomas*, 9 Sim. 634; 3 Jur. 314.

1. M. C., by his will, gave two leasehold estates (each of which was subject to a distinct mortgage), and all the residue of his estate, subject to the payment of his debts, to trustees, for his wife E. C., for life, with remainder as she should appoint. E. C. paid off both mortgages, and took an assignment of each to a trustee, "to the end and intent that the same might be kept on foot for her benefit." She afterwards executed her power of appointment over both estates; over the one by a deed poll, by which she annexed to the gift a condition that her appointees should release a certain claim which might have been enforced against the estate; and over the other by her will, by which, after reciting her power of appointment over the premises (describing them), she appointed the same to trustees, upon trust to pay the rents, etc., to certain of her children:—Held, that it was E. C.'s intention to keep these charges on foot, and, therefore, that her appointees took subject to them. *Cole* v. *Stutely*, 6 Jur. 314.

M. C.'s general assets being insufficient to pay off the mortgage debts:—Held, that the leasehold premises passed to his wife's appointees *cum onere*. *Ib.*

2. Hereditaments were, by deed of 1830, conveyed to a trustee for sale, the produce to be held as A. and B. should appoint. Part of the property was taken by a railway company, and the purchase money was laid out in the purchase of cottages, which, in 1850, were conveyed to the trustees. In 1851, by deed poll, reciting that by the settlement the property (describing it) had been conveyed to the uses above-mentioned, A. and B. appointed all the moneys to arise from the sale of the aforesaid hereditaments, and the said hereditaments until such sale:—Held, that the cottages were not included in the appointment. *Collinson* v. *Collinson*, 24 Beav. 269.

3. In 1858, C. wrote to his bankers requesting them to purchase 2,000*l.* consols, to be added to the sum "now standing in my name," and the dividends to be received by them with this addition as before. C. was tenant for life under his marriage settlement of consols on which the dividends were received by the bankers under a general power of attorney from the trustees. The bankers wrote stating the names in which the consols stood, and asking if the investment was to be made in his name or the trustees'. He thereupon called and endorsed the letter "Make the investment in the trustees' names." The trustees were never informed of this, but the investment was made and the dividends received by C. till his death in 1870. In 1862, he and his wife executed a joint appointment to children under the settlement, of the original sum of consols, not mentioning the addition:—Held, that the 2,000*l.* consols were included in the settlement, and passed as in default of appointment. *Re Curtois*, 14 L. R., Eq., 217; 41 L. J., Ch., 631; 26 L. T. 863.

4. By a settlement a fund was conveyed to trustees, upon trust, after the death of husband and wife, to pay the same unto and amongst the child or children of the marriage, or unto and amongst the issue of such child or children, in case such child or children should then be dead leaving issue, as the husband should appoint; and in default of appointment, and in case such child or children should die in their father's lifetime leaving issue, then upon trust that the share of such child or children should be paid to the issue of such child or children so dying, at such times and in such shares and proportions as such child or children if living would have been entitled to. The trustees applied the trust funds, with a small sum advanced by the husband, in the purchase of a copyhold estate upon the trusts of the marriage settlement. The husband made his will, and by a codicil thereto, after reciting the marriage settlement and the purchase of the copyhold estate, and that, the trust funds being insufficient, he had contributed 300*l.* or thereabouts towards the purchase of the same; and further reciting, that by virtue of the marriage settlement, and the deed or deeds executed upon the purchase of the estate, he had power to direct that the 300*l.* or thereabouts should be raised and paid to such of his issue as he should appoint; and reciting that no appointment of the money or any part thereof had been made by him, and that he was desirous of making such appointment; he thereby, by virtue of the power reserved to him in the marriage settlement, or the deed or deeds, and of every power and authority, directed and appointed that the 300*l.*, or such other sum as he was empowered to appoint, should be raised and paid to his grandson. There was issue of the marriage two children, A. and B., both of whom died in their father's lifetime, leaving children and grandchildren:—Held, that the appointment by the husband was intended to operate over the whole fund over which he had any power of appointment, and was not confined to the money advanced by him in part payment of the purchase money. *Robinson* v. *Sykes*, 2 Jur., N. S., 895; 23 Beav. 40; 26 L. J., Ch., 782.

II. ABATEMENT AND PRIORITY.

5. Mrs. C. had a power to appoint three sums of 10,000*l.* each: the first, under her father's will, amongst her children; the second, under her mother's will, to any person; and the third, also under her mother's will, amongst her children. In 1836 the second sum was appointed to her husband, and paid to him. In 1838 the legacy duty was paid on the third sum, which reduced it to 9,900*l.* In 1842 she purported to appoint the two sums of 10,000*l.* under her mother's will to her two daughters equally; and in 1843 she, by her will, appointed 9,900*l.*, described as derived from her father, to her daughter A. B., and 10,000*l.*, also

described as settled by her father and mother, to the other daughter C. D., and she confirmed the deeds of 1842, so far as they were valid, and not inconsistent with her will; and declared, that if she had exceeded her powers, her will should have effect under the doctrine of election. The Court, having come to the conclusion that Mrs. C., when she made her will, believed she had the power of appointing 19,000*l.*, and appointed 9,900*l.* to A. B., and 10,000*l.* to C. D.:—Held, that the doctrine of *Page* v. *Leapingwell* (18 Ves. 463) applied; and that as the testatrix had then only the power of appointing the first sum of 10,000*l.*, it must be divided between the two legatees in the proportion of 99 to 100. *Lauris* v. *Clutton*, 15 Beav. 65; 21 L. J., N. S., Ch., 226; 16 Jur. 825.

1. A donee of a power affecting two sums of stock of different description, appointed a gross amount, part of one of them, and exceeding one-fourth part of it. Afterwards she executed, successively, deeds purporting to appoint aliquot parts of both funds, as one subject, and without noticing the previous appointment of the gross sum, which was never severed from the mass. The appointees comprised all the parties entitled, subject to the appointment, and the aliquot part so appointed amounted to four-fifths, thus exceeding, with the earliest appointment, the entirety of one of the funds:—Held, first, that the latter appointees were not entitled to put the earlier to their election, so that the excess might be made good out of the unappointed one-fifth of the unexhausted fund; and, secondly, that the successive appointments of the aliquot parts operated upon the aliquot parts of the whole of each fund, and that therefore the loss arising from the deficiency of the one fund fell upon the last appointees. *Trollope* v. *Routledge*, 1 De G. & Sm. 662; 11 Jur. 1002.

2. Under a marriage settlement a sum of consols was held in trust for the husband for life, remainder as to a certain portion of it for the wife for life, remainder for such one or more of the children as the husband and wife should appoint, remainder for the children at twenty-one, and as to the rest of the consols in trust after the husband's death for the children absolutely at twenty-one. There were five children who attained twenty-one. The parents, conceiving that they had power to appoint the whole of the consols, made appointments at different times to two of them, which more than exhausted that portion of the consols which was appointable. Each deed of appointment declared that the appointee should not be entitled to any further or other share in the trust fund under the settlement until he should have put in hotchpot the thereby appointed share, unless a contrary intention should be expressed in the instrument by which any further appointment should be made:—Held, that though the appointable part of the consols was not sufficient to answer fully the second appointment, yet there was to be no apportionment, and that the second appointee as well as the first was prevented by the hotchpot clause from taking any part of his one-fifth of the unappointable consols, unless he would give up the whole of what he would get under the appointment, and that the unappointable consols belonged wholly to the three other children. *Warde* v. *Firmin*, 11 Sim. 235; 10 L. J., N. S., Ch., 43; 5 Jur. 288.

3. A testator having a power of appointment by will over a sum of stock, bequeathed two sums of 5,000*l.* and 500*l.* sterling thereout to A. and B., and the residue to his son. The stock became in equity liable to his debts, and, by payment thereof and of the costs of the suit, the fund became less than 5,500*l.* sterling:—Held, that the pecuniary and residuary legatees were not liable to abate proportionably, but that the residuary gift failed altogether. *Petre* v. *Petre*, 14 Beav. 197; 15 Jur. 693.

4. Three policies of assurance on the settlor's life were assigned by a voluntary deed on trust for A., B., and his other children, in such shares, etc., as he should appoint. He, on A.'s marriage, appointed 2,000*l.* out of the sums secured by the policies to her: he made a similar appointment on B.'s marriage. By his will he appointed 2,000*l.* to each of the other children. Two of the policies having dropped before his death:—Held, that the sums given to A. and B. should be paid in full, according to the priorities of the appointments, and the entire loss fall on the other objects. *Borough* v. *Close*, 11 Ir. Eq. R. 391.

5. A donee of a power of appointment over a gross sum of money which, in default of appointment, was to be divided equally among her children, appointed a specific sum which she described as being part of the gross sum, but she did not make any appointment of the residue, the gross sum proving deficient:—Held (reversing 2 Jur., N. S., 943; 4 W. R. 453), that the specific sum appointed was to be paid in full, and not ratably out of the deficient gross sum. *Booth* v. *Alington*, 6 De G. M. & G. 613; 3 Jur., N. S., 49; 26 L. J., Ch., 138; 5 W. R. 107.

B., the wife of B., having an absolute power of appointment over a sum of 120,000*l.* bequeathed by the will of her father, by deed, reciting that she was desirous, in the event of her dying in the lifetime of her husband, that the sum of 30,000*l.*, part of the sum of 120,000*l.*, might immediately after her decease be paid to the husband as a permanent and certain provision for him, appointed that sum to be paid to him immediately after her death. The estate of her father proved insufficient to pay the legacies in full, and the legacy of 120,000*l.* had, with others, to abate:—Held, that the husband, the appointee, was entitled to an absolute sum of 30,000*l.*, and not a mere aliquot part of the abated legacy of 120,000*l.* *Ib.*

6. By a settlement of 1835 a sum of 16,000*l.* was vested in trustees upon trust for A. for life; and after her decease, upon trust for her children as she should appoint. By a settlement of 1847, 5,000*l.* consols was vested in trustees upon trust for A. for life; and after her death, upon trust for her children or grandchildren (such grandchildren to be born in her lifetime) as she should appoint. A., by her will, after referring generally to these settlements, appointed "all such real or personal estate as she should have power to appoint or otherwise dispose of" to trustees, upon trust to sell, and out of the proceeds of sale to invest 3,500*l.*, and to pay the income to

her daughter B. for life, and after her death, for her children as therein mentioned; and "as to the residue of the proceeds of the said sale," she devised and bequeathed the same to C. At the death of A. her daughter B. was unmarried:—Held, that the 3,500*l.* must be considered as appointed ratably out of both funds. *Swete* v. *Tindal*, 31 L. T., N. S., 223.

Held, also, that, subject to B.'s life interest, the 3,500*l.* remained unappointed, and did not pass to C. under the residuary gift. *Ib.*

1. A testatrix, having the power to raise and appoint 10,000*l.* out of real estate, after directing that sum to be raised, and appointing 5,000*l.* of it to A., proceeded to direct the residue to be distributed in the proportions thereinafter mentioned, naming certain beneficiaries, among others, a charity. She then gave and bequeathed to B., C., and D. certain sums, and provided that, in the event of any of the legatees or appointees dying in her lifetime, their share should go over to other persons. The money thus disposed of amounted to 8,950*l.*:—Held, that this was a good appointment of the whole 10,000*l.*, and ordered that, after setting aside 5,000*l.* for A., the residue was to be apportioned among the remaining appointees, including the charity, in proportion to the amounts set against their names; that the sum apportioned to the charity must sink for the benefit of the estate charged with raising the 10,000*l.*, and that the cost of raising the 10,000*l.* was to be borne by the estate. *Cust* v. *Middleton*, 18 L. T., N. S., 36.

2. Where a testatrix appointed 600*l.* to a trustee to invest and pay 75*l.* to each of her daughters, and to apply the income of the residue for the benefit of her granddaughter till she attained seventeen, and then to pay 100*l.* more to each of her daughters, and apply the income of the residue for the benefit of her granddaughter till she attained twenty-one, and then to pay such residue to the granddaughter for her own absolute use and benefit; and the fund had been diminished by certain costs and was insufficient:—Held, that the gift of the residue to the granddaughter was not a gift of a fixed sum, but only of what might be left after payment of the fixed legacies, and that, therefore, the legacies to the daughters must be paid in priority, and were not liable to abate *pari passu* with the residue. *Harley* v. *Moon*, 1 Dr. & Sm. 623; 31 L. J., Ch., 140; 7 Jur., N. S., 1227; 10 W. R. 146.

3. A married woman, having over one fund an absolute power of appointment and over two other funds a power of appointment by will in case she should die in the lifetime of her husband, and an absolute interest in the events (which happened) of her surviving her husband and having no children, attempted to dispose of both funds, by way of appointment, by a will made in her husband's lifetime and not republished after his death. The fund, which was well disposed of, being insufficient to satisfy the legacies in full:—Held, that those of the next of kin, who were also legatees, were entitled to have their legacies paid (ratably with the other legatees) out of the fund disposed of by the will, and at the same time to share in the undisposed-of residue, without being put to their election. *Blaiklock* v. *Grindle*, 17 W. R. 114.

4. A testator gave his real estate and the residue of the personalty to sell and convert and pay certain annuities, and after the decease of his wife 5,000*l.* to such persons, etc., as she should by will appoint. The widow by her will, reciting the power, gave 5,000*l.* in her husband's will mentioned to his trustees, to call in and invest the same, and stand possessed of the dividends and interest as to one moiety during the life of her niece, A., for her separate use, and after her decease (subject to the power of her appointing any part of such moneys not exceeding 1,000*l.*) on like trusts for her niece S., and as to the other moiety, on the same terms as were used with respect to the first moiety to her niece S., and she gave her nieces power to appoint by will any part of the said trust moneys (not exceeding 1,000*l.*), and after the decease of the survivor, that the trustees should stand possessed of the trust moneys (subject to the payment of the respective sums not exceeding 1,000*l.* each) for C. D. and S. D. The estate was deficient, and 2,148*l.* 19*s.* only was apportioned in respect of the 5,000*l.* A. by her will gave 1,000*l.* to S., and the representative of C. D. and S. D. contended that there must be an abatement in respect of the 1,000*l.*:—Held, that there must be such abatement. *Miller* v. *Huddlestone*, 18 L. T., N. S., 203; 37 L. J., Ch., 421; 6 L. R., Eq., 65.

5. The equitable doctrine of cumulative gifts does not apply to appointments under powers. *England* v. *Lavers*, 15 W. R. 51; 3 L. R., Eq., 63.

6. When an appointment is made to take effect out of a trust fund generally, and afterwards an appointment is made of a specific portion of the trust fund, the portion of the fund not specifically appointed must be first applied in satisfaction of the first appointment; and the specifically-appointed portion is only to be resorted to in the event of a deficiency. *Morgan* v. *Gronow*, 42 L. J., Ch., 410; 16 L. R., Eq., 1; 28 L. T., N. S., 434.

7. An appointor by deed appointed specified shares of a trust fund of consols, "or other the stocks, funds, and securities of which the same should then consist, or thereafter should or might consist, or upon which the same, or any part or parts thereof, should then, or thereafter should or might be invested," to appointees, named, and the residue to C. At the date of the execution of the deed the appointor was aware that the fund had diminished in value, through re-investment, and at the time of his death it proved insufficient to satisfy the specific appointments irrespective of the residue:—Held, that it must be distributed ratably amongst the appointees, exclusive of C. *De Lisle* v. *Hodges*, 30 L. T., N. S., 158; 43 L. J., Ch., 385; 22 W. R. 363.

8. A father having power to appoint 10,000*l.* among his children, and having exercised the power by appointing 3,000*l.* to one child, appointed by will 10,000*l.* among all his children nominatim, being 3,000*l.* in excess of the power. One of the children, to whom 4,000*l.* was thus appointed, having died in the testator's lifetime, so that his appointed share lapsed:—Held, that the deficiency of the other shares should be made up out of the lapsed share. *Eales* v. *Drake*, 45 L. J., Ch., 51; 1 L. R., Ch. D., 217; 24 W. R. 184.

1. The donee of a special power to appoint (subject to a life interest) 3,000*l.* raisable out of the proceeds of two policies and of real property, made three appointments by successive deeds of 1,000*l.*, described as part of the 3,000*l.*, in favour of three objects of the power. The property available eventually, owing to the insolvency of the insurance office, fell short of 3,000*l.*:—Held, that the appointees took according to priority of appointment, and not ratable portions of the fund. *Stokes* v. *Bridgman*, 47 L. J., Ch., 759.

Held, also, that the sums appointed were not to be answered ratably by the different properties from which the sum of 3,000*l.* was raisable, but that each 1,000*l.* in its entirety was charged upon the aggregate fund. *Ib.*

2. By a marriage settlement a special power of appointment, by deed or will, was given over a sum of 10,000*l.*, which was invested on certain mortgage security. The donee of the power made successive revocable appointments, by deed, of sums of 3,000*l.*, 1,200*l.*, 1,000*l.*, and 1,000*l.* (respectively described as part of the 10,000*l.*), in favour of three objects of the power. He confirmed these appointments by his will, and appointed the residue of the fund among objects of the power. The mortgage security was bad, and the fund became insufficient to satisfy the sums appointed:—Held, that the appointments took effect in order of date, and that the appointees did not take ratable portions of the fund. *Gilbert* v. *Whitfield*, 52 L. J., Ch., 210; 48 L. T. 383.

III. SHARES IN UNAPPOINTED RESIDUE AND HOTCHPOT.

3. A testator having by his will charged 6,000*l.* on his real estate, directed the same to be paid to and among such of his younger children, in such shares and proportions, as his wife should appoint, and the wife having by her will directed the inheritor "three of the 6,000*l.* I wish to have given to the two elder girls":—Held, that this was a good appointment of the 3,000*l.*, and that the appointees took as tenants in common and not as joint tenants; and as to the remaining 3,000*l.*:—Held, that it was to go and be divided amongst all the objects of the power equally, including those to whom an appointment of the other 3,000*l.* had been made; and that they were not bound to bring their shares into hotchpot, when there is no express clause in the instrument creating the power so requiring, which direction should, therefore, be always inserted in order to prevent such accumulation. *Alloway* v. *Alloway*, 2 Con. & L. 517; 4 Dr. & War. 380.

There is nothing better established than that any portion of a fund, the subject of a power which is not appointed, goes as it would have gone in default of any appointment. *Ib.*

4. On marriage 4,000*l.* was settled in trust after the decease of the husband and wife, to pay among all and every the child and children, other than an eldest or only son, at such time and in such proportion as he or she or the survivor should appoint by deed or will; for want of appointment, among such child or children other than, etc., equally to be divided; if but one, to that one, payable at twenty-one or marriage, or as soon after as the life interest should drop; the shares in the 4,000*l.* of any dying before, payable, or so much as should not be appointed to go to the survivors at the same time. There were four children; the marriage settlement of one recited that she was entitled to 1,000*l.*, part of this fund; one-fourth of it was appointed to another on this marriage; and to a third, 1,000*l.* as her share of that portion; the fourth died above twenty-one, before his father, who survived his wife, and died without any further appointment:—Held, that 3,000*l.* was well appointed, and that the remainder vested in all equally, according to the direction for want of appointment. *Wilson* v. *Piggott*, 2 Ves. J. 351.

5. Parties having a power of appointment of certain funds amongst children, and no power of appointment over other funds, to which the same children were entitled in equal shares, executed several instruments, by mistake assuming to appoint both funds:—Held, that notwithstanding the mistake, all the appointments were valid and operative, as to the funds expressed in them that were subject to the power; but that the effect of the hotchpot clauses contained in the instruments of appointment was to exclude the appointees respectively from the whole of the benefits thereby intended to be given to them, unless they gave up the whole of the shares to which they were respectively entitled in the fund not subject to the power. *Warde* v. *Firmin*, 11 Sim. 235; 10 L. J., N. S., Ch., 43; 5 Jur. 288.

6. Where two funds were settled on tenant for life, with remainder to his children, as to one fund as he should appoint, and as to the other in equal shares, and the appointment did not refer exclusively to the former fund:—Held, that the appointee was entitled to his share of the other fund, and to have the sum mentioned in the appointment made up to him out of the former fund. *Sheffield* v. *Von Donop*, 7 Hare 42; 17 L. J., N. S., Ch., 481; 12 Jur. 672.

7. A father executed a power of appointment under which his four younger children, B., C., D., and E., became entitled, subject to his life interest, to 30,000*l.* in equal shares. The father afterwards, by several instruments of appointment, affected to appoint the whole fund to B., C., and D., in the following shares, viz., to B. 13,000*l.*, to C. 5,000*l.*, and to D. 12,000*l.* E., who was a son, died in his father's lifetime intestate and without issue; whereupon his share devolved to the father. After E.'s decease, the father, with a view to support the subsequent appointment, executed a deed-poll, declaring that the original appointment, under which the children took equally, was made by mistake:—Held, that though the subsequent appointments were invalid, so far as related to the shares of B., C., and D., yet, as regarded the share of E., the father was bound by the statement in the deed-poll; and that E.'s share, amounting to 7,500*l.*, must be apportioned between B., C., and D., in satisfaction *pro tanto* of the losses which, through the invalidity of the subsequent appointments, had been sustained by their respective shares. *Armytage* v. *Armytage*, 1 Y. & Coll. C. C. 461; 6 Jur. 790.

8. Power of appointment among three persons, executed by a transfer of one-third to one

under an order on petition, stating that the person having the power was desirous that the fund might be equally divided; that person dying without any farther execution, the Court gave the two remaining thirds respectively to another of the objects, and to the administratrix of the third, who was dead, but had survived the person having the power. *Fortescue* v. *Gregor*, 5 Ves. 553.

1. A testator gave a fund to four persons, or any of them, in such shares, etc., as A. B. should appoint, and in default equally. He directed that such four persons should bring into hotchpot the amount of advances he might make to any of them in his life:—Held, that the hotchpot clause operated only on the unappointed fund, if any. *Brooklehurst* v. *Flint*, 16 Beav. 100.

2. A sum of consols was settled (subject to life estates) for the benefit of the children of A. and B. as they should appoint, and in default for the children equally. There were two children. A. by will gave one child H. an annuity for life, declaring that if no appointment should be made of the sum of consols, or if any appointment should be made of the sum of consols, or if any appointment should be made thereof whereby H. should be benefited, then the bequest of the annuity should be void. Afterwards A. and B. joined in appointing to the other child a moiety of the sum of consols. No other appointment was ever made:—Held, that H. did not lose the annuity. *Arnott* v. *Tyrrell*, 21 Beav. 49.

3. Power was reserved under a settlement for husband and wife jointly to appoint a fund amongst the children of the marriage, and in default upon trust to assign the capital and interest, or so much as there should be no joint appointment of, unto the children of the marriage, in equal proportions, but no child taking under any appointment made in exercise of the power was to be entitled to any share of the unappointed part of the fund without bringing his appointed share into hotchpot. The husband and wife executed an appointment directing the trustees to stand possessed of the fund, and the interest which should accrue after their death, "upon the trusts following (that is to say), to appropriate one-fifth of the capital for the benefit of each of the five daughters exclusive of all other the children of the marriage," for their separate use, the share of each daughter dying unto her children or their issue; in case of failure of issue the daughter's share to go to her sisters, but in case all the daughters should die without issue then to divide the capital equally between the sons of the marriage:—Held, that the daughters each took for life one-fifth of the appointed fund, and that the residue of the fund went as in default of appointment. *Rucker* v. *Scholefield*, 11 W. R. 137; 32 L. J., Ch., 46; 9 Jur., N. S., 67; 1 Hem. & M. 36; 1 N. R. 48.

The settlement giving the power contained the usual hotchpot clause:—Held, that the life interest given by the appointment must be valued and brought into hotchpot. *Ib.*

4. D. by his will directed his trustees to raise such sum of money for the younger children of T., not exceeding 8,000*l.*, as T. should appoint; and in default of such appointment, the sum of 8,000*l.* T., being about to marry, irrevocably appointed that 6000*l.* should be raised for the younger children of his then intended marriage; and if he should survive his wife and not have any issue by a future marriage, then 2,000*l.* more to the same children, reserving the power of appointing the same among them. He afterwards appointed to one of these younger children 2,000*l.*, describing it as part of the sum of 8,000*l.* made raisable by the will. He subsequently died in the lifetime of his wife:—Held, that T. having given no direction that no more than 6,000*l.* should be raised, the whole 8,000*l.* must be raised; and that the appointee of the 2,000*l.* was entitled to share in the unappointed 6,000*l.* *Walmsley* v. *Vaughan*, 5 W. R. 549; 26 L. J., Ch., 503; 3 Jur., N. S., 497; 1 De G. & J. 114. Varying 5 W. R. 12; 2 Jur., N. S., 1117; 3 Sm. & Giff. 353.

5. An appointment to one of a class of a part of a fund as "her part, share, and proportion," does not prevent her participating in the unappointed fund, limited to the class equally in default of appointment. *Wombwell* v. *Hanrott*, 14 Beav. 143; 20 L. J., N. S., Ch., 581.

6. Under a marriage settlement, the husband and wife had a power of appointing a fund among their children, and in default of appointment, or so far as it did not extend, the fund was to go to the children equally. There were three children of the marriage. An appointment of one-third of the fund was made in favour of one of the children, yet so as not to affect the same power further than to the extent specified, and also, in case of no complete exercise or execution of the same power or authority as to the share of the fund not affected by the appointment, so as not to prejudice or affect the right or contingent interests of the appointee under the proviso for accruer, in case of the death of any or either of the other children, in such manner as specified in the settlement, and notwithstanding that in case of no complete appointment the then "appointment was intended to be made in lieu of all claims and demands" of the appointee to or for any original or principal share of the fund:—Held, that the appointees must be taken by necessary implication to have appointed the other two-thirds to their two other children, and that the appointee was not entitled to share in such two-thirds. *Foster* v. *Cautley*, 6 De G. M. & G. 55; 2 Jur., N. S., 25. Reversing 1 Jur., N. S., 202; 24 L. J., Ch., 252; 3 Sm. & G. 96; 3 W. R. 279. See also *Clunc* v. *Apjohn*, 17 Ir. Ch. R. 25; *Armstrong* v. *Lynn*, 9 Ir. Eq. R. 186.

7. On the marriage of M. and his wife two deeds were executed, one conveying English estates, the other Irish; in the former a term was created to raise 40,000*l.* portions; in the latter a term to raise 25,000*l.*; in each, after powers of appointment, was a hotchpot clause, declaring that "in default of any appointment to the contrary," no child should take any unappointed part without bringing his appointed share into hotchpot, and the Irish deed referred to the English. Two appointments were made of parts of the 40,000*l.*, and there was a direction in the deeds of appointment that the appointment should not prejudice the appointee's rights in the unappointed part:—Held, that he was not obliged to bring anything into hotchpot, but was entitled to

his share in the 25,000*l.* and in the residue of the 40,000*l.*, as if he had taken nothing by appointment. *Wellesley (Lady)* v. *Mornington (Lord)*, 1 Jur., N. S., 1202; 2 Kay & J. 143.

1. K. by his will gave a fund upon trust for such of the children of his daughter M. (who was then married) as she should by will appoint, and, in default of appointment, for her children equally. The will contained no hotchpot clause. M. had several children, some of whom were illegitimate, having been born before her marriage. By her will she appointed the fund to her "children E. and C., their executors, administrators, and assigns, for their own use and benefit." E. was one of the illegitimate, and C. one of the legitimate children:—Held, reading M.'s testamentary appointment as indicating an intention to appoint the fund in moieties, that one moiety passed to C. under the appointment, and that the other moiety, E. not being an object of the power, was divisible among all the legitimate children, as in default of appointment. *Re Kerr*, 4 L. R., Ch. D., 600; 46 L. J., Ch., 287; 36 L. T. 356; 25 W. R. 390.

Children born subsequent to Appointment.] 2. A lady having a power to appoint among her issue living at the date of the appointment, by deed appointed to the children of her daughter in equal shares on their attaining twenty-one. The daughter had three children at that date, and three born afterwards:—Held, that each of the children living at the date of appointment would, on attaining twenty-one, take one-sixth of the property plus an accruing share of the sixth appointed or purported to be appointed to any other child who might die under twenty-one. *Re Farncombe*, 9 L. R., Ch. D., 652; 47 L. J., Ch., 328.

3. By a settlement, lands were conveyed to trustees upon trust, either in the lifetime of M., with his consent in writing, or else not till after his decease, to raise 12,000*l.*, and pay the same unto and between the two daughters of M. as he should by deed, attested by two witnesses, appoint, and in default of appointment, to the two daughters equally, to be vested interests in them at twenty-one or marriage, and to be paid at such age or time if the same should happen after the decease of M., but if the same should happen in his lifetime, then immediately after his decease, "unless he should signify his consent in writing under his hand and seal that the said respective shares should be raised and paid in his lifetime." M., by deed attested by two witnesses, reciting the power, and that he was desirous of making some immediate as well as future provision for his daughter E., appointed that the trustees should raise two sums of 5,000*l.* and 1,000*l.*—the 5,000*l.* immediately, and the 1,000*l.* immediately after his decease—and pay the same to the said E., "to the intent that the payment of the portion or portions of the said E. under the said settlement may as to the said sum of 5,000*l.* be accelerated and take effect according to the true intent and meaning of these presents, anything in the said settlement to the contrary thereof notwithstanding." M. died without making any further appointment:—Held, that E. was entitled to one moiety of the unappointed part of the 12,000*l.*, in addition to the sums so appointed to her. *Re Alfreton's Trust Estates*, 52 L. J., Ch., 745; 31 W. R. 702.

4. Where by a settlement of 1827, containing no hotchpot clause, a fund was settled (after the usual life interest) on the children of the marriage as their mother, J., should appoint, and in default of appointment, equally, and J., by a deed of 1855, after reciting a desire to appoint to her daughter H. 2,000*l.*, part of the fund, "as and for her full share and proportion thereof," accordingly appointed to her the sum of 2,000*l.*, part of, and as and for, her full share or proportion of and in the fund—the appointment being made by indenture, which was also executed by H.:—Held, that H. was not precluded from claiming her distributive share in the ultimately unappointed residue of the fund. *Close* v. *Coote*, 7 L. R., Ir., 564.

Effect of Lapse.] See VI. *ante.*

IV. PAYMENT POSTPONED. INTERIM INCOME.

5. Bequest, after the death of A., of 2,500*l.* as A. should appoint, with a gift over "of the same" in default, and to be paid with interest from A.'s death; A. appointed a part to B., and 1,630*l.* to other persons, and directed the said sums to be paid at the decease of B., except the one left to himself, which was to be payable at A.'s decease:—Held, that the interest on the 1,630*l.*, accruing between the debts of A. and B., neither passed to the appointees of that sum, nor to B. by implication, but went over, as in default of appointment. *Henderson* v. *Constable*, 5 Beav. 297; 11 L. J., N. S., Ch., 332.

6. Real estate was settled for (*inter alia*) a term of 1,000 years for raising a capital sum, with interest from A.'s death, for A.'s younger children, as he should appoint; in default, equally. A. by will appointed the capital sum unequally between his two younger children after the death of his mother and himself. His mother survived him:—Held, that the interest accruing in the interval between A.'s death and his mother's was not divisible in proportion to the shares of the children in the capital, but was unappointed and therefore divisible equally. *Watts* v. *Shrimpton*, 21 Beav. 97.

7. Where a testator, having a power of appointment over personalty, appoints a share of the fund to an object of the power upon the happening of a certain event, the appointment carries with it all the intermediate accretions to that share, whether in the shape of income or otherwise. Under a settlement made on the second marriage of M., a widow, a trust fund belonging to her was vested in a trustee upon trust for her three children, nominatim, in such shares as she should by deed or will appoint, and in default of appointment, for such three children equally. By her will M. appointed that the trustee of the settlement should stand possessed of the trust fund, as to one-third part thereof, upon trust to pay the income thereof to her son C. (an object of the power) during his life, or until anticipation; and from and after his death or the determination of his estate, upon

trust to pay the said one-third part to her grandson (not an object of the power) when he should attain twenty-one; and in case he should die before he should attain twenty-one, upon trust to pay the said one-third part to her daughter S. (an object of the power). C. survived the testatrix and died, the grandson being then an infant:—Held, that, although the appointment to the grandson was void, the appointment over to S. was good, and that the income from C.'s death of the one-third so appointed would pass with the capital to S., if the grandson died under twenty-one; but that, if that event did not happen, both income and capital would pass under the settlement as in default of appointment. *Long* v. *Ovenden*, 16 L. R., Ch. D., 691; 50 L. J., Ch., 314; 44 L. T. 462; 29 W. R. 709.

XIII. Defective or Non-execution.

I. *Aiding Defective Execution*, 5801.
II. *Non-Execution*, 5805.
III. *Rectifying Execution*, 5806.
IV. *Informal Instruments Generally*. See X., *ante*.

I. AIDING DEFECTIVE EXECUTION.

1. *In General*, 5801.
2. *In Favour of Charity*, 5802.
3. *In Favour of Creditors*, 5802.
4. *In Favour of Husband, Wife, or Child*, 5803.
5. *In Favour of Purchaser*, 5803.

1. In General.

1. A court of equity relieves against a defective execution of a power, only when the defect consists in the want of some circumstances in the manner of execution; and it will reform a deed where the intention of the parties is mistaken by the drawer, but will not correct an error in an instrument occasioned by the ignorance of the parties in matter of law. *Cockerell* v. *Cholmeley*, 1 Russ. & M. 418.

A plaintiff ought never to come into a court of equity to have an alleged defect in the execution of a power supplied, without admitting, on the record, that at law the power has not been well executed. S. C. 3 Russ. 565; Taml. 435. Affirmed 1 Cl. & F. 60; 6 Bli. N. S. 120.

2. Equity aids a defective execution of a power, if for a valuable consideration, and this against a remainderman, or one not claiming under the power. *Cotter* v. *Layer*, 2 P. W. 623.

Where there is a power to declare a use by writing attested by three witnesses, and such use is declared by a writing only attested by two, if for a valuable consideration, equity will help it. *Ib.*

3. Defective execution of power aided. *Gooding* v. *Gooding*, 1 Eq. Abr. 342.

4. Where testator refers to a power, but does not legally execute it, but has other estates to which the will can apply, the defect of the execution cannot be supplied, though, where he could not make the gift but by virtue of the power, he shall be supposed to have intended to execute it, and therefore the defect shall be supplied. *Lowson* v. *Lowson*, 3 Bro. C. C. 272.

5. Power over land by deed or will "duly" executed, requires three witnesses; but where will is to operate by way of appointment, taking no effect from the statute, such defect may be cured in equity. *Wilkes* v. *Holmes*, 9 Mod. 485.

6. Lands were settled to such uses as A. and B. should, by a joint deed executed in the presence of witnesses, appoint, and in default of appointment to uses in strict settlement, A. and B. being the first tenants for life in succession. In 1845 the S. W. Railway Company contracted with A. and B. for the sale of land, but the price was not named. In 1846 the company advanced part of the consideration money to them upon their joint receipt, in which it was stated that the money was "in respect of the lands, part of our estate required for the uses of the S. W. Railway Company." Before any formal exercise of the joint power by A. and B., A. died:—Held, that the receipt was not such a defective execution of the power as would be aided in equity. *Morgan* v. *Milman*, 16 Jur. 755. Affirmed 1 W. R. 134; 3 De G. M. & G. 24; 17 Jur. 193; 22 L. J., Ch., 897.

7. The mere fact that a party, having a power by deed to revoke and make a new appointment of trust funds, has attempted to make such revocation and new appointment by will, owing to her having forgotten the restrictions of the power, and being at the time unable to procure the deeds, is not a ground upon which equity will supply the formal execution required by the terms of the power, or give to the will the effect of a deed, or convert the trustees of the property into trustees for the persons who would be appointees, if the will were a good execution of the power. *Buckell* v. *Blenkhorn*, 5 Hare 131.

8. It is the duty of the Court to support a power, if possible, and to give effect to its execution, if it is not exercised from improper motives or for improper objects. *Carver* v. *Richards*, 6 Jur., N. S., 410; 29 L. J., Ch., 357; 8 W. R. 349; 2 L. T., N. S., 161.

Where, therefore, a donee of an exclusive power made several successive appointments, reserving powers of revocation and new appointment, and by the last appointment showed an intention to pass the property subject to the power, though she did not thereby expressly state such appointment to be in exercise of the power, and although it was contended that the appointment rested on a vicious deed, the consequence of a vicious bargain, the Court (affirming 27 Beav. 488; 29 L. J., Ch., 169; 1 L. T., N. S., 257) carried out the intention, and declared such appointment to be a valid execution of the power. *Ib.*

9. A testator gave an estate upon trust for sale, with power of pre-emption to his younger children, and the proceeds were to be held upon such trusts as his widow, by deed, or instrument sealed and delivered before the youngest child attained the age of twenty-five years, should appoint, and in default for his children, except the eldest son, equally The

testator's widow, by deed-poll executed within the prescribed period, appointed the proceeds of the estate among all the children equally; but reserved a power of revocation. By her will, which was also executed before the youngest child attained twenty-five, but came into operation by her death after the prescribed period, she appointed the estate by name to the eldest son:—Held, that the will, having come into operation after the prescribed period, could not take effect as a new appointment under the power; and that this was not such a defective execution as would be relieved against in equity. *Cooper* v. *Martin*, 3 L. R., Ch., 47; 16 W. R. 234; 17 L. T., N. S., 587.

1. A testatrix bequeathed 5,000*l.* upon trusts for her nephew for life, and then for his wife for life. She then gave to her nephew a power of appointment by will over the 5,000*l.* amongst his children; and in default of appointment, or subject to any such as should not be a complete and entire disposition of the whole sum, she gave the same to all her nephew's children absolutely, to become vested at twenty-one or marriage. The nephew had five children, one of whom, a son, after attaining twenty-one, died unmarried and intestate. Afterwards a daughter, who had also attained twenty-one, married, and on this occasion the father covenanted that he would, in exercise of the power, appoint by will to the trustees of her settlement one-fifth of the 5,000*l.* The daughter also assigned to the trustees all that her fifth part or share in default of any testamentary appointment of and in the 5,000*l.* The father died without having exercised the power in any way. Upon the death of the widow, the trustees of the settlement claimed not only the 1,000*l.*, but also one-fifth of the remaining 4,000*l.*, as being a part of the fund which was not completely and entirely disposed of by the covenant of the appointor:—Held, that the covenant, though not actually performed, had been substantially satisfied; and that they were entitled to no more than 1,000*l* *Thacker* v. *Key*, 8 L. R., Eq., 408.

2. A lady, having power to appoint a fund by deed to be sealed and delivered and attested by one witness, in January 1870, signed an unattested memorandum, stating her wish that if she died suddenly her eldest son should have the fund, and that her intention was to make it over to him legally if her life was spared. She died in March 1870, after two days' illness:—Held, that her intention to appoint the property by this memorandum was sufficiently clear, and that the Court would give effect to the memorandum as an execution of the power. *Kennard* v. *Kennard*, 42 L. J., Ch., 280; 8 L. R., Ch., 227; 21 W. R. 206; 28 L. T., N. S., 83.

3. A. having in the events that happened power to appoint funds amongst her children by deed, or by her last will in writing, or any writing purporting to be or being in the nature of her last will, or any codicil thereto, to be signed and published in the presence of, and to be attested by, two credible witnesses, died intestate; but left in an envelope, addressed to her son, an unattested memorandum (signed by herself, and dated eight years before her death), "for my son and daughters. Not having made a will, I leave this memorandum, and hope my children will be guided by it, though it is not a legal document. The (funds) I wish divided as follows:"—(amongst her children, followed by bequests out of another fund, and a gift of the residue, and concluding), "this paper contains my last wishes and blessings upon my dear children, and thanks for their love to me":—Held, that this memorandum showed no intention to execute the power, and, consequently, that the Court could not remedy any defects in the execution so as to give validity to it as an appointment. *Garth* v. *Townsend*, 7 L. R., Eq., 220.

See also X. *ante*.

2. In Favour of Charity.

4. A power well exercised in other respects will, in favour of charities, be deemed to be an effective execution of the power, although the form in which the power has been exercised has not conformed to the requisitions imposed by the instrument creating or giving the power. *Innes* v. *Sayer*, 3 Macn. & G. 606; 21 L. J., N. S., Ch., 274; 16 Jur. 21. Affirming 7 Hare 377; 18 L. J., N. S., Ch., 274; 13 Jur. 402.

5. An appointment by a tenant in tail to a charity shall bind the reversioner; statute of charitable uses applies to all defects of assurance which the donor was capable of making. *Att.-Gen.* v. *Burdet*, 2 Vern. 755.

3. In Favour of Creditors.

6. Equity will supply a defective execution of a power in favour of creditors. *Hervey* v. *Hervey*, 1 Atk. 563.

7. Distinction between a power and absolute property. A power, unless executed, not assets for debts. *Holmes* v. *Coghill*, 12 Ves. 206.

8. A bond was vested in a trustee in trust, as to income, for a married woman, for her life, for her separate use, with remainder; as to the corpus, in trust for her issue, and, in default of issue, in trust for such persons as the married woman alone, notwithstanding coverture, should, by deed or instrument in writing, to be by her sealed and delivered in the presence of, and to be attested by, two credible witnesses, appoint. The husband being indebted to his bankers on the balance of an account current, the married woman deposited the bond with the bankers, with a letter signed by her, to the effect that in consideration of the bankers paying, or having already paid, the cheques of the husband, or otherwise advancing him sums of money, she thereby guaranteed the repayment thereof; and that she deposited, as a collateral security, the bond, which she undertook to assign to the bankers on request:—Held, that the consideration was sufficient, and that the separate life-interest of the wife was effectually charged; but that, the letter not having been executed and attested as required by the power, the Court would not, under the circumstances, give effect to it as an appointment. *Thackwell* v. *Gardiner*, 5 De G. & Sm. 58; 21 L. J., N. S., Ch., 777; 16 Jur. 588.

9. An original power is extinguished by a reservation of a power of revocation and new

appointment. The Court will not aid a defective execution, but distinguishes between the cases of creditors and legatees. *Evans* v. *Saunders*, *Evans* v. *Evans*, 1 W. R. 529; 1 Drew. 415; 22 L. J., Ch., 471; 17 Jur. 338.

4. In Favour of Husband, Wife, or Child.

1. A husband having a power to make a jointure on his wife by deeds made it by will; she having no other provision, equity will make this good. *Tollet* v. *Tollet*, 2 P. W. 489; *Sergeson* v. *Sealey*, 2 Atk. 415; *Sneed* v. *Sneed*, Ambl. 64; *Darlington* v. *Pulteney*, Cowp. 266; *Wade* v. *Paget*, 1 Bro. C. C. 633; *M'Adam* v. *Logan*, 3 Bro. C. C. 310.

2. Defective execution of power by wife not supplied in favour of husband. *Moodie* v. *Reid*, 1 Madd. 516.

3. Defect in a legal conveyance not supplied in favour of a natural child. *Blake* v. *Blake*, Beat. 575.

4. Defective execution of a power refused to be supplied in favour of a natural son against persons claiming under a subsequent valid execution of it. *Bramhall* v. *Hall*, 2 Eden. 220; Ambl. 467.

5. The defective execution of a power aided in favour of an eldest against younger children, also provided for; probate held not to be conclusive proof that instruments, so far as they affect real estates, are of a testamentary character. *Hume* v. *Rundell*, 6 Madd. 331.

6. Defective appointment, by unattested will, to children absolutely, supplied in their favour, though the fund on default of appointment was given to them in equal shares for life, with remainder to their issue, the shares of the daughters to be for their separate use. *Lucena* v. *Lucena*, 5 Beav. 249.

7. A father, under a power to appoint to his children, appointed a share to a daughter for life, for her separate use, with remainder as she should by will appoint:—Held, that this was a good execution of the power. The Court aided the defective execution of a power in favour of a daughter, as against her brothers, who, in default of appointment, would participate in the property. *Morse* v. *Martin*, 34 Beav. 500.

8. A., having a power of charging portions upon a property and an ultimate reversion in the same property, exercised the power. The power from subsequent events became inoperative:—Held, that the Court would execute A.'s intention to create portions, and would therefore hold that a disposal of the reversion had been effected. *Sing* v. *Leslie*, 4 N. R. 17; 2 Hem. & M. 68; 10 Jur., N. S., 794; 11 L. T., N. S., 232; 33 L. J., Ch., 332.

9. A will made by a donee of a special power to appoint by deed, though it shows that the donee supposed the power to have been extinguished, and purports to be an execution of an invalid power, and of all other powers enabling in that behalf, and though it appoints to persons, some of whom are strangers to the power, is a defective execution which equity will aid in favour of a child otherwise provided for, and to the prejudice of other children entitled in default of appointment. *Bruce* v. *Bruce*, 40 L. J., Ch., 141; 11 L. R., Eq., 371; 24 L. T., N. S., 212.

10. Equity will supply the defective execution of a power, as well in the case of younger children and a provision for a wife, as in favour of purchasers or creditors; and where such provisions are intended, their being voluntary is no impediment. It has been said, that a wife or child applying for aid in the defective execution of a power, must be wholly unprovided for; but that is not the right rule, for, by the invariable and proper rule, the Court considers a husband or father the most competent judge of what is a reasonable provision; yet, where a wife has not the provision stipulated for her by her jointure, she shall be considered as wholly unprovided for, and, according to the rules of equity, shall be aided in carrying a defective provision into execution. *Hervey* v. *Hervey*, 1 Atk. 563; 9 Mod. 225.

5. In Favour of Purchaser.

11. Defective execution of power decreed in favour of valuable consideration. *Wilkie* v. *Holme*, Dick 165.

12. Equity aids a defective execution of a power, if for a valuable consideration, and this against a remainderman, or one not claiming under the power. *Cotter* v. *Layer*, 2 P. W. 623.

13. A wife, in the event of her surviving her husband, and not having younger children, had a power to dispose of 4,000*l.* by deed or will, executed in the presence of three witnesses; and this sum was a charge on the real estate of the husband. Before her second marriage, she, by articles executed in the presence of two witnesses only, appointed 2,000*l.* out of the 4,000*l.* to be for the use of her intended husband, and the remaining 2,000*l.* she disposed of by will, but did not execute it in the presence of three witnesses:—Held, that the articles were a good appointment of the 2,000*l.* for the benefit of her second husband; for, though the appointment was inaccurately and informally expressed, yet, being executed for a valuable consideration, equity will supply the defect; but the will, under which the 2,000*l.* was given, being a voluntary disposition, and not pursuing the power, was held a void appointment, and the 2,000*l.* shall sink into the real estate. *Sergeson* v. *Sealey*, 2 Atk. 414; 9 Mod. 370.

14. Power of appointment over a sum of money to be raised under a trust term executed in favour of volunteers, is assets for creditors; but the equity of purchaser from a party taking under a voluntary deed of appointment, was preferred to that suit, creditors having no specific charge. *George* v. *Milbanke*, 9 Ves. 190.

15. Whether, in case of a lease made by tenant for life having leasing power, the lessee at best rent, without fine, is so far a purchaser as to be entitled in equity to relief, as against the remainderman, from a defect in the execution of a power under which the lease was intended to have been made, *quære*. *Donnell* v. *Church*, 4 Ir. Eq. R. 630.

Semble, it is questionable whether the rule laid down in the text books, that equity will aid a defective execution of a power only in behalf of purchasers for valuable consideration, or a child, is a sound one. *Ib.*

donee should think fit, may be exercised by an exclusive appointment to one child, such one child also being the only survivor of the objects of the power. *Woodcock* v. *Renneck*, 1 Ph. 72; 11 L. J., N. S., Ch., 110; 6 Jur. 138. Affirming 4 Beav. 190.

1. A., having been indebted to the estate of B. in a sum of money, but from which he had been discharged under a commission of bankruptcy, voluntarily executed to C., the widow of B., a bond for the payment of part of such debt, for the use of herself and children, but at her disposal. Two years afterwards, A. executed to C. another bond for the payment of the remainder of such debt, for the use and benefit of herself and children only, in what proportions among the latter she may think proper to direct, but for no other use, purpose, or intent whatsoever:—Held, that the widow took a life interest in the money secured by the bonds, and that the principal, after her decease, became payable among the children, in such manner, and in such proportions, as she should direct; and the widow having made no exclusive appointment in favour of two of her children, it was held that such appointment was void, and that all the children took as tenants in common. Though, generally speaking, an instrument must be construed by the provisions contained in it, and not by anything *dehors*, yet, under the circumstances of this case:—Held, that the Court might call the language of the second bond into aid in construing the effect of the first. Where there is a general power of appointment among children, and the appointment from any circumstances becomes void, the children take as tenants in common. *Fowler* v. *Hunter*, 3 Y. & J. 506.

2. Where by the marriage settlement the husband and wife, or the survivor, in the event of there being two or more younger children, were to appoint the fund amongst them by deed, in such shares as they should think fit, and in default of appointment to be distributed equally:—Held, that the power was not an exclusive one, and that each of the younger children was entitled to participate; and sums having been raised and appointed to three of the children, and the residue appointed to a fourth, to the exclusion of three other of the younger children, the three first appointments were good, and the last void. *Young* v. *Waterpark* (*Lord*), 13 Sim. 202; 11 L. J., N. S., Ch., 367; 6 Jur. 656.

3. By marriage settlement of 1773, certain estates were limited to the sons of A., in such shares as he should appoint by will, and in default of appointment, to them in fee as tenants in common. A. having three sons, B., C., and D., by his will appointed all the lands to B. for life, remainder to his first and other sons in tail, remainder to C. for life, with limitations to his issue; and gave other valuable properties to his sons C. and D., and made D. his residuary devisee:—Held, that the power of appointment was badly executed. *Beere* v. *Prendergast*, Hay. & J. 384.

4. A testator by his will having charged 6,000*l.* on his estates, and directed same to be paid to and among such of his younger children, in such shares and proportions, as his wife should appoint, and the wife having by her will directed the inheritor as follows: "three of the 6,000*l.* I wish to have given to the two elder girls":—Held, that this was a good appointment of 3,000*l.*, and that the appointees took as tenants in common and not as joint tenants. *Alloway* v. *Alloway*, 2 Con. & L. 509; 4 Dr. &. War. 380.

5. On the settlement of the family estates upon Sir J. B. Piers attaining his majority, a power was given to each person to whom, under the settlement, a life estate was limited when in possession, to charge, as portions for all younger children, a sum not exceeding the sum of 4,000*l.* In the year 1798, Sir J. B. P. became seised of the life estate under this settlement, and in the year 1815, he married A. K. in the Isle of Man, by whom he had issue only two children, the plaintiffs. Sir J. B. P. being so entitled, and also being in debt on bond, filed his bill in the Court of Chancery, in the year 1828, to restrain his creditors from proceeding at law, alleging usury, and offering to pay whatever, on taking an account, should be found to be due on the bonds. In 1832 a decree was pronounced, referring it to the Master to take the necessary accounts. In 1833 a consent was entered into in this and several other causes, in which Sir J. B. P. was a party, by which, among other things, it was agreed that a sum of 4,207*l.* should be the sum to be found by the Master as due on foot of the bonds for principal and interest, up to the 11th December, 1833. This consent having been embodied in the Master's report, a decree was pronounced in the year 1834, declaring that the said sum of 4,207*l.* was due on foot of the securities, that the same was well charged on the lands in the pleadings mentioned, and that the receiver appointed in the other causes should be extended to this. In the year 1836, Sir J. B. P. executed his power to charge for younger children, by appointing the entire sum of 4,000*l.* in equal moieties between the plaintiffs:—Held, that the power was not duly exercised, the entire 4,000*l.* having been given to the plaintiffs without reserving any part of it for any other children of Sir J. B. P. who might thereafter come *in esse*. *Piers* v. *Twite*, 1 Dr. & Wal. 279.

6. By a petition presented under the 11th section of the Court of Chancery Regulation Act, it appeared that a person entitled to the interest of a legacy of 3,000*l.* during her life, with a power to appoint the principal amongst her children, which power did not authorise an exclusive appointment, having three sons and a daughter, by deed in 1834 appointed that sum equally amongst her two younger sons and her daughter, and made a provision *aliunde* for the eldest son. Subsequently the daughter married, and the eldest son died in nonage. The petition stated that the donee of the power, having been advised that the appointment in 1834 was not a valid execution of the power by deed made in 1850, appointed 1,900*l.* to one of the surviving sons, 1,000*l.* to the other, and 50*l.* to the daughter, and left 50*l.* unappointed. The petition was presented by the two surviving sons, and prayed that the appointment of 1834 should be declared invalid, and that the appointment of 1850 should be declared valid. Counsel appeared at the hearing for the daughter, and supported the prayer of the petition. Her

husband, however, resisted the petition, and in his affidavit stated that his wife was, at the instigation of the donee, living separate from him, and that the donee had executed the later appointment in order to defeat the former appointment, on faith of which he alleged that he had married the daughter; and the affidavit also alleged that the donee of the power was in collusion with her sons for the purpose of obtaining the fund, or a large portion of it, in payment of her own debts. There was not any evidence entered into on either side. The Court refused to make the declaration prayed for, and dismissed the petition without prejudice and without costs. *Re O'Reilly*, 1 Ir. Ch. R. 497.

1. A father, having a power of appointment among all his children, by his will, purporting to make an appointment of the whole fund, excluded one child, and appointed a portion of the fund to grandchildren, who were not objects of the power:—Held, that the appointment was valid as far as it related to the portion of the fund appointed to the children. But having given other legacies by the will to the children in whose favour he had appointed:—Held, that they were bound to elect in favour of the grandchildren. *Exp. Bernard, Re Leigh's Trust*, 6 Ir. Ch. R. 133.

2. A. made his will, and gave personalty to B., a married woman, for life, and after her death as she should appoint, and, in default of appointment, to her husband; and if she should survive him, and make no appointment, then to her children. B. had three children, and by her will she appointed, after her husband's death, 2,000*l.* between two of her children, and 1,500*l.* to the other, and she appointed the residue to her three children by name, in such manner as her husband should appoint by will; he, by his will, appointed 500*l.* to one of the children, —*l.* to another, and the residue to the third:—Held, that the husband had no power to exclude either of the children; that his appointment was therefore bad; and that the appointment of the wife took effect in favour of the three children. *White* v. *Wilson*, 1 W. R. 47; 1 Drew. 298; 22 L. J., Ch., 62; 17 Jur. 15.

3. By a marriage settlement, executed in 1784, certain hereditaments were vested in trustees, in trust for the husband and wife successively for life; and on the death of the survivor, to pay the rents in maintenance of "all and every the child or children, until such child or children" should attain twenty-one, "and when and as such child or children respectively should attain twenty-one," upon trust to convey "unto such child or children" as the parents should appoint; and in default "to convey all the same premises unto and amongst such children equally;" and if but one such child, upon trust to convey to such only child, and his or her heirs for ever, with a gift over. By a deed executed in 1835, the surviving parent executed the appointment in favour of some only of the children:—Held, that the word "such" must be taken in the sense of "the said;" and that the power did not warrant an exclusive appointment in favour of some of the children. *Strutt* v. *Braithwaite*, 5 De G. & Sm. 369; 16 Jur. 882; 21 L. J., Ch., 609.

4. A power of appointment in a marriage settlement was to be exercised in favour of "all or every and any child or children":—Held, that those words conferred a right of appointing the whole fund to one or more, in exclusion of the others of such children. *Bland* v. *Plummer*, 9 L. T., N. S., 825.

5. By marriage settlement of 1791, freehold lands were conveyed to trustees, upon trust, to permit and suffer J. B., the intended husband, during his life, to hold and enjoy the same; and in case S. G., the intended wife, should survive him, to permit her to receive a certain annuity; and after the death of J. B., to permit and suffer the lands to be enjoyed for ever by the issue male of the marriage, in such shares and proprotions as J. B. should by deed or will appoint, and for want of issue male of the marriage attaining the age of twenty-one years, the lands were charged with portions for the daughters of the marriage; and if J. B. should die without issue male attaining the age of twenty-one years by S. G., or any other after-taken wife, the lands were to go in tail male to the heirs of J. B. for ever. J. B. died, leaving four sons, all of whom attained the age of twenty-one years in his lifetime. By deed of 1826, not referring to the settlement of 1791, J. B., in execution of an agreement therein mentioned, conveyed certain lands, not a part of the settled lands, to the use of his second son P. F. B. and his issue; and by another deed, executed by himself alone in 1831, he conveyed the settled lands to the use of himself for life, with remainder to trustees for 200 years, upon trust, for the issue female of the marriage, with remainder to trustees to preserve contingent remainders, with remainder to his eldest son M. B. for life; with remainder to his first and other sons in tail male; remainder to his third son R. B. for life, with remainder to his first and other sons in tail male; with similar remainders to his fourth son E. B. in tail male; then to his second son P. F. B. and his sons in tail male, with remainder to his own right heirs. Upon bill by P. F. B.:—Held, that the power in the settlement of 1791 did not authorise an exclusive appointment, and that the deed of 1831 was not a good execution of the power of appointment. *Barron* v. *Barron*, 2 Jones 226.

Semble, a power to appoint amongst the objects "in such shares and proportions" as the appointor thinks fit, will authorise the appointment of a remainder only to one of the objects; and if such a power be executed by appointing the whole estate to one of the objects for life, with remainders over to persons who are not objects of the power, whereby an illusory share devolves, as in default of appointment, upon the other objects of the power, the case is not within the 1 Will. 4, c. 46, and the whole appointment is bad. *Ib.*

6. Where there is a primary power, and no default of appointment, a secondary power, or partial exercise of the primary power, does not exclude the exercise of the secondary power. *Mapleton* v. *Mapleton*, 4 Drew. 515; 28 L. J., Ch., 785.

Power to a husband to appoint among children and issue of children living at the wife's death; in default of appointment, power to the wife to appoint to children and issue of

children living at husband's death. The husband appointed to four children only, leaving a fifth living at his death, with issue. After his death the fifth child died, leaving three children, one of whom, A., was living at the death of the first donee, the other two being born afterwards. The second donee, the wife, then appointed among her four children, and to A., the eldest child of her deceased child: —Held, that although the two others would have been objects of the primary powers, their exclusion by the joint operation of the two powers did not render the execution of either bad. *Ib.*

1. A testator gave real estate to trustees, to pay the rents to A. for life, and after her decease, "in case she should leave issue, to dispose of his estate in such manner, amongst such issue," as A. should by deed or will appoint, with gifts over, "in default of such issue." A. appointed the property by will amongst some only of her issue living at her decease:—Held, that such appointment was void for exclusiveness, and that all her issue living at her death, of whatever degree, were entitled as tenants in common. *Stolworthy* v. *Sancroft*, 10 Jur., N. S., 762; 33 L. J., Ch., 708; 10 L. T., N. S., 223; 12 W. R. 635.

2. A. had a testamentary power to appoint a fund to any one or more of his children. He had, under a distinct instrument, another testamentary power to appoint another fund amongst his children, but not exclusively to any one of them. He had five children. By his will he exercised the first power in favour of Susannah, one of his own children, and the second in favour of two others of his children. The second power was accordingly badly exercised, and Susannah took, in default of appointment, a share in the fund which was subject by the second power:—Held, that no case by election was raised against Susannah. *Re Aplin*, 13 W. R. 1062.

3. Bequest to A. or such of her children, in such parts, shares, and proportions as B. should appoint, and in default to A. for life, with remainder to her children equally:—Held, to authorise an exclusive appointment to one of several children of A. *Turner* v. *Bryans*, 31 Beav. 303.

4. A power to appoint amongst such of the testator's children as should be living at the death of the testator, in such proportions as the donee of the power should direct, does not authorise an exclusive appointment to one or more of the objects. *Re Davids*, 1 Johns. 495; 6 Jur., N. S., 94; 29 L. J., Ch., 116; 1 L. T., N. S., 130.

A testatrix, having a power of appointment to and amongst three persons over a fund originally invested in 3*l.* 10*s.* per cent. reduced annuities, which at the date of her will were reduced to 3*l.* 5*s.* per cent. annuities, bequeathed to two objects of the power 10*l.* sterling each, and to A., the third, "all the residue of her property to be found in the 3*l.* 10*s.* per cent. reduced bank annuities, now reduced to 3*l.* 5*s.* per cent., and all other property whatsoever and wheresoever to be by A. possessed and enjoyed absolutely during the term of her natural life, and to be disposed of as she should think fit at her death":—Held, first, that the power of appointment was well exercised. *Ib.*

Held, secondly, that A. was absolutely entitled to the fund, subject to the payment thereout of the two sums of 10*l.* each to the other subjects of the power. *Ib.*

5. By a settlement, a trust fund was settled, after the death of husband and wife, upon the children equally who should survive them. But if any child should die in the life of the husband and wife, and leaving "issue" then living, his share should go equally between the issue of such child, and when and at such time as the respective shares of such child would become due and payable:—Held, that the "issue" of children took *per stirpes*, and that the successive generations of "issue" took their respective shares by substitution, and not concurrently, so that grandchildren and great grandchildren could not take together as a class. *Robinson* v. *Sykes*, 23 Beav. 40; 2 Jur., N. S., 895; 26 L. J., Ch., 782.

A testator had a power of appointment amongst his issue, which did not warrant an exclusive appointment. By will, after reciting that the trust fund had been invested in land, and reciting (erroneously) that he had advanced 300*l.* towards the purchase, he made an exclusive appointment in favour of one of several objects of "300*l.* or such other sum as he was empowered to appoint":—Held, that the intention was either to appoint the fund contributed (which was trifling, if any), or the whole trust fund, and that in the latter case the appointment was void. *Ib.*

6. By a marriage settlement, a policy of assurance on the husband's life was assigned to trustees to pay the amount when realised to and amongst the issue of the marriage, in such shares as the husband should appoint, and in default of appointment amongst the issue equally. No notice of the settlement was given to the insurance company. The husband, by his will made in 1862, correctly recited that a certain sum was payable on foot of the policy if the life dropped, and then appointed various sums to all the children save one, leaving unappointed a portion of the sum so recited to be payable. The trustees of the settlement had left the policy with the husband, who, previously to the date of the will, borrowed money on it from a purchaser without notice; so that after his death, when the policy was paid, the sum available for the children was reduced much below the total of the sums appointed:—Held, that the appointments were good, and were not invalidated by the ultimate reduction of the amount of the fund. *Barry* v. *Barry*, 10 Ir. R., Eq., 397.

7. An appointment is not void for exclusiveness, if any part is void for another reason. *Ranking* v. *Barnes*, 3 N. R. 660.

The donee of a power to appoint amongst children, appointed two-sixths of the fund to a daughter, in order, as to one-sixth, to enable her husband to discharge a liability incurred by him for the benefit of another object of the power:—Held, that the appointment was invalid as to one-sixth, but valid as to the other sixth. S. C. 10 Jur., N. S.. 463; 33 L. J., Ch., 539; 12 W. R. 565.

The donee afterwards made an appointment, which, if the former appointment had been valid, would have exhausted the fund, and

have been void, as exclusive:—Held, that the second appointment was not void. *Ib.*

1. A power was given to A. to appoint a fund, by will, to his wife alone, or to his wife and such of his children as he should direct. The wife died, and A. appointed the fund exclusively to five out of his seven children:—Held, that the appointment was valid. *Paske* v. *Haselfoot*, 33 Beav. 125; 9 Jur., N. S., 1047; 11 W. R. 1089; 9 L. T., N. S., 75; 2 N. R. 568.

2. A person, having power to appoint by will a fund amongst all and every of her children and their children, covenanted to appoint a certain sum to one child. She then, by her will, appointed that sum, and appointed other parts of the fund to certain objects of the power, and bequeathed and appointed all the estate ever which she had a disposing power to one object of the power. There were other objects of the power:—Held, that all the appointments were bad, as being exclusive. *Bulteel* v. *Plummer*, 6 L. R., Ch., 160; 23 L. T., N. S., 753. Varying 17 W. R. 1058; 8 L. R., Eq., 585; 39 L. J., Ch., 805; 18 W. R. 1091.

3. A mother bequeathed a fund to her daughter for life, and after her death "to and amongst my other children or their issue in such parts, shares, and proportions, manner and form, as my daughter shall by deed or will appoint":—Held, that the daughter's power was exclusive, and not distributive merely, and was well exercised by an appointment to one only of its objects to the exclusion of the rest. *Re Veale*, 4 L. R., Ch. D., 61; 35 L. T., N. S., 612. Affirmed 5 L. R., Ch. D., 622; 46 L. J., Ch., 799; 36 L. T. 634.

4. By a post-nuptial instrument executed in pursuance of a marriage contract, a fund was directed to be vested in trustees, in trust to pay the interest to the wife for life to her separate use; after her death to the husband for life, and after the death of the survivor to pay the principal to the issue of the marriage in such proportions as the wife might appoint, and failing such appointment, to and among the child or children of the marriage equally among them, and to the issue of any of them who might have died leaving lawful issue *per stirpes*. There were five childen of the marriage. In 1853 the wife appointed the fund among them. In 1861, after her death, the husband appointed the fund among the same five children. One of these children, a girl, had married, and was, at the time of her father's death, *enceinte* of a child, which was subsequently born:—Held, that issue in the agreement was used in its extended sense, and therefore, as the power did not authorise an exclusive appointment, both appointments were invalid, and the fund was divisible among the five children in default of appointment. *Donoghue* v. *Brooke*, 9 Ir. R., Eq., 489.

5. The 37 and 38 Vict., c. 37, s. 1 applies to cases only where the instrument making the appointment is executed after the passing of the Act. *Moynan* v. *Moynan*, 1 Ir. L. R., Ch. D., 382.

Therefore, where a married woman, having a power to appoint a fund among her children by her will, before the Act made an exclusive appointment by will, and died after the Act:—Held, that the appointment was invalid. *Ib.*

6. An appointment since the Illusory Appointments Act (11 Geo. 4 and 1 Will. 4, c. 46), under a non-exclusive power, of an entire fund unto and amongst the objects "and the survivors and survivor of them, and if only one should survive, then unto that one":—Held, valid. *Re Capon's Trusts*, 10 L. R., Ch. D., 484; 48 L. J., Ch., 355; 27 W. R. 376.

II. APPOINTMENT OF ILLUSORY OR UNEQUAL SHARES.

7. If a man gives his wife power to divide his estate amongst his three children, she must do it equally. *Astry* v. *Astry*, Pre. Ch. 256.

8. Personal estate devised to the wife, upon trust not to dispose thereof, but for the benefit of her children; she, by will, gives 5*s.* only to one child:—Decreed, the estate to be divided equally. *Gibson* v. *Kinven*, 1 Vern. 66.

9. A. directs his lands shall descend to his three daughters in such shares and proportions as his wife, by deed, shall appoint. She makes a very unequal distribution; whether equity will relieve against it, *quære*. *Wall* v. *Thurborne*, 1 Vern. 355.

10. Power of appointment by mother may be unequally distributed, but not so as to be illusory, unless there is a great misbehaviour. *Maddison* v. *Andrew*, 1 Ves. 59.

11. Power to appoint among children, each must have a part, not illusory nor reversionary; but a particular interest, as for life, may be given to one. Such a power will not extend to grandchildren, nor can a discretion be given to another to appoint. But though that would be void, it would not devolve on the Court, which is only where the power is well created, but by accident cannot be executed by the party. *Alexander* v. *Alexander*, 2 Ves. 640.

12. Devise of all to wife, that she might give her children such fortunes as she should think proper or they deserve; there being five children, and the eldest being provided for, an appointment of a guinea to him and the rest among the other children, was held a good appointment. *Burrell* v. *Burrell*, Ambl. 660.

13. Power to appoint in shares, etc., as P. should think proper, not exceeding estates tail; he appoints to two of his children, one acre for life, then to fall into the residue of the estate, which he gave to his second son for life, with remainders over. This execution of the power is illusory and bad. *Pocklington* v. *Bayne*, 1 Bro. C. C. 450.

14. Gift to A. and his issue, to be divided among them as he thinks fit, the issue have an interest in all events, and A. has no authority but as to the proportions; if no appointment, equally. Where to be divided among issue, the proportion must not be illusory. *Hockley* v. *Mawbey*, 1 Ves. J. 150.

15. Testator, under a power to appoint among children, appointed to the husband of a daughter for life, and if she survived him, to her for life, and having advanced her in marriage, recited that as a reason for giving her a small share; this is not illusory. *Bristow* v. *Warde*, 2 Ves. J. 336.

16. Trusts in marriage articles to pay certain funds, the property of the wife, to all and every her child and children, in such parts, etc., as she should by will give, etc., and for

want of such gift, etc., to all and every her child and children, part and share alike, and for want of such issue, over. By her will she gave ten guineas, part of the fund, to her eldest son, declaring that he was otherwise provided for by the will of his uncle; and the remainder she gave to all her other children, naming them, equally, with survivorship in case of the death of any during minority, and before receipt of his, her, or their shares; and in case of the death of her eldest son before he comes to the possession of his uncle's fortune, she gave her second son only ten guineas. The only provision of the eldest son was a remainder in tail after the life estate of his father, who survived his wife. The Court was of opinion, first, that children illegitimate, being born after elopement, and no access, clearly could not take; secondly, that a share appointed to a child who died in the life of her mother, lapsed; but the case was determined upon the third point, that under the circumstances the appointment of ten guineas was illusory, and, therefore, the whole was void; and the fund was distributed among the surviving children and the representative of the deceased child; the interest vesting on the birth, liable to be devested only by appointment. *Vanderzee* v. *Aclom*, 4 Ves. 771.

Under a power to appoint to and among several persons, each of the objects must have a part, but a court of law will not enter into the amount of the share appointed. *Id.* 785.

1. An appointment by a father not illusory where he gives other provisions to the object excluded. *Long* v. *Long*, 5 Ves. 445.

2. Appointment giving very small shares to some of the objects, set aside as illusory. *Spencer* v. *Spencer*, 5 Ves. 362.

But the rule as to illusory appointments is not to be applied where a sufficient reason appears upon the face of the appointment, perhaps not between parent and child, if clearly proved. *Id.* 368.

3. Under a power to appoint among several subjects, each must have a share, and by the rule in equity as to illusory appointments, a substantial share, unless a good reason appears, as another provision by the person executing the power, not from any other quarter. Under such a power, an appointment of a fund, nearly 1,900*l.*, among three children the objects, 10*l.* to one, 50*l.* to another, and the remainder to the third, all having other provisions *aliunde*, was set aside as illusory. Evidence that an appointment was improperly obtained, being executed by a will regularly proved, was rejected. *Kemp* v. *Kemp*, 5 Ves. 849.

Power to appoint to the use of such child or children, etc.: an appointment to one or more, good. *Id.* 857.

4. Out of a fund of 2,500*l.*, appointment of 33*l.* 6*s.* 8*d.* to two children, each, and the 33*l.* 6*s.* 8*d.* among the children of another child (the power extending to their issue), and 2,400*l.* equally to two other children, the only other objects, established. *Mocatta* v. *Lousada*, 12 Ves. 123.

5. Appointment of 55,000*l.* to one child, 1,100*l.* to another, and 500*l.* among the others, seven in number:—Held, not illusory. *Dyke* v. *Sylvester*, 12 Ves. 126.

6. Equitable jurisdiction upon illusory appointment discretionary according to the circumstances. *Bax* v. *Whitbread*, 16 Ves. 15.

Appointment of 100*l.* S. S. annuities to one child, and 2,400*l.*, the residue, to another, those being the only objects of the power:—Held, not illusory, S. C. 10 Ves. 31.

Execution of a power of appointment among children and grandchildren, by giving 100*l.* to one, 2, 400*l.* the residue of the fund to the only other object, established under the circumstances, the former being at the time of appointment an uncertificated bankrupt, and other interests being given to him and his family by the instrument creating and executing the power. *Ib.*

7. Appointment of 200*l.* stock, though a very unequal proportion of the fund:—Held, not illusory. *Butcher* v. *Butcher*, 1 Ves. & B. 79. Affirming 9 Ves. 382.

The question whether an appointment is or is not illusory, must be determined upon the circumstances of each case, according to a sound discretion; the power, however large the terms, being in some degree coupled with a trust; but an equal distribution is not required, nor any reason for the inequality, unless a share is clearly unsubstantial. *Ib.*

8. *Semble*, a power to appoint amongst the objects "in such shares and proportions" as the apportioner thinks fit, will authorise the appointment of a remainder only to one of the objects; and if such a power be executed by appointing the whole estate to one of the objects for life, with remainders over to persons who are not objects of the power, whereby an illusory share devolves. as in default of appointment, upon the other objects of the power, the case is not within the 1 Will. 4, c. 46, and the whole appointment is bad. *Barron* v. *Barron*, 2 Jones 226.

9. A., having a power of appointment of 2,000*l.* among younger children, and having two sons and a daughter, his eldest son being an idiot, and the second son having obtained a part of the surplus profits of the estate during the idiot's life, appoints 1,999*l.* to the daughter, and 20*s.* only to the second son. This appointment illusory; perhaps it might have been good, if the second son had had a certain provision *aliunde* at the time of the execution of the power. *Lysaght* v. *Royse*, 2 Sch. & Lef. 151.

10. In case of the execution of a power to appoint to children whether the Court could make a reference to the Master to inquire whether the sum appointed was reasonable in amount, and if not, could authorise him to substitute his discretion for that which the donor had reposed in the donee of the power, *quære*. *Edgeworth* v. *Edgeworth*, Beat. 328.

11. A power of appointment was given for the benefit of all and every the children of A., in such parts and shares as A. should appoint:—Held, that an appointment of the whole to one child for life, with remainders successively to the other children, was a defective exercise of the power. *Lloyd* v. *Lance*, 14 L. J., N. S., Ch., 456.

12. The donee of a power of appointment of a fund among her children, to whom the fund was limited in default of appointment, had only two daughters, and apportioned nearly the whole of the fund to one of them, who was

unmarried, on an understanding, but without any positive agreement, that the appointee would re-settle one moiety of it on trusts for the separate use of the other daughter, who was married, exclusively of her husband, and, after her death, on trusts for her children. A re-settlement was accordingly made, without the privity of the married daughter, who did not hear of the transaction until several years afterwards:—Held, on the suit of her husband, that the appointment was invalid, and a settlement was directed to be made of the married daughter's share. *Salmon* v. *Gibbs*, 3 De G. & Sm. 343; 18 L. J., N. S., Ch., 177; 13 Jur. 355.

1. Upon the construction of an instrument creating a power of raising portions:—Held, that the donee had a right to distribute the portions unequally. *Cotgreave* v. *Cotgreave*, 1 De G. & Sm. 38; 16 L. J., N. S., Ch., 145; 11 Jur. 51.

2. A testator directed his trustees to divide his property "amongst his first cousins, as they might, in their uncontrolled discretion, think proper, by dividing the whole equally among them, or between two or more of them, or giving the whole to any one of them, and for such estate or estates, interest or interests, and with, under, and subject to such powers, discretions, and limitations as they might think proper, so that the same were in favour of some one or more of his first cousins or their descendants":—Held, that the trustees could not appoint to the cousins in unequal shares. *Ward* v. *Tyrrell*, 25 Beav. 563; 4 Jur., N. S., 779; 27 L. J., Ch., 749.

3. A testator bequeathed a legacy to his widow, "to be used for her own and the children's benefit, as she shall in her judgment and conscience think fit, being convinced that it will be disposed of conscientiously and properly by her for the purposes mentioned, recommending her not to diminish the principal." The widow appointed the capital between the children very unequally. The Court (one child opposing) refused to part with the fund, or to declare the right during the life of the widow. *Hart* v. *Tribe*, 32 Beav. 279.

4. A testator, having given his daughter a life estate in certain lands, devised them after her death amongst her children as she should by deed or will appoint. It then provided that, in case of alienation or incumbrance by her, her share should go to the persons next in remainder, as if she were actually dead. The donee of the power appointed to one of her sons all the lands and premises except the square yard of ground thereinafter mentioned; and to the other, one square yard of the said lands, in such part thereof as his brother should think fit:—Held, that the power was well executed. *Re Stone*, 3 Ir. R., Eq., 621. Affirmed 18 W. R. 222.

5. By a settlement the trustees were directed to hold the trust funds in trust for five persons, or their respective issue, in such parts, shares, or proportions as D. should by will appoint. D., by her will, gave to three of the objects of the power 5*l.* each, and gave all the residue of her property of whatever kind, and over which she had any power of appointment, to the two remaining objects absolutely:—Held, that the legacies were charged on the settled property, and that the appointment was a valid exercise of the power. *Gainsford* v. *Dunn*, 30 L. T., N. S., 283; 22 W. R. 499; 17 L. R., Eq., 405; 43 L. J., Ch., 408.

XV. Execution. Fraud on Power.

I. *In General*, 5813.
II. *Appointment to Sick or Dying Person*, 5815.
III. *Appointment to Infant*, 5815.
IV. *For Benefit of Appointor*, 5816.
V. *For Benefit of Strangers to the Power*, 5821.
VI. *Excess. When Severable*, 5825.
VII. *Evidence and Burden of Proof*, 5826.
VIII. *Confirmation*, 5827.
IX. *Rights of Purchaser for Value*, 5827.
X. *Liability of Trustees*, 5828.
XI. *Re-execution after Invalid Appointment.* See VIII. XII. *ante*.

I. IN GENERAL.

6. An appointment having been made on an emergency, and not *bonâ fide* for the end designed by the donor of the power, *semble*, it is void. *Weir* v. *Chamley*, 1 Ir. Ch. R. 295.

7. Agreement by one of the objects of a power to return part in consideration of an appointment in its favour is a fraud in the appointee as well as in the appointor, both on the other objects of the power, and on the party who is to take in default of appointment. *Daubeny* v. *Cockburn*, 1 Meriv. 644.

Secus, where the appointee is not privy to the corrupt agreement. *Ib.*

8. Effect of an agreement between several appointees under different appointments, as between such appointees and the trustees of the property, that one of the appointments, which is invalid, shall not be disturbed. *Harrison* v. *Randall*, 9 Hare 409; 16 Jur. 72; 21 L. J., Ch., 294.

A court of equity will not entertain a suit to set aside an appointment of a part of certain trust funds as a fraud upon the power, when it appears that another appointment not impeached by the bill was made of funds subject to the same power, in which regard was had to the appointment complained of, and the object was to equalise the interests of the several appointees; for the Court will not undo part of an entire transaction, the other parts of the same transaction not being brought within its jurisdiction. S. C. 9 Hare 397.

Where there is an appointment to A. and B. by one instrument (and *à fortiori* by different instruments), the appointment to A. may be good, and the appointment to B. bad, and A. and B. may well agree between themselves that the bad appointment shall not be disturbed. *Ib.*

9. A power to be validly executed must be executed without any indirect object. The donee of the power must give the property which is the subject of it, as property to the person to whom he affects to give it. *Portland*

(*Duke*) v. *Topham*, 11 H. L. Ca. 32; 34 L. J., Ch., 113; 10 Jur., N. S., 501; 12 W. R. 697; 10 L. T., N. S., 355. Affirming 1 De G. J. & Sm. 517; 31 Beav. 525; 32 L. J., Ch., 81; 32 L. J., Ch., 257; 11 W. R. 507; 8 L. T., N. S., 180.

It makes no difference whether the power is created by another person, or by the donee himself, without valuable consideration, the same rule of equity applying equally to both cases. *Ib.*

Where an appointment was made in favour of an object of the power, in order that other deeds might be executed by the appointee to raise inducements for a daughter of the donee of the power, who was herself an object of the power, to abstain from marrying a person objected to by the father, the appointment was set aside, as not having been made for a purpose contemplated by the donor of the power. *Ib.*

A. created a power to appoint a fund between two of his daughters, H. and M., or to appoint it to one, in exclusion of the other, and subject to such restrictions as the donee of the power (A.'s son) might think fit. The donee of the power executed a deed of appointment, which, in form, gave the whole of the fund to one of the sisters, H., but it was understood between the parties that H. was only to receive one moiety of the fund for her own use, and that she was to allow the other to accumulate, subject to some future arrangement; and in pursuance of this understanding, H. gave her brokers directions, to invest, in the name of the donee of the power, of another brother, and of herself, one-half of the fund, and the interest thereon to accumulate:—Held, that this was, in equity, a fraudulent execution of the power, and that the deed of appointment was wholly void. *Ib.*

1. It is not necessary, in order to render void an appointment as a fraud upon a power, to show that there was a previous agreement between the appointor and the appointee, that the appointee would deal with the property in a manner foreign to the purposes for which the power was intended; but it is sufficient to establish that the appointment was made solely by reason of the well-founded reliance which the appointor placed on his influence over the appointee, that the appointee would act in accordance with the wishes of the appointor. *Topham* v. *Portland* (*Duke*), 8 Jur., N. S., 1083; 7 L. T., N. S., 11.

Evidence was admitted to show the intention with which the appointor made the appointment. *Ib.*

Where an appointment is set aside as fraudulent and void, the parties making or concurring in the fraudulent appointment must pay the plaintiff's costs, but not the increased costs occasioned by the plaintiff's dealings with the fund. S. C. 12 W. R. 186; 9 L. T., N. S., 526.

2. A tenant for life of an estate had also a power of appointing it, by deed or will, among his children, or to one of them; but he had no power to lease it. He granted a lease, and on the day of the date of the lease he made a will, in exercise of the power, in favour of one of his children, a daughter; she and the appointor at the same time gave the lessee a bond of indemnity against the forfeiture of the lease by the death of the appointor during the term:—Held (affirming 3 L. T., N. S., 876; 9 W. R. 396), that the power was well exercised, as there appeared to be no corrupt bargain between the appointor and his daughter. *Pickles* v. *Pickles*, 7 Jur., N. S., 1065; 9 W. R. 763; 4 L. T., N. S., 755; 31 L. J., Ch., 146.

3. A married woman, having power to appoint amongst her five children after her death, appointed the whole to the eldest daughter, then twenty. The appointment was not communicated to the daughter, but it was shown that the appointment was made in the expectation that the daughter would give a portion of the fund to her father, the husband of the donee:—Held, even though the motive was not morally wrong, that the appointment was a fraud on the power, and bad. *Re Marsden*, 5 Jur., N. S., 590; 28 L. J., Ch., 906; 7 W. R. 520; 33 L. T. 217; 4 Drew. 594.

4 A married woman with an absolute power of appointment over property settled to her separate use having by her acts induced the trustees to lend the fund on an unauthorised security, so that it was lost, and conceiving herself unable to maintain a suit to charge the trustees for loss, executed an appointment of the fund, after it had been lost, in favour of her infant children, to enable them to file a bill to charge the trustees; the Court dismissed the bill. *Brewer* v. *Swirles*, 2 Sm. & G. 219; 18 Jur. 1069.

5. *Semble*, a covenant by a fiduciary donee of a testamentary power, to exercise the power to a certain extent in favour of one of the objects of the power, is illegal and void. *Thacker* v. *Key*, 8 L. R., Eq., 408.

6. A., who was unmarried at the death of B., and had under his will a power to appoint the lands of P. and T. to such child or such children as she might have, devised her lands called P. to her eldest son for life, and on his decease to his eldest son living at his death or born in due time after in fee; and if her eldest son had not such eldest son living at the time of his death or born in due time after, she devised the premises to her second son in fee; and she devised her lands of T. to her executor and his heirs, on trust to sell and lay out the produce in the purchase of freehold property in France, and to convey the property so purchased to her second son and his heirs, provided he should previously decide to reside in France; and if he should not decide to reside in France, then she devised the property so purchased to her executor and his heirs:—Held, first, that the limitations of P., subsequent to the life estate of the eldest son, were void for remoteness. *D'Abaddie* v. *Bizoin*, 5 Ir. R., Eq., 205.

Held, secondly, that the condition to reside in France could not be separated from the appointment of T., and that it rendered it invalid, as it showed an intention of the testatrix to accomplish by the appointment an indirect purpose not warranted by the power. *Ib.*

7. An appointment under a general testamentary power, coupled with a covenant not to revoke the will, is not a fraudulent exercise of the power. *Robinson* v. *Ommanney*, 21 L. R., Ch. D., 780; 51 L. J., Ch., 894; 47 L. T. 78; 30 W. R. 939. Affirmed 23 L. R., Ch. D., 285; 52 L. J., Ch., 440; 49 L. T. 19; 31 W. R. 525.

II. APPOINTMENT TO SICK OR DYING PERSON.

1. A testator, by will, giving his widow a life interest in his residuary real and personal estate, gave her an absolute power of appointment amongst children; in the event of there being no children, or of their all dying under twenty-one and unmarried, there was an absolute gift over to the testator's brother. The survivor of the three children of the marriage, an infant, being at the point of death, the widow executed the power, by appointing the whole estate, subject to the life interest, to him. The child died four days afterwards. Upon a bill by the representatives of the reversioner, praying that the appointment might be set aside as fraudulent, and for an account of the general personal estate, the defendant, claiming through the appointment, demurred to so much of the bill as is set forth, on the ground that there was no fraud on the power and no title to relief in the lifetime of the tenant for life. *Carroll* v. *Graham*, 11 Jur., N. S., 1012; 13 L. T., N. S., 391.

2. Appointment by a father to a son, then in a state of mental and bodily disease, of which he died within a year, set aside, the Court inferring from the evidence as to the father's knowledge of his son's state of health and pecuniary circumstances, as to the circumstances attending the preparation and execution of the appointment, and as to its not having been communicated to the persons to whom it ought to have been communicated, that the appointment was made by the father, not for the benefit of his son, but for his own benefit, and was a fraud upon the power. *Wellesley* (*Lady*) v. *Mornington* (*Earl*), 2 Kay & J. 143; 1 Jur., N. S., 1202.

III. APPOINTMENT TO INFANT.

3. A residue was bequeathed in trust for A. for life, and after his death for his children as he should appoint; and in default of appointment, for the children equally, with remainder over. Before A. was married or had exercised the power, some of the parties entitled in remainder filed a bill to have the accounts of the testator's estate taken, and the residue ascertained and secured. Before decree, A. married and had a child, and four days after the child was born he exercised his power, and then filed a bill against the plaintiffs in the former suit, stating his marriage, the birth of the child, and the appointment, and insisting that thereby the interests of the plaintiffs in the former suit had been wholly determined and put an end to. The plaintiffs, however, contended that the appointment was fraudulent and void *in toto*, inasmuch as, though it was made in favour of A.'s children, he would, in the probable event of their dying, become entitled to the property as their next of kin; but the Court held that, under existing circumstances, the appointment was good, and therefore, that no decree ought to be made in the original suit until the happening of events which would entitle A. to the property. *Butcher* v. *Jackson*, 14 Sim. 444.

4. Funds were settled on A. for life, with remainder to his children, at such ages, etc., as he should appoint, and in default to them equally, to vest at twenty-one, and there was a power of maintenance until the vesting. There was a gift over, in case there should be no child absolutely entitled. A., having a child four months old, and another *en ventre sa mère*, appointed the fund to all his children to vest immediately. One of the children survived A. and died an infant, and his share was claimed by his mother as his administrator:—Held, that the appointment was not a fraud on the power, and that she was entitled. *Fearon* v. *Desbrisay*, 14 Beav. 635; 21 L. J. N. S., Ch., 505.

5. A married woman, having a power to appoint a fund to her children, appointed, it to an only child of tender years, who died four months afterwards. Her husband attested the deed of appointment as a witness. Twenty-four years afterwards the wife died in the lifetime of the husband, who then claimed the fund as administrator of the child. The Court directed issues to try whether the power had been executed without fraud on the part of the husband and wife. *Gee* v. *Gurney*, 2 Colly. 486; 10 Jur. 367.

6. A power in a settlement to raise a portion for a younger child, at such time as the parent should direct; he directs it to be raised when she is fourteen, and she dying, files his bill for it as her administrator. The portion shall not be raised for the father. *Hinchinbroke* v. *Seymour*, 1 Bro. C. C. 395.

7. Power of appointment in favour of children in such shares and to be vested at such times as husband and wife shall during their joint lives and after the death of either as the survivor shall appoint, with the usual provision in default of appointment:—Held, that there was nothing unreasonable in husband and wife making a joint appointment between the only two children, the shares to be vested immediately, though one was an infant, and there were no circumstances requiring the exercise of the power; and that in the absence of any appearance of fraud the appointment was valid. *Domville* v. *Lamb*, 1 W. R. 246; 9 Hare (App.) lv.

8. Power to husband and wife to appoint in favour of children; in default of appointment children to take vested interests at twenty-one; if no children the fund to go over to the next of kin of the wife, as if she had died a widow and intestate. An appointment in favour of an only child, four years old, to be a vested interest immediately, but payable at twenty-one, with power of revocation and new appointment:—Held, to be a valid execution of the power, although the intention and, in the events which happened, the effect was to prevent the fund going over to the persons entitled in remainder. *Beere* v. *Hoffmeister*, 23 Beav. 101; 3 Jur., N. S., 78; 26 L. J., Ch., 177.

9. A father had a power of appointment over trust funds, subject to his life-interest in favour of his children. Upon the marriage of his daughter whilst a minor, he appointed a share of the funds upon her intended husband for life, remainder to the daughter for life, remainder to the children of the marriage:—Held, a valid appointment and settlement of the funds, notwithstanding the infancy of the

daughter. *Fitzroy* v. *Richmond* (*Duke*), 5 Jur. N. S., 971; 28 L. J., Ch., 752; 27 Beav. 190.

1. When a father was, by his marriage settlement, empowered to divide at discretion the funds in which the children had an expectant interest:—Held, that he could not deal or negotiate with them in executing the power. *Cuninghame* v. *Anstruther*, 2 L. R., H. L. (Sc.), 223.

A parent in such a case purchasing the interests of the children, one of them being only eighteen years of age, is a transaction wholly inconsistent with that protection which the law of every civilised country affords to children, and would not be permitted without the fullest evidence of an intention authorising it, and releases or discharges granted by the children to the father, in consideration of money payments made by him, will form no bar to their subsequent claims under the settlement. *Ib.*

2. B. P. W. having a power of charging portions for younger children on real estate under a settlement which gave him in the clearest terms power to fix the ages and times at which the portions should vest, and contained no provision for raising portions in default of appointment, and having three daughters aged nine, seven, and one, appointed by deed in 1828 10,000*l.* (being the full amount he was entitled to charge) for the portions of the daughters, to be a vested interest in the three daughters immediately respectively on the execution of the deed, the portions to be paid to them at such times and in such proportions as he should by deed or will appoint, and in default of appointment to be paid to them share and share alike, at twenty-one or marriage, if the same age or time should happen after his decease, but if in his lifetime, then the payment to be postponed till after his death, unless he should signify his consent in writing to their being raised and paid in his lifetime; maintenance at 4*l.* per cent. to be raised from his death; and the deed contained a power of revocation. In 1832 he made by deed a similar appointment by way of confirmation of the former, the portions to be vested immediately on the execution of the deed. One daughter married and attained twenty-one, and in 1851 B. P. W. appointed 5,000*l.*, part of the 10,000*l.*, to her. The other two died infants and spinsters, one in 1836, the other in 1845. B. P. W. assigned to the plaintiff for value in 1875 the 5,000*l.* appointed to the two deceased daughters, and after his death the plaintiff brought this action to have it raised:—Held (reversing the decision of Kay, J., who had dismissed the action as against the owners of the settled estate), that where a donee of a power of charging portions on real estate has, under the terms of the power, clear authority to fix the times at which portions shall vest, and appoints a portion to vest, immediately, there is no rule of law which prohibits its being raised in the event of the child dying under twenty-one and unmarried, and that the decision could not be supported on the ground that the appointment, so far as it made the portions vest immediately, was not within the power. *Hinchinbroke* (*Lord*) v. *Seymour* (1 Bro. C. C. 395) considered and examined. *Henty* v. *Wrey*, 21 L. R., Ch. D., 332; 47 L. T. 231; 30 W. R. 850. Reversing 19 L. R., Ch. D., 492; 51 L. J., Ch., 422; 45 L. T., 752; 30 W. R. 317.

Held, also, that the decision could not be supported on the ground that the appointment, so far as it made the portions vest immediately, was a fraud on the power as being made with a view to secure a benefit to the appointor; for that having regard to the fact that if the father had died without making any appointment, the children would have been unprovided for, it was manifestly for the benefit of the children that the father should make an appointment, and that as there was nothing to lead to the conclusion that when the appointments were made the children were likely to die young, and as in the event of the early death of the appointor the children might have derived a benefit from the absolute vesting of their portions, there was no ground for attributing to him an intention to benefit himself by making the portions vest immediately:—Held, therefore, that the plaintiff was entitled to have the 5,000*l.* raised. *Ib.*

IV. FOR BENEFIT OF APPOINTOR.

1. *Where Antecedent Contract with Appointee*, 5816.
2. *Other Cases*, 5819.

1. Where Antecedent Contract with Appointee.

3. Power of jointuring executed in favour of a wife, but with an agreement that a wife should only receive a part as an annuity for her own benefit, and that the residue should be applied to the payment of the husband's debts:—Held, a fraud upon the power, and the execution set aside, except so far as related to the annuity, the bill containing a submission to pay it, and only seeking relief against the other objects of the appointment. *Aleyn* v. *Belchier*, 1 Eden 132.

4. If the donee of a power appoints the fund to one of the objects of the power under an understanding that the latter is to lend the fund to the former, although on good security, the appointment is bad. *Arnold* v. *Hardwicke*, 7 Sim. 343; 4 L. J., N. S., Ch., 152.

5. Appointment by father and son, under a power, of money charged on an estate, that in case the son should survive, it should be applied by him in and towards payment of the debts of the father, and subject thereto the residue, if any, should go and be considered as part of the personal estate of the father, and in case the latter should survive it should go and be paid by them, his executors, etc., in and towards satisfaction of his debts, with a similar provision as to the residue; the father surviving appointed in favour of another son for valuable consideration as to part: as to that, the decree directed payment under the appointment. *Clinton* v. *Seymour*, 4 Ves. 440.

6. A. having a power to appoint 10,000*l.* amongst his younger children, appoints it to them equally, reserving to himself a power of revocation as to 5,000*l.*, which he afterwards irrevocably appoints to E., one of the children, in consideration of her having agreed to apply part of it in payment of his debts. After-

wards, A., by a deed, to which E. is also a party, revokes, with her consent, the last appointment as to 2,500*l.*, and in pursuance of all powers, appoints that sum to a child by a second marriage, and confirms E.'s title to the remainder under the former appointment:—Held, that the appointment of the 5,000*l.* being void, the appointment of the 2,500*l.* must also fail. *Farmer* v. *Martin*, 2 Sim. 502.

1. Tenant for life, with a power to jointure, marries; but does not exercise the power. His wife was seised of real estate for the term of her life, which, on the marriage, was settled to the use of the husband for the joint lives of himself and his wife, remainder to the wife for her life. The husband afterwards became indebted; and agreed with his wife and creditor that he would exercise the power of jointuring in her favour, and that she should grant to the creditor an annuity for the term of her life, equal in amount to the jointure, to be charged upon her estate, and to become payable upon the death of the husband; which agreement was carried into execution. The husband died:—Held, that the execution of the power of jointuring was not a fraud upon the remainderman. *Baldwin* v. *Rooke*, 5 Ir. Eq. R. 110.

2. The donee of a power of selection cannot lawfully exercise his power in such a manner, as to secure an advantage to himself, by any stipulation or arrangement with the appointees in whose favour the power is exercised. *Ashham* v. *Barker*, 17 Beav. 37; 22 L. J., Ch., 769.

A father had a power of appointing to any of his children. Having obtained part of the trust funds by a breach of trust, he appointed them to his daughters, to the exclusion of his son, under an agreement that they should convey their appointed shares to him in exchange for some real property of equal or superior value to which he was absolutely entitled. This arrangement was carried out. After his death, the son filed a bill to set aside the appointment as a fraud on the power:—Held, that the father having gained no benefit by the arrangement beyond relieving his estate from the breach of trust, the appointment was valid. S. C. 1 W. R. 279.

3. A father, having a power of appointing among his children, cannot, from the execution of it, derive to himself a benefit. *Palmer* v. *Wheeler*, 2 Ball & B. 29.

Father, tenant for life, with a power to appoint the fee among his sons, in such shares as he pleased, by one deed, upon the coming of age of his eldest son, appoints the fee to him; by a second deed, dated two days after, the son is made to join the father in a mortgage, to secure a debt due by the father; and by a third deed, dated the next day, the son is made tenant for life of the equity of redemption, with remainder to his issue in tail male, reversion in fee to the father, and an additional charge for the younger children of the father is created. On bill by the son of the appointee, to be relieved from the additional charge and mortgage:—Held, first, that the deed, so far as it charged the additional sum for younger children, was good, but the limitations void, and the excess corrupted; secondly, that the mortgage was a fraud upon the power, the father deriving a benefit to himself, and declared void, the mortgagee having notice of it. S. C. 2 Ball. & B. 18.

Equity will not relieve against a contract entered into by a child with a parent, for an appointment from him; and a purchaser from the parent, with notice of the fraud, will be affected with it. *Id.* 30.

4. Where tenant for life, with power of appointing to one or more of his children, in consideration of money in part paid on account of his own debts, executed it in favour of his son in tail male, and a few days after they joined in a demise of part of the estate for lives therein named and to be added, and nearly four years after the son executed a reconveyance to the father, in consideration of debts paid by the latter:—Held, that the transaction was sufficiently doubtful as to render the validity of the appointment fit to be inquired into; and decree below, in favour of a party claiming under the will of the father, reversed. *Jackson* v. *Jackson*, West 575; 7 Cl. & F. 977.

Where a power is vested in a father, and a stipulation is made by him for his own benefit in the exercise of it, this Court considers such a disposition as a fraud upon the power; the fraud consists, not in the selection by the father of one child in preference to another, but in the arrangement which makes the appointment, though in form to one child, in effect an appointment to the father himself. To render such appointment fraudulent, it is not necessary that it should be wholly for the benefit of the father; it is enough that it is partially so. S. C. Dr. 91.

5. A power to jointure having been executed under an agreement that the creditor of the husband should have part of the jointure, the appointment was set aside, as far as the creditors were to benefit. *Lane* v. *Page*, Ambl. 233.

And see *Wicherley's case*, Ambl. 234. n.

6. Appointment to one of several objects of a power, in payment of a debt due to her from the appointor:—Held, void. *Reid* v. *Reid*, 25 Beav. 469.

An appointment was made to a person not an object of a power, with remainder to an object. The first appointment being void:—Held, that the second was not accelerated, but failed with the first. *Ib.*

7. An appointment made as part of an arrangement between the appointor and appointee, for improving the subject matter of the appointment for the benefit of all the objects of the power, is not invalid by reason of the appointment being also incidentally for the benefit of the appointor. *Re Hwish's Charity*, 39 L. J., Ch., 499; 10 L. R., Eq., 5; 18 W. R. 817; 22 L. T., N. S., 565.

A tenant for life of lands, under a power to appoint to his children, who also were entitled in default of appointment, appointed the whole to his eldest son for the purpose of having them resettled substantially upon the same trust, but subject to a power for granting building leases to be exercised by trustees, with the consent of the tenant for life and the eldest son:—Held, a valid exercise of the power. *Ib.*

8. A husband and wife lived apart, and the wife had the care of one of their two younger

children. The husband being desirous of raising money by mortgage of his settled estates, and being unable to do so on account of the existing charges thereon, applied to the wife to postpone her pin-money and jointure annuities to his proposed mortgages. The wife consented, provided that the husband would exercise a power of appointment which he had over a sum of 30,000*l.*, in favour of his younger children, to the extent of appointing 5,000*l.* to the child under her care. He accordingly did so by a revocable deed; and by a similar deed, dated the next day, reciting the former appointment, he appointed the rest of the fund to his only other younger child. The former deed only was communicated to the wife, and she objecting to the power of revocation, it was cancelled, and a new irrevocable deed was prepared and executed of the same date as the former. The husband died before the mortgage which he proposed to make was effected. On an attempt being made to prove that the deeds were given to the family solicitor as escrows, not to take effect until the mortgage transaction was completed:—Held, that though, *à priori*, it was probable that the appointment of the 5,000*l.* might have been so made, there was not the same probability as to the other appointment of the 25,000*l.*, and although a purchaser in the position of the wife would not have expected to have the deed of appointment of the 5,000*l.* delivered to him until the consideration was paid, that rule would not apply to the case of a mother seeking the benefit of one of her children by inducing the father to exercise a power of appointment in the child's favour; and the evidence of the solicitor who prepared the deeds, to the effect that they were delivered to him as escrows, being unsupported by any other witness, being given fourteen years after the transaction, not very exactly, and being entirely contradicted by his conduct at the time of their execution, and subsequently, it was discredited, and the deeds were considered to have been duly sealed and delivered:—Held, also, that although the bribe to the husband would affect the validity of the appointment of the 5,000*l.*, yet that the appointment of the 25,000*l.* was not so connected with the former appointment as to be also invalid; nor indeed was the motive for the latter appointment the same as in the former case, for instead of being an inducement to the wife to consent to the proposed arrangement, the second appointment, if sealed to her, would probably have prevented her concurring in postponing her pin-money and jointure. *Rowley* v. *Rowley*, 1 Kay 242; 18 Jur. 306; 23 L. J., Ch., 275; 2 Eq. Rep. 241.

If a power of jointuring be exercised on a corrupt bargain for some benefit to be given to the husband, the fraud being only upon the donor of the power, the Court will sever the appointment, and hold it to be good so far as it is for the benefit of the jointress, and bad as to the rest. *Ib.*

But although, under a power of distribution among children, the fund is to be considered as a gross fund, to be fairly apportioned among all the objects; yet the donee, by appointing one share corruptly, has only to that extent diminished the common fund; and the Court will not, on that account, in consideration of the rights of the objects of the power, hold the whole to be invalid. *Ib.*

1. A tenant for life, with remainder to his children as he should appoint, in default of appointment to them equally, appointed to his eldest son, subject to certain charges for his adult younger children. The tenant for life and the appointees joined in executing to A. a mortgage, to secure a debt of the tenant for life. The eldest son afterwards filed a petition, alleging the appointment to have been made in pursuance of an agreement between the tenant for life and A., and that the mortgage was a fraud on the power. The petition also contained charges of actual fraud by A. upon the appointees. The petition prayed that the mortgage might be set aside as fraudulent, and as a fraud on the power:—Held, that, at the hearing, the petition might be amended, by praying that the deed of appointment might be set aside. *Skelton* v. *Flanagan*, 14 Ir. Ch. R. 484.

H. being tenant for life of real estate, with remainder to his children as he should appoint, and, in default of appointment, to them equally, and being indebted to F., who had obtained a receiver over his life estate, entered into an agreement with F. that he and his children should join in a mortgage to secure the sum due to F., and that the receiver over the life estate should be removed. H. accordingly appointed the lands to his eldest son, J., subject to certain charges for his younger children; and H. and all his children, except one, who was a minor, joined in a mortgage to F. A sale of the lands was had in the Landed Estates Court, where the personal representative of the minor, who had died without issue, and leaving her father, H., her heir-at-law, claimed the charge appointed to her. J., the eldest son, filed a petition, praying that the appointment might be set aside as a fraud on the power. To this suit, the mortgagee, the father, and the younger children, or their representatives, were made respondents. No actual fraud or undue influence by H. on his children was proved:—Held, that J. and the other children, except the minor, having concurred in the mortgage, and the real and personal representatives of the minor having concurred or acquiesced in the transaction, the appointment could not be impeached. S. C. 1 Ir. R., Eq., 362.

2. When a father was, by his marriage settlement, empowered to divide at discretion the funds in which the children had an expectant interest:—Held, that he could not deal or negotiate with them in executing the power. *Cunninghame* v. *Anstruther*, 2 L. R., H. L. (Sc.), 223.

A parent in such a case purchasing the interests of the children, one of them being only eighteen years of age, is a transaction wholly inconsistent with that protection which the law of every civilised country affords to children, and would not be permitted without the fullest evidence of an intention authorising it, and releases or discharges granted by the children to the father, in consideration of money payments made by him, will form no bar to their subsequent claims under the settlement. *Ib.*

3. Under a marriage settlement made in 1820, a father had a power of appointment among his children. He afterwards borrowed

the funds subject to the power, amounting to 6,000*l.*, from the trustees of the settlement, on the security of a freehold estate which was his own property. On the marriage of his only daughter in 1853 he settled 3,000*l.* upon her out of his own property. In 1863 the father executed three deeds of even date. By the first, he made a voluntary settlement of the freehold estate with some other property on his eldest son, E., for his life, with remainder for the benefit of E.'s children or remoter issue, as he should appoint, and in default of appointment, E.'s children equally, and in default of children, to himself in fee. By a second deed, the father appointed the whole of the 6,000*l.* under his marriage settlement to E., absolutely; and the same deed contained a release by the father and his wife, and also by E., and the surviving trustee of the settlement, of the mortgage debt of 6,000*l.*, and a conveyance by the same parties of the freehold estate discharged from the mortgage to the uses of the voluntary settlement of even date. By a third deed, the father gave the residue of his property to his only other son, R. The father made his will, bearing the same date, and thereby confirmed the three deeds of even date, and charged his ultimate remainder under the first deed with 3,000*l.* in favour of his only daughter, M., and subject thereto, gave the same to R. The father died in 1864. E., although made a party to the two first-mentioned deeds of even date, was not consulted on their preparation, and he at first refused to execute them, but he did in fact execute them in the year 1871:—Held, that in the opinion of the Court the arrangement by which the mortgage debt of 6,000*l.* had been released and the ultimate remainder reserved to the father had not been made for the purpose of benefiting the appointor; and that the appointment was not fraudulent or invalid. *Roach* v. *Trood*, 3 L. R., Ch. D., 429; 24 W. R. 803; 34 L. T., N. S., 105. Reversing 31 L. T., N. S., 666.

Held, also, that the condition annexed to the appointment, that E. should release the estate from the mortgage debt, was not binding upon E. until he assented to the arrangement; and that he might have claimed the benefit of the absolute appointment in his favour discharged from the condition, but that, having executed the deeds, he had by his voluntary act assented to be bound by the conditions. *Ib.*

1. The donee of a power appointed the whole trust fund to her daughter, one of the objects. The money was paid by the trustee at the daughter's written request of even date with the appointment to the mother's banking account; the daughter was married soon after, and her husband received a portion only of the fund:—Held, that the representatives of the trustee were liable to replace the trust fund. *Mackechnie* v. *Marjoribanks*, 39 L. J., Ch., 604; 18 W. R. 993; 22 L. T., N. S., 841.

2. Other Cases.

2. Strong suspicion that an appointment by a father to his son was for the benefit of the father, and fraud upon the power of appointment, is not sufficient to avoid the transaction. *Hamilton* v. *Kirwan*, 2 J. & L. 393; 8 Ir. Eq. R. 178.

3. A father, having a power of appointment amongst children, cannot take any benefit himself, but must appoint to a child or children, and cannot give any interest to a stranger; but if a further advantage is given to the child than he could have under the power, and the father sells part of his own interest, the Court will not weigh the consideration. *Langston* v. *Blackmore*, Ambl. 289. See *Tucker* v. *Sanger*, M'Clel. 449; 13 Price 609.

4. A father was tenant for life of certain estates, with remainder among his children, in such shares, etc., as he should appoint, and was also absolute owner of other property. Having two daughters, on the marriage of the elder, the other being very young, he limited all his estates in trust to secure himself an annuity until certain scheduled debts were paid, and then to divide the rents equally between him and his daughter's husband, during his life; remainder for a term to secure 2,000*l.* for the younger daughter; remainder, subject to a jointure for his widow, to his daughter's husband and herself, and their issue, in strict settlement:—Held, a good execution, not being a fraud on the power from the benefit the donee took himself as he settled the additional property, and the limitations to the daughter's issue being good, as made with the consent of the object of the power. *Conolly* v. *M'Dermott*, Beat. 601.

5. A power of appointing a fund between A., B., and C. is well executed by an appointment between A., B., and the husband of C.; but an appointment to such husband of a share of the fund, after deducting therefrom a debt due to the appointor, is an invalid execution of the power, so far as regards the direction to deduct. *Hewitt* v. *Daore* (*Lord*), 2 Keen 622; 7 L. J., N. S., Ch., 295; 2 Jur. 836.

6. Father, having power to appoint among children, and purchasing the share of one, cannot by appointment entitle himself to more than the share of that child in default of appointment. *Smith* v. *Camelford* (*Lord*), 2 Ves. 714.

7. Freeholds were, by marriage settlement, conveyed upon trust for the issue male in such shares as the father should appoint. By indenture reciting the settlement, the father conveyed to a trustee for the eldest son and his issue certain other lands in consideration of his releasing all his right under the settlement:—Held, that the father was entitled to that share of the settled property to which the son was entitled in default of appointment. *Barron* v. *Barron*, 2 Jones 798.

8. Appointment by a mother, under a power contained in her marriage settlement, in favour of one of her daughters, set aside, the evidence showing that such appointment had not been determined on, prepared, and executed solely with a view to the benefit of the daughter, but that it was intended, in part at least, for the benefit of the appointor. *Humphrey* v. *Olver*, 5 Jur., N. S., 946; 28 L. J., Ch., 406; 7 W. R, 334; 33 L. T. 83. Reversing 5 Jur., N. S., 111.

9. Certain policies of insurance effected by a father on his life as a provision for his daughters, were assigned to a trustee, upon trust for such of the daughters as the father

should appoint; and certain estates were demised to the same trustee, upon trust, out of the rents and profits to secure the payment of the premiums. The trustee advanced some sums of money in payment of the premiums, and the father appointed the bonuses which had accrued upon the policies to three of his daughters; and the three daughters soon afterwards authorised the trustees to receive the sum paid by the office for the bonuses, and invest part thereof as a fund to keep down the premiums, and a part of the sum was applied in satisfaction of the arrears of such premiums. A subsequent appointment was made in favour of the other daughters of the residue of the sums to be received on the policies, and which was intended to equalise the shares:—Held, that the first appointment was a fraud upon the power, its immediate object being to relieve the father, and its necessary consequences to relax the diligence of the trustee in enforcing the rights of the daughters against the father. *Harrison* v. *Randall*, 9 Hare 397; 16 Jur. 72; 21 L. J., Ch., 294.

1. A tenant for life had power to appoint to any of his children, an estate, which, in default, was limited to his eldest son in fee. The eldest son attained twenty-one in January 1841, and in February the father appointed the estate to him absolutely. In May, the father and the son mortgaged the estate for the father's debts, and in July the father and eldest son conveyed the estate to a trustee, to indemnify the son against the mortgage debts, and then to sell and divide the surplus between all the children equally. *Semble*, that the latter deed was not void as part of a transaction constituting a fraud on the power; but held, that the deed of July must be treated as void until set aside by an independent proceeding for that purpose in a suit by a younger child to carry it into execution. *Beddoes* v. *Pugh*, 26 Beav. 407.

2. A father, in exercise of a power, appointed part of a fund to one of his daughters, not twenty-one. She immediately mortgaged her interest so appointed, and part of the purchase money was applied to the use of the father and his daughters:—Held, that the transaction was so doubtful that a purchaser under the mortgagee was not compelled to accept the purchase. *Warde* v. *Dickson*, 5 Jur., N. S., 698; 28 L. J., Ch., 315.

3. A tenant for life with a power of appointment among his children appointed to two, and then joined with them in a mortgage, the money being expressed to be advanced to all three:—Held, that this was no fraud on the power of appointment. *Cockroft* or *Cockcroft* v. *Sutcliffe*, 2 Jur., N. S., 323; 25 L. J., Ch., 313.

Lands being limited to a father for life, with an exclusive power of appointment among his children, remainder over, the two eldest sons, being of full age, and desirous of being established in the world, set up in business as millers in partnership. At their request the father joined the partnership. In order to procure capital for the business, the father appointed the lands to his two sons exclusively, and joined with them in mortgaging the fee for 800*l*., which was placed to the credit of the partnership generally, other property belonging to the father of the value of 600*l*. being included in the security. There were five other children, three of whom were still infants, and two of age. These two had confirmed the transaction. There was no evidence of any bargain, or any *mala fides* on the part of the father, or any advantage except such as he derived from the produce of the mortgage being employed in the trade in which he was a partner:—Held, that it was a good appointment. *Ib.*

4. A will valid in its inception as an execution of a power of appointment, will not be afterwards avoided by being made the basis of transactions amounting to a fraud on the power. *Pares* v. *Pares*, 12 W. R. 231.

P., who had a power of appointment, by deed or will, in favour of her children, executed a will in February 1853 by which she appointed the property to her two daughters. In March 1853 she made a similar appointment by deed, and immediately afterwards P. and her daughters raised money by an assignment of the property, by way of mortgage, and the money was applied for P.'s benefit. The solicitor of the mortgagee acted for P. in the preparation of the will and deeds:—Held, that though it was a case of suspicion, the deeds being clearly bad, yet as no fraud was proved and the facts were consistent with honesty, the will was a good execution of the power. S. C. 10 Jur., N. S., 90; 33 L. J., Ch., 215.

5. The donees of a power of appointment amongst their children over a trust fund in which they had life interests, executed a deed poll in contemplation of the marriage of one of the daughters, then a minor, and thereby, after reciting that upon the treaty for the marriage it was agreed that they should execute the power in favour of the daughter, in order that the appointed share might be settled in the manner mentioned in an indenture of even date, appointed a share of the trust fund to the daughter; and by the settlement referred to the appointed share, together with a sum of nearly equal amount, secured by the bond of the father, was settled upon the usual trusts for the husband and wife and other children of the marriage, with ultimate trusts in default of children for the father, one of the donees of the power:—Held, that the appointment was a valid execution of the power, notwithstanding the contingent interest which the father obtained under it by the arrangement. *Cooper* v. *Cooper*, 39 L. J., Ch., 240; 5 L. R., Ch., 203; 18 W. R. 299; 22 L. T., N. S., 1. Affirming 38 L. J., Ch., 622; 8 L. R., Eq., 312; 17 W. R. 1007; 21 L. T., N. S., 197.

6. A marriage settlement gave to the parents a power, with the consent of the trustees, to make void the trusts, and of appointing the estate to new uses. This power was exercised for the purpose of mortgaging the estate to one of the trustees for a sum advanced to the father. The estate was afterwards sold under a power of sale contained in the mortgage deed:—Held, that a good title could not be made under it. *Eland* v. *Baker*, 29 Beav. 137; 7 Jur., N. S., 956; 9 W. R. 444.

A father of a lady on her marriage conveyed property to trustees, upon trust for the wife

and husband successively for life, and after the death of the survivor, upon trust for the children of the marriage. The settlement empowered the father, the son-in-law, and the daughter, with the consent in writing of the trustees, to revoke the uses and trusts of the settlement, and to re-limit and declare new uses and trusts. There were children of the marriage. One of the trustees having advanced a sum of money to the husband, an indenture of mortgage was executed, whereby the donees of the power of revocation, with the consent of the trustees, concurred in the exercise of the power of revocation contained in the settlement, and revoked the uses of the settlement, and re-limited the estate to the trustee by way of mortgage:—Held, that the deed was a fraud upon the power, and that the mortgagee could not, under the power of sale contained therein, make a good title to a purchaser. *Ib.*

1. By a marriage settlement a power of appointment over a trust fund was given to the husband (the plaintiff) in favour of the children of the marriage, to be exercised by deed or will. In default of appointment the property was to be divided equally among the children. There were four children of the marriage, of whom one died in 1869, a bachelor and intestate. The plaintiff was his personal representative. In 1876 the plaintiff appointed by deed in favour of his three surviving children, but reserved a power of revocation. In 1880 he revoked by deed the appointment made in 1876, so that the property might stand limited as theretofore. The plaintiff proposed to execute an absolute release of the power of appointment, and submitted that he would thereby become entitled to a share of the trust fund. The defendants contended that the plaintiff executed the deed of revocation in 1880 in order that he might claim the share for his own benefit, and that his intention was to commit a fraud on the power:—Held, that the donee of a power might deal with it in any lawful way he pleased. He might exercise the power and reserve to himself a power of revocation. Although, in this case, by an accident, namely, the death of one of the objects of the power, the donee had derived benefit from so doing, he could not be regarded as having committed a fraud on the power, and upon executing a proper release, he would be entitled to the share he claimed. *Shirley* v. *Fisher*, 47 L. T. 109.

V. FOR BENEFIT OF STRANGERS TO THE POWER.

1. *Where Antecedent Contract with Objects of the Power*, 5821.
2. *Appointment to Objects and Contemporaneous Settlement by them*, 5823.
3. *Interests given to Grandchildren or Parent by Way of Settlement*, 5824.

1. Where Antecedent Contract with Objects of the Power.

2. A. being desirous of voluntarily settling property on the female descendants of D. then in existence, by deed reciting this desire, and that certain persons therein named were the only descendants of D. then in life, settled a part of the property amongst such several persons so named, and reserved to himself a power of appointing the remaining part of the property amongst such several persons before named which, in default of appointment, was given to those several persons named. He afterwards discovered that there were other descendants of D. in existence, who had been omitted; and to remedy that omission, he appointed a part of the fund to an object of the power, upon his executing bonds for the payment to the persons newly discovered of the amount when received:—Held, that the appointment was void, and that the Court would not, in a suit to have the rights of the parties to the appointed fund declared, determine whether the case was such as to entitle the parties to have the settlement reformed according to the intention of the settlor. *Lee* v. *Fernie*, 1 Beav. 483.

3. P., a tenant for life of an estate, had a power of appointment over it in favour of his children, or any one or more of them. No power of leasing was given to him. He had granted a lease to F., and the term became vested in G., and to the latter he agreed to grant a new lease for a term commensurate with the remainder of the old term. P. and his daughter executed a joint bond to indemnify G. against the determination of the lease by P.'s death before the end of the term, and on the same day P. executed his will, by which he made an appointment of the whole estate in favour of his daughter. Thereupon G. surrendered the whole term, and the lease was executed to him for the remainder of the original term. A son of P. filed a bill to set aside the transaction as being a corrupt bargain between P. and his daughter, and a fraud upon the power, but Kindersley, V.-Ch. (3 L. T., N. S., 876; 9 W. R. 396), dismissed the bill with costs; and on appeal:—Held, that the will formed no part of the arrangement with reference to the lease and the bond. *Pickles* v. *Pickles*, 31 L. J., Ch., 146; 7 Jur., N. S., 1065; 9 W. R. 763; 4 L. T., N. S., 755.

4. Where a donee exercises a power of appointment in favour of one of several objects of the power, with a view to the benefit of a stranger, the appointment is fraudulent and void, even although the appointee is ignorant of the fraud, and the motive of the donee is not morally wrong. *Re Marsden*, 4 Drew. 594; 5 Jur., N. S., 590; 28 L. J., Ch., 906; 7 W. R. 520; 33 L. T. 217.

Therefore, where a married woman having a power to appoint a fund, of which she received the income for her life, among her children, appointed the whole fund at her death to her eldest daughter, in order that thereout the daughter should benefit her father, but the daughter was not informed of the mother's intention until after her mother's death:—Held, that such appointment was void. *Ib.*

5. An appointment is not void for exclusiveness, if any part is void for another reason. *Ranking* v. *Barnes*, 3 N. R. 660.

The donee of a power to appoint amongst children, appointed two-sixths of the fund to a daughter, in order, as to one-sixth, to enable

her husband to discharge a liability incurred by him for the benefit of another object of the power:—Held, that the appointment was invalid as to one-sixth, but valid as to the other sixth. S. C. 10 Jur., N. S., 463; 33 L. J., Ch., 539; 12 W. R. 565.

1. Voluntary settlement of personal property, in trust for such one or more of his children as the settlor shall appoint. Appointment to one child, exclusively, upon a secret understanding that that child shall re-assign a part of the fund to, or in favour of, a stranger. This appointment is a fraud upon the settlement, and void, not only to the extent of the sum assigned back, but *in toto*. Bill, by purchaser for valuable consideration without notice, under this appointment, dismissed as against the person entitled under the settlement in default of appointment, such person having also the legal estate in the fund which was the subject of the appointment. *Daubeny* v. *Cockburn*, 1 Meriv. 626.

Agreement, by one of the objects of a power, to return part in consideration of an appointment in its favour, is a fraud in the appointee as well as in the appointor, both on the other objects of the power, and on the party who is to take in default of appointment. *Id.* 644.

Secus, where the appointee is not privy to the corrupt agreement. *Ib.*

2. The donee of a power of appointment of a fund among her children, to whom the fund was limited in default of appointment, had only two daughters, and apportioned nearly the whole of the fund to one of them, who was unmarried, on an understanding, but without any positive agreement, that the appointee would re-settle one moiety of it on trusts, for the separate use of the other daughter, who was married, exclusively of her husband; and after her death, on trusts for her children. A re-settlement was accordingly made, without the privity of the married daughter, who did not hear of the transaction until several years afterwards:—Held, on the suit of her husband, that the appointment was invalid, and a settlement was directed to be made of the married daughter's share. *Salmon* v. *Gibbs*, 3 De G. & Sm. 343; 18 L. J., N. S., Ch., 177; 13 Jur. 355.

3. In 1813 a married woman who was entitled for life to estates, including the L. estate, with a power of appointing them after her death to all or any of her children, appointed them by deed to her eldest son in fee. This appointment was made upon a bargain between the husband and wife, and the eldest son, that the estates should be settled, subject to the wife's life estate, to the use that the husband should receive a rent charge for his life, and subject thereto to the use of all or any of the children of the marriage as the husband and wife should jointly appoint, or as the wife, if she survived, should by deed or will appoint; and the estates were so settled accordingly. In 1820, the husband and wife made a joint appointment of the estates among their children, by which they gave the L. estate to the eldest son, and they made slight variations of these dispositions in 1826, reserving on each occasion a power of revocation and new appointment to them jointly and to the wife if surviving. In 1827 the husband died. In 1829, the widow, who had not married again, by a deed not noticing the invalidity of the appointment of 1813, and expressed to be made in exercise of the powers given her by the deeds of 1820 and 1826, or by the deeds recited in them, and of all other powers vested in her, made some slight variations of the dispositions made by the deeds of 1820 and 1826, and subject thereto, confirmed the dispositions of those deeds:—Held, that although the appointment of 1813 was invalid as being made on a bargain for the benefit of the husband, and the appointments of 1820 and 1826 were therefore invalid, as made under a power which was ill created, the original power of the wife was well exercised by the appointment of 1829, and that the title of the eldest son to the L. estate was good. *Carver* v. *Richards*, 1 De G. F. & J. 548. And see S. C. 6 Jur., N. S., 410; 5 Jur., N. S., 1412; 29 L. J., Ch., 357; 8 W. R. 349; 2 L. T., N. S., 161.

4. If a power of appointment is exercised in favour of an object of the power, upon the understanding that deeds shall be executed by the appointee, settling the property upon persons not objects of the power, in furtherance of the desire of the donee of the power to appoint to those persons, the appointment, although made without any corrupt motive, is void in equity as a fraud upon the power. *Pryor* v. *Pryor*, 32 L. J., Ch., 731; 11 W. R. 873; 9 L. T., N. S., 78; 4 N. R. 82.

Secus, where a *bonâ fide* appointment is made to an object of the power, with a view to an immediate settlement of the appointed property with the approbation of the appointee; as an appointment by a parent to a child in contemplation of a settlement on the marriage of the latter, in which case the parental influence of the donee of the power may be legitimately exerted in procuring a proper settlement. *Ib.*

Parents having a power of appointing an estate to all or any of their children, appointed it absolutely to two of their sons, upon the understanding that the appointees should re-settle the estate upon certain trusts for the benefit of all the children then living during their respective lives, and subject thereto for the benefit of the children of the sons. This re-settlement was made by a contemporaneous deed:—Held, that the transaction could not be supported by analogy to the common case of an appointment to a daughter in contemplation of her marriage, accompanied by a contemporaneous settlement of the appointed fund, but that the appointment was void in equity, as made upon a bargain for the benefit of persons not objects of the power. S. C. 2 De G. J. & S. 205; 10 Jur., N. S., 603; 33 L. J., Ch., 441; 12 W. R. 781; 10 L. T., N. S., 360; 4 N. R. 440.

An appointment to an object of a power upon a bargain to make a settlement in favour of another person, also an object thereof, is valid, *semble*. *Ib.*

5. The execution of a power in favour of a stranger, confirmed by the only object of the power, was held to be valid; and though the deed contained a power of revocation, it was not revoked by a subsequent appointment in favour of the object of the power, it being proved that the second deed was executed for a specific purpose only, and by mistake included the whole property comprised within

the power. *Wright* v. *Goff*, 2 Jur., N. S., 481; 25 L. J., Ch., 803.

A. B., a tenant for life, had a power of appointing a fund amongst her children. There being only one object of the power, viz., C. D., who was a married woman, an arrangement was come to between A. B. and C. D., and her husband, whereby the whole fund was appointed to C. D. and then resettled, giving an interest to C. D.'s children, and to E. F., a stranger. The husband survived:—Held, that the transaction was binding on him and his representatives. S. C. 22 Beav. 207.

1. An absolute appointment was made to an object of a power, under a prior understanding between the appointor and appointee, to hold in trust for persons, some of whom were objects and some not:—Held, that the whole was void. *Tucker* v. *Sawyer* (M'Clel. 424) observed upon. *Birley* v. *Birley*, 25 Beav. 299; 4 Jur., N. S., 315; 27 L. J., Ch., 569; 6 W. R. 400.

A parent had a power to appoint to children alone. She appointed to two children absolutely. The next year the appointees settled the property on children and grandchildren of the parent, by a deed reciting that when the appointment was made, it was understood between the appointor and appointees that the latter should consider themselves as possessed of the property upon the trusts of settlement:—Held, that the transaction was a fraud on the power, and wholly void. *Ib.*

2. K., by his will dated in 1862, after reciting that he had two children, namely, his son F. and his daughter M., and that under a codicil of his father he had power, by deed or will, to appoint to his children, in such proportions as he might think fit, the principal share wherein he took a life interest in the residuary estate of his father, in exercise of such power directed and appointed that such share should, from and after his decease, go and belong absolutely to his daughter M., but in case she should die in his lifetime, then to his son F. The testator's daughter was married to B. By a settlement dated in 1866, and made upon her marriage, it was declared that K., in consideration of the marriage, appointed his daughter to receive the property over which he had a power of appointment, only reserving to himself the faculty of disposing in favour of his wife of the reversion of 10,000 francs during her life. K., by a codicil to his will, dated in 1871, and made in France, where he was then residing, stated as follows: "When I married my daughter . . . I expressed the desire of leaving to my wife . . . a small revenue at my death . . . but not having it in my power to do so, my daughter and her husband . . . proposed to me as follows: that if I would consent to leave to them the whole of the sum of my share of the residue of my father's estate . . . which I have power to dispose of in favour of my children, they would take the engagement at my death to have placed in my said wife's name, for her life, the sum of 10,000 francs . . . and at my wife's death the said sum to return to my said daughter. . . . In the case that my said daughter . . . and her husband should respect my memory and their signature, then it is my will and desire that my daughter and her husband should and may have the whole of the sum of my aforesaid share." This codicil was written and signed by the testator, but was unattested. It was, however, admitted to probate under 24 & 25 Vict., c. 114:—Held, that the appointment under the settlement and codicil were invalid, as being respectively frauds upon the power; that neither the settlement nor the codicil operated so as to revoke the will of 1862, but that the bargain which had been made had, in equity, the effect of preventing the appointee from taking under the appointment in the will, and consequently the fund must go as in default of appointment. *Re Kirwan's Trusts*, 52 L. J., Ch., 952; 49 L. T. 292; 25 L. R., Ch. D., 373; 32 W. R. 581.

See also Next Subdivision.

2. Appointment to Objects and Contemporaneous Setttlement by Them.

3. An appointment of parties not objects of the power by the direction of a party who is, is valid, operating as an appointment to and settlement by the latter. *Goldsmid* v. *Goldsmid*, 2 Hare 187; 12 L. J., N. S., Ch., 113; 7 Jur. 11.

A valid appointment may be made to persons not objects of the power, with the concurrence of those who are objects; and by an extension of this principle, it was held that, in a settlement grounded upon an appointment to one who was an object of the power, and made with the concurrence of such appointee, a power might be reserved to such appointee to appoint to the wives or husbands of the objects of the original power. *Ib.*

4. If a father, having a power to appoint to a child, without making an actual appointment connive with the child in making a settlement which cannot have effect unless through a previous appointment, that very disposition is considered first as an appointment to the child, and then as a settlement by the child of the property appointed; but if the intention of the parties be not to execute the power of appointment, but to operate on the estate in default of appointment, and if the transaction considered as an appointment would be a fraud on the power, the Court will not imply an appointment, none such having been actually made. *Thompson* v. *Simpson*, 2 J. & L. 110; 8 Ir. Eq. R. 55. See S. C. 1 Dr. & War. 459.

5. A. having a power, by deed or will, to appoint the lands of D. (which were held with other lands, and were subject to a proportioned rent of 19*l.*) to the use of such child or children of his marriage, in such shares, or the whole to one of such children, for such estates, and with such conditions, and limitations over, for the benefit of some or one of such children, and subject to such charges for the other or others of such children as he should appoint, purchased the reversion of the lands of D., and afterwards, by a settlement on the marriage of B., his eldest son, reciting that he was seised in fee of the lands of D., and that it had been agreed that an annuity, to be thereby granted and charged on the lands of D., should be assigned upon the trusts of the settlement, granted an annuity of 100*l.*,

to be charged on the lands of D. for 100 years, upon trust, after death of the survivor of A. and his wife, to pay the same to B. for life, and after his decease to C. (B.'s intended wife), so long as there should be issue of the marriage, and she should remain a widow; and after the death of the survivor, or in case C. should survive B., and there should have been no issue of the marriage, or she should marry again, in trust for the executors, etc., of A. By will, A., reciting his power, devised all his right to the lands of D. to his three sons, in trust by sale, etc., to raise a sum for his younger children:—Held, that the settlement operated as an appointment to B., and a settlement by him on C., and that she was therefore, though not an object of the power, entitled to the annuity after B.'s death. *Irwin* v. *Irwin*, 10 Ir. Ch. R. 29.

1. A father, in exercise of a power, appointed part of a fund to one of his daughters, not twenty-two. She immediately mortgaged her interest so appointed, and part of the purchase money was applied to the use of the father and his daughters:—Held, that the transaction was so doubtful that a purchaser was not compelled to accept the purchase. *Ward* v. *Dickson*, 5 Jur., N. S., 1698; 28 L. J., Ch., 315.

2. A tenant for life had the power of appointing the settled property amongst such of his children as he should think fit. The trustees had, in breach of trust, lent him part of the trust moneys, without taking any security. In 1834 the tenant for life appointed to his daughters the money so lent, and 500*l.*, in exclusion of his son. Contemporaneously, the daughters exchanged the sum so appointed for an estate of the father, and the old trustee retired. The transaction was supported, the estate being worth the amount given in exchange. *Askham* v. *Barker*, 17 Beav. 37; 22 L. J., Ch., 769; 1 W. R. 279.

3. A testator gave real and personal estate to his widow for life, and after his death to his two daughters "in such proportions" as she should appoint, and in default equally. The will also contained a direction that the fortune of each daughter should go to her children after her decease, in such proportions as she should direct, and in default equally. By a deed poll the widow appointed the estates in equal moieties to such uses as her two daughters, who were both then married women, should appoint, and in default to them absolutely; and directed the appointment to take effect immediately. By a mutual settlement executed the following day the two daughters appointed their respective shares to themselves and their husbands for life, with remainder to their children as they should appoint, and in default equally; and if either daughter should die without issue, her moiety was to go over upon the trusts declared of the other moiety:—Held, that the widow had power to determine the nature of the interests as well as the proportion of the property which each daughter should take; and that the deed of appointment was therefore valid:—Held, also, that the deed of settlement was valid so far as it determined the interests of the daughters and their children; but whether the life interests given to the husbands were good, *quære*. *Jebb* v. *Tugwell*, 4 W. R. 157; 25 L. J., Ch., 109; 20 Jur. 54; 8 De G. M. & G. 663. S. C. 3 W. R. 278; 24 L. J., Ch., 433; 1 Jur., N. S., 460; 20 Beav. 84, 97. n.

4. Under a power to appoint to children, an appointment was made by deed poll to trustees upon the trusts of a contemporaneous settlement on the marriage of one of the daughters. This settlement, to which the daughter was a party, declared trusts for the daughter for life, with limitations over to her husband and children:—Held, that the appointment was good, being equivalent to an appointment to the daughter, and a settlement by her. *Daniel* v. *Arkwright*, *Courthope* v. *Daniel*, *Daniel* v. *Courthope*, 2 Hem. & M. 95; 10 Jur., N. S., 764; 11 L. T., N. S., 18; 4 N. R. 418.

Another appointment was made in favour of another daughter already married, and the deed of appointment itself declared trusts in favour of the daughter, her husband, and children:—Held, that this appointment was bad; but on the evidence of intention the appointment was rectified. *Ib.*

See also Preceding Subdivisons.

3. Interests given to Grandchildren or Parent by Way of Settlement.

5. Under power to appoint amongst children, interests may be given to grandchildren, by way of settlement on their mother, with her consent and her husband's. *White* v. *St. Barbe*, 1 Ves. & B. 399.

6. A tenant for life had a power to appoint to children. By a post-nuptial settlement, to which his married daughter and her husband were parties, he appointed the reversionary interest to his daughter, and her husband and children:—Held, that the appointment to the husband and grandchildren was valid. *Re Gosset*, 19 Beav. 529.

7. Where a party has a right to appoint an estate to one of his children, and that child joins his father in a settlement of the estate upon his children, although the grandchildren thus provided for are not objects of the power, yet the Court holds such a dealing as an appointment of the estate to the child, and then a disposition of it by him in favour of the grandchildren. *Thompson* v. *Simpson*, 1 Dr. & War. 459.

8. A. B., a tenant for life, had a power of appointing a fund amongst her children. There being only one object of the power, viz., C. D., who was a married woman, an arrangement was come to between A. B. and C. D., and her husband, whereby the whole fund was appointed to C. D. and then resettled, giving an interest to C. D.'s children, and to E. F., a stranger. The husband survived:—Held, that the transaction was binding on him and his representatives. *Wright* v. *Goff*, 22 Beav. 207; 2 Jur., N. S., 481; 25 L. J., Ch., 803; 4 W. R. 522.

9. Parents had a life interest in a sum of money, with power to appoint it to their children. On the marriage of an infant daughter, by a settlement to which she and her intended husband were parties, the parents appointed the reversionary fund to trustees, on trust for the daughter, the intended husband, and the child of the marriage. The daughter and her husband survived the parents:—Held, that the

appointment to the husband and children, though not objects of the original power, was valid, notwithstanding the infancy of the daughter. *FitzRoy* v. *Richmond (Duke)*, 27 Beav. 190; 5 Jur., N. S., 971; 28 L. J., Ch., 752.

VI. EXCESS. WHEN SEVERABLE.

1. A. having a power to appoint 10,000*l.* amongst his younger children, appoints it to them equally, reserving to himself a power of revocation as to 5,000*l.*, which he afterwards irrevocably appoints to E., one of the children, in consideration of her having agreed to apply part of it in payment of his debts. Afterwards, A., by a deed, to which E. is also a party, revokes, with her consent, the last appointment as to 2,500*l.*, and in pursuance of all powers, appoints that sum to a child by a second marriage, and confirms E.'s title to the remainder under the former appointment:—Held, that the appointment of the 5,000*l.* being void, the appointment of the 2,000*l.* must also fail. *Farmer* v. *Martin*, 2 Sim. 502.

2. Power of jointuring executed in favour of a wife, but with an agreement that a wife should only receive a part as an annuity for her own benefit, and that the residue should be applied to the payment of the husband's debts:—Held, a fraud upon the power, and the execution set aside, except so far as related to the annuity, the bill containing a submission to pay it, and only seeking relief against the other objects of the appointment. *Aleyn* v. *Belchier*, 1 Eden 132. And see *Lane* v. *Page*, Ambl. 233.

3. Voluntary settlement of personal property, in trust for such one or more of his children as the settlor shall appoint. Appointment to one child, exclusively, upon a secret understanding that the child shall re-assign a part of the fund to, or in favour of, a stranger. This appointment is a fraud upon the settlement, and void, not only to the extent of the sum assigned back, but *in toto*. Bill, by purchaser for valuable consideration without notice, under this appointment, dismissed as against the person entitled under the settlement in default of appointment, such person having also the legal estate in the fund which was the subject of the appointment. *Daubeny* v. *Cockburn*, 1 Meriv. 626.

4. The Court will not entertain a suit to set aside an appointment of a part of certain trust funds, as a fraud upon the power, when it appears that another appointment not impeached by the bill was made of funds, subject to the same power, in which regard was had to the appointment complained of, and the object was to equalise the interests of the several appointees; for the Court will not undo part of an entire transaction, the other part of the same transaction not being brought within its jurisdiction. *Harrison* v. *Randall*, 9 Hare 397; 21 L. J., N. S., Ch., 294; 16 Jur. 72.

Where there is an appointment to A. and B. by one instrument (*à fortiori* by different instruments), the appointment to A. may be good and the appointment to B. bad, and A. and B. may well agree between themselves, that the bad appointment shall not be disturbed. *Ib.*

5. When an appointment is partly within the power, and partly in excess of it, but the lawful intention is not so connected with or so dependent on the wrong intention as to be affected by it, the Court will give effect to so much of the appointment as is within the power. *Topham* v. *Portland (Duke)*, 1 N. R. 496.

6. A father had a power of appointing to any of his children. Having, in breach of trust, obtained possession of part of the trust funds, he, in 1834, appointed that part to his daughters, in exclusion of his son, under an agreement that that part should afterwards be conveyed to him, in exchange for an estate of less value. In 1844 he executed a second appointment, reciting the previous dealing with the fund, and he thereby appointed the remaining portion of the trust property, "and all other" the property comprised in the settlement, to his daughters:—Held, that the first appointment was void; and, secondly, that the portion of the property comprised therein was not appointed by the second deed. *Askham* v. *Barker*, 12 Beav. 499.

7. Father, tenant for life, with a power to appoint the fee among his sons, in such shares as he pleased, by one deed, upon the coming of age of his eldest son, appoints the fee to him; by a second deed, dated two days after, the son is made to join the father in a mortgage, to secure a debt due by the father; and by a third deed, dated the next day, the son is made tenant for life of the equity of redemption, with remainder to his issue in tail male, reversion in fee to the father, and an additional charge for the younger children of the father is created. On bill by the son of the appointee, to be relieved from the additional charge and mortgage:—Held, first, that the deed, so far as it charged the additional sum for younger children, was good, but the limitations void, and the excess corrupted. *Palmer* v. *Wheeler*, 2 Ball. & B. 18.

8. Under a marriage settlement 3,000*l.* consols were vested in trustees for the husband and wife for life successively, and afterwards to pay the principal (in case there should be any children) among such children in such manner as the husband and wife should jointly appoint by deed, or the survivor by deed or will, and in default of appointment, for the children equally, with benefit of survivorship. There were six children, and, after the father's death (there having been no joint appointment), the mother appointed two-sixths to a married daughter, it being in evidence that the daughter's husband had become liable to pay the penalty of a bond as surety for his wife's brother, and that he had negotiated with his mother-in-law to make the 3,000*l.* consols available to relieve him from such debt. One-sixth only was applied to pay the debt, and, subsequently, the mother appointed the remainder of the fund (four-sixths) to two of her sons, leaving a son and daughter to whom no appointment was made. A bill was filed to carry out the trusts of the settlement, and declare the rights as to the 3,000*l.*, and a reference directed as to the circumstances attending the appointments:—Held, that the appointment to the wife to relieve the husband was invalid as to one-

to be charged on the lands of D. for 100 years, upon trust, after death of the survivor of A. and his wife, to pay the same to B. for life, and after his decease to C. (B.'s intended wife), so long as there should be issue of the marriage, and she should remain a widow; and after the death of the survivor, or in case C. should survive B., and there should have been no issue of the marriage, or she should marry again, in trust for the executors, etc., of A. By will, A., reciting his power, devised all his right to the lands of D. to his three sons, in trust by sale, etc., to raise a sum for his younger children:—Held, that the settlement operated as an appointment to B., and a settlement by him on C., and that she was therefore, though not an object of the power, entitled to the annuity after B.'s death. *Irwin* v. *Irwin*, 10 Ir. Ch. R. 29.

1. A father, in exercise of a power, appointed part of a fund to one of his daughters, not twenty-two. She immediately mortgaged her interest so appointed, and part of the purchase money was applied to the use of the father and his daughters:—Held, that the transaction was so doubtful that a purchaser was not compelled to accept the purchase. *Ward* v. *Dickson*, 5 Jur., N. S., 1698; 28 L. J., Ch., 315.

2. A tenant for life had the power of appointing the settled property amongst such of his children as he should think fit. The trustees had, in breach of trust, lent him part of the trust moneys, without taking any security. In 1834 the tenant for life appointed to his daughters the money so lent, and 500*l.*, in exclusion of his son. Contemporaneously, the daughters exchanged the sum so appointed for an estate of the father, and the old trustee retired. The transaction was supported, the estate being worth the amount given in exchange. *Askham* v. *Barker*, 17 Beav. 37; 22 L. J., Ch., 769; 1 W. R. 279.

3. A testator gave real and personal estate to his widow for life, and after his death to his two daughters "in such proportions" as she should appoint, and in default equally. The will also contained a direction that the fortune of each daughter should go to her children after her decease, in such proportions as she should direct, and in default equally. By a deed poll the widow appointed the estates in equal moieties to such uses as her two daughters, who were both then married women, should appoint, and in default to them absolutely; and directed the appointment to take effect immediately. By a mutual settlement executed the following day the two daughters appointed their respective shares to themselves and their husbands for life, with remainder to their children as they should appoint, and in default equally; and if either daughter should die without issue, her moiety was to go over upon the trusts declared of the other moiety:—Held, that the widow had power to determine the nature of the interests as well as the proportion of the property which each daughter should take; and that the deed of appointment was therefore valid:—Held, also, that the deed of settlement was valid so far as it determined the interests of the daughters and their children; but whether the life interests given to the husbands were good, *quære*. *Jebb* v. *Tugwell*, 4 W. R. 157; 25 L. J., Ch., 109; 20 Jur. 54; 8 De G. M. & G. 663. S. C. 3 W. R. 278; 24 L. J., Ch., 433; 1 Jur., N. S., 460; 20 Beav. 84, 97. n.

4. Under a power to appoint to children, an appointment was made by deed poll to trustees upon the trusts of a contemporaneous settlement on the marriage of one of the daughters. This settlement, to which the daughter was a party, declared trusts for the daughter for life, with limitations over to her husband and children:—Held, that the appointment was good, being equivalent to an appointment to the daughter, and a settlement by her. *Daniel* v. *Arkwright*, *Courthope* v. *Daniel*, *Daniel* v. *Courthope*, 2 Hem. & M. 95; 10 Jur., N. S., 764; 11 L. T., N. S., 18; 4 N. R. 418.

Another appointment was made in favour of another daughter already married, and the deed of appointment itself declared trusts in favour of the daughter, her husband, and children:—Held, that this appointment was bad; but on the evidence of intention the appointment was rectified. *Ib.*

See also Preceding Subdivisons.

3. Interests given to Grandchildren or Parent by Way of Settlement.

5. Under power to appoint amongst children, interests may be given to grandchildren, by way of settlement on their mother, with her consent and her husband's. *White* v. *St. Barbe*, 1 Ves. & B. 399.

6. A tenant for life had a power to appoint to children. By a post-nuptial settlement, to which his married daughter and her husband were parties, he appointed the reversionary interest to his daughter, and her husband and children:—Held, that the appointment to the husband and grandchildren was valid. *Re Gosset*, 19 Beav. 529.

7. Where a party has a right to appoint an estate to one of his children, and that child joins his father in a settlement of the estate upon his children, although the grandchildren thus provided for are not objects of the power, yet the Court holds such a dealing as an appointment of the estate to the child, and then a disposition of it by him in favour of the grandchildren. *Thompson* v. *Simpson*, 1 Dr. & War. 459.

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1. A. having a power to appoint 10,000*l.* amongst his younger children, appoints it to them equally, reserving to himself a power of revocation as to 5,000*l.*, which he afterwards irrevocably appoints to E., one of the children, in consideration of her having agreed to apply part of it in payment of his debts. Afterwards, A., by a deed, to which E. is also a party, revokes, with her consent, the last appointment as to 2,500*l.*, and in pursuance of all powers, appoints that sum to a child by a second marriage, and confirms E.'s title to the remainder under the former appointment:—Held, that the appointment of the 5,000*l.* being void, the appointment of the 2,000*l.* must also fail. *Farmer* v. *Martin*, 2 Sim. 502.

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Where there is an appointment to A. and B. by one instrument (*à fortiori* by different instruments), the appointment to A. may be good and the appointment to B. bad, and A. and B. may well agree between themselves, that the bad appointment shall not be disturbed. *Ib.*

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7. Father, tenant for life, with a power to appoint the fee among his sons, in such shares as he pleased, by one deed, upon the coming of age of his eldest son, appoints the fee to him; by a second deed, dated two days after, the son is made to join the father in a mortgage, to secure a debt due by the father; and by a third deed, dated the next day, the son is made tenant for life of the equity of redemption, with remainder to his issue in tail male, reversion in fee to the father, and an additional charge for the younger children of the father is created. On bill by the son of the appointee, to be relieved from the additional charge and mortgage:—Held, first, that the deed, so far as it charged the additional sum for younger children, was good, but the limitations void, and the excess corrupted. *Palmer* v. *Wheeler*, 2 Ball. & B. 18.

8. Under a marriage settlement 3,000*l.* consols were vested in trustees for the husband and wife for life successively, and afterwards to pay the principal (in case there should be any children) among such children in such manner as the husband and wife should jointly appoint by deed, or the survivor by deed or will, and in default of appointment, for the children equally, with benefit of survivorship. There were six children, and, after the father's death (there having been no joint appointment), the mother appointed two-sixths to a married daughter, it being in evidence that the daughter's husband had become liable to pay the penalty of a bond as surety for his wife's brother, and that he had negotiated with his mother-in-law to make the 3,000*l.* consols available to relieve him from such debt. One-sixth only was applied to pay the debt, and, subsequently, the mother appointed the remainder of the fund (four-sixths) to two of her sons, leaving a son and daughter to whom no appointment was made. A bill was filed to carry out the trusts of the settlement, and declare the rights as to the 3,000*l.*, and a reference directed as to the circumstances attending the appointments:—Held, that the appointment to the wife to relieve the husband was invalid as to one-

sixth, but valid as to the other one-sixth, and that the appointment to the two sons, although it exhausted the whole fund apparently, was valid, inasmuch as in fact one-sixth remained unappointed by reason of the invalidity of the first appointment as to that one-sixth. *Ranking* v. *Barnes*, 12 W. R. 565; 3 N. R. 660; 10 Jur., N. S., 463; 33 L. J., Ch., 539.

1. Distinction between the appointment exceeding the limits of a power, and void for the excess only, and one which being a fraud on the power is void altogether. *Agassiz* v. *Squire*, 18 Beav. 431; 1 Jur., N. S., 50; 23 L. J., Ch., 985.

A. B. had a power to appoint a rent charge in favour of her sons, and a power to appoint policy moneys in favour of her children. On the 13th August, 1838, she appointed the rent charge to her son G., who, on the following day, settled it, not only in favour of himself and other objects of the power, but also of A. B.'s husband and others, not objects of the power. On the same day A. B. appointed the policy moneys partly in favour of objects of the power, and partly in favour of her husband and other persons, not objects of the power. The deed contained a proviso, that if any of the objects should refuse to accede to the arrangements as to the rent charge and policy moneys, he should forfeit the benefits intended. On the same day G. gave a bond to A. B.'s husband for securing him a benefit out of the policy moneys. The Court being of opinion that the transaction must be taken as a whole:—Held it altogether void, both as against the objects of the power and the rest, considering it an entangled transaction to effect a fraudulent execution of the power in favour of persons who were not objects. *Ib.*

2. A husband and wife lived apart, and the wife had the care of one of their two younger children. The husband being desirous of raising money by mortgage of his settled estates, and being unable to do so on account of the existing charges thereon, applied to the wife to postpone her pin-money and jointure annuities to his proposed mortgages. The wife consented, provided that the husband would exercise a power of appointment which he had over a sum of 30,000*l.*, in favour of his younger children, to the extent of appointing 5,000*l.* to the child under her care. He accordingly did so by a revocable deed; and by a similar deed, dated the next day, reciting the former appointment, he appointed the rest of the fund to his only other younger child. The former deed only was communicated to the wife, and she objecting to the power of revocation, it was cancelled, and a new irrevocable deed was prepared and executed of the same date as the former. The husband died before the mortgage which he proposed to make was effected. On an attempt being made to prove that the deeds were given to the family solicitor as escrows, not to take effect until the mortgage transaction was completed:—Held, that though *à priori* it was probable that the appointment of the 5,000*l.* might have been so made, there was not the same probability as to the other appointment of the 25,000*l.*, and although a purchaser in the position of the wife would not have expected to have the deed of appointment of the 5,000*l.* delivered to him until the consideration was paid, that rule would not apply to the case of a mother seeking the benefit of one of her children by inducing the father to exercise a power of appointment in the child's favour; and the evidence of the solicitor who prepared the deeds, to the effect that they were delivered to him as escrows, being unsupported by any other witness, being given fourteen years after the transaction, not very exactly, and being entirely contradicted by his conduct at the time of their execution, and subsequently, it was discredited, and the deeds were considered to have been duly sealed and delivered. Held, also, that although the bribe to the husband would affect the validity of the appointment of the 5,000*l.*, yet that the appointment of the 25,000*l.* was not so connected with the former appointment as to be also invalid; nor indeed was the motive for the latter appointment the same as in the former case, for instead of being an inducement to the wife to consent to the proposed arrangement, the second appointment if revealed to her would probably have prevented her concurring in postponing her pin-money and jointure. *Rowley* v. *Rowley*, 1 Kay 242; 23 L. J., Ch., 275; 18 Jur. 306; 2 Eq. Rep. 241.

3. If a power of jointuring be exercised on a corrupt bargain for some benefit to be given to the husband, the fraud being only upon the donor of the power, the Court will sever the appointment, and hold it to be good so far as it is for the benefit of the jointress, and bad as to the rest. *Ib.*

But although under a power of distribution among children, the fund is to be considered as a gross fund, to be fairly apportioned among all the objects; yet the donee, by appointing one share corruptly, has only to that extent diminished the common fund; and the Court will not, on that account, in consideration of the rights of the objects of the power, hold the whole to be invalid. *Ib.*

VII. EVIDENCE AND BURDEN OF PROOF.

4. Though a party is not permitted to execute a power for his own benefit, and the objection cannot be waived by a party participating in the benefit as against other interests, the Court will not act against the title upon a mere suspicion that a transaction was of that nature, appearing fair both upon the instruments and the abstract, viz., purchase under the execution of a power of appointment by a father, subject to estates for life, in him and his wife, in favour of their son; all three joining; and receiving the money, the fair value; which is presumed to be received according to their interests in the estate, and the purchaser not bound to see to the application. *M'Queen* v. *Farquhar*, 11 Ves. 467.

5. Strong suspicion that an appointment by a father to his son was for the benefit of the father, and fraud upon the power of appointment, is not sufficient to avoid the transaction. *Hamilton* v. *Kirwan*, 2 J. & L. 393; 8 Ir. Eq. R. 278.

6. The burden of proving the invalidity of an appointment lies on the person who seeks to set it aside; and not only the deed, but the whole matter, and all the accompanying facts

must be examined, in order to ascertain the real nature and character of the transaction. *Askham* v. *Barker*, 17 Beav. 37; 22 L. J., Ch., 769; 1 W. R. 279.

1. The intentions of the donor are to be collected from the instruments, and not from parol evidence, but parol evidence is admissible to show the purposes for which the power is exercised, although they may not appear on the deeds. *Topham* v. *Portland* (*Duke*), 32 L. J., Ch., 257; 11 W. R. 507; 8 L. T., N. S., 180; 1 De G. J. & S. 577. S. C. 31 Beav. 525; 32 L. J., Ch., 81; 8 Jur., N. S., 1083; 7 L. T., N. S., 11; and on appeal to House of Lords, 11 H. L. Ca. 32; 34 L. J., Ch., 113; 10 Jur., N. S., 501; 12 W. R. 697; 10 L. T., N. S., 355.

2. When an appointment, valid on the face of it, had been set aside by reason of what has taken place between the donee of the power and the appointee, a second appointment by the same donee to the same appointee cannot be sustained otherwise than by clear proof on the part of the appointee, that the second appointment is perfectly free from the original taint which attached to the first. *Topham* v. *Portland* (*Duke*), 39 L. J., Ch., 259; 5 L. R., Ch., 40; 18 W. R. 235; 22 L. T., N. S., 847. Affirming 38 L. J., Ch., 573; 17 W. R. 911.

3. A will valid in its inception as an execution of a power of appointment, will not be afterwards avoided by being made the basis of transactions amounting to a fraud on the power. *Pares* v. *Pares*, 12 W. R. 231; 10 Jur., N. S., 90; 33 L. J., Ch., 215.

To substantiate a charge of fraud strict evidence is requisite; therefore, where a will purporting to be made in execution of a power of appointment, was prepared one month before a deed of appointment, which amounted to a fraud on the power, and which repeated almost identically the provisions of the will, and also referred to and kept alive the will, the will and deeds having been all prepared by one solicitor:—Held, that there was not sufficient evidence to show that the will was made with the intention of committing a fraud on the power. *Ib.*

4. Where the evidence establishes that it was at one time intended by the appointor that an appointment should be exercised for his own benefit, the onus of proving that such intention was subsequently abandoned lies on the appointee, or those who support the appointment. *Humphry* v. *Olver*, 5 Jur., N. S., 946; 28 L. J., Ch., 406; 7 W. R. 334; 33 L. T. 83. Reversing 5 Jur., N. S., 111.

VIII. CONFIRMATION.

5. Effect of an agreement between several appointees under different appointments, as between such appointees and the trustees of the property, that one of the appointments, which is invalid, shall not be disturbed. *Harrison* v. *Randall*, 9 Hare 409; 16 Jur. 72; 21 L. J., Ch., 294.

6. Husband and wife, who had under their marriage settlement a power of appointment over a fund in favour of such one or more, exclusively of the others or other of the children of the marriage, as they should jointly by deed appoint, made certain appointments nominally in favour of objects of the power, but in reality for their own benefit. By a deed, to which all the children of the marriage were parties, and which they all executed, these appointments were subsequently ratified and confirmed. On a bill by a child of the marriage who had not attained his majority at the date of the deed of confirmation, but had executed the deed some months after he came of age, to set aside the appointments and the deed of confirmation:—Held, that the appointments were not *ipso facto* void, but only voidable, and that he having deliberately executed the deed of confirmation could not after the lapse of nearly seven years rip open the transaction. *Preston* v. *Preston*, 21 L. T., N. S., 346.

7. H. being tenant for life of real estate, with remainder to his children as he should appoint, and, in default of appointment, to them equally, and being indebted to F., who had obtained a receiver over his life estate, entered into an agreement with F. that he and his children should join in a mortgage to secure the sum due to F., and that the receiver over the life estate should be removed. H. accordingly appointed the lands to his eldest son, J., subject to certain charges for his younger children; and H. and all his children, except one, who was a minor, joined in a mortgage to F. A sale of the lands was had in the Landed Estates Court, where the personal representative of the minor, who had died without issue, and leaving her father, H., her heir-at-law, claimed the charge appointed to her. J., the eldest son, filed a petition, praying that the appointment might be set aside as a fraud on the power. To this suit, the mortgagee, the father, and the younger children, or their representatives, were made respondents. No actual fraud or undue influence by H. on his children was proved:—Held, that J. and the other children, except the minor, having concurred in the mortgage, and the real and personal representatives of the minor having concurred or acquiesced in the transaction, the appointment could not be impeached. *Skelton* v. *Flanagan*, 1 Ir. R., Eq., 362.

IX. RIGHTS OF PURCHASERS FOR VALUE.

8. Though a party is not permitted to execute a power for his own benefit, and the objection cannot be waived by a party participating in the benefit as against other interests, the Court will not act against the title upon a mere suspicion that a transaction was of that nature, appearing fair both upon the instruments and the abstract, viz., purchase under the execution of a power of appointment by a father, subject to estates for life in him and his wife, in favour of their son; all three joining; and receiving the money, the fair value; which is presumed to be received according to their interests in the estate, and the purchaser not bound to see to the application. *M'Queen* v. *Farquhar*, 11 Ves. 467.

9. Equity will not relieve against a contract entered into by a child with a parent, for an appointment from him; and a purchaser from the parent, with notice of the fraud, will be affected with it. *Palmer* v. *Wheeler*, 2 Ball. & B. 30.

10. Where property was settled on the hus-

band and wife for life, with power of appointment to children, and after having incumbered their life estate, they executed the power in favour of one who joined with them immediately in a mortgage, with power of sale under which a contract sale took place; but previously to the completion, notice was given to the purchaser, by one on behalf of the other children, that the appointment was in fraud of the marriage settlement, but no further proceedings took place:—Held, that the mere notice was not a ground for refusal to complete the purchase, a good title being shown. *Green* v. *Pulsford*, 2 Beav. 70.

1. A conveyance to a purchaser for valuable consideration, set aside, on the ground that it proceeded upon an appointment by a father to his eldest son, made in fraud of the power. *Hall* v. *Montague*, 8 L. J., Ch., 167.

2. Payment of a valuable consideration by a person not having the legal estate, and not being an object of the power, cannot set up an invalid appointment in favour of such purchaser. *Daubeny* v. *Cockburn*, 1 Meriv. 638.

Seous, where the power is unlimited as to its objects, and the appointment is only impeachable on the ground of its being voluntary. *Ib.*

3. A father, having a power of appointment among his children, appointed a large portion of the property to one son, and by deed bearing date shortly after the son mortgaged it. Both deeds were prepared by the mortgagee's solicitor, but were both altered by the family solicitor of the father and son. The mortgage and receipt indorsed treated the money as paid to the son, but the father, who had a legal estate, was a party to the mortgage, and the mortgagee wrote a letter of the same date to the father, promising not to call in the money for three years. Both father and son joined in a collateral bond. The draft mortgage furnished to the family solicitor differed in date from that executed. An underhand agreement was alleged, but not proved, to have been made by the mortgagee's solicitor, against whom the bill was dismissed by consent. There was no proof that the father received the money, except a transfer to his credit at a banker's a considerable time after:—Held, that although the transaction was suspicious, it must be supported in favour of the mortgagee. *Hamilton* v. *Kirwan*, 8 Ir. Eq. R. 278; 2 J. & L. 393.

4. A. was tenant for life, with remainder to his children as he should appoint, with remainder in default of appointment among them equally. A. joined with his eldest son in fines and a recovery, and afterwards, by an innocent conveyance, which the son signed, conveyed to a purchaser, the entire purchase money being paid to his father:—Held, that as the transaction, if formal, would have been in fraud of the power, it could not be aided so as to give it operation, first as an appointment, and then as a conveyance to a purchaser; but that whatever interest the son had at the time passed by the deed. *Thompson* v. *Simpson*, 8 Ir. Eq. R. 55; 2 J. & L. 110. See S. C. 1 Dr. & War. 459.

5. A father, in exercise of a power, appointed part of a fund to one of his daughters, not twenty-two. She immediately mortgaged her interest so appointed, and part of the purchase money was applied to the use of the father and his daughters:—Held, that the transaction was so doubtful that a purchaser under the mortgagee was not compelled to accept the purchase. *Warde* v. *Dickson*, 5 Jur., N. S., 698; 28 L. J., Ch., 315.

X. LIABILITY OF TRUSTEES.

6. A trustee is not, in all cases, to be made liable upon the mere ground of having deviated from the strict letter of his trust; for such deviation may be necessary or beneficial to the interests of the *cestui que trust*; but when a trustee ventures to deviate from the letter of his trust, he does so under the obligation and at the peril of afterwards satisfying the Court that the deviation was necessary or beneficial. *Harrison* v. *Randall*, 9 Hare 397; 16 Jur. 72; 21 L. J., Ch., 294.

The existence of a suit in which an appointment of trust funds made in execution of a power is brought before the Court, and directions consequential thereto are obtained, and the trustees retire and are succeeded by others, but in which material facts connected with such appointment of the trust funds are not brought to the knowledge of the Court, does not protect the retiring trustees from the liabilities which result from such facts, if they involve a breach of trust; but, on the contrary, renders such breach of trust less excusable. *Ib.*

Certain policies of insurance effected by a father on his life as a provision for his daughters, were assigned to a trustee, upon trust for such of the daughters as the father should appoint; and certain estates were demised to the said trustee, upon trust out of the rents and profits to secure the payment of the premiums. The trustee advanced some sums of money in payment of the premium, and the father appointed the bonuses which had accrued upon the policies to three of his daughters; and the three daughters soon afterwards authorised the trustee to receive the sum paid by the office for the bonuses, and invest part thereof as a fund to keep down the premiums, and a part of the sum was applied in satisfaction of the arrears of such premiums. A subsequent appointment was made in favour of the other daughters, of the residue of the sums to be received on the policies, and which was intended to equalise the shares:—Held, that the first appointment was a fraud upon the power, its immediate object being to relieve the father, and its necessary consequences to relax the diligence of the trustee in enforcing the rights of the daughters against the father; and that the application of the trust funds, in pursuance of the appointment by the trustee, who knew that the appointment was fraudulent, was a breach of trust, for which he was responsible to the objects of the power. *Ib.*

A trustee who, having good reason to doubt the validity of an appointment, thinks proper to act upon it, must be affected by the consequences which follow upon the Act. S. C. 9 Hare 407; 16 Jur. 72; 21 L. J., Ch., 294.

7. A father having a power of appointment subject to his own life estate among his children and their issue, appointed the whole

fund to his eldest son immediately on his attaining twenty-one; and the father and son then applied to the trustees to transfer the fund into their joint names. The trustees not being satisfied that no undue influence had been exercised, and fearing that the interests of the son would be imperilled, took the opinion of counsel, who advised that they might transfer under certain conditions. These conditions were complied with, but the trustees were not satisfied, and declined to transfer without the sanction of the Court. The father and son therefore filed a bill praying for a transfer, and that the trustees might pay the costs:—Held, that the trustees were, under the circumstances, justified in refusing to transfer without the sanction of the Court; and although the Court ordered the transfer, the trustees were allowed their costs. *King* v. *King*, 6 W. R. 85; 1 De G. & J. 663; 27 L. J., Ch., 29.

1. The donee of a power appointed the whole trust fund to her daughter, one of the objects. The money was paid by the trustee at the daughter's written request of even date with the appointment to the mother's banking account; the daughter was married soon after, and her husband received a portion only of the fund:—Held, that the representatives of the trustee were liable to replace the trust fund. *Mackechnie* v. *Marjoribanks*, 39 L. J., Ch., 604; 18 W. R. 993; 22 L. T., N. S., 841.

XVI. Excessive Execution in Respect of Estates and Interests Appointed.

I. *Substantial Compliance with Terms of Power*, 5829.
II. *Absolute Interests Cut Down*, 5832.
III. *Clause Against Anticipation Annexed*, 5834.
IV. *Conditions Annexed*, 5835.
V. *Power Annexed*, 5837.
VI. *Perpetuity and Remoteness. See also* Preceding Subdivisions.
VII. *Excess when Severable. See also* Preceding Subdivisions.

I. SUBSTANTIAL COMPLIANCE WITH TERMS OF POWER.

1. *In General*, 5829.
2. *Estates or Interests created by Appointment*, 5830.

1. In General.

2. An affirmative power must be strictly pursued, but a negative one by way of restriction need not. *Churchman* v. *Harvey*, Ambl. 340.

3. Power to appoint land is well executed by a charge. *Kenworthy* v. *Bate*, 6 Ves. 796.

Power of appointing real estate is well executed by a devise to trustees to sell, and an appointment of money produced by the sale. *Id.* 793.

4. A. settles land to the use of himself for life, remainder to such of his four children, and in such shares and proportions, as A. by any writing shall appoint. A. may not only limit the land to any of his children, but may charge the land with any rent charge or sums of money for any of his children. *Thwaytes* v. *Dye*, 2 Vern. 80.

5. A person having a limited interest, such as a power of appointment, cannot elect to appoint in specie that which the donor of the power has directed to be converted. *Cooper* v. *Martin*, 12 Jur., N. S., 887; 15 W. R. 5; 15 L. T., N. S., 268.

6. Two sums were charged on real estate to be divided among the younger children of A., one sum in such parts and porportions, etc., the other in such shares and proportions, manner, and form, as he should appoint. By his will he recited the powers, and directed his executors to raise the two sums, and apply them, together with the rest of his personal estate, in discharge of certain legacies bequeathed to his younger children. *Semble*, a good execution of the powers. *Van Reitzenstein* v. *Magan*, 12 Ir. Eq. R. 415.

7. Power for husband to appoint estates to children of marriage, for such estates, and in such parts, and in such manner and form as he should by deed or will appoint, is exercised by appointment to trustees for term of 500 years, upon trust to raise sums by way of portions for children, and words, "manner and form," enable husband to give them equitable estate. *Trollope* v. *Linton*, 1 Sim. & S. 477; 2 L. J., Ch., 3.

8. Covenant to settle an estate in strict settlement, subject to a power to the father, tenant for life, in case there should be any younger child or children, to charge such sum or sums for such younger child or children, payable in such proportions, and at such times, as he should appoint. The power was held well executed by a will directing a sale and appointing the money. *Long* v. *Long*, 5 Ves. 445.

9. A power to appoint an estate authorises an appointment to trustees to sell and divide the produce between the objects. *Fowler* v. *Cohen*, 21 Beav. 360; 2 Jur., N. S., 315.

10. In a marriage settlement, by which real estates were settled to the use of the children of the settlor by a former marriage, power was reserved to the settlor, "during his life," by deed to devise, limit, or appoint any of the settled lands to trustees for terms of years upon trust, by sale or otherwise, to raise any sum or sums for the better advancement, etc., of such children, to be raised and paid at such times and subject to such limitations, etc. (for the benefit of the children) as the settlor should by such deed appoint. By deed reciting the powers, the settlor limited the estates to trustees for a term of 1,000 years, "to commence after his decease," and "without impeachment of waste," upon trust to sell the premises comprised in the terms, and out of the proceeds to pay certain specified sums to the several children by name:—Held, a valid execution of the power, and that two of the children having died intestate and without issue in the settlor's lifetime, the sums appointed to them devolved to the settlor, and were subject to the dispositions of his will. *Ricketts* v. *Loftus*, 4 Y. & Coll. 519.

1. Realty was entitled to such uses as A. should appoint, so only that every such appointment should be made in favour of a child or children or other issue of A. to be born in his lifetime. A., by will, devised all his real and personal estate, whereof he had power to dispose, to trustees, upon trust to sell (with power to give receipts and to discharge purchasers), and apply the proceeds in payment of his debts, funeral and testamentary expenses, and, subject thereto, to stand possessed of the proceeds in trust for his children, in certain shares:—Held, that the will amounted to an execution of the power of appointment, notwithstanding the invalid attempt to throw the burthen of the testator's debts on the settled property. *Cowx* v. *Foster*, 1 John. & H. 30; 6 Jur., N. S., 1051; 29 L. J., Ch., 886.

2. Power to appoint estates, to be purchased with money produced by the sale of other estates, well executed by an appointment operating directly on the original estates. *Bullock* v. *Fladgate*, 1 Ves. & B. 471.

Power to appoint an estate includes a power to dispose of the estate and appoint the produce. The same effect has been given in the more doubtful case of a power to charge; and a power to appoint the money produced by an estate directed to be sold, has been considered as a power to appoint the estate itself. *Id.* 478.

3. A power to appoint an estate amongst a class will be executed in equity by giving the whole of the estate to one of the class, and a part of the produce thereof, or money charged thereupon, to the other. *Crozier* v. *Crozier*, 2 Con. & L. 294; 5 Ir. Eq. R. 540; 3 Dr. & War. 373.

In considering whether a will be a valid execution of a power, the intention of a testator is always to be considered and effectuated as far as possible. *Ib.*

4. A power, to appoint the interest of a fund, held to authorise the appointment of the capital, notwithstanding subsequent powers over and limitation of the said "trust moneys, and the interest." *Phillips* v. *Brydon*, 26 Beav. 77.

5. A., by will, devised his collieries, etc., to trustees, upon trust to dispose and convey the same in such manner as his daughter M., whether sole or covert, should direct or appoint; and for want of such direction or appointment, to apply the money arising thereby to certain purposes in his will mentioned. He then declared, that "though his meaning was to give his said daughter the absolute disposal of the said collieries, etc., to prevent the expenses and trouble that must attend the management of affairs of such a nature, under the direction of the Court of Chancery, he requested his said daughter to direct the money arising therefrom to be applied in such manner as he had directed the same in default of her direction and appointment." The daughter made an appointment in favour of her husband absolutely. But this appointment was held to be void, as being contrary to the testator's intention. *Bute (Earl)* v. *Stuart*, 1 Bro. P. C. 476.

6. Power to appoint to children, "with such directions or regulations for maintenance, education, and advancement as their mother should appoint." The mother appointed the income to the children's father until the younger attained twenty-one, "in or towards the maintenance and education" of all her children:—Held, that the appointment was invalid. *Lloyd* v. *Lloyd*, 26 Beav. 96.

7. A testator by his will having charged 6,000*l.* on his estates, and directed same to be paid to and among such of his younger children, in such shares and proportions, as his wife should appoint, and the wife having by her will directed the inheritor as follows: "three of the 6,000*l.* I wish to have given to the two elder girls":—Held, that this was a good appointment of 3,000*l.*, and that the appointees took as tenants in common, and not as joint tenants. *Alloway* v. *Alloway*, 2 Con. & L. 509; 4 Dr. & War. 380.

8. Trustees under a discretionary power to purchase an annuity for A. did not purchase the annuity, but the acting trustees paid, from time to time, various small sums, amounting in the aggregate to more than the total income, but less than the principal:—Held, that this was a proper exercise of the discretionary power *pro tanto*. *Messena* v. *Carr*, 39 L. J., Ch., 216; 9 L. R., Eq., 260; 18 W. R. 415; 22 L. T., N. S., 3.

2. Estates or Interests created by Appointment.

9. Power by will to J., to appoint "to use of such child or children, and for such estate, and in such parts, and in such manner and form, as the said J. should, by deed or will, limit or appoint, or give or devise; and in default of such appointment, to the children equally, as tenants in common." J. orginally appointed the trust estate to the grandchild of testator absolutely in fee; but by subsequent deed, and pursuant to an agreement made prior to the execution of the power, a term of two hundred years was created and vested in trustees, to provide for the costs of the appointee in the original suit, and the costs of the parties to that instrument in another suit to be instituted by them in the name of the appointee, and for his benefit, and to raise and pay annuities to the other objects of the power; and subject to the term and its trusts, the estate was re-settled to the use of the appointee for life, remainder in fee to his children; and if no son should attain twenty-one or no daughter attain that age, or marry, then to appointee in fee:—Held, a good appointment. *Tucker* v. *Sanger*, M'Clel. 439; 13 Price 607.

10. A power of appointing a fee may be executed at several times, viz., at one time to pass an estate for life, and the fee at another. *Bovey* v. *Smith*, 1 Vern. 85; 2 Ch. Ca. 124.

11. Lands were settled to the use of a man for life, remainder in fee to such one or more of his children as he should by deed or will appoint, and in default of appointment to the children equally. The father, by his will, devised the lands to his wife for her life, upon condition that she should thereout maintain and educate his children in such manner as his executors should think proper; and that, at the end of every year, whatever sum should be in her hands, after defraying all necessary expenses, should be accumulated in order to

form a fund for payment of the legacies thereinafter given by him; and he gave to each of his younger children 500*l*., and devised the lands to his eldest son in tail, with a direction that if, at the death of his wife, there should not be accumulated a sufficient fund for the payment of the legacies, those lands, together with certain other lands not the subject of the power, should stand charged with the deficiency:—Held, that the direction for the maintenance of the younger children, and the gift of the legacies to them were, *pro tanto*, a good execution of the power. *Crozier* v. *Crozier*, 5 Ir. Eq. R. 540; 3 Dr. & War. 353; 2 Con. & L. 294.

Held, also, that during the wife's life, so much of the rents as was not required for the maintenance of the younger children, and the payment of the legacies, went as in default of appointment. *Ib.*

1. A real estate was settled to the use of a father for life with remainder to the use of all and every, or such one or more of his children, for such estate and estates, and in such parts, shares, and proportions, and with such limitations over, and charged with such annual or gross sums, such limitations over and charges to be to or for the benefit of the same children, some or one of them, and in such manner and form as the father should appoint. The father afterwards appointed the estate to trustees and their heirs, upon trust to pay the rents and profits thereof to his daughter, who was a married woman, for her sole and separate use, during the life of her husband, without power of anticipation:—Held, that the appointment to the trustees was a good execution of the power. *Thornton* v. *Bright*, 2 Myl. & Cr. 320; 6 L. J., N. S., Ch., 121.

2. A daughter being entitled, under the marriage settlement of her father and mother, to such share and interest in lands and money as the surviving mother should appoint, provides, by her own marriage settlement, that all such share and interest to which she should become entitled under her mother's settlement, should be vested in trustees to the use of her intended husband for life, remainder to herself for life, remainder to the children of the marriage. Four years after the marriage, the mother appoints a sum of 3,000*l*. to be paid to the trustees of the daughter's settlement, upon the uses therein expressed, in satisfaction of the daughter's share and interest under the marriage settlement of the father and mother:—Held, that this was substantially an appointment to the daughter, and therefore valid. *Limbard* v. *Grote*, 1 Myl. & K. 1; 2 L. J., N. S., Ch., 10.

3. A testator, having a special power of appointment over 10,000*l*., in exercise of her power appointed that it should be held by the trustees of her will and upon the trusts therein mentioned for the benefit of the objects of the power. She also appointed that the said sum of 10,000*l*. "should be paid and transferred unto" the trustees of her will:—Held, that the proposed transfer was not authorised by the power. *Busk* v. *Aldam*, 31 L. T., N. S., 370; 23 W. R. 21.

4. A tenant for life of a trust fund, with power to appoint the reversion to a child, appointed a portion of the reversionary fund to a daughter absolutely, by a deed, to which the daughter, the daughter's husband, and the trustees of the fund were parties; and by the same deed, she assigned her life interest in the appointed portion to the daughter absolutely. By a subsequent witnessing part, it was expressed to be agreed and declared, by and between all the parties, that the appointed portion should be held on trust for the daughter's separate use, during her life, and afterwards on trusts for her husband and children:—Held, that (independently of any question as to the merger of the life estate) the trust for the separate use was good. But, *quære*, whether the limitations of the subsequent interests were effectual. *Trollope* v. *Routledge*, 1 De G. & Sm. 662; 11 Jur. 1002.

5. If a fund is given in trust for all and every the children of A., in such parts and shares, and in such manner, etc., as A. shall appoint, an appointment of the whole income of the fund to the children for their lives successively, is invalid. *Lloyd* v. *Lavor*, 14 Sim. 645.

6. Under his marriage settlement, A. had a power of appointing a fund amongst his children. By his will he appointed the fund equally amongst his eight children; but he afterwards postponed the payment of the capital, partly until the majority of the children, and partly until after the death or marriage of his last surviving unmarried daughter, the unmarried daughters being in the meanwhile entitled to the income:—The appointment held valid. *Wilson* v. *Wilson*, 21 Beav. 25.

7. Under a power to appoint to children, an appointment to a child for life, remainder to his children, who are incapable of taking, may give the child an estate tail. *Line* v. *Hall*, 22 W. R. 124; 29 L. T., N. S., 568.

A father having power to appoint an estate to any one or more of his children by will, gave it with other proproty, of which he was owner in fee, to trustees for a term of 1,000 years, to raise portions for grandchildren (not objects of the power), with the usual proviso for cesser in case the term should be incapable of taking effect, with remainder after the expiration of the term, and in the meantime subject thereto, to one of his sons (an object of the power) for life remainder to his issue in tail. The objects of the term were not satisfied:—Held, that the will operated as an execution of the power, and that the son took under the *cy près* doctrine an estate tail. S. C. 43 L. J., Ch., 107.

8. B., by will, directed his trustees to convert his property into money, and after investing the same, to pay the interest, etc., unto his daughter E. for her life; and after her death he gave all his estate to her children in such shares as she should appoint; and in default of appointment, unto all of them in equal shares; but in case she should die without leaving any child, then he directed his trustees to raise 3,000*l*., and to pay the same to the grandchildren, living at the time of the death of his daughter, of his cousin R. B., in equal shares; and after the same should be raised, the testator directed his trustees to convey his estate unto such person as E. should by deed or will appoint; and in default of appointment, he gave the same unto the persons who at the decease of E. should be

her next of kin. B. empowered his daughter by her will to apportion all or any interest, etc., to be paid to her husband for his life. E. intermarried with N., and by her will appointed that the estate made subject to her appointment should become vested in her husband for his own absolute use, and appointed the rents, etc., to be paid to him. The chief clerk certified that there were four grandchildren of R. B. living at the time mentioned, and they (not parties to the suit) presented a petition praying that they might be at liberty to attend and take part on the hearing of the cause, and might be paid their costs of substantiating their claim as if they had been parties:—Held, that E. had no power to abridge the right of the four grandchildren to the legacy of 3,000*l.* which became raisable on B.'s death, by a sale or mortgage. *Boycott* v. *Newman*, 2 Jur., N. S., 702.

Held, also, that the costs of the grandchildren in proving that they composed the class entitled must be borne by the fund, and not by the general estate; but that the costs of all parties, and the costs of the petition, must be paid out of the general estate. *Ib.*

1. A wife had under a settlement a power to appoint the income of a fund to her husband as long as he should continue a widower, with a proviso that he was to apply it to the maintenance of her children:—Held, that the husband took a beneficial interest under an appointment by his wife, and was entitled to the income of the fund till he married again, though there were no children of the wife. *Re Main*, 15 W. R. 216.

II. ABSOLUTE INTERESTS CUT DOWN.

2. One having a power of appointing a fund amongst her children, or remoter issue, appointed a sum to one of her children absolutely, and then attempted to limit it over to the unborn children of such child. The appointment to the grandchildren being too remote:—Held, that the prior absolute gift to the child was effectual. *Kampf* v. *Jones*, 2 Keen 756; 7 L. J., N. S., Ch., 63; 1 Jur. 814.

3. Power to appoint amongst children, or some or one of them, with limitations over for benefit of one or more of such children, or his or their issue. The donee of the power appointed equal shares to his daughters respectively for life, for their separate use; then to their issue, as they (the daughters respectively) should appoint; in default, amongst the issue equally:—Held, that, subject to the life interest of the wives for their separate use, the shares appointed to the daughters belonged to them and to their husbands in their right. *Carver* v. *Bowles*, 9 L. J., Ch., 91.

4. Testratrix gave a sum of money to her children, who should be living at the time of her decease, and in case she should die without leaving any such issue over, and having a power to appoint to the children of D., she gave 2,000*l.*, to the separate use of A. (one of the children), and if she died without issue by her then present husband or any other she might thereafter take, the 2,000*l.* to be divided amongst other objects of the power:—Held, that A. was absolutely entitled to the 2,000*l.* *Caulfield* v. *Maguire*, 2 J. & L. 141; 8 Ir. Eq. R. 164.

5. A testator, by virtue of a power, appointed a fund to trustees for his four children, in four equal portions, and subject to the trusts thereinafter contained respecting his own residuary estate. Some of those trusts were to the children for life, with remainder to their children, and (as regarded the fund subject to the power) the appointment to grandchildren was void for remoteness:—Held, that the children took absolutely in the first instance, and that the subsequent attempt to limit the absolute gift being void, the children took the fund absolutely. *Stephens* v. *Gadsden*, 20 Beav. 463.

6. Where there is an absolute appointment by will in favour of a proper object of the power, and that appointment is followed by attempts to modify the interest so appointed, in a manner which the law will not allow, the Court reads the will as if all the passages in which such attempts are made were swept out of it, for all intents and purposes, *i.e.*, not only so far as they attempt to regulate the quantum of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied upon as raising a case of election. *Woolridge* v. *Woolridge*, 1 John. 63; 5 Jur., N. S., 566.

7. Where there is an absolute appointment to A., an object of the power, followed by a qualification limiting the interest of A. to a life interest, with remainder to persons not objects of the power, the latter being void, A. takes absolutely, under the prior appointment. *Gerrard* v. *Butler*, 20 Beav. 541.

A testatrix, having a power to appoint a fund to her children, appointed it in this form: Among my children, A., B., C., and D., the share of A. to be upon the trusts of her marriage settlement, and to be paid to the trustees thereof. A. was the only person in the marriage settlement within the power:—Held, that she took her share absolutely. *Ib.*

8. Where there is a valid appointment to an object of power, with additional words of appointment in favour of the appointee's children, by which, in excess of the power, those children are also made appointees, so as to cut down the previous absolute interest:—Held, that the words in excess of the power are to be altogether rejected, and that the appointee, who is an object of the power, takes absolutely. *Re Sonde's (Lord) Will*, 2 Sm. & G. 417.

9. Appointment to A., an object of a power, to be settled for her separate use, and to be divided at her death amongst her children. The gift to the children being void, they not being objects:—Held, that A. took for life only, and not an absolute interest ineffectually attempted to be cut down. *Reid* v. *Reid*, 25 Beav. 469.

10. Donees of a power, authorising the appointment of personal estate amongst the children of the donees, or the issue of such children born during the lives of the donees or the life of the survivor, appointed it "upon the trusts following; that is to say," trusts for the benefit of some of the children, and to pay the interest to them for life; and after the decease of each child, to dispose of her share amongst her children:—Held, that the

whole appointed trust must be read together; that the appointees took only life interests, and the residue of the fund was unappointed. *Rucker* v. *Scholefield*, 1 Hem. & M. 36; 9 Jur., N. S., 17; 32 L. J., Ch., 46; 1 N. R. 48; 11 W. R. 137.

1. Where an absolute gift or an appointment in a will is attempted to be cut down by a subsequent inoperative modification or restriction, the original gift remains unaffected by the intended restriction. *Churchill* v. *Churchill*, 16 W. R. 182; 5 L. R., Eq., 44.

2. A marriage settlement comprised a sum of 20,000*l.* South Sea Annuities, 7,000*l.* 3 per cent. reduced, and 3,150*l.* new 4 per cents.; also certain shares in a company, and 54,000*l.* French rentes. These were settled on trust to raise an annuity of 500*l.* for the life of the wife for her separate use, subject thereto, for the husband and wife for their joint lives; if the wife should predecease her husband, then on trust, to raise 3,000*l.*, over which a general power of appointment was given to the wife, and as to the rent, after the death of the wife so predeceasing her husband, for him for life, and after his death, in trust for all and every, or such one, or more, exclusively of the other or others of the relations in blood to the said Sarah Harvey (the wife) at the time of her decease, within the eighth degree of consanguinity to her, at such age, day, or time, or respective ages, days, or times, and, if more than one, in such shares and proportions, and with such annual sums of money, and future, or executory, or other trusts (such annual sums of money, and future, or executory, or other trusts, being for the benefit of the said relations in blood of the said Sarah Harvey, within the degree aforesaid, or such, or one of them), and in such manner as the said Sarah Harvey should, notwithstanding her coverture, by her last will and testament in writing, or any codicil or codicils in writing, or any writing or writings in the nature of or purporting to be a will or codicil, to be signed and published by her in the presence of, and to be attested by, two or more credible witnesses, direct or appoint; and in default of such direction, or appointment, and so far as any direction or appointment should not extend, in trust for such person, or persons, as under the Statute for the Distribution of the Effects of Intestates would at the decease of the said Sarah Harvey have become entitled thereto as her next-of-kin, in case the said Archibald Morrison (the husband) had died in her lifetime, and she had died possessed thereof, his widow, and intestate. The settlement also comprised certain plate, linen, china, etc., over which a general power of appointment was given to the wife, to take effect after the death of the husband. It comprised also certain shares in a public library, and tickets of admission to a theatre, and jewellery, etc., and as to these the settlement gave to the wife a general power of gift and appointment, either during her life, or after her death, as well as over what she should save out of her separate income. The wife died many years before her husband. By her will she said: "I do, by virtue of the power and authority reserved to me in and by the deed of settlement made, etc., hereby make, publish, and declare this my last will and testament, in manner and form following, that is to say." She then referred particularly to the power to dispose of 3,000*l.*, and made a disposition of a great part of it. She gave to her husband for life all the benefit of her shares in the public library, of her admission to the theatre, and of her books. After his death, she disposed of these things to various persons; she disposed also of her jewels, china, and other things, and her will concluded as follows:—"And after payment of my just debts, funeral expenses, the charges of proving this my will, and of carrying the trust thereof into execution, I direct and appoint, give and bequeath, after the decease of my said husband, all the rest, residue, and remainder of my moneys, and other my personal estate, of whatever description the same may be, unto and among all and every, the daughters of my said brother John Harvey, the said Charles Day, and Louisa Day, the children of my deceased niece, and the two daughters of my said brother Charles Savile Onley, or to such of them as shall be living at my said husband's death, and to the issue of such of them as shall then happen to be dead, to be equally divided amongst them, share and share alike. But it is my will that the said Charles Day, and Lousia Day, and the children of any other of my nieces who may be dead, shall only be entitled to the share in the said residue which his or her mother would have had if living at the death of my said husband. And further it is my will that the shares of each of my said nieces, of each of the residue of my personal estate, shall be placed and continue out at interest by my surviving executor, his executors or administrators, on Government or real security, during the respective lives of my said nieces, and the dividend or interest on each share, as the same shall from time to time become due, shall be paid to each of my nieces during her life, on her own receipt, for her own sole and separate use, and not be subject to the debts or control of her present or any future husband. And as to the share of my niece Caroline Onley, I will and desire that the same shall after her decease be paid to all my other nieces who shall be living at the decease of the said Caroline Onley, and to the issue of such of them as shall then happen to be dead, equally, share and share alike, but the issue of any deceased niece is only to be entitled to the share which his or their mother would have had if living at the decease of the said Caroline Onley; and after the death of each of my other nieces, I direct that the dividends and interest of her share shall, if she die married, be paid to her husband during his life, for his own use. And I further will and direct that after the several deceases of my said last-mentioned nieces, or their respective husbands, that the share of each of the said last-mentioned nieces shall be paid to her child, children, or grandchildren, or any other relation in blood to my said niece, in such parts and proportions, manner, and form as she may, by her last will and testament, duly executed, and which she shall have power to make, notwithstanding her coverture, give and bequeath the same, and in default thereof then unto the next of kin in blood of my said niece, according to the Statute of Distribution of Intestate Personal Estates":—Held, first,

that the will was an execution of all th powers, that is of the power to appoint each portion of property comprised in the settlement; secondly, that the appointment in favour of the daughters of John Harvey was not void *ab initio* because it might comprise persons not living at the death of the testatrix and within the eighth degree, nor did it become void *in toto* because it did in fact at the time of distribution include such persons, but that it was good *pro tanto*; thirdly, that the attempted limitation to the husbands of the nieces was bad, as they were strangers, and the limitations to their children, grandchildren, or other relations in blood was void for remoteness; fourthly, that the attempt to cut down the estate given to the nieces in the first instance failing, the attempted remainders over did not go as unappointed to the next of kin, but failed wholly and left absolute interests subsisting in the nieces. *Harvey* v. *Stracey*, 1 Drew. 73; 22 L. J., N. S., Ch., 23; 16 Jur. 771.

III. CLAUSE AGAINST ANTICIPATION ANNEXED.

1. Under a power to charge an estate with a sum not exceeding 1,000*l.* for the portion or portions of a younger child or younger children, the donee of the power appointed the 1,000*l.* to a married daughter for her separate use, with a restraint upon anticipation during the coverture; and it was held, that the interest of the appointee might lawfully be so restricted by the terms of the appointment. *Dickinson* v. *Mort*, 8 Hare 178.

2. A real estate was settled to the use of a father for life, with remainder to the use of all and every, or such one or more of his children, for such estate and estates, and in such parts, shares, and proportions, and with such limitations over, and charged with such annual or gross sums, such limitations over and charges to be to or for the benefit of the same children, some or one of them, and in such manner and form as the father should appoint. The father afterwards appointed the estate to trustees and their heirs, upon trust to pay the rents and profits thereof to his daughter, who was a married woman, for her sole and separate use, during the life of her husband, without power of anticipation:—Held, that the appointment to the trustees was a good execution of the power. *Thornton* v. *Bright*, 2 Myl. & C. 230; 6 L. J., N. S., Ch., 121.

3. Under a power of appointment of a trust fund among children in the usual form, the share of a married daughter, who was unborn at the creation of the power, was limited to trustees upon trust for her separate use, for life, without power of anticipation, and, after her decease, to her general appointees by deed or will, and in default, to her executors or administrators:—Held, that such an appointment was not void as fettering the property beyond the legal limits, but that the restraint upon anticipation might be rejected, and the rest of the appointment sustained. *Fry* v. *Capper*, 1 Kay 163; 2 W. R. 136.

4. By a settlement upon marriage, funds were vested in trustees upon trust, after the death of the husband and wife, for the children of the marriage, as the husband and wife or the survivor of them should appoint. After the death of the wife the husband made an appointment, subject to his own life interest, in favour of one of the children of the marriage, who was a married woman, and he directed that it should be held for her separate use without power of anticipation:—Held, that the restraint upon anticipation was void, but that the rest of the appointment was good. *Re Cunynghame*, 40 L. J., Ch., 247; 19 W. R. 381; 11 L. R., Eq., 324; 24 L. T. 124.

5. By a marriage settlement a fund was settled in trust for the wife for her separate use during the joint lives of her and her husband, with remainder to the children of the marriage in such shares as the wife, if surviving, should appoint. The wife survived her husband, and appointed one-fifth part of the fund to a married daughter for her separate use without power of anticipation:—Held, that the appointment was good, but the restraint upon alienation was bad, as it infringed the rule against perpetuities. *Re Teague*, 22 L. T., N. S., 742; 18 W. R. 752; 10 L. R., Eq., 564.

6. A testator gave his property to trustees to pay the income to two persons for life, and after the death of the survivor to divide the capital between the children of A. B. and C. D., two females, the shares of sons to be paid on their attaining twenty-one, and the shares of daughters to be invested and the interest paid to such daughters for life for their separate use without power of anticipation, and on their deaths the capital to go as the daughters should by will appoint. A. B. was dead at the date of the will, and C. D. was sixty years of age, and therefore past child-bearing:—Held, that if the children of A. B. and C. D. had not necessarily been lives *in esse* at the date of the will, the restraint on anticipation in respect of the daughters' shares would have been bad, as infringing the rule against perpetuities; but as A. B. was dead and C. D. past child-bearing, all the children were lives *in esse*, and the restraint on alienation was valid. *Cooper* v. *Larooke*, 17 L. R., Ch. D., 368; 43 L. T. 794; 29 W. R. 438.

7. By indenture made in December 1874, S. and J. S., wife and husband, who had at the date of the indenture been married many years, and had two children, daughters, both married, assigned to trustees a sum of money in trust to invest for the benefit of the settlors, and after their deaths the trustees were to stand possessed of the moneys upon trust for their children as they or the survivor should appoint, and in default of appointment, for all the children or any the child of S. by J. S. who being a son should attain twenty-one, or being a daughter should attain twenty-one or marry under that age, if more than one in equal shares, and if daughters for their separate use, and without power to alienate or anticipate the same. There were no other children of the marriage. S. died in 1876, and J. S. in 1879, without having made any appointment:—Held, that, notwithstanding the rule against perpetuities, the shares of the two daughters were subject to restraint on anticipation. *Herbert* v. *Webster*, 15 L. R., Ch. D., 610; 49 L. J., Ch., 620.

IV. CONDITIONS ANNEXED.

1. A father having a power to appoint an estate to the use of all and every his child or children for any estates or interests, and in any shares, and subject to any charges and incumbrances, to one or more of them, devised the estate to trustees in trust to apply the rents, until the eldest son attained age, to the maintenance and education of all the children, and further thereout to pay the interest of his debts and so much of the principal as the surplus would reach; and he charged the estate with 3,000*l.* for the younger children; and in case the eldest son should, by business or marriage, or otherwise, be enabled to pay off the 3,000*l.*, that the trustees should convey the lands to him; and in case the eldest son should not pay it, to the second or third son on the same conditions; and in case none of the sons should take or accept the estate, that the trustees should sell the estate and pay off the father's debts and divide the surplus among all the children:—Held, that the will was a good equitable execution of the power, the portion of it which exceeded the power being separable, and the 3,000*l.* being a charge and not a personal condition. *Richardson* v. *Simpson*, 9 Ir. Eq. R. 367; 3 J. & L. 540.

2. Part of a fund was appointed under a power to an object of the power, subject to a charge not within the power:—Held, that though the charge was void, the appointment was valid. *Re Jeaffreson*, 35 L. J., Ch., 622.

3. C., having power to appoint a money fund to all and every or any child or children of hers, and to the exclusion of any one or more of them, in such shares and payable at such times as she should appoint, and in default of appointment to be equally divided between them, by her will appointed different sums to several of her children; and reciting that her daughter M. had declared her intention of becoming a nun, and had retired into a convent preparatory thereto, she declared that she deemed her patrimony in that case sufficient for her maintenance, but in case M. should change her mind, and return to her family and friends, she bequeathed to trustees 1,000*l.* in trust for M. to receive the interest of the same during her life, and at her decease to be divided amongst her children, if any; or in either case of her not leaving the convent or not leaving issue, the 1,000*l.* to be divided amongst her three daughters therein named, and she bequeathed to her said three daughters any residue of the fund that might be after paying the several legacies in her will mentioned:—Held, that the power authorised an appointment to take effect upon the happening of a contingency; that the interest which should accrue on the 1,000*l.*, while the contingency was undetermined, passed under the residuary bequest in the will. *Caulfield* v. *Maguire*, 2 J. & L. 141; 8 Ir. Eq. R. 164.

4. W., by a deed of settlement, vested stock and money in trustees, upon trust to pay the interest, dividends, and annual produce to W. for life, and after his death to pay the trust moneys, stock, funds, and securities unto and amongst all and every his child or children, or the child or children of any deceased child, in such shares and proportions as he should by deed or will appoint. W., by will, dated in 1848, in execution of the power, after directing certain sums to be raised and paid out of the trust funds for the benefit of certain of his children, appointed the residue of the trust funds to his son absolutely. He further directed, that within one year after any of his children or grandchildren should become entitled to the residuary trust funds comprised in such settlement, and should be competent so to do, such person or persons should settle the same in the manner therein prescribed; and if such child or children, grandchild or grandchildren, should neglect or refuse to make such settlement within a year, then and in every such case the trusts declared in favour of such child or grandchild should cease, as if such child or grandchild had died in his lifetime without leaving issue:—Held, that the condition was not an integral part of the appointment, and that the power had been well exercised in favour of his son. *Watt* v. *Creyke*, 3 Jur., N. S., 56; 26 L. J., Ch., 211; 3 Sm. & G. 362.

5. Under a power of appointment and selection among children, if an appointment be made upon a condition to be performed by the appointee, the appointment is good, but the condition is void. But an appointment to child A. upon a certain contingency, and if that contingency should not happen, then the same share to go to child B., is a good conditional limitation under the power. So it is, if the event on which the shifting limitation is to take effect, be some act to be done by A., if such act be consistent with the scope of the power; as if the limitation over be to take effect if A. do not upon the request in writing of the appointor, make over another fund derived from a different source to the other subjects of the power; for this is consistent with the intention of the power, which was, that the donee should, according to his view of the exigencies of the objects of the power, appoint the whole fund to all of them or to some only in exclusion of the others. If the condition be in form that A. should do this upon the request, not only of the appointor, but of his executors and administrators, it will be construed as if the limitation were inserted in the instrument creating the power; and where that provides that the appointment must be made so as to take effect within twenty-one years after the death of the appointor, the condition will be valid. A bill in such case, by a married woman, and the trustees of her settlement, claiming to be entitled to the share so appointed to her, freed from the conditional limitation, or, if bound to elect, for an inquiry whether it would be most beneficial for the persons entitled under the settlement to take under the appointment or not, is not an election. *Stroud* v. *Norman*, 1 Kay 313; 18 Jur. 264; 23 L. J., Ch., 443; 2 Eq. Rep. 308.

6. A settlement contained a power to a tenant for life to appoint to children, or any one or more of them, two sums, one in consols, the other in new 3*l.* per cents. The tenant for life by will, not referring to the power, gave to three of seven surviving children the money that he had in consols and in the new 3*l.* per cents.; and he gave 100*l.* to his grandson, directing that the three appointees should contribute it. The only

property he had was 144*l.* consols, his title to which was disputed at the date of the will, but which was afterwards assigned to him, and his interest in the one-eighth share of a trust fund of a son deceased during his life:—Held, that the gift of the 100*l.* to the grandson was a condition imposed on the appointees, and, as such, void; and that the appointees took the whole fund. *Rooke* v. *Rooke*, 2 Dr. & Sm. 38; 31 L. J., Ch., 636; 10 W. R. 435; 6 L. T., N. S., 527.

1. Husband and wife had a joint power of appointment over real estate amongst the children of the marriage. In default of appointment, the estate was to be held, subject to the parents' life interests, in trust for all the unappointed children, the shares to vest at twenty-one or marriage. The settlement contained a power of sale and exchange, but no trust for sale. A son attained twenty-one and died intestate. Afterwards the husband and wife appointed two-fourths of the real estate, and declared that the shares of the persons beneficially interested in the capital arising from any sale of the premises should be of the quality of personal estate. A sale having taken place under the power in the settlement:—Held, that the interest of the heir of the deceased son was defeated by the conversion. *Webb* v. *Sadler*, 14 L. R., Eq., 533; 20 W. R. 740.

2. A testator, having power to appoint by will a sum of 3,000*l.*, made his will, giving his general estate to his children for life, with remainder to their issue; and after referring to the above power, he appointed the fund amongst his children, and requested them not to spend their shares thereof, but to leave the same for the benefit of their children:—Held, that these words did not constitute a trust for the grandchildren, so as to put the children to their election, but that they amounted to a condition annexed to the appointment in favour of children, and that such condition was void, as inconsistent with the power. *Blacket* v. *Lamb*, 14 Beav. 482; 16 Jur. 142; 21 L. J., Ch., 46.

3. Under the terms of a marriage settlement B. was given a power to dispose of a fund "to and amongst her lawful issue in such shares and proportions as she shall by her last will and testament direct, limit, or appoint." By her will she directed 180*l.* of the fund to be paid to her daughter E., then in America, "if she applies for the same within twelve months after my decease," and, in default, that the sum should be divided amongst the children of F., another daughter:—Held, that the appointment was valid as within the power. *Graham* v. *Angell*, 17 W. R. 702.

4. A gift made under a power accompanied by directions and conditions *ultra vires* will be valid, but the directions void. *McDonald* v. *McDonald*, 2 L .R., H. L. (Sc.), 482.

Where there is an appointment authorised by the power, but with a superadded wish, desire, or condition not authorised by the power, the appointment is valid; but the superadded wish, desire, or condition necessarily fails, unless the appointee elects to give effect to it, which he may do without vitiating the appointment. *Ib.*

A mere purpose or direction unwarranted by the power, though it may have operated as a motive to the appointment, will not bind the appointee. *Ib.*

5. A., who was unmarried at the death of B., and had under his will a power to appoint the lands of P. and T. to such child or such children as she might have, devised her lands called P. to her eldest son for life, and on his death to his eldest son living at his death or born in due time after, in fee; and if her eldest son had not such eldest son living at the time of his death or born in due time after, she devised the premises to her second son in fee; and she devised her lands of T. to her executor and his heirs, on trust to sell and lay out the produce in the purchase of freehold property in France, and to convey the property so purchased to her second son and his heirs, provided he should previously decide to reside in France; and if he should not decide to reside in France, then she devised the property so purchased to her executor and his heirs:—Held, that the condition to reside in France could not be separated from the appointment of T., and that it rendered it invalid, as it showed an intention of the testatrix to accomplish by the appointment an indirect purpose not warranted by the power. *D'Abbadie* v. *Bixoin*, 5 Ir. R., Eq., 205.

6. Under a power of appointment by will among a certain class, a testator appointed to A. and B., objects of the power upon trust for various purposes, some of which were not within the scope of the power, and appointed the ultimate residue, including all such portions the appointment whereof should from whatever cause fail of taking effect, to A. and B. absolutely:—Held, that it was a valid, legal, and equitable appointment, and that A. and B. could give a good discharge for the whole fund. *Wilson* v. *Wilson*, 17 W. R. 220.

7. S devised and bequeathed his real and personal property upon trust for his wife for her life, and after her death in trust for his children who should be living at her death, and the issue then living of his children, as she should appoint, and in default of appointment, as therein mentioned. The wife having survived her husband, by will appointed two-fifths of the residue of the trust fund in trust for a son, for his life, subject as therein provided, and after his death to his children as he should appoint, so that the benefit of every such appointment should vest before or upon the expiration of twenty-one years from the death of the son; and if there should be no child of his who should acquire a vested interest, then in trust for the son absolutely. Provided that if he should alien or dispose of his share, or should become bankrupt, the trust in his favour should cease and determine, and the property subject to the trust should be held by the trustees for the support, maintenance, or otherwise for the benefit of his wife and children, as the trustees in their discretion should think proper. S. died, and the son became bankrupt. The gift over in the proviso for cesser on his bankruptcy was held void as being in excess of the power, and the prior limitation to his children, as he should appoint, was also held void as being a delegation of a power. *Stockbridge* v. *Story*, 19 W. R. 1049.

Held, also, that the shares of the trust fund

appointed in favour of the son became his absolutely under the provisions of his mother's will, and consequently went to his assignee on his bankruptcy. *Ib.*

V. POWER ANNEXED.

1. By a marriage settlement, a fund was vested in trustees, in trust for all and every the child and children of the marriage, in such shares, at such age or ages, time or times, and subject to such conditions, restrictions, and limitations as the wife, in case she survived her husband, should appoint. There was one child only of the marriage. The wife appointed the fund to that child for her separate use for life, and after her decease, to such persons as the child should appoint; and in default of such appointment, to the executors or administrators of the child:—Held, that the power in the settlement was well exercised. *Bray* v. *Hammersley*, 3 Sim. 513. Affirmed *sub. nom. Bray* v. *Bree*, 26 Cl. & F. 453; 8 Bli. N. S. 453.

2. By articles, the wife's fortune, and an equal sum advanced by the husband, were agreed to be settled for the husband for their joint lives, and if he should die first leaving issue by her, for her life; after her decease as to the capital in such manner as he should appoint; in default of appointment to be divided equally among the issue at twenty-one, with maintenance and survivorship after marriage. In pursuance of the articles, an estate purchased with the fund was settled upon the husband for the joint lives of him and his wife; remainder to trustees to preserve, etc.; remainder in case of his death first, without issue, to certain uses; remainder, in case of his death first, leaving any child or children, to the wife for life; remainder to the child or children in such shares as the husband should appoint; for want of appointment, equally in tail, with cross-remainders; remainder to the heirs of the husband. Children only are the objects; and an appointment to a child for life, remainder to his children as he shall appoint, is an excess of power; and the doctrine of *cy près*, by giving the child an estate tail, is not applicable; but the appointment is void for the excess only; and what is ill appointed, goes as in default of appointment. *Bristow* v. *Warde*, 2 Ves. J. 336.

3. Where a fund was given by will in trust for A. for life, with power to appoint among her children or their issues, remainder over in default of appointment, and A. appointed a portion of the fund to her daughter for life, remainder over as the daughter should appoint:—Held, that the last-mentioned power was well created, being in the nature of an interest, and therefore within the terms of the first power. *Phipson* v. *Turner*, 9 Sim. 227; 2 Jur. 414.

There being three objects of a power, a lady and her two brothers, and an appointment having been made to the former for life, remainder as she should by will appoint, and in default of appointment to the two latter, a deed was executed by them reciting doubts as to the validity of the appointment, so far as it gave a testamentary power, and accordingly making a new disposition of the fund. The Court considered such deed was only to take effect in case such power was invalid, or should not be executed; and being of opinion that it was valid, supported a subsequent execution of it in favour of the lady's husband. *Ib.*

4. Power to appoint amongst children, or some or one of them, with limitations over for benefit of one or more of such children, or his or their issue. The donee of the power appointed equal shares to his daughters respectively for life, for their separate use; then to their issue, as they (the daughters respectively) should appoint; in default, amongst the issue equally:—Held, that, subject to the life interest of the wives for their separate use, the shares appointed to the daughters belonged to them and to their husbands in their right. *Carver* v. *Bowles*, 9 L. J., Ch., 91.

5. A testator gave all his property to his widow for life, and after her death to his two daughters, in such proportions as his wife should appoint; and in default of appointment, equally between them; and in case only one survived the widow, the whole to the survivor, unless the deceased daughter should have any children, in which case they should inherit the portion intended for their mother; and he directed that the fortune of each of his daughters should go to her children after her decease, in such proportions as she might direct; but if no appointment, to be equally divided between them. The daughters were both married. The widow by deed-poll appointed the property (subject to her life estate) in moieties, to such uses as the daughters should respectively appoint; and in default of appointment, to them absolutely. By a settlement, dated the following day, each daughter appointed her moiety to her separate use for life, with remainder to her husband for life, with remainder to her children, with cross limitations, in the event of a daughter dying without having children who attained a vested interest, to the other daughter and her family. Both daughters survived the widow:—Held, that the power given to the widow enabled her not only to determine the shares which the daughters were to take, but to model their interests in such shares; and that the appointment and the settlement were effectual, subject to the question whether the limitations of life interests to husbands were valid. *Jebb* v. *Tugwell*, 2 Jur., N. S., 54; 25 L. J., Ch., 109; 8 De G. M. & G. 663; 4 W. R. 157. Reversing 20 Beav. 84, 97. n.; 1 Jur., N. S., 460; 24 L. J., Ch., 433; 3 W. R. 278.

6. A father, under a power to appoint to his children, appointed a share to a daughter for life, for her separate use, with remainder as she should by will appoint:—Held, that this was a good execution of the power. The Court aided the defective execution of a power in favour of a daughter, as against her brothers, who, in default of appointment, would participate in the property. *Morse* v. *Martin*, 34 Beav. 500.

7. A mother having a power to appoint to children, appointed by her will part of the settled fund to her son for life, with remainder to such persons as he should by will appoint, and in default of appointment to her three

daughters equally, to whom she gave other benefits by the will:—Held, first, that the power of appointment given to the son was void for remoteness. *Wollaston* v. *King*, 17 W. R. 641; 38 L. J., Ch., 392; 20 L. T., N. S., 1003; 8 L. R., Eq., 165.

Held, secondly, that the fund went, after the son's death, to the three daughters under the trust in default of appointment in the mother's will, and not as unappointed under the original settlement. *Ib.*

Held, thirdly, that the daughters need not be put to their election. *Ib.*

1. Under a common power in a marriage settlement to appoint amongst children, an appointment may be made to such uses as a child may appoint; but such power to appoint must be given so as necessarily to become effectually exercisable within the time allowed by the law of perpetuities. *Morgan* v. *Gronow*, 42 L. J., Ch., 410; 16 L. R., Eq., 1; 28 L. T., N. S., 434.

Under these circumstances, therefore, a power for a child to appoint by will is void for remoteness, and a power for an unmarried child to make an appointment to take effect on marriage is also void for remoteness. *Ib.*

But where the donee of a power to appoint among children had given an unmarried child a power to make appointments to take effect only in case of the child's marriage, and after the child's marriage he executed a further deed, in the operative part of which he was expressed to confirm the prior appointment:—Held, that this second deed operated as a new appointment, and gave the child a valid general power of appointing exercisable immediately. *Ib.*

2. When, under a special power, an appointment is made giving an invalid power of appointment, with a gift over in certain events, the gift over is not invalidated by the invalidity of the power. *Slark* v. *Dalyns*, 10 L. R., Ch., 35; 44 L. J., Ch., 205; 31 L. T., N. S., 712; 23 W. R. 118. Affirming 15 L. R., Eq., 307; 42 L. J., Ch., 524.

A power to appoint is not bad because it may be so exercised as to render the appointment void as being too remote. *Ib.*

A power to appoint to children absolutely may be exercised by giving a child an estate for life with power to appoint by will. *Ib.*

A father gave property upon trust for his granddaughter A. for life, and after her death for her children, or some of them, as she should by deed or will appoint. A., by her will, appointed one-fifth of the fund to each of five children (all of whom were living at the death of the original testator) for life, and directed that, after the death of each child, the share in which the child had a life interest should be held in such manner as the child might by will appoint, with limitations over in default of appointment in favour of the survivors in different events:—Held, a good exercise of the power of appointment. *Ib.*

3. Parents having under their marriage settlement a power of appointment over a trust fund in favour of their children, appointed a portion of the fund upon such trusts as S., one of the children, should, with the consent of the trustees of the father's will, appoint, and in default of appointment, upon trust for S. for life, or until he should become bankrupt within the joint lives of the parents, or twenty-one years from the death of the survivor of them; and after his decease, if his interest should not have determined, upon trust for his executors or administrators, as part of his personal estate:—Held, first, that the words requiring the consent of the trustees of the father's will to the exercise of the power by S., being inseparably connected with the power, rendered the whole power void. *Webb* v. *Sadler*, 42 L. J., Ch., 498; 8 L. R., Ch., 419; 21 W. R. 394; 28 L. T., N. S., 388. Varying 14 L. R., Eq., 533; 20 W. R. 740.

Held, secondly, that the gift over in default of appointment amounted to an absolute appointment in favour of S., subject to the contingency of his becoming bankrupt, etc., within twenty-one years after the death of the surviving parent. *Ib.*

VI. PERPETUITY AND REMOTENESS.

4. A money fund was settled in trust for the issue of the marriage of M. and his wife; after their deaths, in such shares, etc., and at such times, as M. should appoint. M., by his will, appointed the fund to his sons in equal shares, "their respective portions to be paid to them as and when they should attain their respective ages of twenty-five years, and not before":—Held, that the appointment was void for remoteness. *Massey* v. *Barton*, 7 Ir. Eq. R. 95.

5. A widow, having a power of appointing a fund amongst her children, by her will appointed shares to certain of her children, for life, with remainder to their children; and in case any of her children died in her lifetime, she gave the share to his or her issue; and in case there should be no issue, the survivors of A.'s children were to take:—Held, that the appointment to the grandchildren was void, but that the alternative gift over to the surviving children, in case any died in the testatrix's lifetime without issue, was valid. *Hewitt* v. *Dacre* (*Lord*), 2 Keen 622; 7 L. J., N. S., Ch., 295; 2 Jur. 836.

6. By a marriage settlement, dated in 1821, real estate was conveyed to trustees to the use of the settlor, M., for life, and after his death to the use of all or any exclusively, of the children, grandchildren, or other issue of M. (to be born before the appointment was made), as he should by deed or will appoint, and in default to the uses therein declared. By will dated in 1867, M. appointed the estate to his son W. in fee, but in case he should have no child who should attain twenty-one, then to the settlor's grandson B. in fee:—Held, that the executory gift over to B. was void for remoteness. *Re Brown*, 3 L. R., Ch. D., 156.

7. A., who was unmarried at the death of B., and had under his will a power to appoint the lands of P. and T. to such child or such children as she might have, devised her lands called P. to her eldest son for life, and on his decease to his oldest son living at his death or born in due time after in fee; and if her eldest son had not such eldest son living at the time of his death or born in due time after, she devised the premises to her second son in fee; and she devised her lands of T. to her executor and his heirs, on trust to sell and lay out the

produce in the purchase of freehold property in France, and to convey the property so purchased to her second son and his heirs, provided he should previously decide to reside in France, and if he should not decide to reside in France, then she devised the property so purchased to her executor and his heirs:—Held, that the limitations of P., subsequent to the life estate of the eldest son, were void for remoteness. *D'Abbadie* v. *Bizoin*, 5 Ir. R., Eq., 205.

1. Personal estate settled on marriage for the husband for life, then for the wife for life, then to and among all and every the children and grandchildren, or issue in such shares, under such restrictions, at such times and in such manner, as they or the survivor should appoint by deed or deeds, or by will; for want of appointment to all and every the children and grandchildren or issue living at the decease of the survivor, equally, payable at twenty-one or marriage; if but one, to that one, provided that, in case of no appointment, the issue of any children dead should not have a greater share than their parents would have had, Issue only are within the power, but in any degree; but an appointment to any issue not living must be restrained to twenty-one years after lives in being at the creation of the power, otherwise it is void even as to such as come *in esse* within those limits: but on marriage of a daughter interests may be given to her children generally, and to her husband. What is ill-appointed goes as in default of appointment: but children of a living parent cannot take under the proviso. *Routledge* v. *Dorril*, 2 Ves. J. 357.

2. G. P., a tenant for life of real estate, with remainder for all and every, or any one or more, to the exclusion of the other or others of his children as he should by deed or will appoint, made an appointment to trustees, upon trust for his son G. S. P., his heirs, executors, administrators, and assigns, and to be conveyed to him when and as he should attain the age of twenty-three years; and in case his son G. S. P. should die before he had attained the age of twenty-one years, to the use of the second, third, and fourth, and every other son of the testator successively in tail, with remainder to his daughters in tail, with remainder to his brother in fee. And after directing the payment of two annual sums of money during the minority of his son, he directed his trustees to invest the clear residue of the rents and profits, to accumulate until G. S. P. or such other sons as aforesaid should attain the age of twenty-three, and on his or their first attaining that age then upon trust to pay over all such securities and accumulations unto G. S. P. or to such other sons, his executors, administrators, and assigns, for his and their absolute use and benefit:—Held, that the power of appointment was duly exercised; that G. S. P. took an estate in fee upon the death of the testator, liable to be devested in case of his death under twenty-one; and that the trust for accumulation was valid until G. S. P. attained the age of twenty-three. *Peard* v. *Kekewich*, 21 L. J., N. S., Ch., 456; 15 Beav. 166.

3. Where there is a gift to a class, some of whom are within the rule against perpetuities, and some not, but the class itself and the shares of each cannot be ascertained within the legal limits as to time, the whole gift is void. But where the individual shares of the members of the class can be ascertained within the proper periods, the gift is valid as to those within the rule against perpetuities, though invalid as the rest. *Wilkinson* v. *Duncan*, 30 Beav. 111; 9 W. R. 915; 7 Jur., N. S., 1182; 5 L. T., N. S., 161; 30 L. J., Ch., 938.

If a stated sum is given to each member of a class, wholly independent of the same, or a similar gift to every other member of a class, and cannot be affected whether the others receive their legacies or not, the gift as to those who are within the limits allowed by law. *Ib.*

4. A power of appointing lands amongst all the children of B. "begotten and to be begotten, and their issue," and in default of appointment amongst the children equally; B. had six children, all living at the time of the power being created, and by will directed that the share which every child of B. begotten, etc., was entitled to, in default of appointment, should be held in trust for that child for life, and after its death for its children:—Held, valid, and not void for remoteness. *Griffith* v. *Pownall*, 13 Sim. 393.

5. A power to appoint by will is a general power within the scope of the Wills Act, 7 Will. 4 and 1 Vict., c. 26, s. 27, so that where a person having a power to appoint real or personal estate by will makes a residuary disposition of his property without reference to the power, the will will be construed as an execution of the power. *Re Powell*, 18 W. R. 228; 39 L. J., Ch., 188.

But such a general power does not constitute ownership; so that, for the purpose of considering the question whether the exercise of the power be or be not void for remoteness, the real or personal estate subject to the power will be deemed to be the property of the donor, and not of the donee of the power. *Ib.*

P. bequeathed sums amounting to 5,000*l.* after the deaths of certain persons mentioned, upon trust, for H. for life, and after her death upon trust for such person or persons as H. should, by her last will and testament, appoint. H. made a will not referring in any way to the power, but leaving the residue of her property in trust for her daughter L. for life, for her separate use, without power of anticipation, and after her death in trust for the children of L., who, being a son or sons, should attain the age of twenty-one, or, being a daughter or daughters, should attain that age or marry. L. was born after the death of P.:—Held, that the exercise of the power was void for remoteness. *Ib.*

6. A gift of all the residue, real and personal, to A. upon trust to divide it into two moieties, the income of one moiety to go to A. for life, and the testator empowered his trustees to set apart out of this moiety 5,000*l.*, and to advance, by way of loan or absolute gift, the whole or any part of such sum to B., or all or any of his children, in such manner as to A. or other of the testator's trustees should seem meet; and when B. and his children were all dead, then the said sum to be subject to the trusts of the other moiety of the residue; and he appointed A. sole executor

and inserted in the will a power of appointing new trustees:—Held, that the power was divisible, and was to be considered as two powers, one to be exercised by A., and the other by the succeeding trustees in default of A. exercising his power, and that the former power was valid whatever might be said of the latter. Held, also, that such power was not bad, because it contemplated an appointment to objects, some of whom were too remote, but that a valid appointment thereunder might be made to such of its objects as were within the proper limits. *Attenborough* v. *Attenborough*, 1 Kay & J. 296.

1. A testatrix by will, dated in 1845, limited to a daughter an exclusive power of appointment by will amongst her children. The daughter, by her will, dated in 1874, in exercise of the power, appointed the fund amongst the objects of the power in certain shares, giving to two of her daughters life interests only, and declared that if either during her life or after her death any son or daughter of hers should marry a person who did not profess the Jewish religion, or was not born a Jew though converted to Judaism, or should forsake the Jewish and adopt the Christian or any other religion, then such son or daughter should forfeit all share in the fund, and in case of forfeiture the forfeited share was to accrue and go over to the other or others of the children living at the time of the forfeiture. Julius, a son of the appointor, married a Christian in his mother's lifetime, but without her consent. The plaintiff, one of the two daughters of the appointor, to whom a life interest only was appointed, became a Christian after the mother's death. Both Julius and the plaintiff were born after the death of the creator of the power:—Held, first, that the forfeiture clause was not void as against public policy: secondly, that it was effectual as to the shares of children marrying Christians or becoming Christians during the lifetime of the appointor, and therefore that the share of Julius was forfeited: thirdly, that the forfeiture clause must be read in conjunction with the gift over, and therefore that, so far as it affected, after the death of the appointor, the share of a child born after the death of the creator of the power, it was void for remoteness, whether such share was appointed for life only or absolutely, and consequently that the plaintiff had not forfeited her share. *Hodgson* v. *Halford*, 11 L. R., Ch. D., 959; 48 L. J., Ch., 548; 27 W. R. 545.

See also Preceding Subdivisions.

Application of Cy Près Doctrine.] See PERPETUITY, VII.

VII. EXCESS. WHEN SEVERABLE.

2. Where there has been an excess in the execution of a power, it is void *quoad* the surplus, but good within the limits of the power. *Hervey* v. *Hervey*, 1 Atk. 569. *Parry* v. *Bowen*, Nel. 87; 2 Ves. 644.

3. Power may be good and bad in part, and the excess only void where the execution is complete, and the bounds between it and excess clear. *Alexander* v. *Alexander*, 2 Ves. 644.

Where interest in appointment under power is given to those not capable, together with another who is capable, the latter will take the whole. Under such power, it cannot be given free from debts of the appointee. *Id.* 640.

4. An appointment exceeding the power by a limitation to objects not within the power, is void as to the excess. *Crompe* v. *Barrow*, 4 Ves. 681.

5. A testator had power, under his marriage settlement, to divide 2,000*l.* between his children as he should direct "by any deed or writing, to be sealed and delivered in the presence of two witnesses." By his will, which was "sealed, signed, published, and declared," in the presence of three witnesses, the testator recited the power, and divided the 2,000*l.* between his three children living at his death and the survivor of them, excluding a deceased child, and then amongst their issue; and in default of issue of his three children, then to his nephews and nieces:—Held, that the power was well executed amongst the children and the survivor of them; but beyond that, the residue to go as in default of appointment. *De la Hooke* v. *Hill*, 4 Jur. 765.

6. Excess in the execution of a power, if capable of separation, will be corrected. *Palmer* v. *Wheeler*, 2 Ball. & B. 28.

7. When a power is exceeded in the execution, in order to reject the excess, and let the appointment stand, the Court must see distinctly what the person executing the power had in view, and be satisfied that if he had rightly understood the extent of his power, he would so have executed it. *Hamilton* v. *Royse*, 2 Sch. & Lef. 315.

8. *Quære*, whether if the estate, limited to an object of a power, be preceded by a limitation of a term of years to trustees to raise money for persons who are not objects of the power, the whole appointment is bad, or merely the limitation of the term. *Barron* v. *Barron*, 2 Jones 226.

9. Words in excess of a power rejected where there is a valid appointment to an object of the power, and in such a case:—Held, that the appointee, being object of the power, takes absolutely. *Re Sondes' (Lord) Will*, *Re Watson's Will*, 2 Sm. & Gif. 416.

10. An appointment to take effect at a future period is not void *in toto* because it may include, or in the event turns out to include, strangers as well as objects of the power; but it fails only as to those appointees who are not objects. *Re Farncombe*, 47 L. J., Ch. D., 328; 9 L. R., Ch. D., 652.

11. A marriage settlement comprised a sum of 20,000*l.* South Sea Annuities, 7,000*l.* 3 per cent. reduced, and 3,150*l.* new 4 per cents.; also certain shares in a company, and 54,000 French rentes. These were settled on trust to raise an annuity of 500*l.* for the life of the wife for her separate use, subject thereto, for the husband and wife for their joint lives; if the wife should predecease her husband, then on trust, to raise 3,000*l.*, over which a general power of appointment was given to the wife, and as to the rent, after the death of the wife so predeceasing her husband, for him for life, and after his death in trust for all and every, or such one, or more, exclusively of the other or

others of the relations in blood to the said Sarah Harvey (the wife) at the time of her decease, within the eighth degree of consanguinity to her, at such age, day, or time, or respective ages, days, or times, and, if more than one, in such shares and proportions, and with such annual sums of money, and future, or executory, or other trusts (such annual sums of money, and future, or executory, or other trusts, being for the benefit of the said relations in blood of the said Sarah Harvey, within the degree aforesaid, or such, or one of them), and in such manner as the said Sarah Harvey should, notwithstanding her coverture, by her last will and testament in writing, or any codicil or codicils in writing, or any writing or writings in the nature of or purporting to be a will or codicil, to be signed and published by her in the presence of, and to be attested by, two or more credible witnesses, direct or appoint; and in default of such direction, or appointment, and so far as any direction or appointment should not extend, in trust for such person, or persons, as under the Statute for the Distribution of the Effects of Intestates would at the decease of the said Sarah Harvey have become entitled thereto as her next of kin, in case the said Archibald Morrison (the husband) had died in her lifetime, and she had died possessed thereof, his widow, and intestate. The settlement also comprised certain plate, linen, china, etc., over which a general power of appointment was given to the wife, to take effect after the death of the husband. It comprised also certain shares in a public library, and tickets of admission to a theatre, and jewellery, etc., and as to these the settlement gave to the wife a general power of gift and appointment, either during her life, or after her death, as well as over what she should save out of her separate income. The wife died many years before her husband. By her will she said: "I do, by virtue of the power and authority reserved to me in and by the deed of settlement made, etc., hereby make, publish, and declare this my last will and testament, in manner and form following, that is to say." She then referred particularly to the power to dispose of 3,000*l.*, and made a disposition of a great part of it. She gave to her husband for life all the benefit of her shares in the public library, of her admission to the theatre, and of her books. After his death, she disposed of these things to various persons; she disposed also of her jewels, china, and other things, and her will concluded as follows: "And after payment of my just debts, funeral expenses, the charges of proving this my will, and of carrying the trust thereof into execution, I direct and appoint, give and bequeath, after the decease of my said husband, all the rest, residue, and remainder of my moneys, and other my personal estate, of whatever description the same may be, unto and among all and every, the daughters of my said brother John Harvey, the said Charles Day, and Louisa Day, the children of my deceased niece, and the two daughters of my said brother Charles Savile Onley, or to such of them as shall be living at my said husband's death, and to the issue of such of them as shall then happen to be dead, to be equally divided amongst them, share and share alike. But it is my will that the said Charles Day, and Louisa Day, and the children of any other of my nieces who may be dead, shall only be entitled to the share in the said residue which his or her mother would have had if living at the death of my said husband. And further it is my will that the shares of each of my said nieces of each of the residue of my personal estate, shall be placed and continue out at interest by my surviving executor, his executors or administrators, on Government or real security, during the respective lives of my said nieces, and the dividend or interest on each share, as the same shall from time to time become due, shall be paid to each of my nieces during her life, on her own receipt, for her own sole and separate use, and not to be subject to the debts or control of her present or any future husband. And as to the share of my niece Caroline Onley, I will and desire that the same shall after her decease be paid to all my other nieces who shall be living at the decease of the said Caroline Onley and to the issue of such of them as shall then happen to be dead, equally, share and share alike, but the issue of any deceased niece is only to be entitled to the share which his or their mother would have had if living at the decease of the said Caroline Onley; and after the death of each of my other nieces, I direct that the dividends and interest of her share shall, if she die married, be paid to her husband during his life, for his own use. And I further will and direct that after the several deceases of my said last-mentioned nieces, or their respective husbands, that the share of each of the said last-mentioned nieces shall be paid to her child, children, or grandchildren, or any other relation in blood to my said niece, in such parts and proportions, manner, and form as she may, by her last will and testament, duly executed, and which she shall have power to make, notwithstanding her coverture, give and bequeath the same, and in default thereof then unto the next of kin in blood of my said niece, according to the Statute of Distribution of Intestate Personal Estates":—Held, first, that the will was an execution of all the powers, that is of the power to appoint each portion of property comprised in the settlement; secondly, that the appointment in favour of the daughters of John Harvey was not void *ab initio* because it might comprise persons not living at the death of the testatrix and within the eighth degree, nor did it become void *in toto* because it did in fact at the time of distribution include such persons, but that it was good *pro tanto;* thirdly, that the attempted limitation to the husbands of the nieces was bad, as they were strangers, and the limitations to their children, grandchildren, or other relations in blood was void for remoteness; fourthly, that the attempt to cut down the estate given to the nieces in the first instance failing, the attempted remainders over did not go as unappointed to the next of kin, but failed wholly and left absolute interests subsisting in the nieces. *Harvey* v. *Stracey*, 1 Drew. 73; 22 L. J., N. S., Ch., 23; 16 Jur. 771.

1. A lady having four children by her first husband, and three by her second, and having power to appoint a fund amongst the former only, appointed it amongst all her children

equally, and declared that if her children by her first husband should refuse to share the fund with her other children, the whole fund should go to her youngest child by her first husband:—Held, that the appointment was not wholly void, but that the first class of children took each one-seventh of the fund under it, and the other shares went to them, as in default of appointment. *Sadler* v. *Pratt*, 5 Sim. 632.

1. By settlement upon the marriage of C., certain fee simple lands were conveyed to C. for life, and, after his decease, to such of his children as he should by deed or will appoint, and to their heirs and assigns, and, in default of appointment, to such children equally. C., having several children, devised these lands to his wife for her life, upon condition that she should support, maintain, and educate the children; and after her decease, to C.'s son, John:—Held, that the gift to the wife was void, but the trusts in favour of the children valid, and that the gift to the son was good, the execution of the power being void only for the excess, and not *in toto*. *Crozier* v. *Crozier*, 2 Con. & L. 294; 5 Ir. Eq. R. 540; 3 Dr. & War. 373.

2. An appointment good in itself is not rendered invalid by the annexation of a condition subsequent not authorised by the power. Settlement upon trust for all and every the children or child of R., in such shares, at such age, etc., as R. should appoint. Appointment by will by R. in trust for his son F. absolutely, with a direction that he should within one year settle the trust funds upon trusts therein declared, and that on refusal the provisions in his favour should cease:—Held, that the condition was to be merely rejected, and did not vitiate the appointment. *Watt* v. *Creyke*, 26 L. J., Ch., 211; 3 Jur., N. S., 56; 3 Sm. & G. 362.

3. A will made by the donee of a special power to appoint by deed, though it shows that the donee supposed the power to have been extinguished, and purports to be an execution of an invalid power, and of all other powers enabling in that behalf, and though it appoints to persons, some of whom are strangers to the power, is a defective execution which equity will aid in favour of a child otherwise provided for, and to the prejudice of other children entitled in default of appointment. *Bruce* v. *Bruce*, 40 L. J., Ch., 141; 11 L. R., Eq., 371; 24 L. T., N. S., 212.

4. Parents having under their marriage settlement a power of appointment over a trust fund in favour of their children, appointed a portion of the fund upon such trusts as S., one of the children, should, with the consent of the trustees of the father's will, appoint, and in default of appointment, upon trust for S. for life, or until he should become bankrupt within the joint lives of the parents, or twenty-one years from the death of the survivor of them; and after his decease, if his interest should not have determined, upon trust for his executors or administrators, as part of his personal estate:—Held, that the words requiring the consent of the trustees of the father's will to the exercise of the power by S. being inseparably connected with the power, rendered the whole power void. *Webb* v. *Sadler*, 42 L. J., Ch., 498; 8 L. R., Ch., 419; 21 W. R. 394; 28 L. T., N. S., 388. Varying 14 L. R., Eq., 533; 20 W. R. 740.

5. Conditions annexed to appointments made in pursuance of a power, though in themselves void:—Held, not to invalidate the appointments. *Palsgrave* v. *Atkinson*, 1 Colly. 190.

6. A person having a power of appointing a sum of money among his younger children, by his will, reciting the power, bequeathed as follows: "I leave and bequeath unto my said daughter Harriet, a further sum of 200*l.*, to have me properly buried, and to pay what small debts I may owe at my decease":—Held, that this was a bad exercise of the power, and that the 200*l.* should go as if unappointed. *Hay* v. *Watkins*, 2 Con. & L. 157; 3 Dr. & War. 339; 5 Ir. Eq. R. 273.

When there is an appointment, with a condition annexed, if there appear to be a clear intention to benefit the appointee, the Court will hold the appointment good discharged of the condition. *Ib.*

7. A father, having a power to appoint an estate to the use of all and every his child and children for any estates or interests, and in any shares and subject to any charges and incumbrances, to one or more of them, devised the estate to trustees in trust to apply the rents, until the eldest son attained age, to the maintenance and education of all the children, and further thereout to pay the interests of his debts and so much of the principal as the surplus would reach; and he charged the estate with 3,030*l.* for the younger children; and in case the eldest son should, by business or marriage, or otherwise, be enabled to pay off the 3,000*l.*, that the trustees should convey the lands to him; and in case the eldest son should not pay it, to the second or third son on the same conditions; and in case none of the sons should take or accept the estate, that the trustees should sell the estate and pay off the father's debts and divide the surplus among all the children:—Held, that the will was a good equitable execution of the power, the portion of it which exceeded the power being separable, and the 3,000*l.* being a charge and not a personal condition. *Richardson* v. *Simpson*, 9 Ir. Eq. R. 367; 3 J. & L. 540.

8. Part of a fund was appointed under a power to an object of the power, subject to a charge not within the power:—Held, that though the charge was void, the appointment was valid. *Re Jeaffreson*, 35 L. J., Ch., 622; 2 L. R., Eq., 276; 12 Jur., N. S., 660; 14 W. R. 759.

9. When an absolute gift or an appointment in a will is attempted to be cut down by a subsequent inoperative modification or restriction, the original gift remains unaffected by the intended restriction. *Churchill* v. *Churchill*, 16 W. R. 182; 5 L. R., Eq., 44.

10. A., who was unmarried at the death of B., and had under his will a power to appoint the lands of P. and T. to such child or such children as she might have, devised her lands called P. to her eldest son for life, and on his decease to his eldest son living at his death or born in due time after in fee; and if her eldest son had not such eldest son living at the time of his death or born in due time after, she devised the premises to her second son in fee; and she devised her lands of T. to her executor and his heirs, on trust to sell and lay

out the produce in the purchase of freehold property in France, and to convey the property so purchased to her second son and his heirs, provided he should previously decide to reside in France; and if he should not decide to reside in France, then she devised the property so purchased to her executor and his heirs:—Held, that the condition to reside in France could not be separated from the appointment of T., and that it rendered it invalid, as it showed an intention of the testatrix to accomplish by the appointment an indirect purpose not warranted by the power. *D'Abbadie* v. *Bicoin*, 5 Ir. R., Eq., 205.

See also Preceding Subdivisions.

In Case of Fraud or Power.] See XV. VI. *ante.*

XVII. Objects of Special Powers and Excessive Execution in Respect Thereof.

I. *Children. Of what Marriage*, 5843.
II. *Grandchildren*, 5844.
III. *Illegitimate Children*, 5845.
IV. *Issue*, 5846.
V. *Nephews and Nieces*, 5847.
VI. *Family*, 5847.
VII. *Wife. Of what Marriage*, 5847.
VIII. *Relations*, 5848.
IX. *Appointment to Survivors*, 5849.
X. *Substitution of Children for Parents*, 5850.
XI. *Class of Objects. When Ascertained and Vesting*, 5850.
XII. *Implied Gift in Default of Appointment*, 5856.
XIII. *Appointment to Non-Objects in Other Cases*, 5861.
XIV. *Persons Entitled Under Ultimate Limitations in Settlements and Wills.* See SETTLEMENT—WILL.
XV. *Eldest Child and Younger Children. Meaning of and when Ascertained.* See YOUNGER CHILDREN.
XVI. *Appointment to Strangers in Fraud of Power.* See XV. *ante.*
XVII. *Excess. When Severable.* See XV. VI. —XVI. *ante.*
XVIII. *Perpetuity and Remoteness.* See XVI. VI. *ante.*
XIX. *Application of Cy Près Doctrine.* See PERPETUITY, VII.

I. CHILDREN. OF WHAT MARRIAGE.

1. A., a widower, settles lands to raise 100*l.* a year for his eldest son, and 100*l.* apiece for his younger children, and afterwards marries again, and has children by his second wife. Decreed, the children by his second wife were equally entitled with the other younger children; though portions of the younger children were by the settlement to ce paid according to their seniority, yet in case of a deficiency they shall be paid in average. The portions of the younger children, who died in the life of their father, not to be raised in favour of the administrators; otherwise, if any of the daughters had married in the lifetime of their father, and afterwards died. *Brathwaite* v. *Brathwaite*, 1 Vern. 334.

2. A. B. on his second marriage executed a deed of settlement, whereby certain lands were vested in trustees to the use of the settlor for life; then to secure a jointure for his intended wife, and subject thereto to the use of the first and every other son of the settlor by his said intended wife; and in the same deed, there was a power, if the settlor should have more than one son, by deed or will to prefer such son to the whole or part of said lands, subject to said jointure of 60*l.* per annum to his wife, and also subject to all such sums as he might think fit to charge, in the whole not exceeding 4,000*l.* Shortly after the execution of the settlement, the settlor executed the power, and charged the said lands with a sum of 4,000*l.* in favour of the children of his former marriage, and subsequently made his will, and thereby devised certain estates, of which he was seised, to the defendant, who was the only son of the second marriage then living, and reciting, that "by his settlement he was empowered to charge the settled lands with 4,000*l.*, and that he had accordingly charged them," etc., and further declaring that, inasmuch as he had, by the deed of 3rd September, 1819, fully provided for the sons of his first marriage, he left the residue of his real and personal estate to his son by his second marriage." A bill having been filed by the assignee of the share of one of the children of the first marriage:—Held, that the power of charging could not be exercised, save in favour of the children of the second marriage; also, that it was not an absolute power, but a power dependent upon the event of there being more sons than one of that marriage, and any one of such sons being preferred to the settled lands according to the terms of the primary power. *Cooke* v. *Briscoe*, 1 Dr. & Wal. 596.

3. A. person having a power to charge 500*l.* and appoint it among his younger children, by articles on first marriage, charged it for the benefit of the younger children of that marriage. He married again. There were younger children of both marriages. By his will he appointed nominal shares to the children of the first, and the entire substantially to those of the second marriage:—Held, that the power included all younger children, and the articles therefore became invalid as an appointment after the second marriage, and that the power might be re-exercised; but held, also, that the articles were a contract to exercise it substantially for the children of the first marriage, and controlled the power, and that the testamentary appointment was therefore also invalid, and the fund should be divided equally among the younger children of the first marriage and the younger children of the second marriage as a class. *Alleyne* v. *Alleyne*, 3 Ir. Eq. R. 493; 2 J. & L. 544.

4. Testator devised lands to P. upon trust to convey them to his three sons, in such shares as P. should appoint; and in default of appointment he gave the lands to them equally, as tenants in common. In 1786 P., in execution of the trust, conveyed part of the lands to the use, that in case S. (one of

the sons) should marry, with the consent of P. first obtained, but not otherwise, such woman or women as he should so marry, in case she should survive him, should, during her life, receive for jointure such annuity (not exceeding a certain sum) as S. should appoint: and to the further use, in case S. should marry with such consent, but not otherwise, that he might by deed or will charge the lands with 500*l.* for portions for his younger children, payable in such shares as he should appoint. In 1788, S. married with consent, and, reciting his power, covenanted that the trustees of his settlement, in case there should be one or more younger children of the marriage living at his death, should raise 500*l.* out of the lands; the said sum to be divided in such shares and proportions amongst such younger children as he should by will appoint, and for want of appointment, equally. There was issue of this marriage three younger children. S., after the death of P., married a second wife, and charged the lands with an annuity for her jointure; and died, leaving his wife and four children of the second marriage, and the three younger children of his first marriage, surviving. By his will in 1842 he appointed 1*s.* to each of the children of the first marriage, and the residue among the children of the second marriage:—Held, upon the construction of the settlement in 1786, and the circumstances that the consent of P. was only requisite to any marriage of S. which should take place in his lifetime; and that the children of the second marriage were objects of the power; that the settlement of 1788 amounted to a contract, that so far as S. could bind his power, the children of the first marriage should take the fund equally between them, if he did not otherwise apportion it amongst them; that, upon there being issue of the second marriage, S.'s power of appointment was gone; and that the children of both marriages were entitled to the fund equally between them as one class. *Green* v. *Green*, 2 J. & L. 529; 8 Ir. Eq. R. 473.

1. By a marriage settlement, certain stock in the funds was settled upon the intended husband and wife for their joint lives, and the life of the survivor, and then upon the children of the marriage, with a power to the trustees, with the consent of the wife, to advance part of the fund for the benefit of the children in her lifetime. There were four children of the marriage; the husband died; the wife married again; the second husband assigned the wife's life interest for value; after the assignment the trustees, with the consent of the wife, exercised the power of advancement in favour of the children of the first marriage:—Held, that the power was well executed as against the assignee of the second husband. *Whitmarsh* v. *Robertson*, 1 Colly. 571; 14 L. J., N. S., Ch., 157; 9 Jur. 125. And see S. C. 1 Y. & Coll. C. C. 715; 11 L. J., N. S., Ch., 404; 6 Jur. 921.

II. GRANDCHILDREN.

2. Appointment void as far as it exceeds the power, viz., to grandchildren under a power to appoint to children. *Butcher* v. *Butcher*, 1 Ves. & B. 79. Affirming 9 Ves. 382.

3. A power to appoint among children does extend to grandchildren. The appointment being bad under the power, the party taking benefit of it not obliged to make satisfaction out of the personal estate which he took under the same will. *Robinson* v. *Hardcastle*, 2 Bro. C. C. 344.

4. Execution of a power of appointment to children:—Held, good, though it extended to the issue of one of them, under the special circumstances of the case. *Langston* v. *Blackmore*, Ambl. 289. See *Tucker* v. *Sanger*, M'Clel. 449; 13 Price 609.

5. Power to appoint among children, each must have a part, not illusory nor reversionary; but a particular interest, as for life, may be given to one. Such a power will not extend to grandchildren, nor can a discretion be given to another to appoint. But though that would be void, it would not devolve on the Court, which is only where the power is well created, but by accident cannot be executed by the party. *Alexander* v. *Alexander*, 2 Ves. 640.

6. Testator appoints to grandchildren, under a power to appoint to children, a fund, to go, and in default of appointment, equally: the appointment being bad, the children having legacies must elect. *Whistler* v. *Webster*, 2 Ves. J. 366.

7. Testator bequeathed a sum of 6,000*l.* in trust for his daughter for life, "and on her decease, I give the said 6,000*l.* to the children, or their descendants, of T. F. in such proportions to each as my daughter may direct." The daughter died without having made any appointment:—Held, that the children of T. F. were entitled to the fund to the exclusion of their issue. *Jones* v. *Torin*, 6 Sim. 255.

8. By articles, the wife's fortune and an equal sum advanced by the husband were agreed to be settled for the husband for their joint lives; and if he should die first, leaving issue by her, for her for life; after her decease, as to the capital, in such manner as he should appoint; in default of appointment, to be divided equally among the issue at twenty-one without maintenance and survivorship. After marriage, in pursuance of the articles, an estate purchased with the fund was settled upon the husband for the joint lives of him and his wife, remainder to trustees to preserve, etc.; remainder, in case of his death first, without issue, to certain uses; remainder, in case of his death first, leaving any child or children, to the wife for life; remainder to all the child or children in such shares as the husband should appoint, for want of appointment equally in tail, with cross-remainder; remainder to the heirs of the husband. Children only are the objects, and an appointment to a child for life, remainder to his children as he shall appoint, is an excess of power, and the doctrine of *cy près*, by giving the child an estate tail, is not applicable; but the appointment is void for the excess only, and what is ill-apportioned goes as in default of appointment. *Bristow* v. *Warde*, 2 Ves. J. 336.

9. Upon marriage articles, 15,000*l.* was vested in trustees on trust, together with 5,000*l.* covenanted by the husband to be paid, to be laid out in land to be settled upon the husband for life, remainder to the wife for life, remainder to the

use of such child and children, in such shares, for such estates, and subject to such powers, limitations, and provisions as the husband and wife, or the survivor, should appoint; in default of appointment, to the children in tail; in default of issue, to the husband in fee. The husband and wife joined in a direction to the trustees, reciting their resolution to invest the trust fund in an estate lately purchased by the husband for 16,300*l.*, and directing them to deliver the said stock, etc., to him, at the price they were at on the day of the purchase, which was done. The wife died; there were two daughters; the father, by will, reciting the purchase, and that he had not conveyed it to the uses of the settlement, and that it was not his intention, that the said purchase should be an investment of the trust fund, but that the said fund, with its increase, should be taken out of his personal estate, gave 10,000*l.*, part of the trust fund, in trust to be laid out in land, to be conveyed to one daughter for life for her separate use, remainder to her children in tail, remainder to the other daughter in fee, for whom he also appointed the residue of the fund, but revoked that by codicil reciting a portion given on her marriage: —Held, first, that grandchildren are not objects of the power, but the excess only would be void; secondly, the fund, with its increase, was invested in the purchase; thirdly, there was no appointment of the estate or money due on the covenant; fourthly, the remainders in default of appointment are vested subject to be devested by appointment, and will take effect as to what is ill appointed or unappointed: fifthly, the share of the daughter, to whom the portion was advanced on marriage, was thereby satisfied. *Smith* v. *Camelford* (*Lord*), 2 Ves. J. 698. See further this case, *nom. Pitt* v. *Jackson*, 2 Bro. C. C. 51.

1. A power to appoint among children, "subject to such regulations and directions with regard to the settling the shares in trust for their separate use, and with, under, and subject to such powers, provisoes, conditions, and other restrictions and limitations over (such limitations over being for the benefit of some or one of them)," does not authorise an appointment to grandchildren. *Hewitt* v. *Dacre* (*Lord*), 2 Keen 622; 7 L. J., N. S., Ch., 295; 2 Jur., 836.

2. A. K. by will gave all his realty and personalty to his wife O. to bring up his children, and when they came of age "to settle" on them what she would deem "prudence," reserving to herself maintenance. If she married again, T. P. was to become trustee for the children of the testator. At his wife's death what property remained was to be equally divided among the children of the testator then living. The wife and five children survived the testator; two children afterwards died under twenty-one. The widow settled part of the property on one of the children and her issue:—Held, that this was a bad execution of the power, so far as it gave any interest to grandchildren. *Kennerly* v. *Kennerly*, 16 Jur. 649.

3. "Child or children" may mean "issue." A testator bequeathed property to trustees upon trust to pay the income thereof to his daughter during her life, and directed that, in case she should leave any issue living at her death, the property should be disposed of, and the produce thereof paid to and amongst such child or children as she should appoint, and in default of appointment to and amongst such issue as tenants in common, or if there should be but one child the whole to be paid to such one; and if there should be no issue of his daughter living at her decease, or they should die infants, then over:—Held, that the words "child or children" must be construed "issue," and, therefore, that an appointment to the exclusion of the grandchildren was void. *Dalzell* v. *Welch*, 2 Sim. 319.

4. Where the words "children" and "issue" are used interchangeably in a will, the operation of the word "children" may be extended to "issue generally," to effectuate the intention. *Harley* v. *Mitford*, 21 Beav. 280.

A testator declared, that in case his daughters should "leave issue," they might appoint a fund "unto such children" in "such manner" as they should choose, and in default of any child, they might appoint it to their sisters and their children; and in case all his daughters should die without issue," then over: —Held, that "children" must be construed "issue," and that an appointment to a grandchild was within the power. *Ib.*

Held, also, that the word "such" did not refer to the issue a daughter might leave, but to such of the class as she might choose. *Ib.*

5. Devise to A. for life, with remainder to the use of all and every, or such one or more, of his children, and their, his, or her heirs, for such estate and estates, and in such shares and proportions, as A. should by deed or will appoint; and in default of appointment, to the use of all and every such child or children, and the respective heirs of their bodies:—Held, that an appointment to a grandchild of A. was a valid exercise of the power. *Fowler* v. *Cohen*, 21 Beav. 360; 2 Jur., N. S., 315; 4 W. R. 412.

By Way of Settlement when not Objects of the Power.] See XV. v. 3 *ante.*

III. ILLEGITIMATE CHILDREN.

6. One devises 3,000*l.* to all the natural children of his son by J. S.; the bastards born after making the will shall not take; nay, the child *in ventre sa mere* shall not take; and, though in the principal case the money was to be paid by the executors, as the testator by deed should appoint, and the testator afterwards made the deed of appointment, the deed of appointment, referring to the will, was held as part of the will. *Metham* v. *Devonshire* (*Duke*), 1 P. W. 529. See 8 Price 22.

7. Trusts in marriage articles to pay certain funds, the property of the wife, to all and every her child and children, in such parts, etc., as she should by will give, etc., and for want of such gift, etc., to all and every her child and children, part and share alike, and for want of such issue, over. By her will she gave ten guineas, part of the fund, to her eldest son, declaring that he was otherwise provided for by the will of his uncle; and the remainder she gave to all her other children, naming them, equally, with survivorship in case of the death of any during

minority, and before receipt of his, her, or their shares; and in case of the death of her eldest son before he comes to the possession of his uncle's fortune, she gave her second son only ten guineas. The only provision of the eldest son was a remainder in tail after the life estate of his father, who survived his wife. The Court was of opinion, that children illegitimate, being born after elopement, and no access, clearly could not take. *Vanderzee* v. *Aclom*, 4 Ves. 771.

1. A married woman, having several legitimate children, and one illegitimate child, and being separated from her husband, and *enceinte* with a second illegitimate child, appointed a fund to her illegitimate child then born, reserving a power of revocation, as to a moiety, in favour of any after-born children she might have born of her body. After the birth of the second illegitimate child, she revoked the appointment of the moiety, and appointed the entire fund equally between the two illegitimate children:—Held, that the after-born children, for whose benefit the revocation might be made, must be taken in the primary and legal sense as applying to legitimate children only; that, therefore, the second illegitimate child was not an object of the reserved power, and could not take under the latter appointment. *Dover* v. *Alexander*, 2 Hare 275; 12 L. J., N. S., Ch., 175; 7 Jur. 124.

The objection to the validity of a limitation to unborn illegitimate children is not founded exclusively on the uncertainty of description, nor *semble* is there any distinction between the validity of a limitation in favour of such persons, whether described as the children of a man or the children of a woman. *Ib.*

2. A husband by his will gave his property in trust for the use of his wife for life, with power to dispose of it by will at her death "among our children," and if she died intestate the property to be divided equally between "my children by her." The testator was twice married. By his first wife he had two children, both of whom died in his life, one of them leaving an only child. By his second wife he had two children, both born before the marriage:—Held, that the two illegitimate children did not take. *Dorin* v. *Dorin*, 7 L. R., H. L., 568; 45 L. J., Ch., 652; 33 L. T. 281; 23 W. R. 570. Reversing 17 L. R., Eq., 463; 43 L. J., Ch., 462; 29 L. T. 731; 22 W. R. 217.

3. K. by his will gave a fund upon trust for such of the children of his daughter M. (who was then married) as she should by will appoint, and, in default of appointment, for her children equally. The will contained no hotchpot clause. M. had several children, some of whom were illegitimate, having been born before her marriage. By her will she appointed the fund to her "children E. and C., their executors, administrators, and assigns, for their own use and benefit." E. was one of the illegitimate and C. one of the legitimate children:—Held, reading M.'s testamentary appointment as indicating an intention to appoint the fund in moieties, that one moiety passed to C. under the appointment, and that the other moiety, E. not being an object of the power, was divisible among all the legitimate children, as in default of appointment. *Re Kerr*, 4 L. R., Ch. D., 600; 46 L. J., Ch., 287; 25 W. R. 390; 36 L. T., N. S., 356.

4. An illegitimate child whom the testator had treated and recognised as a child was included as an object of a power to appoint testator's "family." *Humble* v. *Bowman*, 47 L. J., Ch., 62.

IV. ISSUE.

5. Issue will extend to any remote degree, as a description of objects of the power of A. to distribute among them as he thinks fit; but they must all be in existence during his life. *Hockley* v. *Mawbey*, 1 Ves. J. 150.

Gift to A. and his issue, to be divided among them as he thinks fit, the issue have an interest in all events, and A. has no authority but as to the proportions; if no appointment, equally. Where to be divided among issue, the proportion must not be illusory. *Ib.*

6. Where, in a deed, a power is given to appoint among issue, followed by a limitation over in their favour, and then it is declared that the children shall take in equal shares, the word "children" does not cut down the strict technical meaning of the word "issue." *Harrison* v. *Symons*, 14 W. R. 959.

7. By marriage articles a reversionary interest in a fund was agreed to be settled on the husband for life, remainder to the wife for life, and after the death of the survivor on the issue of the marriage living at the death of the survivor of the husband and wife, in equal shares, if more than one, and if but one then the whole was to go to such only child; and if there should be no issue of the marriage living at the death of the survivor of the husband and wife, then the fund was to go as the husband should appoint. The only child of the marriage died in the father's lifetime, leaving a child:—Held, that the word "issue" was to be construed "child," and therefore that an appointment of the fund made by the father to herself was valid. *Swift* v. *Swift*, 8 Sim. 168; 5 L. J., N. S., Ch., 376.

8. Personal estate settled on marriage for the husband for life, then for the wife for life, then to and among all and every the children and grandchildren, or issue in such shares, under such restrictions, at such times and in such manner, as they or the survivor should appoint by deed or deeds, or by will; for want of appointment, to all and every the children and grandchildren, or issue, living at the decease of the survivor, equally payable at twenty-one or marriage; if but one, to that one; provided, that in case of no appointment, the issue of any children dead should not have a greater share than their parents would have had. Issue only are within the power, but in any degree; but an appointment to any issue not living must be restrained to twenty-one years after lives in being at the creation of the power, otherwise it is void, even as to such as come *in esse* within those limits; but on marriage of a daughter, interest may be given to her children generally, and to the husband. What is ill appointed, goes as in default of appointment; but children of a living parent cannot take under the proviso. *Routledge* v. *Dorril*, 2 Ves. 356.

9. Intention necessary to restrain issue to children. *Leigh* v. *Norbury*, 13 Ves. 340.

1. Where in marriage articles there is no limitation over in default of appointment among the "issue," the word "issue" is confined to children of the marriage. *Lees* v. *Lees*, 5 Ir. R., Eq., 549.

2. By a settlement, a trust fund was settled after the death of husband and wife, upon the children equally who should survive them. But if any child should die in the life of the husband and wife, and leaving "issue" then living, his share should go equally between the issue of such child, and when and at such time as the respective shares of such child would become due and payable:—Held, that the "issue" of children took *per stirpes*, and that the successive generations of "issue" took their respective shares by substitution, and not concurrently, so that grandchildren and great-grandchildren could not take together as a class. *Robinson* v. *Sykes*, 23 Beav. 40; 2 Jur., N. S., 895; 26 L. J., Ch., 782.

V. NEPHEWS AND NIECES.

3. Power to appoint among nephews and nieces does not extend to great-nephews, etc.; and if part be appointed, not pursuant to the power, the money so appointed lapses into, and passes under, the appointment of the residue which was properly appointed. *Falkner* v. *Butler*, Ambl. 514.

4. A power by will, after a life estate, to the testator's widow, to appoint to "nephews and nieces, grand-nephews and nieces," in such shares and on such trusts, etc., as the widow should appoint:—Held, in the absence of any indication to include the children of the latter class, that an appointment to the children of grand-nieces was invalid. *Waring* v. *Lee*, 8 Beav. 247; 9 Jur. 170.

5. Devise to three sisters for life, and subject thereto the survivor to divide and devise "to such of my nieces and other relations as shall be unprovided for at the decease of such survivor, in such proportions as she, in the goodness of her heart, shall think fit"; appointment by survivor to all her nieces living at her decease equally:—Held, that the nieces were entitled either as appointees or as the next of kin of the first testatrix. *Paclow* v. *Laurie*, 2 Jur. 804.

VI. FAMILY.

6. Power to appoint for the benefit of a married woman and her family, would not include the husband in general; but upon the whole will, an appointment in his favour was established. *M'Leroth* v. *Bacon*, 5 Ves. 159.

7. Where a donor recommends or directs that the donee, at her death, shall give personal property to such of his family, or such of his relations, as he shall think fit, the donee has a power to select the objects of her bounty amongst his relations or family, though not within the degree of next of kin. But if the donee does not exercise the power, the word "relations" or the word "family" will be construed "next of kin," unless the special expressions of the donee have a different import. *Grant* v. *Lynam*, 4 Russ. 292; 6 L. J., Ch., 129.

8. Testatrix bequeathed to her sister B. for life, declaring that it was her absolute desire that B. bequeathed to those of her own family what she has power to dispose of, provided they behave well to her; B., by her will, declared she meant to make no disposition of her sister's property: it was held a trust for next of kin of B. *Cruwys* v. *Colman*, 9 Ves. 319.

9. Construction of a testamentary power to donee to appoint to "whatever existing member of my family he may be disposed." *Sinnott* v. *Walsh*, 5 L. R., Ir., 27.

10. A power to an unmarried woman to appoint a fund amongst "her own family or next of kin," is not confined to her statutory next of kin, but is capable of extension to any relative. *Snow* or *Sum* v. *Teed*, 9 L. R., Eq., 622; 23 L. T., N. S., 303; 39 L. J., Ch., 420; 18 W. R. 623.

11. Under a power to appoint to testator's "family":—Held, that an illegitimate child whom the testator had treated and recognised as a child was an object of the power. *Humble* v. *Bowman*, 47 L. J., Ch., 62.

12. A testator gave his estate to his widow "to be at her disposal in any way she may think best, for the benefit of herself and family." The widow by her will gave a part of the estate to an illegitimate son of one of the testator's sons:—Held, that the gift was valid. *Lambe* v. *Eames*, 6 L. R., Ch., 597; 40 L. J., Ch., 447; 25 L. T., N. S., 175; 19 W. R. 659. Affirming 40 L. J., Ch., 15.

13. A testamentary gift by a married man to his "family" should be read as a gift to his "children," to the exclusion of his wife. *Re Hutchinson*, 8 L. R., Ch. D., 540; 39 L. T. N. S., 86; 26 W. R. 904.

VII. WIFE. OF WHAT MARRIAGE.

14. A marriage was dissolved by the Divorce Court, but before the decree had become absolute, the husband married A. abroad, and by a settlement, reciting that marriage, a power was reserved to him to appoint a life interest to any surviving wife:—Held, that A. was an object of the power, whether the second marriage was valid or not. *Dolby* v. *Powell*, 30 Beav. 534.

15. A testator devised an estate, *pur autre vie*, in the funds of B. and G., and a term for years in the lands of S., upon trust for his son for life, remainder over; and also empowered that son to make a settlement for the use of any wife he might marry, and to incumber the said properties for that use, and to the use of any issue lawfully begotten. The donee of the power exercised it on his marriage in 1805 in favour of his first wife, and reserved a power to charge a jointure for any future wife. The first wife having died, he, on his second marriage in 1815, executed a settlement reciting his title to the premises under the will, but without allusion in that recital to the power contained in the will, and also reciting the settlement of 1805 and the reservation therein of a power to grant a jointure to a future wife, and then granting to trustees for the second wife a jointure of 100*l.* per annum chargeable upon the lands of B. and S., and chargeable, in case the said lands should be

insufficient for payment thereof, upon all and every other property, real or personal, of which he was then, or should thereafter be possessed, or which he should die possessed of, in lieu of dower, etc.:—Held, that the power contained in the will must be exercised in favour of the first wife; held, also, that the settlement of 1815 was a valid execution of the power in favour of the second wife, although that settlement contained no reference to that power, and only alluded to the reservation in the settlement of 1805; held, also, that the lands of G., although not specified by name in the settlement of 1815, were charged thereby with the jointure in favour of the second wife; held, also, that it was within the jurisdiction of this Court to appoint a receiver over the lands for the purpose of collecting the arrears of that jointure. *Maultby* v. *Maultby*, 2 Ir. Ch. R. 32.

1. A. on his marriage put the lands of Blackacre in settlement upon himself for life, remainder to the sons of the intended marriage in tail male, remainder to B., his brother, in tail male, and, in default of such issue, to the use of all daughters of the intended marriage. There was no issue of the marriage, and by a subsequent deed, executed upon a second marriage, A. purported to charge the lands with an annuity of 50*l.* by way of jointure for his second wife D. A. having died, B. barred the entail, and D. claimed her annuity:—Held, that under the first settlement, A. had no power to jointure an after-taken wife, and that the limitation to B. in the first settlement was valid as against subsequent purchasers for value, inasmuch as it was interposed between the two limitations to different classes of the issue of the marriage, and, consequently, that D. was not entitled to the jointure. *Re Sheridan*, 1 L. R. Ir. 54.

2. A direction, after a devise to the testator's three sons during their lives, that "in case all or any of my three sons should think of marrying, I empower and direct my trustees or the survivor of them to settle and secure the share or shares of such son or sons so marrying as a jointure on the wife of such marriage during her life and to their issue share and share alike," enures for the benefit of any wife, whether in the case of a first or of any subsequent marriage, and whether there is or is not any issue of such marriage, at any rate if there is a gift over in case of the son dying "without children." *Mason* v. *Mason*, 19 W. R. 741.

3. The execution of a power to appoint a jointure and portions for children by deed, supported in equity, though executed by will. By marriage articles, a provision was made for the intended wife and the children of the marriage, and a power was given to the husband to appoint a jointure for any wife or wives he might marry, and in like manner to appoint portions for younger children:—Held, that the power to appoint jointure and portions was confined to the children of a second or subsequent marriage. *Mills* v. *Mills*, 8 Ir. Eq. R. 192.

4. A power was given by will to successive tenants for life to limit a rent-charge for any woman whom they may respectively marry by way of jointure, and in bar of dower to be in proportion to the marriage portion they shall respectively receive with their respective wife or wives, *i.e.*, 100*l.* jointure for every 1,000*l.* they shall so actually receive as a marriage portion with their respective wife or wives if they shall so think fit, not exceeding 500*l.* such grant, limitation of appointment to be made either before or after marriage:—Held, that the wife of a tenant for life, who afterwards came into possession, but who had been married previous to the will, was not an object of the power, there being no ground from the rest of the will for giving a past meaning to the words of futurity; and, *semble*, that money of the wife, which had been settled to her separate use with remainders to the husband and children of the marriage, was not "received" by the husband within the meaning of the power. *Dillon* v. *Dillon*, 11 Ir. Eq. R. 423.

VIII. RELATIONS.

5. J. S. gave "all his real and personal estate" to trustees on certain trusts, remainder "to such of his relations on his mother's side who were most deserving, and in such manner as they should think fit," and for such charitable uses and purposes as they should also think most proper and convenient:—Held, *per* Master of the Rolls, that the limitation over of the personal estate was good, and his Honour (deciding by the known rule of equity) directed that one-half of the said estates should go to the testator's relations on his mother's side, and the other half to charitable uses; his Honour could not judge of the merits of the testator's relations, nor prefer the one to the other, but he should exclude those beyond the third degree:—Held, also, that the representatives of those relations who died in testator's lifetime could have no claim. *Doyley* v. *Att.-Gen.*, 4 Vin. Abr. 485 (C) Pl. 16.

6. Bequest to relations confined to next of kin according to Statute of Distributions. *Crawys* v. *Colman*, 9 Ves. 323.

Though upon bequests to relations with a power of selection, the party may go beyond those included in Statute of Distributions; the contrary is adhered to whenever the execution devolves on the Court. *Id.* 324.

Bequest to testator's relations, with power of selection, is, if that power is not exercised, a trust for next of kin at death of party who had the power. *Id.* 325.

7. Testator expressing his will and desire, that one-third of the principal of his estate and effects should be left entirely to the disposal of his wife, among such of her relations as she may think proper after the death of his sisters; a trust for her next of kin at the time of her death, having made no disposition. *Birch* v. *Wade*, 3 Ves. & B. 198.

8. Word "relations," in a will means "next of kin;" bequest of residue to testator's wife for life with a direction to dispose of the residue amongst his relations "in such manner as she should think fit." Appointment to relations not being next of kin, void, and the residue decreed to be distributed amongst those who were next of kin to the testator at the time of his death. *Pope* v. *Whitcombe*, 3 Meriv. 689. But see *Sugden on Powers*, App. No. 29.

9. Residuary devise and bequest for such of the testator's relations and kindred in such

proportions, etc., as his executors should think proper, recommending and advising his said trustees and executors to give the greatest share to such person and persons who in their opinion and judgment should appear to them to be his nearest relations and most deserving, declaring his intention not to control their discretion, but that everything relative to that disposition, who were his relations, and the proportions, should be entirely in the discretion of the said trustees and executors, and the heirs, executors, and administrators of the survivor of them:—Held, a trust and a power: the ground of the power being personal confidence, it is *primâ facie* limited to the original trustees, not without express words passing to others to whom by legal transmission the same character may happen to belong; and cannot be executed by the devisees and executors, for that specific purpose only, of the surviving trustee: a trust, therefore, executed by the Court for the next of kin at the death of the testator according to the Statute of Distributions. *Cole* v. *Wade*, 16 Ves. 27.

1. Bequest of residue to a brother in trust to dispose of among such of testator's relations, and in such manner, etc., as he shall think fit, without regard to the legacies before given:—Held, the power extended to the relations at large, and not confined to next of kin. *Supple* v. *Lowson*, Ambl. 729.

2. Where a donor recommends or directs that the donee, at her death, shall give personal property to such of his family, or such of his relations, as he shall think fit, the donee has a power to select the objects of her bounty amongst his relations or family, though not within the degree of next of kin; but if the donee does not exercise the power, the word "relations," or the word "family," will be construed "next of kin," unless the special expressions of the donee have a different import.' *Grant* v. *Lynam*, 4 Russ. 292; 6 L. J., Ch., 129.

3. Testator bequeathed a sum of money to his executors upon trust to pay the interest to his niece A. for life; and, after her decease, to pay the principal to her son, or to any of the testator's relations, in such shares and proportions as the executors, or the survivor of them, might think fit. By a deed-pool, reciting the will, the surviving executor appointed the principal sum in certain shares to the son of A., and two nephews of the testator:—Held, that the appointment was valid. *Lee* v. *Okey*, 1 Y. & Coll. 550; 10 L. J., N. S., Exch. Eq., 44.

4. A testatrix, after devising real estate to her three sisters for their lives, and the life of the survivor, directed that the surviving sister should divide and devise the estate among such of the testatrix's nieces and other relations, particularly female, as should be unprovided for at the decease of the surviving sister, in such shares as she should think fit. The surviving sister, after reciting this power, directed her executor to sell the estate, and divide the proceeds among her nieces, who should be living at her death, in equal shares. These nieces were, at the death of the surviving sister, the sole next of kin of the first testatrix:—Held, that either under the appointment contained in the last will, or as next of kin of the first testatrix, the nieces were entitled to the estate in question. *Cracklow* v. *Norie*, 7 L. J., N. S., Ch., 278.

5. A testator gave real and personal estate to A. for life, and afterwards to his own relations, in such shares as A. should by will appoint. A. appointed it amongst the testator's relations living at her death, and who were not the testator's next of kin at his death:—Held, upon the authority of *Pope* v. *Whitcombe* (3 Meriv. 689), that the appointment was valid. The report of *Pope* v. *Whitcombe* is incorrect in *Merivale*, but correct in *Sugden* on *Powers*, App. No. 29. *Finch* v. *Hollingsworth* or *Hollingworth*, 21 Beav. 112; 1 Jur., N. S., 718; 25 L. J., Ch., 55; 3 Eq. Rep. 993; 3 W. R. 589.

6. A testator gave to the tenant for life of his general residuary estate a power of appointment by will among her relations and friends. The donee of the power made a general bequest of her residuary estate, without reference to the power:—Held, that the power of appointment was special and not general. And, therefore, being not well exercised by the will of the donee, the Court would imply a trust in favour of the relations of the testator, and that this term must be limited to his next of kin under the statute. *Re Caplin*, 11 Jur., N. S., 383; 34 L. J., Ch., 578; 13 W. R. 646; 12 L. T., N. S., 526; 2 Dr. & Sm. 527; 6 N. R. 17.

IX. APPOINTMENT TO SURVIVORS.

7. Power to divide a fund among all and every the children, to be vested at twenty-one, and in default, or part execution, the whole, or part unappointed, to go to all. There were two children, a son and a daughter; a partial provision was made for the son, who died unmarried, and without issue. A subsequent appointment of the whole residue to the daughter is a good execution of the power. *Boyle* v. *Peterborough* (*Bishop*), 3 Bro. P. C. 243; 1 Ves. J. 299.

8. Devise in trust to dispose of the premises unto and amongst the devisee's four children, in such manner, shares, etc., as he should, by deed or will, appoint. One dying in the life of his father before appointment, was held entitled to a fourth; the father, after that child's death, having appointed three-fourths to his three surviving children respectively. *Reade* v. *Reade*, 5 Ves. 744. This decision, as far as it leaves one-fourth to the deceased child, is questioned by Lord Eldon. *Butcher* v. *Butcher*, 1 Ves. & B. 92.

9. Appointment to a deceased child, or its representatives, void. *Butcher* v. *Butcher*, 1 Ves. & B. 91.

The old practice of executing a power of appointment after the death of one of the objects, by giving part to the survivors, and letting the rest go, as in default of appointment, among all, incorrect. *Ib.*

Under a general power of appointment, among all the children by deed or will from time to time, etc., in default of appointment equally at twenty-one, etc., the death of one above that age does not prevent an appointment to the survivors. *Id.* 79.

10. A father, upon his second marriage, settled lands to the use of the children of his first marriage (naming them), for such estates,

and in such shares and proportions, manner, and form, as he should from time to time by deed or will appoint, and in default of appointment to the use of said children (except the eldest), as tenants in common in tail. All the children, except two, viz., the eldest son and a daughter, died in the lifetime of the settlor. By his will, reciting the power, the settlor appointed a rent charge out of the estates to the daughter, and the estates, subject to the rent charge, to the son in fee:—Held, the appointment so made to the surviving children was a valid execution of the power. *Ricketts* v. *Loftus*, 4 Y. & Coll. 519.

1. A testator bequeathed 1,700*l.* stock to trustees, in trust to pay the dividends to J. C. and S. his wife during their lives and the life of the survivor; and after their decease, then in trust to transfer or pay over the stock unto their children, in such shares and proportions as the survivor of them, J. C. and S. his wife, by his or her last will, should direct or appoint. At the death of the testator J. C. and S. had three children living. After the deaths of S. and two of those children, J. C. by will appointed the whole fund to the only surviving child:—Held, a good appointment. *Woodcock* v. *Renneck*, 1 Ph. 72; 11 L. J., N. S., Ch., 110; 6 Jur. 138. Affirming 4 Beav. 190.

2. Property was settled, subject to an estate for life to the parents, to the use of all and every the child and children of the marriage, as the parents should by deed appoint, and in default equally. There were nine children, and one-eighth was duly appointed to one of such children, who afterwards died. After the death of four of the other children, the remaining seven-eighths were appointed to the surviving four children:—Held, that this appointment was good; and, secondly, that the property having been appointed by two deeds, formed no objection to the due execution of the power. *Colston* v. *Pemberton*, 5 L. J., N. S., Ch., 181.

3. Testator bequeathed 12,000*l.* stock to trustees for his son for life, then for the son's wife for life, then unto and amongst his wife and children in such shares, for such interest, etc., as the son should appoint, and, in default of appointment, unto the children equally; and if there should be no child, then to the son's next of kin in blood. The son died, leaving his wife surviving, but never having had a child:—Held, that an appointment made by the son of part of the stock to his wife, was good, though there was only one object of the power in existence. *Houstoun* v. *Houstoun*, 4 Sim. 611; 1 L. J., N. S., Ch., 50.

4. A power was given to A. to appoint a fund, by will, to his wife alone, or to his wife and such of his children as he should direct. The wife died, and A. appointed the fund exclusively to five out of his seven children:—Held, that the appointment was valid. *Paske* v. *Haselfoot*, 33 Beav. 125; 9 Jur., N. S., 1047; 11 W. R. 1089; 9 L. T., N. S., 75; 2 N. R. 568.

Where there is a power to divide a fund amongst the members of a particular class, the death of some of the members of that class, before the exercise of the power, will not prevent its exercise in favour of the survivors. *Ib.*

5. An appointment since the Illusory Appointments Act (11 Geo. 4 and 1 Will. 4, c. 46), under a non-exclusive power of an entire fund unto and amongst the objects "and the survivors and survivor of them, and if only one should survive, then unto that one":—Held, valid. *Re Capon's Trusts*, 10 L. R., Ch. D., 484; 48 L. J., Ch., 355; 27 W. R. 376.

X. SUBSTITUTION OF CHILDREN FOR PARENTS.

6. Bequest of residue in trust, after the death of the testator's wife to be divided amongst all his children, including his son A., if then living, in such manner and in such proportions as the testator's wife should by will appoint, provided that the share assigned to A. should not be less than those of any of the other children; and in default of appointment to be divided equally among all the testator's children living at his wife's death, including his said son A. Moreover, if any child should happen to die previously to the death of the testator's wife, leaving children, such children to have the "share" of their late parent. And if all the testator's children should die under age, and without leaving children, gift over. The wife appointed the fund by will amongst all the children who should be living at her death. A. died in her lifetime, leaving children:—Held, that the power was well exercised in favour of the surviving children of the testator, and that the clause commencing "moreover" did not apply to the preceding limitation, but only to the gift in default, and therefore A.'s children were properly excluded. *Fox* v. *Gregg* (2 Sugd. Pow. App., No. 23) distinguished. *Neatherway* v. *Fry*, 1 Kay 172; 23 L. J., Ch., 222.

XI. CLASS OF OBJECTS. WHEN ASCERTAINED AND VESTING.

1. *Where Gift to Objects only through the Power*, 5850.
2. *Where Gift to Objects Subject to Exercise of the Power*, 5852.
3. *Where Express Gift to Objects in Default of Appointment*, 5854.

1. Where Gift to Objects only through the Power.

7. Bequest to A. for life, and after her death to divide it in portions for children as she should please; and in case of A.'s death before testator, to be divided equally:—Held, children living at A.'s death were only objects of power, and as such entitled to share lapsed by death of a child to whom it had been appointed. *Kennedy* v. *Kingston*, 2 Jac. & Walk. 431.

8. Where there is no appointment under a power, and no gift over in default of appointment, those persons only will take who could take by appointment. A testator gave the residue of his personal estate to his wife, for her own sole use and disposal, trusting that she would thereout provide for his family, and particularly his only son; and, at her decease,

give and bequeath the same to her children by him, as she should appoint:—Held, that the wife could appoint only by will, and that children living at her death were alone entitled to share in an unappointed portion of the fund. *Walsh* v. *Wallinger*, 2 Russ. & M. 78; Taml. 425; 9 L. J., Ch., 7.

1. Gift to wife for life, "to be disposed of at her death amongst my children as she shall think proper":—Held, to confer a power to appoint, by will, amongst his children living at his death and an implied gift in default of appointment. *Reid* v. *Reid*, 25 Beav. 469.

2. Bequest to trustees to pay the dividends to A. and B. his wife, during their lives, and the life of the survivor; and after their decease, in trust to transfer and pay over unto their children, in such shares and proportions as the survivor of A. and B. should by will appoint:—Held, that the objects of the power and of the gift were the children living at the death of the surviving parent; and therefore that the representative of a child who died in the life of A. had no interest in the fund. *Woodcock* v. *Renneck*, 4 Beav. 190. Affirmed 1 Ph. 72; 11 L. J., N. S., Ch., 110; 6 Jur. 138.

3. Power to charge lands for portions for younger children living at the father's death: a child *en ventre sa mere*, is a child within the power. *Beale* v. *Beale*, 1 P. W. 246.

4. Power of appointment in a marriage settlement:—Held, to comprehend, as its objects, all the children of the marriage, and not to be confined to such of the children only as should be living at the death of the survivor of the parents. *Howgrave* v. *Cartier*, Coop. 66; 3 Ves. & B. 79.

5. Power to appoint amongst testator's present or future grandchildren, or their respective issues, does not authorise the donee to exclude the children of a deceased grandchild, who were living at the donee's death. *Garthwaite* v. *Robinson*, 2 Sim. 43.

6. Power to appoint sum of money in such shares to children as appointor should think proper, with direction as to the time they should take such appointed shares. Two children dying before appointor, held not to have vested interests. *M'Ghie* v. *M'Ghie*, 2 Madd. 368.

7. Bequest to executors in trust, that they shall pay, etc., unto and amongst the testator's two brothers and his sisters, or their children, in such shares, etc., as the trustees, or the major part of them, or the survivor, his executors, etc., shall think fit. All the children living at the death of the testator held entitled with the parents, *per capita*, the Court not having a discretion. *Longmore* v. *Broom*, 7 Ves. 124.

8. A testator empowered his widow, with the assistance of his trustees, to sell his estates, and the money arising therefrom "she, his said wife, should and might divide and appoint among his children, as she should think fit and proper, or as she should direct and order by any will":—Held, that this was a trust for the children, and that, no valid appointment having been made by the widow, the children were entitled equally. *Grieveson* v. *Kirsopp*, 2 Keen 653; 6 L. J., N. S., Ch., 261.

9. Bequest to trustees for A. for life, and if he should die childless, upon trust to apply the sum to the benefit of such of the testator's children, or their issue, as the trustees should think fit, for the interest and good of the testator's family; with no gift in default of appointment. No appointment having been made, and the tenant for life having survived the donees of the power, and died childless:—Held, that children and remoter issue took in equal shares *per capita*, and that the period for ascertaining the class was the death of the tenant for life. *Re White*, 1 Johns. 656.

10. A testator gave all his property to his wife for life, and directed her to pay his debts, and, "at her decease, to make such a distribution and disposal of his then remaining property among his children as might seem just and equitable, according to her discretion":—Held, a power to the wife, exercisable by will only, to appoint in favour of the testator's children living at her death. *Freeland* v *Pearson*, 3 L. R., Eq., 658; 15 W. R. 419; 36 L. J., Ch., 374.

11. Settlement of a fund after the death of A. and B., for such descendants of C. as B. should by will appoint:—Held, to create a power in the nature of a trust for descendants of C. living at B.'s death, entitling such descendants in equal shares in default of appointment. *Re Susanni*, 47 L. J., Ch. D., 65; 20 W. R. 93.

Held, also, that an appointment to the legal personal representatives of descendants dying before the death of the donee of the power was unauthorised. *Ib.*

12. Devise of 30,000*l.* to testator's wife for life, and afterwards to be distributed among his children as she, by deed, will, or instrument in nature of a will, should appoint. She having married again, appoints, by will (*inter alia*), unto two of the children, who died in her lifetime:—Held, that their representatives were not entitled, and that the shares so appointed to them lapsed and fell into the residue. *Marlborough* (*Duke*) v. *Godolphin*, 2 Ves. 61.

13. A. having a power under a will to charge a sum of money on B.'s estate, as and for a provision for his lawful issue, exercised the power by a deed merely charging the estate with the sum, as a provision for his lawful issue. A. had several children, one born at the testator's death, others at the date of the deed, and others subsequently:—Held, that all the children were entitled to shares, which vested *seriatim* on their successively attaining twenty-one, the share of each proportioned to the number of children *in esse* when it vested, and not before provided for, the children attaining twenty-one being regarded as successive new periods of distribution; though this produced considerable inequality in the shares, and would wholly disappoint any child born after the others had all attained twenty-one; grandchildren to be considered as provided for by their parents' shares. This principle is not applicable to a legacy, the rule being, that whenever a legacy is given to a class of persons, if the gift is immediate, those only take who answer the description at the testator's death; and when the enjoyment is deferred, as by the intervention of a life estate, or appointment of a future time for payment, those take who answer the description at the prescribed period. *Norman* v. *Norman*, Beat. 430.

and in such shares and proportions, manner, and form, as he should from time to time by deed or will appoint, and in default of appointment to the use of said children (except the eldest), as tenants in common in tail. All the children, except two, viz., the eldest son and a daughter, died in the lifetime of the settlor. By his will, reciting the power, the settlor appointed a rent charge out of the estates to the daughter, and the estates, subject to the rent charge, to the son in fee:—Held, the appointment so made to the surviving children was a valid execution of the power. *Ricketts* v. *Loftus*, 4 Y. & Coll. 519.

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7. Bequest to executors in trust, that they shall pay, etc., unto and amongst the testator's two brothers and his sisters, or their children, in such shares, etc., as the trustees, or the major part of them, or the survivor, his executors, etc., shall think fit. All the children living at the death of the testator held entitled with the parents, *per capita*, the Court not having a discretion. *Longmore* v. *Broom*, 7 Ves. 124.

8. A testator empowered his widow, with the assistance of his trustees, to sell his estates, and the money arising therefrom "she, his said wife, should and might divide and appoint among his children, as she should think fit and proper, or as she should direct and order by any will":—Held, that this was a trust for the children, and that, no valid appointment having been made by the widow, the children were entitled equally. *Grieveson* v. *Kirsopp*, 2 Keen 653; 6 L. J., N. S., Ch., 261.

9. Bequest to trustees for A. for life, and if he should die childless, upon trust to apply the sum to the benefit of such of the testator's children, or their issue, as the trustees should think fit, for the interest and good of the testator's family; with no gift in default of appointment. No appointment having been made, and the tenant for life having survived the donees of the power, and died childless:—Held, that children and remoter issue took in equal shares *per capita*, and that the period for ascertaining the class was the death of the tenant for life. *Re White*, 1 Johns. 656.

10. A testator gave all his property to his wife for life, and directed her to pay his debts, and, "at her decease, to make such a distribution and disposal of his then remaining property among his children as might seem just and equitable, according to her discretion":—Held, a power to the wife, exercisable by will only, to appoint in favour of the testator's children living at her death. *Freeland* v *Pearson*, 3 L. R., Eq., 658; 15 W. R. 419; 36 L. J., Ch., 374.

11. Settlement of a fund after the death of A. and B., for such descendants of C. as B. should by will appoint:—Held, to create a power in the nature of a trust for descendants of C. living at B.'s death, entitling such descendants in equal shares in default of appointment. *Re Susanni*, 47 L. J., Ch. D., 65; 20 W. R. 93.

Held, also, that an appointment to the legal personal representatives of descendants dying before the death of the donee of the power was unauthorised. *Ib.*

12. Devise of 30,000*l.* to testator's wife for life, and afterwards to be distributed among his children as she, by deed, will, or instrument in nature of a will, should appoint. She having married again, appoints, by will (*inter alia*), unto two of the children, who died in her lifetime:—Held, that their representatives were not entitled, and that the shares so appointed to them lapsed and fell into the residue. *Marlborough* (*Duke*) v. *Godolphin*, 2 Ves. 61.

13. A. having a power under a will to charge a sum of money on B.'s estate, as and for a provision for his lawful issue, exercised the power by a deed merely charging the estate with the sum, as a provision for his lawful issue. A. had several children, one born at the testator's death, others at the date of the deed, and others subsequently:—Held, that all the children were entitled to shares, which vested *seriatim* on their successively attaining twenty-one, the share of each proportioned to the number of children *in esse* when it vested, and not before provided for, the children attaining twenty-one being regarded as successive new periods of distribution; though this produced considerable inequality in the shares, and would wholly disappoint any child born after the others had all attained twenty-one; grandchildren to be considered as provided for by their parents' shares. This principle is not applicable to a legacy, the rule being, that whenever a legacy is given to a class of persons, if the gift is immediate, those only take who answer the description at the testator's death; and when the enjoyment is deferred, as by the intervention of a life estate, or appointment of a future time for payment, those take who answer the description at the prescribed period. *Norman* v. *Norman*, Beat. 430.

1. A. K., by will, gave all his realty and personalty to his wife O., to bring up his children, and when they came of age, "to settle" on them what she should deem "prudence," reserving to herself maintenance. If she married again, T. P. was to become trustee for the children of the testator. At his wife's death, what property remained was to be equally divided among the children of the testator then living. The wife and five children survived the testator; two children afterwards died under twenty-one. The widow settled part of the property on one of the children and her issue:—Held, first, that this was a bad execution of the power, so far as it gave any interest to grandchildren. Secondly, that the shares vested in all the children living at the death of the testator, and not in those only who lived to attain twenty-one, or who survived the widow. *Kennerley* v. *Kennerley*, 16 Jur. 649.

2. A testator gave his wife a power of appointment in favour of his children, including grandchildren and more remote issue, such issue coming into being in the lifetime of his wife:—Held, that under an appointment to grandchildren, a grandchild born after the decease of the testator's widow might take. *Thomas* v. *Lloyd*, 25 Beav. 620.

3. A husband directed that after the death of his wife his trustees should pay and divide 1,000*l.* equally between such ten of the children or remoter issue of H. as the trustees should think fit. At the death of the widow there were only six descendants of H. living:—Held, that the sum was to be divided equally amongst them. *Carthew* v. *Enraght*, 20 W. R. 743.

4. E., wife of T., being seised of fee-simple lands, E. and T. conveyed them, by fine and deed leading its uses, to a trustee and his heirs, to the use of E. and T., and the survivor for life; with remainder to enable E. to devise the lands to and among the issue of E. and T., in such shares as she should appoint, "it being, however, expressly declared that E. is to have power only to devise such shares and proportions in strict settlement upon such child or children, and their lawful issue, whether male or female; but that if such child should die without having such lawful issue, who should attain twenty-one, or be married, that then and in such case the lands should be devised, go to and among the surviving children and their issue who should attain twenty-one, in such shares and proportions as E. should by will appoint;" in default of appointment, to the children, and such of their lawful issue as should attain twenty-one, or be married, share and share alike. The deed contained a further provision, in case of E. not making a will, that it should be lawful for T., by will, "to give, devise, and bequeath the lands to and among their issue, in the manner aforesaid, in such shares and proportions as he should thereby direct, limit, and appoint:" in default of appointment, to go equally among the said children, and their lawful issue, for ever:—Held, that T. had power to appoint life estates to his children *in esse* at the date of the deed, with remainders to their issue in strict settlement. *Bell* v. *Bell*. 13 Ir. Ch. R. 517.

5. Testamentary power to appoint to "what ever existing member of my family he may be disposed":—Held, that "existing" meant living at the date of the will creating the power. *Sinnott* v. *Walsh*, 5 L. R., Ir., 27.

2. Where Gift to Objects subject to Exercise of the Power.

6. Devise to testator's wife for life, and after her decease, unto and among all and every their children, in such manner, etc., as she should, in her life, or by will, appoint, empowering her to sell and receive the interest for life, and appointing, after her decease, both principal and interest to and among their children, in such proportions as aforesaid; all the children having died in the life of their mother, who died without appointment, were held entitled as tenants in common, to several estates of inheritance. *Casterton* v. *Sutherland*, 9 Ves. 445.

7. By the settlement made on the marriage of B. F. with E. C., a sum of 5,000*l.* consols was settled, in trust, for the husband for life; and if the wife survived, for her absolutely; but if she died in his lifetime, leaving children then living, for all and every the children, in such shares as she should appoint by deed or will; and if there should be no children living at her decease, then over. There were seven children of the marriage, five of whom survived their mother, who had not exercised the power given to her:—Held, that the five children who had survived the mother were entitled to the fund. *Winn* v. *Fenwick*, 11 Beav. 438; 18 L. J., N. S., Ch., 337; 13 Jur. 996.

8. Where property is settled on husband and wife for life, remainder to the issue, subject to a power of appointment, interest vests in an only child, though no appointment was made. *Madoo* v. *Jackson*, 2 Bro. C. C. 588.

9. Bequest to A. for life, with power on her marriage to appoint the interest to her husband for life, and a recommendation to dispose of the principal after her own death, and the determination of the preceding trusts among the children of B.; the recommendation being held an absolute trust, it is a vested interest in all the children, subject to be devested by appointment; and there being no appointment, children born after the death of the testator, and those who died in the life of A., are entitled with the rest. *Malim* v. *Barker*, 3 Ves. 150.

10. The testator, by his will, gave to trustees a sum of stock, upon trust to pay the dividends to his daughter B. for life, and after her decease to pay both principal and interest to and amongst her children as she should, by deed or will, direct; but if she should leave no children living at her decease, or all should die before their ages of twenty-five years, then over. B. died without having exercised the power of appointment, having had two children, one of whom died in her lifetime, at the age of twenty-eight years, and the other survived her, and died at the age of fifty-three years:—Held, that the respective representatives of the two children of B. were entitled to the stock in moieties. *Faulkner* v. *Wynford*, (*Lord*), 15 L. J., N. S., Ch., 8; 9 Jur. 1006.

11. The rule, that none can take by impli-

cation upon the non-execution of a power of appointment who cannot take under an execution of the power, only applies where there are no means of ascertaining the persons intending to take other than the terms of the power. *Lambert* v. *Thwaites*, 2 L. R., Eq., 151; 35 L. J., Ch., 406; 14 L. T., N. S., 159.

Therefore, where real estate was settled upon trust for the settlor for life, with remainder to his wife for life, and after the death of the survivor, upon trust for sale and division amongst all and every the children of the settlor, lawfully begotten or to be begotten, in such shares and proportions, manner and form, as should be directed by any will or codicil then already, or at any time thereafter to be, duly executed by the settlor, with no gift over in default of appointment, and the settlor died without exercising the power:—Held, that the above rule did not apply; that all the children took vested estates, liable only to be divested by the execution of the power; and, therefore, that a child who died before the settlor, took in default of appointment, equally with those who survived. *Ib.*

1. Under a devise of the entire residue, real and personal, to A., B., and C. (children of the testator), and all their younger children, their heirs, executors, etc., for ever; A., B., and C. to receive the yearly interests for their respective lives of such parts thereof as were intended for their respective younger children; and in case of the death of A., B., and C., the share of any of them so dying to go to his or her younger children; and in case of the death of A., B., and C., or any of them, without leaving younger children, the share of such child so dying to go to the survivors and their younger children, with power of appointment amongst their respective younger children; and in case of the death of any of the younger grandchildren before twenty-one or days of marriage, the shares of such to go to the brethren of the child so dying. At the time of the will, and of the testator's death, A. had one younger child; B., several; C., none; each had several since: on bill by after-born grandchildren:—Held, first, that the residue was divisible into three parts, the yearly interests of each to go to A., B., and C., for their respective lives; secondly, that after-born grandchildren were entitled, subject to the power of appointment in their parents; thirdly, that the share of a younger child dying under twenty-one and unmarried, goes over to the brothers and sisters of such child; fourthly, that the share of A., B., and C., dying without leaving younger children, goes over to the survivors for the same estate as their own original shares; fifthly, that a younger grandchild dying in the lifetime of its parent, under twenty-one and unmarried, had not a vested interest in its share, transmissible to its representatives. *Crone* v. *Odell*, 1 Ball & B. 449, 450. Affirmed 3 Dow 61.

2. By a post-nuptial settlement—reciting that A. had a large family, and was anxious to make a provision for it in the case of his death or of the death of his wife, and, for that purpose, had determined to execute the settlement—leaseholds were assigned to trustees upon trust, in case the wife should survive A., to permit her to take one-third of the profit rents, the other two-thirds to go the maintenance, etc., of such of their children as should require it; and after the death or second marriage of the wife the entire to be expended on the education and putting to trade or business of such of the children as should require it; and in case A. should survive his wife, upon trust to permit him to receive the entire of the rents during his life, one-half to be expended on the maintenance, etc., of such of the children as should require it; and in case A. should neglect so to apply the one-half of the rents, the trustees should receive it and so apply it; and after the death of A. the property to go and become the property of the children of A. as B. and A. should appoint; and in case of the death of any of the children before they should become entitled to the property, then his or her share to go to be equally divided among the survivors of such children, and if but one, the whole to that one. A. appointed a share to a child who died in his lifetime:—Held, that the children who survived the father took the share so appointed—the word "entitled" being construed "entitled in possession." *Beale* v. *Connolly*, 8 Ir. R., Eq., 412.

3. A gift by will to A. for life, and "at," or "after," his decease to such persons as he shall appoint, gives A. a life interest with a power of appointment either by instrument *inter vivos* or by will; there being no rule of construction under which a gift in such terms, unless controlled by the context, can be held to confer a testamentary power only. Bequest of residue to A. for life, "the whole principal at her death to be divided amongst her children, if she has any, in such proportions as she shall think proper; and if she dies without leaving children," then over. A. died without having exercised her power of appointment, and having had three children, of whom one only survived her:—Held, that the three children took vested interests liable to be divested by the exercise, either by instrument *inter vivos* or by will, of A.'s power of appointment; and accordingly that on A.'s death the residue became divisible in equal thirds between the surviving child and the representatives of the two deceased children. *Re Jackson's Will*, 13 L. R., Ch. D., 189; 49 L. J., Ch., 82; 41 L. T. 499; 28 W. R. 209.

4. Leaseholds were assigned to trustees upon trust after the decease of the survivor of A. and B. his wife to assign the same unto and amongst such of the children of the said A. and B. his wife, then living, in such manner, shares, times, and proportions as the said A. and B. his wife, jointly, or the survivor of them separately, should by any writing appoint, and in case there should be no such child or children, then upon trust for C. for life, and after his decease upon trust to assign the same unto and amongst such of his children, and in such manner, shares, times, and proportions, as he should by any writing appoint. A. and B. died without issue, B. in 1876, A. in March 1880. C. died in 1863, having had ten children, of whom some predeceased him, and some died between his death and the death of A., and the rest survived A.:—Held, that all the children of C. took, as tenants in common, in equal shares. *Wilson* v. *Duguid*, 24 L. R., Ch. D., 244; 49 L. T. 124; 31 W. R. 945; 53 L. J., Ch., 52.

3. Where Express Gift to Objects in Default of Appointment.

1. Limitation of a leasehold estate in a marriage settlement after the decease of husband and wife, in trust for such child and children as they should appoint, and in default of appointment to all and every the child and children equally:—Held, to be a vested remainder, which opened to take in the issue, as they came *in esse*. *Lawrence* v. *Maggs*, 1 Eden 453.

2. Vesting not suspended by power to appoint. *Twynham* (*Lord*) v. *Webb*, 2 Ves. 208.

3. A limitation in default of appointment over to the objects of the power, is a vested interest in all the objects who come *in esse*, though the appointment is to be by will only. *Heron* v. *Stokes*, 1 Con. & L. 270; 2 Dr. & War. 89; 4 Ir. Eq. R. 284. Reversing 3 Ir. Eq. R. 163.

When, by marriage settlement, lands are settled upon the husband for life, remainder to the issue of the marriage in such shares as the husband should by will appoint, and in default of appointment to the issue, share and share alike:—Held, that the children of the marriage, as they respectively came *in esse*, took immediate vested interests in the lands, liable to be devested by the husband's exercise of the power of appointment. *Ib.*

4. Settlement of 10,000*l.*, the interest to be paid to the husband and wife for their lives, and after their death the principal to all or such of their children as the husband should appoint, and in default as the wife should appoint, and for want of such appointment, to all the children equally at twenty-one or marriage. There were two children; one died in the lifetime of her father, then the father:—Held, the other was entitled to the money after the death of the mother, and to have it secured in her lifetime; held, a contingent vested interest in the children, subject to be devested on appointment. *Gordon* v. *Levi*, Ambl. 364.

5. Power to appoint to or among one or more younger children; in default of appointment, equally. One of two objects being removed by effect of express satisfaction by way of advancement, the other takes the whole, as in the case of death, by analogy to customs of York and London. *Folkes* v. *Western*, 9 Ves. 456.

6. Bequest of 3,000*l.* to Jane, the wife of C., for the use of her younger children, to be distributed as she should appoint; in default equally. All Jane's children by C. being born at the time of the will and death of the testator, it was held vested as a present legacy to them, subject to variation as beween them, but not to extend to her children by a future marriage. The period of vesting being as above; one who was a younger child at the testator's death, and became an elder afterwards, was held entitled. *Coleman* v. *Seymour*, 1 Ves. 209.

7. By marriage settlement 1,500*l.* was provided for younger children, in such shares as the parents should appoint; in default of appointment to all the children after the death of the wife. The parents afterwards made an appointment excluding one child; this deed vests the portions in the children born or to be born; except the one excluded. *Mayhew* v. *Middleditch*, 1 Bro. C. C. 162.

8. Bequest to such of the children of A. as B. shall, by will, direct, and in default of such direction among the children, share and share alike. B.'s disposition, by will, in favour of the children living at her death, established against the claim of one born afterwards, under the general words. *Paul* v. *Compton*, 8 Ves. 375.

9. Devise to A. for life of an estate *pur autre vie*, with power to will it to B. and his lawful issue, in such manner as A. shall think proper: and in case A. shall die intestate, then to B. and his lawful issue, with remainder over to plaintiff. This is a vested estate tail in B., liable to be devested by the execution of the power in A. A. and B. can, by deed conveying their estates, bar the remainders over. *Osbrey* v. *Bury*, 1 Ball & B. 53.

10. Under marriage articles, 15,000*l.* was vested in trustees on trust, together with 5,000*l.* covenanted by the husband to be paid, to be laid out in land, to be settled upon the husband for life, remainder to the wife for life, remainder to the use of such child and children, in such shares, for such estates, and subject to such powers, limitations, and provisoes, as the husband and wife, or the survivor, should appoint; in default of appointment, to the children in tail; in default of issue, to the husband in fee. The husband and wife joined in a direction to the trustees, reciting their resolution to invest the trust fund in an estate lately purchased by the husband for 16,300*l.*, and directing them to deliver the said stock, etc., to him, at the price they were at on the day of the purchase, which was done. The wife died. There were two daughters. The father, by will reciting the purchase, and that he had not conveyed it to the uses of the settlement, and that it was not his intention that the said purchase should be an investment of the trust fund, but that fund, with its increase, should be taken out of his personal estate, gave 10,000*l.*, part of the trust fund, in trust to be laid out in land, to be conveyed to one daughter for life, for her separate use, remainder to her children in tail; remainder to the other daughter in fee, for whom he also appointed the residue of the fund, but revoked that by codicil, reciting a portion given on her marriage:—Held, first, that grandchildren are not objects of the power, but the excess only would be void; secondly, the fund, with its increase, was vested in the purchase; thirdly, there was no appointment of the estate, or money due on the covenant; fourthly, the remainders, in default of appointment, are vested subject to be devested by appointment, and will take effect as to what is ill appointed or unappointed; fifthly, the share of the daughter, to whom the portion was advanced on marriage, was thereby satisfied. *Smith* v. *Camelford* (*Lord*), 2 Ves. J. 698. See this case, *nom. Pitt* v. *Jackson*, 2 Bro. C. C. 51.

11. A testator gave a fund to his wife for life, with a power for her to appoint it by will, amongst "A., B., and C., and their respective children," and in default of appointment, he directed "the same, at his wife's death, to go amongst all the said children equally. The

wife made no appointment:—Held, first, that the children alone took, to the exclusion of the parents. *Pattison* v. *Pattison*, 19 Beav. 638.

Held, secondly, that they took *per capita*. *Ib.*

Held, thirdly, that the fund vested in the children living at the death of the testator, subject to its being divested by the exercise of the power, or by the birth of other children before the death of the tenant for life. *Ib.*

1. Trust, in case husband and wife shall, at death of survivor, have any child or children, and such child or children attain twenty-one, to convey to such child if but one, and if more than one who shall attain twenty-one according to appointment, if father or mother surviving, in default of appointment equally at twenty-one, with survivorship; and if both parents die without leaving any child, etc., remainder to the father:—Held, vested in children having attained twenty-one, who died in the life of one parent, with those who survived both. *King* v. *Hake*, 9 Ves. 438.

2. T. H. by marriage articles covenanted to provide 30,000*l.* for an eldest son; and in case there should be issue of the marriage an only son and an only daughter living at the time of his decease, to provide 10,000*l.* for such only daughter, to be paid to her at twenty-one or day of marriage; but in case there should be other issue of the marriage living at the time of his decease, besides one son and one daughter, then 20,000*l.* for all and every the child and children of the marriage, other than an only son, to be paid and payable to such child or children, and at such time, as T. H. should appoint, and in default of appointment to such child or children, share and share alike amongst them, if more than one, at twenty-one or day of marriage. There were living at the decease of T. H., one son and two daughters; one of the daughters died under age and unmarried:—Held, that the other daughter who attained twenty-one, being the survivor of a class, was entitled to the entire sum of 20,000*l.* provided for that class. *Hynes* v. *Redington*, Ll. & G. *temp.* Plunk. 33.

3. By marriage settlement, a sum of money was vested in trustees upon trust to pay the interest to the wife for life, for her separate use; and after her decease, in case she should leave issue by her intended husband one or more children, upon trust to apply the interest to their maintenance until they should attain the age of twenty-one, or their days of marriage; and from the time such child or children should attain their age or day of marriage, upon trust to pay the principal unto such child or children, if more than one, subject to such limitations as the husband should by deed or will appoint; and in default of such appointment, as the wife should by deed or will appoint; and in default to such child or children in equal shares, if more than one, absolutely; and in case the husband should survive the wife, and there should be no child of the marriage, or issue of such child, living at the time of her death, then in trust for the husband absolutely; and if the wife should survive the husband, and there should be no child of the marriage, or issue of such child, living at the time of his death, then to the wife absolutely. The husband died, leaving his wife and one child surviving. The child afterwards attained the age of twenty-one years and married, and died in the lifetime of the wife:—Held, that she took a vested interest in the trust fund. *Wynne* v. *Brady*, 5 Ir. Eq. R. 239.

The word "leave" construed "have," to favour the vesting of portion. *Ib.*

4. By the marriage settlement of A. and B., a sum of 3,300*l.* was assigned to trustees, upon trust for the husband and wife, for their respective lives, and after the decease of the survivor of them, in case there should be any child or children who should be then living, in such shares, etc., as the husband and wife should jointly appoint, and, for want of such appointment, the same to go and be equally divided among such children, if more than one, as should not be inheritable to the real estate of the husband, share and share alike; and to be paid to him, her, or them, at his, her, or their respective age or ages of twenty-one years or days of marriage, which should first happen; and in case there should be no such child or children living at the time of the death of the survivor of A. and B., or, if such, and they should happen to die before their respective ages of twenty-one years or days of marriage as aforesaid, then the said sum was to go to such person or persons as B. by deed or will should appoint. A. and B. died without executing the joint power of appointment, having had several children, some of whom survived them:—Held, that a son of the marriage who attained twenty-one, but died, without having been married, in the lifetime of one of his parents, acquired a vested interest in the fund, but that two children who died infants and without having been married, in their parents' lifetime, were excluded from the fund. *Mostyn* v. *Mostyn*, 1 Colly. 161; 8 Jur. 456.

5. By settlement on marriage, reciting an intention to provide for the wife and children, certain tolls were granted for the remainder of grantor's term, in trust to raise an annuity for the lives of the wife and her mother, and the survivor, then reciting that the remainder of the term might expire in the life of the wife or her children, therefore to make a provision for her and her children by her then or any future husband: the trustees should be possessed of the said tolls for the remainder of the term, upon trust to raise after the deaths of the grantor and the mother of the wife 100*l.* annually, to be placed out in the purchase of freehold lands, or hereditaments, or leasehold estates, for two or three lives, as often as a competent sum should be raised for that purpose; and until convenient purchases should offer, to be invested in Government securities upon trust, in case the wife should survive the term, to pay the rents and profits of such estate or estates so to be purchased, or the interest, produce, and profits to arise from the money so intended to be placed out, until such purchase should be made to the wife for life; and after her decease, to apply the said rents and profits or interest money towards the support and maintenance of such child and children of her as should be living at her death, till the youngest should be twenty-one, and then to be possessed of such estates so to

be purchased, or of the money arising from the annuity not placed out in one or more purchase or purchases, to the use of such child or children, in such share and proportions, payable at twenty-one, as the survivor of the husband and wife should by will or deed direct, limit, and appoint; in default thereof, to the use of all such children, equally to be divided at their respective ages of twenty-one; but if she should die without leaving any child or children, or all should die under twenty-one, then to the use of the grantor, his heirs, executors, administrators, and assigns; and after paying the said annuities, to be possessed of all the surplus money arising from the said tolls during the remainder of the term, for the use of the grantor, his executors, etc. From the death of the grantor, who survived the wife's mother, the trustees received 100*l.* a year, and laid out in stock the sums received and the produce. One son was the only issue. He attained twenty-one in the life of his mother, and survived her. The Court would not invest the fund in land, but held it, with the accumulations from the death of the grantor, and the future payments, a vested interest in the son at twenty-one, and as personal estate belonging to his administrator. *Swann* v. *Fonnereau*, 3 Ves. 41.

1. On the marriage of A. and B. personalty was limited to them for their lives, and after the decease of the survivor, "leaving one or more child and children then living," on trust "for all and every the child and children" of A. and B. as B. should by will appoint, and, in default of appointment, "upon trust for all and every such child and children" equally:—Held, that, to entitle a child to take in default of appointment, it was not necessary that he should survive his parents. *Re Gratwick*, 35 Beav. 215.

2. A fund was limited by a settlement in trust after the death of the survivor of husband and wife for the benefit of the child or children or other issue of the marriage then in being, as the husband and wife should jointly appoint by deed, and in default of such appointment as the survivor should by deed or will appoint, and in default of any appointment pay the fund to such of the children of the marriage as should be living at the decease of the survivor of the husband and wife at twenty-one or marriage:—Held, that those children only who survived both parents were objects of the power. *Cooney* v. *Holland*, 17 Ir. Ch. R. 201.

3. W. and G. (two brothers) being absolutely entitled in certain events (which happened), as tenants in common, to leasehold houses, by deed made in 1840 assigned the premises to S., upon trust for M. for life, and after the death of M. to the use of S., and after the death of S. in trust for the children of W. and G. "respectively," in such shares and proportions as they, or either of them, should appoint, and in default of such appointment, then to and amongst the said children equally share and share alike. W., by will, purported to appoint all the premises to his then only child W., and died in 1869, without leaving any other child surviving. G. died, leaving several children, and without making any appointment, and M. and S. having also died:—Held, that the children of both brothers, living at the date of the deed of 1840, and subsequently born, were the objects of the non-exclusive power, and also the objects to take in default of appointment, and that there having been only an exclusive exercise of the power such children became entitled, and that they took *per capita*. *Fletcher* v. *Fletcher*, 9 L. R., Ir., 301.

XII. IMPLIED GIFT IN DEFAULT OF APPOINTMENT.

4. The Court cannot execute a mere power, but will execute a trust which fails by the death of the trustee, or accident. *Brown* v. *Higgs*, 8 Ves. 570.

Power, which by the will the party is required to execute as a duty, he is a trustee for the exercise of it, and has no discretion whether he will exercise it or not. The Court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances, to disappoint the interest of those for whose benefit he is to execute it. *Id.* 574.

5. A power to appoint the proportions in which definite objects are to take, tacitly includes a gift to them in default of appointment. *Kennedy* v. *Kingston*, 2 Jac. & Walk. 434.

6. A. devised the residue of his property to his wife, in trust to divide it among their children in such manner as they should deserve. One of the seven children sold her share, and covenanted to make it up a full seventh; this is good: and on a specific performance, she can make a good conveyance without the mother joining. *Musprat* v. *Gordon*, 1 Anstr. 34.

7. Where property is settled on husband and wife for life, remainder to the issue subject to a power of appointment, an interest vests in an only child though no appointment was made. *Madoc* v. *Jackson*, 2 Bro. C. C. 588.

8. Jewels, etc., to A. for life, then to such grandchildren as she should appoint: in default of appointment, they shall go equally. *Witts* v. *Bodington*, 3 Bro. C. C. 95.

9. Gift to A. and his issue, to be divided among them as he thinks fit; the issue have an interest in all events, and A. has no authority but as to the proportions. If no appointment, equally. Where to be divided among issue, the proportions must not be illusory. Issue will extend to any remote degree, as a description of objects of the power of A., to distribute among them as he thinks fit; but they must all be in existence during her life. *Hockley* v. *Mawby*, 1 Ves. J. 150.

10. The sum of 2,500*l.* is provided by settlement for the issue of the marriage, in such proportion as the husband should appoint; he dies, leaving a daughter only, and makes no appointment: she shall have the 2,500*l.* *Davy* v. *Hooper*, 2 Vern. 665. Affirmed 6 Bro. P. C. 51.

11. R., on his marriage, settled Exchequer annuities for ninety-nine years, amounting to 300*l.* per annum, in trust to himself for life, remainder to his wife for life, remainder to his children in such manner as he should appoint. By the marriage there was an only child, a daughter:—Held, that she was entitled to the Exchequer annuities under the settlement, and

that the father had no power of disposing of them otherwise. *Bellasis* v. *Uthwatt*, 1 Atk. 427.

1. Settlement to such uses as husband and wife should jointly appoint, and in default of such appointment to them for life, and after decease of survivor to the use of all or any of the child or children of them, in such shares and proportions, and for such estate and estates, term or terms, and payable at such time or times, and in such manner and form, as the husband should by deed or will appoint, and in default thereof to him and his heirs. The event upon which the last limitation depends, is in default of appointment, not of children. *Jenkins* v. *Quinchant*, cited 5 Ves. 596.

2. Testator devised a freehold estate to his wife for her life, and then directed that she should dispose of the same amongst the testator's children by her at her decease, as she should think proper; the wife made no disposition of the estate: the children took no interest in the estate under the will. *Crossling* v. *Crossling*, 2 Cox 396.

3. Where there is no appointment under a power, and no gift over in default of appointment, those persons only will take who could take by appointment. A testator gave the residue of his personal estate to his wife, for her own sole use and disposal, trusting that she would thereout provide for his family, and particularly his only son; and at her decease, give and bequeath the same to her children by him, as she should appoint:—Held, that the wife could appoint only by will, and that children living at her death were alone entitled to share in an unappointed portion of the fund. *Walsh* v. *Wallinger*, 2 Russ. & M. 78; Taml. 425; 9 L. J., Ch., 7.

4. Testator bequeathed a sum of 6,000*l.* in trust for his daughter for life, "and on her decease, I give the said 6,000*l.* to the children, or their descendants, of T. F. in such proportions to each as my daughter may direct." The daughter died without having made any appointment:—Held, that the children of T. F. were entitled to the fund, to the exclusion of their issue. *Jones* v. *Torin*, 6 Sim. 255.

5. A., having been indebted to the estate of B. in a sum of money, but from which he had been discharged under a commission of bankruptcy, voluntarily executed to C., the widow of B., a bond for the payment of part of such debt, for the use of herself and children, but at her disposal. Two years afterwards, B. executed to C. another bond for the payment of the remainder of such debt, for the use and benefit of herself and children only, in what proportions among the latter she may think proper to direct, but for no other use, purpose, or intent whatsoever:—Held, that the widow took a life interest in the money secured by the bonds, and that the principal, after her decease, became payable among the children, in such manner, and in such proportions, as she should direct; and the widow having made an exclusive appointment in favour of two of her children, it was held that such appointment was void, and that all the children took as tenants in common. Though, generally speaking, an instrument must be construed by the provisions contained in it, and not by anything *dehors*, yet, under the circumstances of this case:—Held, that the Court might call the language of the second bond into aid in construing the effect of the first. Where there is a general power of appointment among children, and the appointment from any circumstance becomes void, the children take as tenants in common. *Fowler* v. *Hunter*, 3 Y. & J. 506.

6. Testatrix gave a weekly sum to A. for his life, or until he should attempt to assign, etc., the same, and she directed a sum of stock to be set apart to answer the payments; and she gave to A. the power of leaving the stock, after the payments to him should cease, to and for the benefit of his wife and children as he should, by will duly executed, give and bequeath the same. A. died, having made an invalid appointment of the stock:—Held, that there was an implied gift to his wife and children, in default of appointment. *Brown* v. *Pocock*, 6 Sim. 257.

7. A widow, by the settlement on her second marriage, settled 2,300*l.*, which had belonged to her first husband, in trust for her separate use for life; and declared that, subject thereto, the fund should, as or whenever she should think fit or be advised, be settled upon trust for the benefit of her daughter and only child by her first husband, and of her daughter's intended husband and her child or children, in such manner and for such rights and interests as should be agreed upon either previously to or after her daughter's marriage with her consent, and that she (the mother) should have full power to settle the fund or any part of it in trust for the immediate benefit of her daughter and her child and children in manner aforesaid, to take effect either upon such marriage, or upon or immediately after her own death as she should think fit; but, if the daughter should not be married in the mother's lifetime and should survive her, then the fund should be assigned to the daughter at twenty-one, or on marriage: but, if the daughter should die in her mother's lifetime without having been married, then the fund should be held in trust for the children of the mother's second marriage:—Held, that a trust, and not a power, was created in favour of the daughter, her husband, and children; but that the mother, if she thought fit, might modify the interests of the *cestui que trust*, on the daughter marrying with her consent. *Croft* v. *Adam*, 12 Sim. 639; 11 L. J., N. S., Ch., 386; 6 Jur. 522.

8. A testator directed that certain stock should stand in his name, and certain real estates remain unalienated "until the following contingencies are completed." And, after giving life interests in such stock and estates to his two children, with remainder to their issue, he declared that, in case his two children should both die without leaving lawful issue, the same should be disposed of as after mentioned; that was to say, the survivor of his two children should have power to dispose by will of his real and personal estate, "amongst my nephews and nieces, or their children, either all to one of them, or to as many of them as my surviving child shall think proper":—Held, that a trust was created in favour of the testator's nephews and nieces, and their children, subject to a power of

selection and distribution in his surviving child. *Burrough* v. *Philcox*, 5 Myl. & C. 72; 5 Jur. 453. And see *Ahearne* v. *Ahearne*, 9 L. R., Ir., 144.

1. Upon a gift to the testator's sisters or their children, as his mother should by deed or will appoint:—Held, on default of appointment, to be a gift to the whole class of sisters and their children equally; and that the word "or" being referable to the discretion of the part appointment, the Court could not assume to exercise the power. *Penny* v. *Turner*, 2 Ph. 493; 15 Sim. 368; 17 L. J., N. S., Ch., 133.

2. Under the following clause: "I empower my wife to give away at her death 1,000*l.*, to A. and B. 100*l.* each, the rest to be disposed of by her will":—Held, that there is not an absolute legacy but a naked power to the wife; who being dead without any disposition, the objects specified are not entitled. *Bull* v. *Vardy*, 1 Ves. J. 270.

3. By a marriage settlement, a fund was limited to the husband for life, with remainder to his wife absolutely, if she survived; but if she predeceased him, then for all the children of the marriage, in such shares as she should appoint; and if there should be no issue of the marriage living at her death, upon trust as she should appoint generally, and in default to the husband absolutely; but there was no express gift to the children in default of appointment. The husband survived, and there were children living:—Held, that such children, notwithstanding the mother never appointed, were entitled to the fund. *Fenwick* v. *Greenwell*, 10 Beav. 412; 11 Jur. 620.

4. A sum of money, the property of the intended husband, was vested in trustees upon trust, during the joint lives of husband and wife, to pay the interest to the husband, and after his decease to permit the wife during her life to receive the same, subject, however, to the control and limitations as the husband should by will appoint amongst the issue of the marriage living or likely to come forth, and in default of such issue or of such will to the wife for her life, and after her decease as she should appoint amongst such of the issue as should be then living, and in default of appointment equally, and if no issue living at the death of the wife over. The wife died, leaving the husband and several issue of the marriage her surviving. The husband is not, in the events which happened, entitled to the trust fund for his own benefit. *Smith* v. *Doolan*, 2 J. & L. 747.

5. A testator, having by his will, bearing date in 1837, bequeathed certain legacies, proceeded as follows: "To my son I give, devise, and bequeath all my lands and tenements, rights and credits, *subject to the legacies aforesaid and my debts, the remainder of my property* to be disposed of by him to and amongst his children in such shares and proportions as he shall think fit." The words in italics were inserted by interlineation. By the last clause in the will, the interlineations, as well as the original text, were declared to be in the handwriting of the testator. In 1839 he added a codicil to his will, by which he merely made a declaration with reference to one of the legacies given by the will. In 1845 the son died in the lifetime of the testator and without having made any appointment among his children:—Held, that the will gave to the son a power, coupled with a trust, and that accordingly his children were entitled as well to the real as to the personal estate of the testator in equal shares. *Hutchinson* v. *Hutchinson*, 13 Ir. Eq. R. 332.

6. Where a fund is given to A. to be by him employed at his discretion upon certain objects, a trust in favour of those objects, and not a mere power, is created. *Salusbury* v. *Denton*, 3 Jur., N. S., 740.

Where a fund is given to A. to be applied for the benefit of B. or C., as A. shall think fit, and A. does not make any appointment, the bequest is void for uncertainty. *Ib.*

Where a fund is given to A. to apply part for B. and part for C., as he shall think fit, and A. does not make any appointment, B. and C. shall be declared to be entitled in equal shares. *Ib.*

Testator gave a fund to be at the disposal of his wife by her will, therewith to apply a part to the foundation of a charity school or such other charitable institution for the benefit of the poor of O. as she might prefer, and under such regulations as she might prescribe, and the remainder of the fund to be at her disposal among the testator's relatives, in such proportions as she might be pleased to direct. No appointment having been made by the widow of the testatrix:—Held, that the gift to charity was not illegal, and that the fund became divisible in equal moieties for charitable purposes according to a scheme as to one; for the testator's next of kin at the death of the widow as to the other. S. C. 5 W. R. 865.

7. A testatrix bequeathed stock to trustees, to pay the interest, and also all or any portion of the capital, to the widow of her son and her three children, in such shares, as they in their absolute discretion should think fit; but she directed, that upon the widow marrying again, her interest under the will should cease:—Held, that, in default of appointment, the widow was entitled to an equal share in the capital, and not a life interest only. *Izod* v. *Izod*, 9 Jur., N. S., 1216; 1 N. R. 462.

8. A testator died leaving a widow and seven children (all of whom were minors except one), and by a will dated in November 1837 he bequeathed to his wife all his property "for the benefit of herself and my children;" if she married she was to get 100*l.*, and the remainder of his property to be divided, share and share alike, among his children or their survivor. He appointed her to execute the will according to its real meaning and spirit, and recommended her to be guided by the Rev. H. H. in all matters relating to the disposal of his property and the education and advancement of his children:—Held, that the children took no interest in possession, but that the wife was, during her widowhood, tenant for life, with the power of appointment amongst the children. *Mill* v. *Mill*, 9 Ir. R., Eq., 104. Affirmed 11 Ir. R., Eq., 158.

9. A testatrix gave her real estate in trust for her grandchildren (by name) and their issue, as F. should appoint, and in default of such appointment, upon trust, for "my afore-

said nephews and nieces, and their respective lawful issue, and also the issue (if any) of F., and their several and respective heirs and assigns for ever," as tenants in common. No nephews or nieces were mentioned in the will. F. died without appointing:—Held, that there was no gift by implication to the grandchildren and their issue; secondly, that the words, "my aforesaid nephews and nieces," could not be read "my aforesaid grandson and granddaughters;" thirdly, that the gift to the nephews and nieces was not void for uncertainty, and lastly, that they took it in tail. *Campbell* v. *Bouskell*, 27 Beav. 325.

1. Gift of a share of residue to trustees, at their discretion, to apply the whole or part of the capital or income for the benefit of J., or, at the option of the trustees, to apply the whole to the augmentation of the other shares. J. died, and the trustees refused to exercise their option:—Held, that the share was undisposed of. *Re Eddowes*, 1 Dr. & Sm. 395; 7 Jur., N. S., 354; 5 L. T., N. S., 389.

2. Devise, in 1817, of a freehold estate for lives, renewable for ever, "to my son W. during his life, and after his death to his lawful issue, in such manner, shares, and proportions as he, by deed or will, shall appoint, and for want of such appointment, then to his issue equally, if more than one, and, if only one child, to said child, and in failure of issue of W." to J. Another estate, consisting of fee-simple lands, was devised in the same terms to another son, J.; and on failure of issue of J., it was to go to W. J. and W., before the birth of any child to W. (J. himself never married), joined in a recovery as to the lands devised to J., and to which W. afterwards succeeded in possession on J.'s death without issue. W. died, leaving four children; he had not executed any appointment, but during his life disposed of both descriptions of lands to creditors for value:—Held, that under these devises each of the first devisees took an estate tail by implication. *Roddy* v. *Fitzgerald*, 6 H. L. Ca. 823.

The remainders were contingent, and therefore the recovery suffered as to the fee-simple lands operated as a bar to them, whether the first devisee did or did not take an estate tail. *Ib.*

3. A. devised all his estates, copyhold and freehold, to his wife for life, and directed that, immediately upon her death, his brother, in case he should survive her, should "part and share out, or divide, all and singular the estates in such manner, amongst all my children, sons and daughters, as they shall severally arrive at their ages of twenty-one, as my brother shall think proper and fair." He also directed that, in case his wife should survive his brother, she should "make her will, and devise all and singular the estates amongst all my children, in the best and fairest manner that she can." The testator died, leaving him surviving his wife, three children, a son and two daughters, and his brother. Two only of the children, the son and one daughter, attained twenty-one, and all three died in the lifetime of the wife. The brother survived the wife, and died without having ever exercised the power of appointment:—Held, that as there was no devise to the children, and all of them died before any power to appoint in their favour had accrued, no estate of inheritance vested, by implication, under the will, in both or either of the two younger children. *Halfhead* v. *Sheppard*, 1 El. &. El. 918.

4. D. devised to trustees freehold premises, to pay the rents to her grandniece P. for life, and after her decease, for such person or persons, being a child or children of P., as she should by will appoint; and in case she should die without leaving children her surviving, or in default of appointment, so far as the same, if incomplete, should not extend, for her nephew J. in fee. P. died in 1860, leaving eight children surviving, but without having exercised the power of appointment:—Held, that J. was entitled to the property, there being no gift at all, express or by implication, to the children of P., as they could only have taken by virtue of an appointment. *Goldring* v. *Inwood*, 8 Jur., N. S., 206; 3 Giff. 139; 5 L. T., N. S., 17.

5. A father, who had power to appoint to his children and their issue born in his life, appointed 5,000*l.* to his daughter O., who, on the next day, settled it on herself, her husband, and her children generally. Afterwards, by a deed, stating the appointment of 5,000*l.* to O., for her separate use, with power to appoint it, the father appointed another fund to O. "and her children, upon the trusts and subject to the same provisions as are hereinbefore declared of and concerning the sum of 5,000*l.* hereinbefore appointed unto and for the benefit of O., or as near thereto as circumstances will admit":—Held, that O. took the second fund for her separate use, with power to appoint it, and that the children took nothing. *Hanbury* v. *Tyrell*, 21 Beav. 322.

6. A testator gave a fund to his wife for life, with a power for her to appoint it by will, amongst "A., B., and C., and their respective children," and in default of appointment, he directed "the same at his wife's death, to go amongst all the said children equally." The wife made no appointment:—Held, first, that the children alone took, to the exclusion of the parents. *Pattison* v. *Pattison*, 19 Beav. 638.

Held, secondly, that they took *per capita*. *Ib.*

7. A testator gave all his real estate to trustees to pay the rents to A. for life, and after her decease, in case she should leave issue, upon trust to dispose of his estate, in such manner, amongst such issue as A., by deed or will, should appoint, and in default of such issue, then over. A., who left several children and grandchildren, made an appointment by will in favour of some, and excluding others:—Held, that an exclusive appointment was not authorised by the power, and that the children and grandchildren of A. living at her decease took as tenants in common. *Stolworthy* v. *Sanoroft*, 10 Jur., N. S., 762; 12 W. R. 635; 10 L. T., N. S., 223; 33 L. J., Ch., 708.

8. Bequest to trustees for A. for life, and if he should die childless, upon trust to apply the sum to the benefit of such of the testator's children, or their issue, as the trustees should think fit, for the interest and good of the testator's family; with no gift in default of appointment. No appointment having been made, and the tenant for life having survived

the donees of the power, and died childless: Held, that children and remoter issue took in equal shares *per capita*, and that the period for ascertaining the class was the death of the tenant for life. *Re White*, 1 Johns. 656.

1. A testator gave 3,000*l.* to his executors for the benefit of M. during her life, and from and immediately after her death "in trust for the benefit of her children, to do that which they, my executors, may think most to their advantage." The executors died in the lifetime of M.:—Held, that the children of M. who were living at the time of her death were entitled to the fund in equal shares as tenants in common. *Re Phene*, 5 L. R., Eq., 346.

2. Devise of copyholds to a married woman to be her sole and separate property, and with power to her to appoint the same to her children and her husband, in such way and in such proportions as she may think fit:—Held, that she was devisee in fee, and that the execution of the power was not made a duty, and therefore no trust in favour of the husband and children. *Brook* v. *Brook*, 3 Sm. & G. 280.

3. Gift to wife for life, "to be disposed of at her death amongst my children as she shall think proper":—Held, to confer a power to appoint, by will, amongst his children living at his death, and an implied gift in default of appointment. *Reid* v. *Reid*, 25 Beav. 469.

4. A fund was settled upon the deaths of I. and E. for such descendants of X. as E. should by will appoint:—Held, that an appointment to the legal personal representatives of descendants who died before E. was an excess of the power, and that power was created in the nature of a trust for descendants of X. living at the death of E., and that in default of appointment they would take in equal shares. *Re Susanni*, 26 W. R. 93; 47 L. J., Ch., 65.

5. A father gave his trustees power, if his daughter should marry with their consent, to give her husband a life interest in her fortune in the event of his surviving her. She married, in her father's lifetime, with his consent, and had recently died. The trustees had died without having exercised the power:—Held, that the husband was entitled to a life interest in her fortune. *Tweedale* v. *Tweedale*, 47 L. J., Ch. D., 530; 7 L. R., Ch. D., 633; 38 L. T. 137; 26 W. R. 457.

6. A testator in his will stated that he had already provided for his children (except one son, to whom he left a substantial legacy), and did not intend thereby to make any further provision for them. He then bequeathed certain personal property and chattels real to his wife in trust to receive the interest for life, with the power to appoint the property to his children. There was no gift over in default of appointment, but the testator bequeathed the residue of his property to his wife:—Held, that the recital in the will negatived any implication of a gift to the children in default of appointment; that the power was not a power coupled with a trust, and that the widow was absolutely entitled to the property. *Carberry* v. *McCarthy*, 7 L. R., Ir., 328.

7. A father gave residuary personalty to trustees in trust for his daughter for life, and after her death in trust for her children as she should by deed or will appoint, and in default of such appointment in trust for such persons generally as she should appoint, and in default, in trust for next of kin, according to the Statute of Distributions. The daughter by her will, after reciting that, as the fact then was, there were no children of the marriage, exercised her general power of appointment in favour of her husband. After the date of the will she had several children, but died without having altered it, or otherwise exercised the power. Upon a petition by the husband for payment out to him of the fund:—Held, first, that in default of exercise of the limited power, the children took by implication. *Re Jeffery*, 42 L. J., Ch., 17; 20 W. R. 667; 14 L. R., Eq., 136; 26 L. T., N. S., 821.

Held, secondly, that if not, the motive for the exercise of the general power being the failure of children, the appointment based upon such motive could not take effect, and the children took in default of appointment as next of kin under the Statute of Distributions to the exclusion of the husband. *Ib.*

8. A father bequeathed a legacy to each of his two daughters, and directed that if either of them should remain unmarried, she should have power to dispose of her property by will as she pleased, but no power of diminishing the principal sum during her life; and that they should, in the event of their dying unmarried, dispose of their legacies to their brothers or sisters, nephews or nieces, but to no other person or persons whatever. One of the daughters having died unmarried and intestate:—Held, that the direction of the testator gave her a power coupled with a trust, and that the capital of her legacy was divisible in equal shares among the persons pointed at. *Re Hargroves*, 8 Ir. R., Eq., 256.

9. A testator gave his residuary estate to be equally divided amongst his children. He afterwards gave the dividends for the use of each of his children during their respective lives, and if they had children, then the principal to be at the disposal of the parent to such children:—Held, that the children took their respective shares for their lives, and had power to appoint to their respective children, if any. *Butler* v. *Gray*, 5 L. R., Ch., 26; 39 L. J., Ch., 291.

One of the daughters, by her will, after expressing her intention to appoint her share to her children, gave a part only to her children, and, after directing her debts and legacies to be paid, gave to one of her children the residue of the personal estate which belonged to her, or which she had any general power to dispose of:—Held, that the unappointed part of the share was not appointed by the residuary bequest, and was divisible amongst the children equally. *Ib.*

10. By a settlement dated in May 1833, a leasehold house was assigned to trustees upon trust for A. for life, and after her decease for B., her husband, for life, and after the decease of the survivor of A. and B. upon trust to assign the premises unto and amongst such of the children of A and B. then living, in such manner, shares, times, and proportions as A. and B. jointly, or the survivor of them separately, should by any writing appoint; and in case there should be no such child or children,

then upon trust for C. for life, and after his decease upon trust to assign the premises unto and amongst such of his children, and in such manner, shares, times, and proportions, as he should by any writing appoint. A. died in 1876 without leaving issue. B. died in 1880. C. died in 1863 without having exercised the power of appointment, having had ten children, of whom three died before him, two after and before the death of A., one after the death of A. and before that of B.:—Held, that all the children of C. took as tenants in common in equal shares. *Wilson* v. *Duguid*, 24 L. R., Ch. D., 244; 49 L. T. 124; 53 L. J., Ch., 52; 31 W. R. 945.

Bankruptcy of Donee. Void Limitation in default of Appointment.] 1. S. bequeathed residue to children in equal shares, then directed that a part of each son's share should be set apart on trust for the son until bankruptcy, then for such of his children as he should appoint, and in default of appointment for such children as should attain twenty-five. One son became bankrupt, and without having exercised his power of appointment:—Held, that the fund set apart, vested in his trustee, and not in his children by implication in default of appointment. *Re Sprague, Miley* v. *Cape*, 43 L. T. 236.

All the testator's children had executed a settlement reciting that the trust in default of appointment was void, and declaring that the son's shares should be held on the trusts of the will:—Held, that this was a valid resettlement by the sons on themselves until bankruptcy, and their children at twenty-five. *Ib.*

XIII. APPOINTMENT TO NON-OBJECTS IN OTHER CASES.

2. A., by will, devised his collieries, etc., to trustees, upon trust, to dispose and convey the same in such manner as his daughter M., whether sole or covert, should direct or appoint: and for want of such direction or appointment, to apply the money arising thereby to certain purposes in his will mentioned. He then declared, "that though his meaning was to give his said daughter the absolute disposal of the said collieries, etc., to prevent the expenses and trouble that must attend the management of affairs of such a nature, under the direction of the Court of Chancery, he requested his said daughter to direct the money arising therefrom to be applied in such manner as he had directed the same in default of her direction and appointment." The daughter made an appointment in favour of her husband absolutely: but this appointment was held to be void, as being contrary to the testator's intention. *Bute (Earl)* v. *Stuart*, 1 Bro. P. C. 476; 2 Eden 88.

3. The donee of a power cannot appoint to any persons not the objects of the power. *Palmer* v. *Wheeler*, 2 Ball & B. 27.

4. Power to husband and wife to charge a term in lands, with sum or sums, not exceeding 200*l.*, for their daughters A. and B., as the husband and wife should appoint; and in failure of their joint appointment, as the survivors should appoint, with interest from such time as the term should commence in possession, and not before. The term was not to commence in possession until after the death of the survivor. The husband and wife, in execution of the power, direct the 200*l.* to be equally divided between the two daughters, six months after the decease of the father and mother; and if either of them die before payment, or the money become due, then the share of her so dying to be laid out for the benefit of her executors; one of the daughters died after the appointment, and before the time of payment:—Held, a good appointment to the daughters themselves, but the appointment to executors is void; but as one of the appointees died before the time of payment, her share sinks into the estate. The joint appointment having appointed the whole, the share of the daughter who died is not subject to any further appointment. *Brown* v. *Nisbett*, 1 Cox 13.

5. A lady having four children by her first husband, and three by her second, and having power to appoint a fund amongst the first only, appointed it amongst all her children equally, and declared that, if her children by her first husband should refuse to share the fund with her other children, the whole fund should go to her youngest child by her first husband:—Held, that the appointment was not wholly void, but that the first class of children took each one-seventh of the fund under it, and the other shares went to them as in default of appointment. *Sadler* v. *Pratt*, 5 Sim. 632.

6. A sum of 8,000*l.* was bequeathed in trust for E. for her separate use for life, and at the decease of E. that two-thirds of the sum should be and remain for the use of the child and children of the said E., and the remaining third thereof she should be at liberty to dispose of by her last will and testament; and failing such disposition, that the said remaining third should go to the use and benefit of the said child or children in equal proportions. By a settlement executed upon E.'s marriage, she, according to her right and interest therein, and in consideration of the marriage, assigned to trustees the said sum of 8,000*l.* in trust, after the decease of the survivor of E. and her husband, in case there should be issue of the marriage one or more children, to pay it over among such issue in equal shares; and be covenanted for further assurances. There were two children of the marriage. E., by her will, in virtue of the power and authority given her by the will of her father, and of all other powers and authorities enabling her in that behalf, devised and bequeathed one-third of said sum of 8,000*l.* in trust to pay legacies to strangers, and as to the residue of said one-third in trust for the use of one of the children, whom she also appointed residuary legatee:—Held, that the will of E. was inconsistent with the trust of the settlement, and therefore the appointment of the two legacies to strangers was void, but the appointment of the residue to the child of E. was valid. *Re Chambers*, 11 Ir. Eq. R. 518.

7. In 1809 certain estates were conveyed to trustees, in trust for J. H. the younger for life, then to his wife for life, or until the only one or youngest child of the marriage should attain the age of twenty-one: and after the decease of J. H. and his wife, and after the attainment

of twenty-one by the youngest child, to the use of all and every the children and child of J. H. by his said wife, for such estates, in such shares, with such limitations, and subject to such charges (the same limitations and charges, if any, being for the benefit of some other or others of the said children) as the said J. H. should by deed or will appoint; and in default of appointment, to all the children of the marriage in tail, with cross-remainders. J. H., by his will in 1854, made in execution of the power, devised the settled estates upon trusts for sale, and he declared the trusts of the proceeds to be, as to one-sixth part thereof, to pay the income in the manner therein mentioned; as to one other sixth part thereof, in trust thereout to pay to T. H. (a son of the testator) 150*l.*, to T. B. (a son-in-law of the testator) 120*l.*, and to S. H. (a son of the testator) 30*l.*; and as to the residue of the said sixth, to pay the interest thereof to the testator's daughter, S. R., the wife of W. R., for her separate use for life; and after her decease, the share to which she should become entitled during her life in the said trust funds, etc., to be in trust for all and every her children and child, in equal shares if more than one; and as to all the remaining sixth parts, in trust for all his, J. H.'s, other children by his then wife, and the child or children of any then deceased, or who might die in the testator's lifetime, as tenants in common. The testator had six children, all of whom survived him, except M. (the wife of T. B.), who left one son:—Held, first, that the appointment of 120*l.* to T. B. (the son-in-law of J. H.) was invalid, he not being an object of the power. Secondly, that the gift of the life interest to S. R., the testator's daughter, was good, but that, subject to the same, the share was unappointed, except as to the two gifts of 150*l.* and 30*l.* appointed to T. H. and S. H. respectively; and, thirdly, that the sixth share to which M. B. would have been entitled had she been living was unappointed, and passed under the limitation in default of appointment. *Ratcliffe* v. *Hampson*, 1 Jur., N. S., 1104; 4 W. R. 67.

1. By the settlement of A. and in the events which happened two-thirds of the fund were limited to certain persons, and three-fifths to the children of B. "living at the time of the death of B., and in default, to B.'s next of kin. Power was given to A. to revoke these trusts, and to appoint the trust fund among the persons who, under the trusts aforesaid, would have become entitled to the funds, "in the proportion and manner aforesaid, or in such manner and form, in all respects, as A. should think fit." A. appointed to a child of B., who survived A., but died in the lifetime of B.:—Held, that such child was not an object of the power. *Denning* v. *Ellerton*, 26 Beav. 231.

2. S. left all his property, real and personal, including trust and mortgage estates, to his wife in trust, as to his beneficial estates and effects, for herself and the children of the marriage as she should by deed or will appoint:—Held, that this was a power to appoint to the children and not to herself, and that an appointment of the property to herself, reserving only one-millionth part to the children, was bad. *Re Sinclair*, 16 W. R. 420; 2 Ir. R., Eq., 45.

3. A testator gave real and personal estate to his trustees for his son for life, and after his death "for all and every or such one or more exclusively of the other or others of the child or children and remote issue born in wedlock of his son, provided he should marry an English lady or one approved of by the testator's trustees, not being a New Zealand native," as he should appoint, and in default of such appointment "for all and every the children of his (the testator's) son, to be divided between them if more than one in equal shares as tenants in common, or the whole to one only child as the case might be, and in default of such issue" over:—Held, that the children of a marriage between the testator's son and a woman, concerning whom there was not sufficient evidence before the Court to show that she was not a New Zealand native, were entitled to the property under the gift in default of appointment. *Armitage* v. *Armitage*, 16 W. R. 643; 3 L. R., Eq., 343.

4. B., being possessed of an estate in D., conveyed it to his daughter in fee, with livery of seisin, who by a memorandum of the same date agreed to hold it for such one or more of B.'s children, herself being one, as he should by deed or will appoint, and in default in trust equally for their benefit. B., notwithstanding this transaction, continued in possession of the property till his death. By his will he devised his estate in D. to trustees, his son being one, upon trust that they should, out of the rents, issues, and profits, raise 300*l.*, and pay the interest to his daughter for her life, and after her decease to her children, and subject thereto he gave the estate to his son A. for his life, with remainder to his children as he should appoint. He devised estates he was possessed of in another county to his other son for life, with remainder to A. in fee. The testator was possessed of a small property in D. worth about 6*l.* a year which was not subject to the power:—Held, that the charge in favour of the daughter and the devise of the estate in D., so far as it was given to A., was a good exercise of the power, but beyond that every gift of the estate in D. was void, and that the sons were put to their election. *Fox* v. *Charlton*, *Charlton* v. *Hall*, *Hall* v. *Fox*, 10 W. R. 506; 6 L. T., N. S., 743.

Appointment to Parent or Husband of Object.] 5. A mother had a power of appointing a reversionary fund to her daughters. A daughter, who was under age, being about to marry, the mother appointed that a moiety of the fund should, on the marriage, become the portion of the daughter, and be vested in her or her intended husband in her right, and to be paid to the husband, his executors, administrators, or assigns, on the death of the tenant for life:—Held, although the husband was not an object of the power, and the fund was reversionary, and the daughter an infant, that there was a valid appointment. *Wombwell* v *Hanrott*, 14 Beav. 143; 20 L. J., N. S., Ch., 581.

6. Property was settled on the wife for life for her separate use, without power of anticipation, with remainder to the husband for life, with remainder to their children, with remainder over; and a power was given to the wife during her life to dispose of the

principal, for the purpose of educating, etc., the children, or to answer any other occasion. The wife executed her power in favour of her husband, and gave him the property:—Held, that this was a due execution, and that the husband was entitled. *Sutton* v. *Southern*, 5 L. J., N. S., Ch., 185.

1. Testator gave 7,000*l.* stock to trustees, in trust to pay the dividends to his son for life, and after his death to pay the capital and dividends to and amongst all his children, at such time or times, age or ages, and in such proportions, manner, and form, and for such intents and purposes in all respects, as the son should appoint; and, in default of appointment, to pay and divide the same unto and equally amongst all the children as they should severally attain twenty-one; and in the meantime to apply the dividends for their maintenance, as the trustees should think fit. The son, by his will, directed that the stock should not be divided amongst his children until their mother's death, and that she should receive the dividends during her life, and apply the same in the exercise of her sound discretion, for the best interest and advantage of his children, and that, on her death, the capital should be divided amongst the children in certain proportions. The son left eleven children, some of whom were adults:—Held, that the son's will was not a good execution of the power, so far as it directed the dividends of stock to be paid to wife during her life. *Chester* v. *Chadwick*, 13 Sim. 102.

2. Power to appoint to children, "with such directions or regulations for maintenance, education, and advancement as their mother should appoint." The mother appointed the income to the children's father until the younger attained twenty-one, "in or towards the maintenance and education" of all her children:—Held, that the appointment was invalid. *Lloyd* v. *Lloyd*, 26 Beav. 96.

3. By a settlement made on the marriage of a father and mother of the plaintiffs, certain personal property was settled upon trust for the wife for life, and after her death for her children, for such interests and in such manner as she should appoint, and in default upon trust for all the children equally. The settlement contained a power to the trustees to apply the income of the presumptive shares of the children in their maintenance during their minorities, notwithstanding their father might be of ability to maintain them. The wife died, having executed an appointment whereby she appointed the property among the children equally, and directed the income to be paid to her husband during his life for the maintenance of the children:—Held, that the direction to pay the income to the husband was not justified by the power; and the Court directed inquiries as to the proper amount of maintenance to be allowed under the power in the original settlement. *White* v. *Grane*, 2 W. R. 320, 328.

4. *Semble*, under a power to appoint a sum of money to a daughter, an appointment to her husband is invalid. *Hanbury* v. *Tyrell*, 21 Beav. 322.

When a Fraud on the Power.] See XV. *ante.*
Excess. When Severable.] *See* XVI. VII. *ante.*

XVIII. Powers of Revocation and of Revocation and New Appointment.

I. *Creation and Reservation of*, 5863.
II. *Construction of*, 5864.
III. *Duration and Time for Exercise*, 5865.
IV. *Execution of*, 5865.
V. *Insertion or Omission of in Voluntary Settlements.* See SETTLEMENT, XVII. v. 4.

I. CREATION AND RESERVATION OF.

5. A person having only an authority to execute, cannot annex a power of revocation when he executes it. *Wall* v. *Thurborne*, 1 Vern. 355.

6. Power of revocation and to appoint new uses; express revocation must be reserved; or it is executed. *Marlborough* (*Duke*) v. *Godolphin* (*Lord*), 2 Ves. 76.

7. Power without revocation reserved, once executed, is not to be revoked and executed anew. *Teynham* (*Lord*) v. *Webb*, 2 Ves. 211.

8. A partial appointment by will under a power is revocable by a subsequent appointment by deed, though no power of revocation is reserved by the will, or the instrument which created the power. *Lisle* v. *Lisle*, 1 Bro. C. C. 533.

9. Deed executed according to power, containing no clause for power to revoke it, cannot be revoked, though original power gave such clause. *Worrall* v. *Jacob*, 3 Meriv. 256.

A wife having a power of appointment by deed or will, with power to revoke the uses of such deed or will, executes the power by deed, which she retains in her possession, and afterwards alters, and re-executes:—Held, that the deed of appointment containing no power of revocation, although it was contained in the instrument creating the power, the re-execution was void, and the original appointment was therefore decreed to be carried into execution. *Ib.*

10. By a marriage settlement a power of appointment over a trust fund was given to the husband (the plaintiff) in favour of the children of the marriage, to be exercised by deed or will. In default of appointment the property was to be divided equally among the children. There were four children of the marriage, of whom one died in 1869, a bachelor and intestate. The plaintiff was his personal representative. In 1876 the plaintiff appointed by deed in favour of his three surviving children, but reserved a power of revocation. In 1880 he revoked by deed the appointment made in 1876, so that the property might stand limited as theretofore. The plaintiff proposed to execute an absolute release of the power of appointment, and submitted that he would thereby become entitled to a share of the trust fund. The defendants contended that the plaintiff executed the deed of revocation in 1880 in order that he might claim the share for his own benefit, and that his intention was to commit a fraud on the power:—Held, that the donee of a power might deal with it in any lawful way he pleased. He might exercise the power and reserve to himself a power of revocation. Although, in this case, by an accident, namely,

the death of one of the objects of the power, the donee had derived benefit from so doing, he could not be regarded as having committed a fraud on the power, and upon executing a proper release, he would be entitled to the share he claimed. *Shirley* v. *Fisher*, 47 L. T. 109.

1. Where the Court directed a deed of appointment as to the respective interests of a father and his children to be made within a limited time, and a deed was executed within the time containing a power of revocation, it was held that the intention of the Court was defeated, and that the deed was consequently void. *Piper* v. *Piper*, 3 Myl. & K. 159.

2. A settlement was made, in pursuance of articles previous to the marriage, to convey to the use of the husband for life, remainder to the wife for life, remainder upon trust to convey unto and amongst all or any of the children, in such parts and proportions, etc., as the husband and wife, or the survivor, should, by deed or writing, with or without power of revocation, or by will, appoint, and in default of appointment, to the first and other sons in tail male; remainder, subject to trusts that failed, to the heirs of the husband. A joint appointment by deed, subject to a proviso for revocation and re-appointment by the husband and wife, and the survivor, was held well revoked by the wife surviving; and by the same deed a re-appointment to the daughter and two sons successively for life, with remainders in tail to the grandchildren, and the ultimate remainder to the daughter in fee, was held void for the excess beyond the power, viz., the estates to the grandchildren, and the ultimate limitation upon them to the daughter, and the principle of *cy près* is not applicable: all beyond the life estate of the children, therefore, shall go as in default of appointment. *Brudenell* v. *Elwes*, 7 Ves. 382.

3. Where person had power of appointment, and at the end of the settlement it was declared that every appointment made by her by virtue of the power in the deed, might from time to time be revoked and a new appointment made. She made an appointment without reserving a power of revocation, and then executed another appointment. Lord Hardwicke inclined to think both powers might be executed once, as they seemed to be distinct and separate powers. *Langley* v. *Brown*, 2 Atk. 199.

4. Power of new limitation, when incident to power of revocation, though not expressly reserved. *Witham* v. *Bland*, 3 Swan. 277.

5. The donee of a power of appointment over personal estate exercised the same, and reserved a power of revocation merely:—Held, that the power of revocation included in it the power of limiting new uses. *Sheffield* v. *Von Donop*, 7 Hare 42; 17 L. J., N. S., Ch., 481; 12 Jur. 672.

6. One makes a settlement, with power by deed to revoke it, and by the same deed, or any other, from time to time, to limit new uses; he revokes the settlement, and limits new uses, but reserves no further power to himself: he cannot, by virtue of the first power, limit any other uses. *Hele* v. *Bond*, Pre. Ch. 474.

7. A. and B., having a joint power of revocation and new appointment, by deed and fine, reciting an agreement that A. should in manner thereinafter mentioned secure to B. payment within twelve months of the principal sum of 12,000*l.* and the interest of a sum of 8,000*l.* irrevocably, revoked the uses of the former settlement, and appointed the lands to trustees for a term of 550 years, upon trust, as soon as conveniently might be (but with the consent in writing of A., if during or within twelve months from the date of the deed, and afterwards of their own authority) to raise 20,000*l.* by sale or mortgage, provided that if the 20,000*l.* thereinbefore directed to be raised within twelve months should not, within or at the expiration of that time, be raised, or if A. should die before the 20,000*l.* should be actually raised, then the deed and every clause and thing therein should be void, and the fine should enure to confirm the several estates and interests in the lands subsisting immediately before the execution of the deed of revocation:—Held, upon the whole deed, that the money was to be raised within twelve months; and that if it were not raised within that time, or A. should die before it was raised, and within the twelve months, the deed should be void. The money not having been raised within the time:—Held, that the old uses, including the power of revocation, revived. *Langford* (*Lord*) v. *Little*, 2 J. & L. 613; 8 Ir. Eq. R. 546.

II. CONSTRUCTION OF.

8. General power of revocation in preamble of deed may be abridged by special power in operating part of it. *Fitzgerald* v. *Fauconberge*, Fitzg. 214. And see S. C. 6 Bro. P. C. 295.

Where owner of estate in voluntary deed reserves power to himself: it is to be construed more favourably than power reserved to a stranger. *Id.* 220.

9. A., tenant for life, remainder to B. in tail, confesses a judgment, and afterwards A. and B. suffer a recovery, and by deed of July 1810, declare the uses as to Blackacre, that the recoverers should stand seised thereof in trust to sell, and apply the money in discharge of incumbrances affecting Blackacre and Whiteacre, and subject thereto to the use of A. in fee; and as to Whiteacre, to secure an annuity to B. during the joint lives of A. and B., and subject thereto to the use of A. for life, and after his decease to secure a jointure for his wife, and then to trustees for a term, and subject thereto to B. and his issue in strict settlement: and A. and B. were empowered, jointly, to revoke all or any of the uses or estates thereinbefore limited or declared of the said lands, or any part thereof, save as to the jointure and the term, and to appoint new uses:—Held, in the construction of the whole instrument, that the power did not authorise the revocation of the uses as to Blackacre. *Brown* v. *Cavendish*, 1 J. & L. 606; 7 Ir. Eq. R. 369.

10. In 1812, under a power to raise portions for younger children, A. B., tenant for life, charged the estates and demised the same to trustees for 500 years, upon trust to raise the amount, and to stand possessed thereof on the trusts to be afterwards declared. Power was then reserved to A. B. to revoke, alter, or vary all, every, or any of the trusts, powers, and provisions thereinbefore contained, etc.:—Held, that this power of revocation did not

extend to a revocation of the term, but only of the trusts of the money. *Vyvyan* v. *Vyvyan*, 30 Beav. 65; 7 Jur., N. S., 891; 9 W. R. 879. Affirmed 8 Jur., N. S., 3; 31 L. J., Ch., 158; 5 L. T., N. S., 511.

1. The donee of a power executed a deed whereby he was expressed to confirm a prior appointment, and also to appoint certain further funds, and the deed contained a power to revoke the appointment thereby made. The confirmation was in law an appointment:—Held, that the power of revocation applied only to that part of the deed which was expressed in terms of appointment, and not to that part which was expressed in terms of confirmation. *Morgan* v. *Gronow*, 42 L. J., Ch., 410; 16 L. R., Eq., 1; 28 L. T., N. S., 434.

2. A donee of a power of appointment by deed or will appointed by deed the whole fee, reserving a power of revocation and new appointment exercisable by deed. By a subsequent deed she revoked the uses, trusts, and powers limited and appointed by the former appointment, and appointed the whole fee, reserving a power of revocation and new appointment, exercisable by deed. By a third deed she revoked the uses, trusts, and powers limited and appointed by the last appointment, but declared no new uses:—Held, that she was not by these deeds precluded from exercising the original power by way of testamentary appointment. *Evans* v. *Saunders*, *Evans* v. *Evans*, 6 De G. M. & G. 654; 1 Jur., N. S., 265; 24 L. J., Ch., 609; 3 W. R. 323; 3 Eq. Rep. 462. Affirmed *sub nom. Sanders* v. *Evans*, *Sanders* v. *Price*, 8 H. L. Ca. 721; 31 L. J., Ch., 233; 7 Jur., N. S., 1293; 9 W. R. 501; 5 L. T., N. S., 129. Reversing 18 Jur. 256; 1 Drew. 415, 654; 22 L. J., Ch., 471, 1024; 1 W. R. 220; 1 Eq. Rep. 444.

A power is not necessarily exhausted by a revocable appointment; and if such an appointment is revoked without having been acted upon, the power is generally, if not universally, still exercisable. *Ib.*

A power of appointment by deed or will is a single power. *Ib.*

A power of revocation and new appointment confers two distinct powers, which may be exercised at different times. *Ib.*

When Testamentary and Liable to Legacy Duty.] See REVENUE, III. 1.

III. DURATION AND TIME FOR EXERCISE.

3. A papist, having a power of revocation under a settlement made prior to the Irish Popery Acts, executes that power after the Acts passed:—Held, that the revocation was good. *French* v. *Caddell*, 3 Bro. P. C. 266.

4. A proviso in a settlement, if the wife survive her husband, they not having issue between them, then she may revoke the settlement; husband dies, leaving a son, who dies in the life of his mother: she may revoke the settlement. *Holt* v. *Burley*, 2 Vern. 651; Pre. Ch. 293.

5. A. and B., father and son, executed deeds for the settlement of some of their family estates, and for payment of the debts of A. There was a power of revocation to be exercised by A. and B. A. died without exercising it:—Held, that the power of revocation was then at an end. *Montefiore* v. *Browne*, 7 H. L. Ca. 241.

6. T. and his wife, in exercise of a joint and several power contained in their marriage settlement, appointed by deed certain funds to their daughter. This deed contained a power to T. and his wife, or the survivor of them, by deed, from time to time, during their joint lives, to revoke the trusts of the then appointment and to limit new trusts. After the death of the wife, T. executed a deed affecting to revoke the appointment to the daughter, and appointing the funds to trustees, on trust for the daughter for life with remainders over:—Held, that this last deed was inoperative, inasmuch as it was not executed during the joint lives of T. and his wife. *Re Twiss*, 15 W. R. 540; 16 L. T., N. S., 139.

7. A testator by his will gave certain property, including the P. H. estate, to trustees to pay the income to his wife for life, with power to them to sell upon her consent, and invest the proceeds, and apply them upon the trusts of his residuary personal estate, which were that, as soon as each and every of his children should have attained twenty-five, or died under that age, leaving issue, the trustees should sell the unconverted portion, with a right of pre-emption to his younger sons, according to seniority, and that the produce and all other his personal property should be in trust for his children and other issue as his wife should, before each and every of his children should have attained the age of twenty-five, by any deed or deeds, instrument or instruments, in writing, sealed and delivered, direct or appoint, with a gift over in default of such appointment. He died in 1840, leaving three sons and his widow surviving, and in 1841 she by a deed, which contained a power of revocation, appointed the general residuary fund among her children as tenants in common. By her will, made later in the same year, the widow devised the P. H. estate in specie to her eldest son. The youngest of the testator's children attained twenty-five in 1851; the widow did not die until 1863:—Held, that the time within which the appointment was to be made by the widow was of the substance and essence of the power, and not mere matter of form; that although the will of the widow was in form a sufficient execution of that power, yet as it had not within the period prescribed by the testator any effect whatever, and (being a will) was of course revocable, the appointment, whatever it purported to make, was invalid; and that, as there was no revocation of the deed of 1841, the interests conferred by that deed took effect upon the youngest son attaining twenty-five. *Cooper* v. *Martin*, 17 L. T., N. S., 587; 3 L. R., Ch., 47; 16 W. R. 234.

If the appointment had been in other respects good, the proceeds of the sale of the estate would have passed under the appointment of the estate. *Ib.*

IV. EXECUTION OF.

8. A deed of appointment, containing a power of revocation and new appointment, must be acted on, although there is evidence of a subsequent appointment having been made, the contents of which it is impossible

to ascertain. *Rawlings* v. *Richards*, 28 Beav. 370.

1. Imperfect conveyances may, as evidence of intent, operate as revocations. *Vawser* v. *Jeffery*, 2 Swan. 274.

2. Mortgage in fee is a revocation *pro tanto* only of a settlement, with power of revocation. *Thorne* v. *Thorne*, 1 Vern. 182.

3. Conveyance to trustees inconsistent with former uses, and that trustees shall recover residue, after satisfying such uses, is a revocation of all the old uses, and not *pro tanto* only. *Fitzgerald* v. *Fauconberge*, Fitzg. 207. Affirmed 6 Bro. P. C. 295.

4. Power to revoke uses substituting other estates: *quære*, whether a substitution of equitable for legal estates, though a bad execution at law, is sufficient in equity; as where it is done by appointing under a power, and declaring uses upon the appointment which are consequently mere trusts. *Cox* v. *Chamberlain*, 4 Ves. 632.

5. Charge well created by settlement, though for volunteer, not revoked by general revocation of the uses under a power for the mere purpose of partition of joint estate and resettling to the same uses, the separate part to be taken on partition. *Uxbridge* (*Earl*) v. *Bayly*, 1 Ves. J. 499; 4 Bro. C. C. 13.

6. A., having a power of revocation and new appointment over an estate, of which B., his heir, was tenant in tail, by his will directed the estate "to be attached to his title as closely as possible":—Held, that the estate of B., and those of all other tenants in tail *in esse* at A.'s death (living in the line of the title), were abridged to estates for life only. *Dorchester* (*Lord*) v. *Effingham* (*Earl*), 3 Beav. 180. n.

7. A. settled lands, with power of revocation by writing in the presence of three witnesses, and in her last illness, by letter, desired a deed of revocation to be prepared, but died before it was done, having by will given the lands to charitable uses:—Held, a good appointment, though no revocation. *Piggot* v. *Penrice*, Gilb. Eq. Rep. 137; 1 Com. 250.

8. If one has made himself tenant for life of lands in Dale, with a power by any writing, etc., to revoke these uses and limit new ones, and he afterwards by will devises all his lands in Dale, etc., to S., having no other lands in Dale, excepting these, they shall pass if the will be circumstanced as the power requires, though no mention be made of the power. *Deg* v. *Deg*, 2 P. W. 415.

9. W. having made a settlement with a general power of revocation, made a will, by which, after reciting that he had been induced to execute the settlement contrary to his intentions and wishes, and that it was fraudulently and wickedly obtained from him, he directed the trustees and executors of the will to use their best exertions and take all steps necessary to have the deed set aside and cancelled, and then disposed of the property included in the deed:—Held, a good revocation under the power. *Irwin* v. *Rogers*, 12 Ir. Eq. R. 159.

10. It is the duty of the Court to support a power, if possible, and to give effect to its execution, if it is not exercised from improper motives or for improper objects. *Carver* v. *Richards*, 6 Jur., N. S., 410; 29 L. J., Ch., 357; 8 W. R. 349; 2 L. T., N. S., 161.

Where, therefore, a donee of an exclusive power made several successive appointments, reserving powers of revocation and new appointment, and by the last appointment showed an intention to pass the property subject to the power, though she did not thereby expressly state such appointment to be in exercise of the power, and although it was contended that the appointment rested on a vicious deed, the consequence of a vicious bargain, the Court (affirming 27 Beav. 488; 29 L. J., Ch., 169; 1 L. T., N. S., 257) carried out the intention, and declared such appointment to be a valid execution of the power. *Ib.*

11. Property was settled by A. with power for him to revoke the settlement by deed. A., by a deed which did not profess to execute the power, conveyed the property to his nephews beneficially:—Held, that the deed operated as a revocation. *Cowlishaw* v. *Hardy*, 25 Beav. 169.

A. settled mortgages on himself for life, with remainder to B., with a power of revocation by deed. A. transferred the mortgages to his nephew C., by a deed expressed to be made in consideration of the mortgage money. C. never paid the consideration, but alleged that A. intended a gift to him:—Held, that there was no revocation, and that either the mortgage, or the consideration money, was subject to the settlement. *Ib.*

12. Under a power to alter uses, the new use will not arise except in the very circumstances prescribed by the contract. *M'Queen* v. *Farquhar*, 11 Ves. 475.

13. An appointment expressed to be made in exercise of every power enabling the appointor, does not extend to property to which the appointor cannot appoint the exercise of a power of revocation, if there is other property to which the appointment can apply. *Pomfret* v. *Perring*, 5 De G. M. & G. 775; 1 Jur., N. S., 113; 24 L. J., Ch., 187. S. C. on appeal 3 W. R. 81; 24 L. J., Ch., 187; 1 Jur., N. S., 173; 3 Eq. Rep. 145. And see 18 Beav. 618; 18 Jur. 989; 24 L. T. 48.

Where a general power to appoint had been exercised as to a portion of the fund subject to it, but not as to the other part, and the deed exercising the appointment reserved a power of revocation and new appointment over the portion of the fund appointed, it was held that general words in a subsequent deed of appointment, executed by the same appointor, purporting to exercise all powers of appointment given or limited to him, or under or by virtue of which he had power to appoint, did not operate as an exercise of the power of revocation of the appointment of the portion of the fund already appointed, but only of the power to appoint the portion still remaining unappointed. *Ib.*

14. By a deed life annuites were granted to seven persons, to commence from the death of the grantor, and secured on land, the annuities given to such of the persons as were married women being limited to their separate use. By a deed executed more than twelve years afterwards, the grantor gave to five of the annuitants life annuities of smaller amount, to commence from the same period, but not secured on land, not given to the separate use of the grantees, and determinable on a contingency. The grantor stood *in loco parentis*

to four of the five grantees in the second deed, but not to the fifth. The first deed was subject to a power of revocation; the second deed did not refer to the first deed, nor profess to exercise this power:—Held, that whatever probability there might be that the grantor had forgotten the execution of the first deed, the Court could not judicially attribute to a man forgetfulness of a solemn instrument executed by himself. *Palmer* v. *Newell*, 20 Beav. 32; 2 Jur., N. S., 268; 25 L. J., Ch., 461.

Held, also, that assuming the grantor to have remembered the first deed when he executed the second, the fact that the second deed did not exercise the power of the revocation, and the differences between the provisions made by the two instruments, showed an intention not to make the provisions of the second deed substitutionary for those of the former. *Ib.*

1. Lands were settled on A. for life, remainder to his wife for life, remainder to their children, with a power of revocation and appointment to new uses by the husband and wife jointly: proviso, that if A. should become bankrupt, etc., then the limitation to him for life should cease, and the lands should go to trustees during his life, for the benefit of his wife and children. A. agreed for the sale of his estate, and proposed to make title to the purchaser by executing this power of revocation. The conveyancer, on the part of the purchaser, required an indemnity against A. having committed any secret acts of bankruptcy, for that the power of revocation would be extinguished by the forfeiture of the life interest of A. On a bill filed by A. to compel the performance of this contract, the Court thought there was no ground for the objection, and that the mistake in opinion of the conveyancer could not save the defendant from costs. *Maling* v. *Hill*, 1 Cox 186.

2. A voluntary settlement in favour of several persons contained a power, authorising the tenant for life (a volunteer) to revoke the trusts of the property, and again re-settle the same upon such trusts as to her should seem meet:—Held, that this general power could not be controlled, and that an appointment of the property to herself absolutely, to the exclusion of the other persons entitled under the settlement, was a good execution of the power. *Meade King* v. *Warren*, 32 Beav. 111.

3. A tenant in tail under a will, with power to charge portions, and for the purpose of raising them to demise the devised hereditaments to trustees for a term, charged the estate with the payment of 4,000*l.* for the benefit of his younger children as he should appoint, and subject to appointment equally, and he appointed the hereditaments to trustees for a term, with a proviso for cesser, and reserved to himself a power of revoking any of the trusts of the money, and to declare any new trusts. He executed a subsequent deed, not noticing the former, purporting to charge part of the hereditaments with 2,000*l.* in favour of a younger child, and to create a term to secure it:—Held, that the trusts of the money were well revoked and re-appointed, but that the re-appointment of the term was void, so that the trustee of it could not give a good receipt to mortgagees for the money raised. *Vyvyan* v. *Vyvyan*, 4 De G. F. & J. 183; 8 Jur., N. S., 3; 7 Jur., N. S., 891; 31 L. J., Ch., 158; 10 W. R. 179.

4. By a marriage settlement, containing the usual limitations, the husband, having a life estate in reversion, expectant upon the death of his father, was empowered, when in possession under the limitations of the settlement, to revoke, etc., as to so much and to such part of the premises conveyed, "as shall be then in possession of any one or more tenants, by virtue of any one or more lease or leases, whereon a rent or rents, not exceeding 300*l.* by the year in the whole, shall be reserved, etc., so as there shall not, at the time of such revocation, be less than twenty years, or three lives, unexpired of such lease or leases." The clause of the settlement conferring the power concluded with a declaration, that it was the true intent and meaning of the parties that the husband should, at any time during his life, after he should come into, and be in the actual possession of, the premises (settled), have absolute power and dominion over so much thereof as should be of the clear yearly value of 300*l.* sterling, and be at full liberty to dispose of the same in such manner, and to such uses and purposes, as he should think proper. The husband (donee of the power), after the death of his father, when he was in possession under the trusts of the settlement, by a deed of revocation, purporting to be an execution of the power, and reciting that certain lands therein specified then produced a clear yearly rent of 300*l.* or thereabouts, revoked the uses of the settlement as to those lands, and appointed the same in trust for him (the donee), his heirs, and assigns. Afterwards the donee died, indebted to an amount exceeding the value of the lands so appointed, and having no other estate or effects. By his will, duly attested, and reciting his title and power to dispose of the lands specified in the deed of revocation and appointment, he devised to trustees his right and interest therein, upon trust, to sell the same, and out of the purchase money to pay his debts, etc. The lands revoked, appointed, and devised, except a very small part to the value of 8*l.* a year, were not (as recited in the deed of revocation) under lease at the time of the appointment by that deed, nor at the date of the will, but, in a suit instituted in behalf of creditors and legatees to carry the trusts of the will into execution, it was found, and reported by the officers of the court, that the lands so appointed and devised were of the value of 300*l.* a year. By the decree in that suit, the will was established, and the revocation and appointment held valid; and, upon appeal to the House of Lords against the decree, it was held that the power was rightly applied to the subject, and that the appointment was well executed. *Lidwell* v. *Holland*, 2 Bligh 99.

5. By a settlement, made in 1810, by lease and release, on the marriage of Henry K. and Mary R., certain landed estates, then limited to one F. R. for life, with remainder in fee to the said Mary R., were settled to the use of Henry K. for life, remainder to the use of Mary R., his intended wife, in like manner, with remainder to the use of all or any of the children of the marriage, with such limitations

or remainders over as Henry K. and Mary K. his wife should from time to time, by any deed or deeds, writing or writings with or without power of revocation and new appointment direct, limit, or appoint; and in default of such joint direction, limitation, or appointment, or in case any such should be made which should not be a complete disposition of the said hereditaments thereby settled, then as the survivor of them, the said Henry K. and Mary K. his wife, by deed or by will should direct, limit, and appoint; and in default of such appointment, joint or several, to certain uses which would give a title to the eldest son. There were two sons of this marriage; and by a deed, dated 1832, Henry K. and Mary K., in exercise of the joint power, appointed the hereditaments, subject to their own life estates, to their youngest son (the defendant) in fee, subject to a power for them jointly by deed to revoke such appointment, and by the same or any other deed to be by them jointly executed to limit or appoint any other uses in favour of their children which might be warranted by the several powers contained in the settlement of 1810. By a deed of the 4th February, 1833, Henry K. and Mary K. jointly revoked the uses contained in the deed of 1832, but made no new appointment. On the 19th February, 1833, Mary K. died; and in the following month of May, Henry K. by will, did, in execution of the powers vested in him, direct, limit, and appoint the hereditaments to the defendant in fee:—Held, that the revocation of the joint appointment was to restore the uses of the original settlement, including the joint and several powers of appointment; and consequently that the appointment by the will of Henry K. was a valid exercise of the power by the survivor, and that the defendant was entitled to the property. *Montagu* v. *Kater*, 8 Exch. 507; 22 L. J., Exch., 154.

1. A power was limited by a settlement to H. E. to charge 3,000*l.* for his own benefit; and the settlement contained a joint power of revocation and re-appointment of uses by H. E. and G. E. They executed a deed whereby they revoked the uses, trusts, limitations, intents, and purposes, by the indenture of, etc., limited; and declared that the manors, etc., subject to the several charges and incumbrances created thereby, should be," etc.:—Held, not to be a revocation of the power to charge the 3,000*l.* *Evans* v. *Evans*, 1 W. R. 215; 22 L. J., Ch., 785.

2. If there is an original power of appointment, and then an execution of that power, reserving a power only to revoke, followed by a revocation, the original power remains unaffected; and if in the first instrument executing the original power there is reserved a power of revocation and of new appointment, such instrument does not constitute a new settlement destructive of the first, nor is the original power thereby exhausted and at an end, but, upon the revocation of such instrument, exists in full force. *Saunders* v. *Evans*, *Saunders* v. *Price*, 8 H. L. Ca. 721; 31 L. J., Ch., 233; 7 Jur., N. S., 1293; 9 W. R. 501; 5 L. T., N. S., 129. Affirming S. C. *nom. Saunders* v. *Evans*, *Evans* v. *Evans*, 6 De G. M. & G. 654; 3 W. R. 323; 1 Jur., N. S., 265; 3 Eq. Rep. 462; 24 L. J., Ch., 609. Reversing 18 Jur., N. S., 256; 1 Drew. 415, 654; 22 L. J., Ch., 471, 1024; 1 W. R. 220; 1 Eq. Rep. 444.

If there is a power of appointment to be exercised by deed or will, and the first instrument executing the power is a deed which contains the reservation of a power to revoke and to appoint anew by deed, and then there is a simple revocation of this instrument, the original power, on such revocation, being in full force, there may be a valid execution of it by will as well as by deed. *Ib.*

In 1794 an estate was made the subject of a settlement, under which two persons about to be married were to have life interests, remainder to the use of such person for such estate as A., the intended wife, by any deed, with or without power of revocation, attested by two or more witnesses, or by will attested by three witnesses, should from time to time, and as often as she should think fit, appoint. In 1830 she, by deed, exercised this power, and the deed contained a power, by deed, to revoke and to make a new appointment. In 1833, a deed revoking that of 1830, and newly appointing, and also reserving power, by deed, to revoke and newly appoint, was executed. This course was exactly repeated in 1835, by a deed of that date. In 1836 she executed another deed, simply revoking that of 1835. In 1848, by a will reciting the power of 1794, A. declared the uses of the estate:—Held, that the deed of 1830 had not exhausted the power of 1794, and substituted a new power for it, to be executed only by deed; and that therefore, on the revocation, in 1836, of the last preceding deed, the power of 1794 was capable of being exercised by A., either by deed or will. *Ib.*

XIX. Powers of Charging.

I. *How Executed*, 5868.
II. *Interest, Charge Of. When Authorised*, 5869.
III. *Other Cases*, 5870.
IV. *Power to Mortgage*, 5871.
V. *Creation of by Reference.* See II. v. *ante.*
VI. *Charge of Annuities.* See ANNUITY.
VII. *When Usual Powers.* See TRUSTS (EXECUTORY).
VIII. *Merger of Charges.* See MERGER.
IX. *Payment off, Apportionment and Duty of Tenant for Life to Keep Down Interest.* See LIFE, ESTATE FOR, V.
X. *Portions. Charge Of.* See PORTION.
XI. *Mortgages by Trustees.* See TRUSTS.

I. HOW EXECUTED.

3. Power to charge includes power to sell. *Kenworth* v. *Bate*, 6 Ves. 797.

4. Under a power to charge any sum for younger children, the whole estate may be disposed of. *Muskerry* v. *Chinnery*, Ll. & G. *temp.* Sugd. 226.

5. Husband and wife, by a post-nuptial settlement, convey part of the wife's estate to a trustee, to the use of the husband for life,

remainder to their eldest son for life, etc., with an ultimate remainder in fee to the husband, and a power to him "to lease, for any time, or term of years, or lives, and with or without covenants for renewal, and in case of the determination of all or any of the aforesaid lease or leases, to make new or other leases, thereof in manner aforesaid, and with or without any fine or fines as he should think fit." He was also empowered "to raise or levy, by sale or mortgage, any sum or sums of money, not exceeding in the whole 20,000*l.*, or to charge the premises therewith," for such uses as he should appoint, and to charge to any amount for younger children. The husband and wife afterwards executed three leases of portions of the estates comprised in the settlement, for terms of 999 years, upon which fines were taken. The amount of the fines received upon the making of these and other leases, were 10,208*l.* The husband consequently mortgaged these estates, subject to the afore said leases, for a sum of 10,500*l.* The mortgagee filed a bill of foreclosure in the Court of Exchequer, and obtained a decree, in pursuance of which the lands were sold subject to the leases. The first tenant in tail under the settlement filed a bill impeaching the said decree, and also the leases, as having been made contrary to the leasing power:—Held, that the leases were not a valid execution of the power to lease, or the power to raise 20,000*l.*:—Held, also, that a vendor having sold an estate subject to impeachable leases, has a right to set them aside. *Muskerry* v. *Chinnery*, Ll. & G. *temp.* Plunk. 182. Reversing Ll. & G. *temp.* Sugd. 185. And on the last point see *Sheehy* v. *Muskerry*, 7 Cl. & F. 1; Macl. & R. 493; Ll. & G. *temp.* Plunk. 568.

1. Power to appoint estates, to be purchased with money produced by the sale of other estates, well executed by an appointment operating directly on the original estates. *Bullock* v. *Fladgate*, 1 Ves. & B. 471.

Power to appoint an estate includes a power to dispose of the estate and appoint the produce. The same effect has been given in the more doubtful case of a power to charge; and a power to appoint the money produced by an estate directed to be sold, has been considered as a power to appoint the estate itself. *Id.* 478.

2. Covenant to settle an estate in strict settlement, subject to a power to the father, tenant for life, in case there should be any younger child or children, to charge such sum or sums for such younger child or children, payable in such proportions, and at such times, as he should appoint. The power was held well executed by a will directing a sale and appointing the money. *Long* v. *Long*, 5 Ves. 445.

3. The words, "to be raised by rents and profits," will imply a power to sell. *Green* v. *Belchier*, 1 Atk. 506. *Okeden* v. *Okeden*, 1 Atk. 551, and notes.

4. Trust of a term to raise portions out of the rents and profits, to be paid as soon as conveniently may be. By virtue of the word "profits," trustees may sell or mortgage; *secus*, if said "annual profits." *Trafford* v. *Ashton*, 1 P. W. 415.

5. Words in will, "rents and profits," extended beyond their natural meaning, viz., "annual profits," to mortgage or sale, when necessary to effect the object, such as raising a gross sum for fines on renewal, as well as portions; and are not controlled by apparent intention to preserve estate entire. *Allan* v. *Blackhouse*, 2 Ves. & B. 65. Affirmed Jac. 631.

Devise of "profit" will pass land. S. C. 2 Ves. & B. 74.

6. Whether a sum directed to be raised out of the rents and profits of a real estate is to be raised by annual rents and profits, or by sale or mortgage, is a question of intention to be collected from the context of the will, and from the purposes to which the money is to be applied. *Wilson* v. *Halliley*, 1 Russ. & M. 590; 8 L. J., Ch., 171.

7. A gross sum to be paid out of rents and profits; the trustees, if the trust requires it, are not confined to annual profits. *Booth* v. *Blundell*, 19 Ves. 528.

II. INTEREST, CHARGE OF. WHEN AUTHORISED.

8. Power to charge lands with sum of money imports interest thereof also. *Kilmurry* (*Lord*) v. *Geery*, 2 Salk. 538.

9. Power to charge a sum in gross implies power to give interest also. *Roe* v. *Pogson*, 2 Madd. 457.

10. Where there is a power of charging land with a gross sum, it imports interest of course. *Hall* v. *Carter*, 2 Atk. 358; 9 Mod. 347.

11. It appears to be the established rule, that if a man has power to charge lands with a sum of money, not exceeding a certain specified sum, he may charge it with that sum and interest. *Simpson* v. *O'Sullivan*, 3 Dr. & War. 446.

12. Where there is a power to charge an estate with a gross sum, it implies a power to charge with interest likewise. *Boycot* v. *Cotton*, 1 Atk. 552.

13. A power to charge a sum in gross implies a power to give any rate of legal interest, and the rule of the Court to give 4 per cent. applies only where no rate is specified by the party having power to fix it. *Lewis* v. *Freke*, 2 Ves. J. 507.

The reason of the rule in Chancery to give interest at 4 per cent. only, is, that money is generally to be had at that rate, but the rule is not invariable. *Id.* 511.

14. By a settlement made in England on the marriage of D. certain real estates in Ireland were limited to trustees for 1,000 years, upon trust by mortgaging the said estates, or out of the rents and profits thereof, to raise 15,000*l.*, to be divided among the younger children of the marriage, as D. should appoint. D. appointed the whole of the portions among his children, appointing 4,000*l.* to his daughter, to be raised at certain specified times, with interest in the meantime at 5 per cent. The trustees being unable to raise the portions by mortgage, an action was brought to carry the trusts into effect:—Held, that D. having only a power of distributing the portions and not of charging them, had no power to fix the rate of interest; but that the land being in Ireland, 5 per cent. was the proper rate to be fixed by the Court. *Lewis* v. *Freke* (2 Ves. J. 507) and

Young v. *Waterpark* (*Lord*) (13 Sim. 199) distinguished. *Balfour* v. *Cooper*, 23 L. R., Ch. D., 472; 52 L. J., Ch., 495; 48 L. T. 323; 31 W. R. 569.

Held, also, that under the terms of the settlement the trustees of the term had right to apply the rents and profits, first in payment of the interest, and secondly in reduction of the capital. *Ib.*

Interest on Portions.] See PORTION, III.

III. OTHER CASES.

1. Power by marriage settlement to husband to charge, is not confined to the immediately preceding limitations of the reversion to him, but held to overreach all the prior limitations. Construction of a charge by will, if the reversion should never fall to testator, viz., if it should not come to him personally in his life; the charge is, therefore, ineffectual, though the reversion come to his heir. *Stackhouse* v. *Barnston*, 10 Ves. 453.

2. Trustees having laid out the fund upon a bad security obtained from the debtor, under circumstances unfavourable, and to the prejudice of other creditors, a charge on his estate under a power, their bill to enforce the charge against his son, tenant in tail under the marriage settlement, was dismissed with costs. *Bradbury* v. *Hunter*, 3 Ves. 187.

3. Power was contained in a settlement to charge the settled property by deed attested by two witnesses. 250*l.* was charged in accordance with the power, but two subsequent charges of 50*l.* and 60*l.* were created, not in accordance with the power:—Held, that the subsequent charges being invalid, the payment of interest for twenty-three years did not bind the estate of the mortgagor, who was a feme covert, in respect of these subsequent charges. *Blandy* v. *Kimber*, 24 Beav. 148.

4. In general, if a tenant for life, with power of charging, makes a charge, his personal estate is not liable to exonerate the land. *Exp. Digby* (*Earl*), Jac. 235.

5. An estate being settled to A. for life, then as to part to B. for life, remainder as to the whole to uses under which the defendant takes as tenant for life with powers to A. to charge (but not to encumber B.'s estate for life), the estate given in remainder falls in during B.'s life, and interest of the charges exhausts the rents and profits. Upon B.'s life estate falling in, the first rents and profits of that portion of the estate shall be applied in discharge of the arrear which shall not be a charge upon the inheritance. *Tracy* v. *Hereford*, 2 Bro. C. C. 129.

6. On the marriage of A. leasehold property was settled on him for life, and after his death to secure a jointure to his wife, and subject thereto to the use of the heirs male of their bodies, with liberty for A. to raise by deed, mortgage, or other writing 1,000*l.*, to be applied to any purpose he should please, but not to be raised by sale; A. assigned his interest in the leasehold property and in the 1,000*l.* to H., for securing a debt, and became bankrupt. The bankrupt's interest was sold to S., under an order in bankruptcy, made on the petition of H.:—Held, that by the assignment of A.'s estate and interest in the premises, H. became entitled to hold the mortgage as a first charge upon the estate, as well after as before the death of A., and until by payment of principal and interest it should be satisfied. *Simpson* v. *O'Sullivan*, West 337; 7 Cl. & F. 550.

7. A father and son, successive tenants for life of settled estates, in exercise of a joint power of appointment given them by the deed of settlement, raised 15,000*l.* by mortgage of the estates. The deed contained a joint and several covenant by the mortgagors for payment of the debt, and a proviso fixing, as between themselves, the proportion in which each was to be liable for payment of interest and principal. By a deed executed two days after the mortgage, the estates were vested in trustees for a term of 150 years (determinable on the death of either tenant for life), for the management of the property, to pay out of the rents and profits annuities and interest on incumbrances, and to accumulate the surplus for the purpose of paying off incumbrances, and ultimately for the tenants for life in their respective proportions. The trustees of the deed of settlement were not parties to either of those deeds:—Held, that the effect of the two deeds was not to exonerate the inheritance from the 15,000*l.*, and that, upon the death of the father, a fund in court, arising from accumulations, was payable to the son as his sole legatee. *Salt* v. *Standish*, 9 L. T., N. S., 167.

8. Lands are settled (by voluntary settlement) to such uses as A. (the settlor) shall appoint, and subject thereto to A. for life, with remainders over in strict settlement. A., in exercise of the power, creates a charge by way of mortgage on the settled property for 15,000*l.*:—Held, that the settled property was not exonerated, and that the remaindermen had no equity to call upon the personalty of A. to bear the burden of the charge created by him under the power. *Jenkinson* v. *Harcourt*, 2 W. R. 688.

9. An absolute power to charge an estate with a definite sum of money is "an incumbrance" upon the estate. *Evans* v. *Evans*, 22 L. J., Ch., 785.

10. S. being tenant for life of real estate, with remainder over, and an ultimate remainder to him in fee, and having power to charge the estate with 6,000*l.*, charged the estate with 6,000*l.* by deed, and declared that it should be held upon the trusts declared by his will. By his will he declared trusts for accumulation by investment in real estate beyond the legal period:—Held, that the deed and will could not be construed together, that the 6,000*l.* did not sink into the estate for the benefit of the inheritance, but was raisable under the deed, and must be treated as personal estate. *Simmons* v. *Pitt*, 21 W. R. 860; 43 L. J., Ch., 267.

11. A tenant for life under a power charged the estate with portions for younger children varying according to the number, being, if there were four or more, 5,000*l.* There were four younger children born, two of whom died, before the portions were raisable. The tenant for life subsequently made an appointment of the full amount of 5,000*l.*:—Held, that the appointment was effectual, notwithstanding the death of the children. *Knapp* v. *Knapp*, 12 L. R., Eq., 238; 24 L. T. 540.

IV. POWER TO MORTGAGE.

1. A power to raise or levy by sale or mortgage, or to charge, is not well exercised by taking fines on leases. *Muskerry* v. *Chinnery*, Ll. & G. *temp.* Plunk. 203. Reversing on this point Ll. & G. *temp.* Sugd. 226. And see *Sheehy* v. *Muskerry* (*Lord*), 1 H. L. Ca. 576; Ll. & G. *temp.* Plunk. 568.

2. Where tenant for life is directed to renew, with power to raise fine by mortgage, and Court directs fine to be raised by sale or mortgage, if money cannot be raised on mortgage, parties cannot be compelled to insure life of *cestui que vie* for better security of mortgage, but must sell. *Grantley* v. *Garthwaite*, 6 Madd. 96.

3. A., being tenant in tail of an estate in remainder expectant on the death of B., entered into articles, on his marriage, by which, after reciting that it had been agreed that the estate should, subject to B.'s life interest therein, and to the raising, by mortgage or otherwise, of any sum or sums not exceeding 15,000*l.* for A.'s use, be settled to the uses thereinafter expressed, he covenanted that he would, subject to the raising, by any ways or means, and at any time or times he should think proper, of the sum or sums before mentioned, by mortgage, annuity, or otherwise for his own benefit, and to any deed or deeds he might make for the repayment thereof and interest, do all necessary acts for settling the estate, subject to B.'s life interest, in the manner agreed upon:—Held, that A. was authorised to raise the 15,000*l.* by sale, and that he was justified in selling his interest in remainder in the whole of the estate, as the 15,000*l.* was nearly the full value of such interest. *Tasker* v. *Small*, 6 Sim. 625; 5 L. J., N. S., Ch., 321.

4. By a deed of disentail and resettlement of real estates power was given to the father and son, and for the son if he should survive, to mortgage the estate to raise such sums as might be requisite to redeem several prior mortgages: the father and son exercised their joint power of appointment, creating various charges: the son was the survivor, and he mortgaged the estates to secure 600*l.* advanced at various times to the grandfather, father, and son, during the lifetimes of the two former, on the faith of an agreement that those sums should be secured to them by a mortgage:—Held, that this mortgage was a valid execution of the power, and compound interest allowed as provided for by the prior charges. *Gepp* v. *Majendie*, 21 L. T., N. S., 168.

5. W. D., having an absolute power of appointment by deed or will over an estate, devised it to her husband, R. D., with power to sell and dispose of the same, or to raise any sum of money thereon, by mortgage or otherwise as he should think proper; "provided that such part of all and every sum and sums of money so, as aforesaid, raised by the said R. D. either by sale or mortgage, as shall be unexpended at my (his) decease, shall be charged upon the houses belonging to R. D., situate, etc., to be disposed of immediately after the decease of the said R. D., the sum to be paid to my four nieces." And she devised the reversion of the estate to her four nieces, in case it should be in mortgage; and if the estate should not be sold or mortgaged by R. D., then she devised the same to her four nieces as tenants in common in fee. R. D. mortgaged the estate, and died, never having charged his houses with any part of the mortgage money:—Held, affirming the decision below, that the condition was not a condition precedent, and that the mortgage by R. D. was a valid mortgage. *Watkins* v. *Williams*, *Havard* v. *Church*, 3 Macn. & G. 622; 21 L. J., N. S., Ch., 601; 16 Jur. 181.

6. A testator devised real estates in strict settlement, and empowered tenants for life (who were unimpeachable for waste) to grant mining leases for such terms, and under and subject to such rents or reservations or agreements, as to them should "seem reasonable and proper." A tenant for life, in 1843, demised mines for a term of ninety-nine years at a peppercorn rent, by way of mortgage to secure 6,000*l.* and interest:—Held, that this was a valid lease under the power, and binding on the inheritance. *Mostyn* v. *Lancaster*, *Taylor* v. *Mostyn*, 51 L. J., Ch., 696; 46 L. T. 648; 31 W. R. 3. Affirming 23 L. R., Ch. D., 583; 52 L. J., Ch., 848; 48 L. T. 715; 31 W. R. 686.

7. A power in trustees to raise by mortgage a fixed sum implies a power to raise also the incidental costs of the mortgage. *Armstrong* v. *Armstrong*, 18 L. R., Eq., 541; 43 L. J., Ch., 719.

Trustees of a marriage settlement made in 1802 were empowered to raise and levy the sum of 6,000*l.* for portions on the security of a term of 300 years in certain freeholds. Part of the 6,000*l.* was raised. In 1872 it became necessary to raise the residue, which then amounted to 3,290*l.* 8*s.* 4*d.* By an order then made in a suit which was instituted for the execution of the trusts of certain indentures of settlement, the trustees were authorised to advance this amount out of their trust funds upon the security on the term. Considerable costs had to be incurred in effecting the security, and it was asked that the lastly-named trustees might be at liberty to advance a further sum out of their trust funds upon the same security to cover the costs so incurred:—Held, that the term of 300 years might properly be taken as a security, not only for the whole amount of 6,000*l.*, but also for the costs. *Ib.*

By Trustees.] See TRUSTS.

By Executors.] See EXECUTOR AND ADMINISTRATOR.

Creation of Mortgages with Power of Sale.] See XXI. 1. 3 *post.*

See also POWER OF ATTORNEY, III.

XX. Powers of Leasing.

I. *Creation and Existence of*, 5872.
II. *Execution of*, 5872.
III. *To whom Leases may be Granted*, 5874.
IV. *Form and Contents of Lease*, 5874.
V. *Reversionary Leases*, 5880.
VI. *Unopened Mines*, 5881.
VII. *Other Cases*, 5881.

VIII. *Perpetuity and Remoteness.* See PERPETUITY.
IX. *When Usual Powers on Execution of Executory Trusts.* See TRUSTS (EXECUTORY).
X. *Under Leases and Sales of Settled Estates Acts.* See SETTLED ESTATES ACTS.
XI. *Leases and Renewals generally.* See LANDLORD AND TENANT, VIII.
XII. *Leases and Renewals by Executors.* See EXECUTOR AND ADMINISTRATOR, XV. VI. and VII.
XIII. *Leases by Mortgagor or Mortgagee.* See MORTGAGE, VI. V.
XIV. *Leases by Tenant for Life generally, and Fines on Renewals.* See LIFE, ESTATE FOR, IV.
XV. *Right to Renewed Leases.* See TRUSTS.
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XVII. *Leases of Charity Property.* See CHARITY, VI. I.

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1. A power to let is the same as a power to lease. *Parker* v. *Sowerby*, 1 W. R. 404.

2. The grant of a lease is *primâ facie* inconsistent with an express trust for sale; but circumstances may justify a departure from the words of the trust. *Evans* v. *Jackson*, 8 Sim. 217; 6 L. J., N. S., Ch., 8.

3. A testator devised lands to trustees upon trust, out of the rents and profits, to pay two annuities, and subject thereto to permit A., and after him his wife, to receive and take the rents and profits during their respective lives; and after the decease of the survivor, he devised the lands to their children:—Held, that the trustees could grant a valid lease of the lands for a term of ten years. *Naylor* v. *Arnitt*, 1 Russ. & M. 501.

4. The Court cannot (independent of the statute) authorise trustees for infants to grant a mining lease, although the legal estate is vested in such trustees, and such leases would be beneficial to the infants. *Wood* v. *Patteson*, 10 Beav. 541.

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6. Upon a special case presented under 22 & 23 Vict., c. 35, and the 23 & 24 Vict., c. 38, the Court declined to give power to trustees to grant leases of real estate for a term not exceeding ten years. *Re Shaw's Trusts*, 25 L. T., N. S., 22; 12 L. R., Eq., 124; 19 W. R. 1025.

7. Power under an Act of Parliament to lessee, his executors, administrators, and assigns, to grant building leases, does not extend to the tenant in the renewed lease, according to the usual course of church leases. *Collett* v. *Hooper*, 13 Ves. 255.

8. A tenant for life, with a leasing power, remainder to B. in tail, executed a disentailing deed, whereby they conveyed the estate to the use of A. for life, remainder to the use of B. in fee:—Held, that A.'s leasing power was not extinguished. *O'Fay* v. *Burke*, 8 Ir. Ch. R. 225.

Discretionary.] 9. A testator gave to his trustees a special power of leasing at their absolute discretion; which formed part of a special scheme of management of his mansion house and estate for a limited period:—Held, in a suit for the execution of the trusts of the will, that the Court would compel the trustees to exercise the power of leasing. *Tempest* v. *Camoys* (*Lord*) (No. 1), 21 L. R., Ch. D., 576.

II. EXECUTION OF.

1. *By Agreement to Lease*, 5872.
2. *Confirmation of Invalid Leases*, 5873.
3. *Statutory Relief*, 5874.

1. By Agreement to Lease.

10. Tenant for life, with power to lease by deed, does not execute power by a written agreement for lease. *Symons* v. *Symons*, 6 Madd. 207.

11. Tenant for life, with a leasing power, enters into an agreement by article, to make a lease pursuant to the power. This agreement shall bind the remainderman. *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52.

12. A., tenant for life, with a power to lease by deed, duly executed under her hand and seal, reserving the best yearly rent; plaintiff enters into possession, and expends money in building under an agreement for a lease evidenced only by the memorandum in writing, entered in the book of A.'s authorised agent, signed, not by the agent himself, but by his clerk, although in evidence to have been approved by him, and according to the usual course of business; A. died; and on a bill for specific performance against the remainderman:—Held, first no sufficient agreement in writing; also, the plaintiff not entitled to compensation from A.'s representatives for money laid out by him on the faith of the alleged agreement. *Blore* v. *Sutton*, 3 Meriv. 237.

13. An agreement by feme covert to execute a power of leasing over lands settled to her separate use:—Held, to be a valid execution of the power, without deciding whether the married woman was personally bound by the agreement. *Dowell* v. *Dew*, 1 Y. & Coll. C. C. 345; 12 L. J., N. S., Ch., 158; 7 Jur. 117.

14. Though a contract to lease by a tenant for life with a leasing power cannot be enforced as an execution of the power, it may be partially enforced by decreeing a lease for the life of the tenant for life, if the contract was *bonâ fide*, and more especially if there has been an outlay on the faith of it. *Dyas* v. *Crwise*, 8 Ir. Eq. R. 407; 2 J. & L. 460.

15. A bill for specific performance of an agreement for a lease signed by the grantor only, and contrary to his leasing power, of which the plaintiff had notice afterwards, amended, praying an execution of the agreement for the life of the grantor, without requiring compensation for the difference of interest, dismissed, the case proved for the plaintiff creating doubts and suspicions of the

fairness of the transactions. *O'Rourke* v. *Percival*, 2 Ball & B. 58.

1. Specific performance of an agreement for a lease, in consideration of the surrender of an old lease, refused, the tenant suppressing that the life on which the old lease depended was, when the agreement was signed, *in extremis*; and as the new lease would, under a power of leasing, at the highest rent, be void, the surrender of the whole lease forming part of the consideration. *Ellard* v. *Llandaff* (*Lord*), 1 Ball & B. 241.

Equity will not direct a lease, void under a power, to be executed, as it would not bind the inheritance, and might embarrass remainderman. *Id.* 251.

2. A solicitor to tenants for life, with power of leasing settled real estate, who had obtained from his clients a parol agreement for a lease, on faith of which he expended large sums:—Held, not entitled to a lease. *Trotman* v. *Flesher*, *Flesher* v. *Trotman*, 3 Giff. 1; 7 Jur., N. S., 386; 4 L. T., N. S., 108.

Specific performance of a parol agreement by a tenant for life, with a power of leasing, not decreed on the ground of possession and expenditure, if prejudicial to remaindermen. *Ib.*

A tenant for life, with a power of leasing, cannot by parol agreement for a lease bind the remaindermen. *Ib.*

3. Insolvency is a ground upon which the Court will refuse to order specific performance of an agreement to grant a lease, but there must be proof of a general insolvency, and a particular default in the payment of rent to the landlord of the premises last occupied by the person contracting for the lease, will not disentitle him to the performance of the contract, where there is the testimony of unexceptionable witnesses to his responsibility. A., having a life interest in premises vested in trustees, who had a power of leasing, agreed to grant a lease for twenty-one years to B. The trustees refused to grant a lease to B., on the ground that he was in insolvent circumstances, and that the grant of such lease would be a breach of trust against their *cestuis que trustent*. The Court, being of opinion that B. was entitled to specific performance, and that the trustees had given A. some authority to act, ordered the trustees to execute a lease to B., to the extent of A.'s interest. *Neale* v. *Mackenzie*, 1 Keen 474; 1 Jur. 149.

4. By a will devising real estate in strict settlement, powers of granting building leases were given to any tenant for life and to trustees during the minority of any tenant in tail. The tenant for life, in pursuance of his power, entered into a contract to grant a building lease, but died without having executed a lease, and was succeeded by an infant tenant in tail:—Held, that the trustees had power to effectuate the contract of the tenant for life by executing a lease. *Davis* v. *Hereford*, 22 L. R., Ch. D., 128; 52 L. J., Ch., 61; 47 L. T. 540; 31 W. R. 61.

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5. Devisees in trust having the legal estate, with a power of leasing, in possession, until the *cestuis que trustent* attained twenty-one, leases not conformable to the power held void in equity, and not confirmed by acceptance of rent. *Bowes* v. *East London Waterworks Co.*, Jac. 324.

Trustees having committed breach of trust, by granting longer leases than they had power by deed to do, the fact of the *cestuis que trustent* receiving rent from the lessees in ignorance of the invalidity of their leases, did not operate as a new agreement; but the *cestuis que trustent* having neglected to look into their rights, no account directed beyond filing of bill, and no costs to plaintiffs. S. C. 3 Madd. 373.

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7. Where lease not warranted by power is granted by tenant for life, containing covenant for perpetual renewal, the reversioner, by accepting for many years after possession the rent reserved, does not confirm the lease, so far as relates to renewal. *Higgins* v. *Rosse*, 3 Bligh 113.

8. A testator devised real estate to trustees upon certain trusts: and he directed that the estate should and might be leased by the the trustees, and the survivor of them, and the executors or administrators of such survivor. One of the trustees died in the lifetime of the testator, and the other disclaimed: and the heir at law of the testator, who was tenant for life of a moiety of the estate, granted a lease, purporting to be in execution of the power:—Held (reversing 10 Jur., N. S., 1228; 12 W. R. 195), that the lease was not binding on the remainderman:—Held, also, that acceptance of rent by the remainderman was not a confirmation of the lease. The lease had been purchased under the usual condition, not to inquire into the lessor's title:— Held (affirming 10 Jur., N. S., 1228; 12 W. R. 195), that the purchaser could not maintain the defence of purchase for value without notice. *Robson* v. *Flight*, 5 N. R. 344; 3 De G. J. & S. 608; 34 L. J., Ch., 226; 11 L. T., N. S., 725.

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9. In 1763 P. C. the elder demised certain lands to A. S. and his heirs, for three lives, the last of whom died in April 1825. In 1788 J. C., being seised in fee of the reversion expectant on the lease of 1763, settled it to the use of himself for life, with remainder (subject to a jointure and a term for raising portions) to the use of his first and other sons in tail male, with remainder to himself in fee, and reserved to himself a power to make leases at the best rent. In 1794 J. C. demised the same lands to T. S. (who was entitled to the interest in the lease of 1763) and his heirs, for the term of three lives, at a rent which was greatly below the best rent, and covenanted for the quiet enjoyment of the lessees and his heirs, against the acts of J. C., and all persons claiming under him. In 1815, upon the marriage of P. C. the younger, the eldest son of J. C., the lands were conveyed by J. C. and P. C. to trustees and their heirs, "subject to the several tenants' leases thereof now subsisting," to uses for the benefit of J. C., P. C.

the younger, his intended wife, and the issue of the marriage; and divers provisions were thereby made for P. C. the younger, and his intended wife, which did or might take effect out of the life estate of J. C.; and J. C. and P. C. covenanted that the lands were free from incumbrances, "the several tenant's leases thereof" excepted. J. C. died in September 1836, and thereupon P. C. brought an ejectment to recover the possession of the lands demised by the lease of 1794, one of the *cestuis que vies* in it being still *in esse*, and obtained judgment therein; thereupon, the person interested in the lease of 1794 filed his bill for an injunction against the proceedings at law, and to compel P. C. the younger to execute a lease to him similar to that of 1794, charging, that by the settlement of 1815, P. C. the younger had agreed to confirm the leases on the estate, and that it was inequitable in him to refuse to do so, and to throw the plaintiff on the assets of J. C. for compensation, inasmuch as he, P. C., had derived great benefits from the life estates of J. C. P. C. denied that there was any intention on the part of the parties to the settlement of 1815, to confirm the leases of the lands; he denied notice of the lease of 1794, and said that the leases to which the settlement of 1815 was made subject, were the leases executed by J. C., pursuant to his power. The only evidence of notice was the possession of the tenant:—Held, first, that P. C. the younger was bound to confirm the lease of 1794; second, that the personal representative of J. C. was not a necessary party to the suit. *Stoughton* v. *Crosbie*, 5 Ir. Eq. R. 451.

1. Lord D., tenant for life, purporting to exercise a leasing power, made a lease in 1767, covenanting for quiet enjoyment against the acts of all claiming through him. In 1791 and 1792 Lord D. and his son, tenant in tail in remainder, joined in suffering recoveries, and resettled the estates, subject to the then existing leases, Lord D.'s son having secured to him an annuity of 2,000*l.*, and 30,000*l.* for his debts. Lord D. died in 1799, and the estates were subsequently again resettled by his son, and the then remainderman. In 1848 the lease was impeached as an excess of the power:—Held, that on the doctrine of *Taylor* v. *Stibbert* (2 Ves. J. 437) and *Stoughton* v. *Crosbie* (5 Ir. Eq. Rep. 451) the lease was then valid, whether originally void or not. *Donegal* (*Marquis*) v. *Greg*, 13 Ir. Eq. R. 12.

The doctrine of these cases does not clash with the principle of *Garrard* v. *Lauderdale* (*Lord*) and similar cases, preventing a stranger from taking advantage of a creditor's deed or the like, to which he is not a party. The two classes of authorities distinguished. *Ib.*

3. Statutory Relief.

2. The 12 & 13 Vict., c. 26, and 13 & 14 Vict., c. 17, for affording relief against defects in leases made under powers, do not apply to leases granted by a mere stranger to a leasing power. *Exp. Cooper, Re North London Railway Co.*, 34 L. J., Ch., 373; 11 Jur., N. S., 103.

3. Under a will which empowered the trustees thereby appointed to grant building leases for ninety-nine years at increasing rentals, and ordinary leases for twenty-one years at the best rents which could be obtained, and provided that a lease granted under either power might contain an option of purchase by the lessee, the trustees demised to C. a piece of freehold and a piece of leasehold land for thirty-five years, at a nominal rent as to both for the first quarter, and afterwards, as to the freehold at an increasing rent, and as to the leasehold at a fixed rent. The lessee did not covenant to build, but only to repair all buildings erected or to be erected on the land, and to insure; and the lease gave him an option of purchase as to any part of the premises during the first twenty-one years. In exercise of this option, C. purchased the leasehold portion of the land, which was accordingly assigned to him. Doubts having afterwards arisen as to the validity of the lease, a notice was indorsed upon it, pursuant to 12 & 13 Vict., c. 26, and signed by C. and the trustees of the will, declaring that the lease should be considered in equity as a contract to grant a valid lease under the power to grant ordinary leases. Upon the sale by C. of the leasehold land purchased by him, objection was taken to the title on the ground that the lease, not being a building lease, and being granted for more than twenty-one years, was an invalid exercise of the power:—Held, that, inasmuch as the lease did not contain any covenant to build, it was invalid as a building lease; that the defect could not be remedied under 12 & 13 Vict., c. 26, by turning that which was a lease of one kind into a contract for a lease of another kind; and that, even if that could be done, the lease would still be invalid in consequence of the rent reserved in respect of the freehold portion being an increasing rent, which was not in accordance with the power to grant leases other than building leases. *Hallett* to *Martin*, 52 L. J., Ch., 804; 48 L. T. 894.

Held, also, that the lease being bad, the option of purchase was ineffectual and could not be exercised. *Ib.*

III. TO WHOM LEASES MAY BE GRANTED.

4. A mortgage containing a power enabling the mortgagor, until foreclosure, to grant leases, and the mortgagor, in exercise of the power, granted a lease to a trustee for himself:—Held, that the lease was a valid exercise of the power. *Bevan* v. *Habgood*, 7 Jur., N. S., 41; 30 L. J., Ch., 107.

5. Trustees of a will had power to grant leases to any "person or persons" they should think fit:—Held, that this authorised them to grant a lease to a limited company. *Re Jeffcock's Trusts*, 51 L. J., Ch., 507.

IV. FORM AND CONTENTS OF LEASE.

1. *Clauses and Conditions. In General*, 5874.
2. *Length of Term*, 5875.
3. *Fines*, 5876.
4. *Rent Reserved*, 5878.

1. Clauses and Conditions. In General.

6. A clause of surrender in a lease, under

a power which does not expressly warrant such a clause, will vitiate the lease. *Muskerry* v. *Chinnery*, Ll. & G. *temp.* Plunk. 201. Reversing Ll. & G. *temp.* Sudg. 229.

Where the power is unlimited, a clause, permitting waste, does not invalidate the lease. S. C. Ll. & G. *temp.* Sugd. 238. See S. C. Ll. & G. *temp.* Plunk. 182, 568.

1. Power reserved upon marriage settlement to tenants for life to grant or renew leases for lives, provided that a right of re-entry is reserved upon such leases, for non-payment of rent, is well executed by lease for lives, providing a re-entry in case the rent remains in arrear fifteen days, and there is no sufficient distress on premises. *Smith* v. *Jersey* (*Earl*), 3 Bligh 290.

2. A court of equity will not, against the reversioner, reform a lease executed under a power, where it contains covenants not warranted. *Medwin* v. *Sandham*, 3 Swan. 685.

3. The last previous lease of premises included in a renewal is not the only evidence receivable of what are usual clauses within the meaning of a power requiring the usual clauses to be inserted in renewals; and the Court refused to set aside a renewal impeached for varying from the previous lease, in a case where the objection was not made by the bill so as to lead the defendant to explain it. *Donegal* (*Marquis*) v. *Greg*, 13 Ir. Eq. R. 12.

4. The lease of a tenant for life, with power of leasing under certain conditions, must be in strict conformity to these conditions; and if it varies from them in the interest demised or the rent reserved, before the above statutes, it could not be supported against the remainderman. *Cavan* (*Countess*) v. *Pulteney*, 6 Bro. P. C. 175; 5 T. R. 567.

5. Where leases of way-leaves (colliery) entered into a correspondence with the tenant for life with power of leasing for a new lease, proposed as a renewal of the former, which contained a usual clause giving the lessees an option of determining the lease on notice, but the correspondence was silent as to the insertion of such a clause:—Held, that the lessees might reasonably have understood (whether it were mutual or not) that the new lease was to contain such a clause, and that they ought not to be compelled to accept the lease without it:—Held, also, that the tenant for life not having under the will a power to grant such a lease, the reversioner, although able to do so, was not entitled to enforce a specific performance of it. *Quære*, in executory agreements, whether there is a presumption in favour of the insertion of such customary stipulation. *Ricketts* v. *Bell*, 1 De G. & Sm. 335; 11 Jur. 918.

6. A settlement of house property gave power to the trustees to demise or agree to demise all or any of the messuages "to any person or persons who shall improve or repair the same, or covenant or agree to improve or repair the same, or shall expend or agree to expend such sum or sums of money in improvements thereof respectively, as shall be thought adequate for the interest therein respectively." The trustees agreed to let a house on the terms of a letter by which the tenant undertook "to do necessary repairs:"—Held, by Chitty, J., that the agreement did not satisfy the terms of the power, and that specific performance of it could not be decreed at the suit of the trustees. But held, by the Court of Appeal, that the agreement imposed upon the tenant the burden of doing all repairs which were requisite during the term, and that it satisfied the requisitions of the power. *Doe* v. *Withers* (2 B. & Ad. 896) doubted. *Truscott* v. *Diamond Rock Boring Co.*, 20 L. R., Ch. D., 251; 51 L. J., Ch., 259; 46 L. T. 7; 30 W. R. 277.

7. A testator devised real estates in strict settlement, and empowered tenants for life (who were unimpeachable for waste) to grant mining leases for such terms, and under and subject to such rents or reservations or agreements, as to them should "seem reasonable and proper." A tenant for life, in 1843, demised mines for a term of ninety-nine years at a peppercorn rent, by way of mortgage to secure 6,000*l.* and interest:—Held, that this was a valid lease under the power, and binding on the inheritance. *Mostyn* v. *Lancaster*, *Taylor* v. *Mostyn*, 51 L. J., Ch., 696; 46 L. T. 648; 31 W. R. 3. Affirmed 23 L. R., Ch. D., 583; 52 L. J., Ch., 848; 48 L. T. 715; 30 W. R. 686.

The said lease of 1843 referred to a prior lease of the same mines granted by the testator in 1829, and purported to grant such on the like liberties, powers, authorities, and privileges thereby granted, and all other liberties, etc., necessary for working the mines, except as in the said lease of 1829 was excepted. The lease of 1829 excepted certain minerals from the demise, and contained covenants by the lessees not to remove the pillars of the mines without the consent of the testator, his heirs or assigns:—Held, that the lease of 1843 incorporated the provisions in the lease of 1829 against the removal of the pillars. *Ib.*

2. Length of Term.

8. Where one has power to make leases for ten years, and he makes one for twenty, it is a good lease for ten years. *Pawcy* v. *Bowen*, 1 Ch. Ca. 23; 3 Ch. Rep. 11.

9. A tenant for life, with power to grant leases for twenty-one years, or three lives, agrees to grant a lease for thirty-one years:—Held, that he is only bound to grant such a lease as is warranted by the power. *Byrne* v. *Acton*, 1 Bro. P. C. 186.

10. J. S. by marriage articles covenants to settle his estate to certain uses, reserving to himself a power of making leases for thirty-one years or three lives. He grants a lease to A. for three lives or thirty-one years which shall last longest:—Held, a good execution of the power. *Commons* v. *Marshall*, 6 Bro. P. C. 168. And see *Montgomery* v. *Charteris*, 5 Dow 293.

11. A power of attorney given by the owner in fee, to make leases "for such terms of lives or years as should be agreed on":—Held, under the circumstances to warrant the making of a lease for lives renewable for ever. *Boyland* v. *Warner*, Hay. & J. 79.

12. Tenant for life of estate, on which were mines opened, with power to let leases in possession for twenty-one years, reserving best rent, leases the mines, opened and unopened,

after her death to himself during his life, and after the death of the survivor for the benefit of their children. The settlement contained a power to S. during his life, and after his death to the wife during her life, and after the death of the survivor to the trustee, to renew leases for lives, and take fines on renewals, but so that the usual rents were still reserved. And it was declared that the trustee should hold all fines which he might take in trust for the child or children who should be then entitled to the inheritance of the premises. S. subsequently assigned his interest under the settlement to B. by way of mortgage. The trustee of the settlement disputed the right of S. to take the fines for his own benefit, claiming them on behalf of the wife. S. accordingly filed a bill against the trustee and B., praying that he might be declared entitled to take the fines on renewals of leases for his own benefit. S. afterwards became bankrupt, and his assignee obtained a supplemental order to carry on the suit:—Held, first, that S. was entitled to take the fines on renewals for his own benefit. *Simpson* v. *Bathurst*, *Shepherd* v. *Bathurst*, 5 L. R., Ch., 193; 18 W. R. 772; 22 L. T., N. S., 29.

Held, secondly, that inasmuch as the legal estate was outstanding and beyond S.'s control, and the trustee had interfered with his power of granting leases, he was entitled to bring a suit in equity for declaration of his rights. *Ib.*

Held, thirdly, that the power of granting renewed leases was not extinguished or suspended either by the assignment of S.'s interest by way of mortgage or by his bankruptcy, but that such power might be still exercised by him with the concurrence of the mortgagee and assignee. *Ib.*

4. Rent Reserved.

1. Where a power of leasing for years required the insertion in the leases of a clause of re-entry, if rent should be behind for twenty-one days; and leases were afterwards made with a power of re-entry, if the rent should be behind or unpaid for twenty-one days, and no sufficient distress could he had:—Held, that such leases were valid, and might be supported. *Tankerville* (*Lord*) v. *Wingfield*, 7 Price 343; 5 Moore 346. n.; 2 B. & B. 498. n.; 3 Eden 331. n.

2. A. by will empowered his devisee for life, of real estate, to demise and lease for twenty-one years, "so as upon each lease there were reserved and made payable, during the continuance thereof, the best imposed yearly rent that could reasonably be had for the same, without taking any sum or sums of money by way of fine or income for or in respect of such lease or leases, and that in every such lease there should be contained a clause of re-entry for non-payment." In exercise of this power, a lease was made for twenty-one years, to hold from the 11th October 1833, at the yearly rent of 903*l.*, payable by equal half-yearly payments, viz., on the 6th April and on the 11th October in every year except the last half year's rent, which was thereby reserved and agreed to be paid on the 1st August next before the determination of the term:—Held, that this lease was a valid execution of the power. *Rutland* v. *Wythe*, 355; 10 Cl. & F. 419.

3. A settlement authorised D., for the encouraging of building in B., to demise houses, lands, and tenements in B. upon building or repairing leases, either for one, two, or more lives, or to continue for and during ninety-nine years, to be computed from the day of the date of such lease, or for any term of years not exceeding ninety-nine years, to take effect either in possession or reversion, or to make fee farm grants, so as in such grants, demises, and leases there be reserved, to continue payable during the continuance of them, the best rent to be got without a fine, and so as in every such lease or grant there be a clause or condition of re-entry for non-payment of the rent reserved thereon; and it authorised leases, under other restrictions, of the other premises comprised in it, besides the houses and buildings at B. Lord D. made a lease in 1767 of certain land and quays in B., with liberty to receive quayage usually payable, and the free use of a certain canal, habendum for three lives and the life of the survivor, and after his death for ninety-nine years from the date of the lease, yielding 8*l.*, until 1791, when a subsisting lease of some of the quays would fall in, and 50*l.* for the residue of the term demised, with covenants for building and improving, and a clause of re-entry upon non-payment of the rent for three months or breach of the covenants. *Semble*, this was a good building and repairing lease, though including quayage and the use of the canal, which alone would not be subjects of such a lease. *Donegal* (*Marquis*) v. *Greg*, 13 Ir. Eq. R. 12.

Semble, also, that the term for lives and years concurrent was within the power; that the rent was well reserved, though the higher sum was not payable for the entire term; and that the clause of re-entry was sufficient, though neither immediate on non-payment nor in the usual form. *Ib.*

A lease made under a power requiring the rent to be reserved payable during the continuance of the lease, was dated in June 1827, and reserved the first half year's rent on the 1st May then next:—Held, that the lease was not thereby avoided, though no rent appeared payable from June to November 1827, especially as the objection was not mentioned in the bill, for, if mentioned, the defendant might have made a case to explain it, or be relieved against it. *Ib.*

A power required that, in leases of premises then in lease, the rent reserved should not be less than the rent then payable out of the same premises. A lease of 1767 had demised quays and other premises, with liberty to receive quayage not exceeding 2*d.* per ton. A lease of 1827, made under the power, demised the quays and premises described as in the leases of 1767 together with the wharfage and quayage of all ships and vessels resorting to the quays and docks (without any limitation of the rate per ton), at a rent of the same amount as was reserved in 1767, to which it was objected that the same rent was not reserved, as the renewal included additional premises:—Held, not a valid objection, as the rent was not reserved out of the quayage, and

by the removal of the restriction the lessor passed nothing new. *Ib.*

By a subsequent lease of 1831, reciting that the unlimited quayage was included by mistake in that of 1827, the premises, as originally leased, were demised at the same rent and fine as in the lease of 1827, and the unlimited quayage at a small additional fine and rent:—Held, that the lessee could rely on the lease of 1831, which would have been valid if made in 1827, when the principal sum was paid, though, perhaps, impeachable if originating in 1831. *Ib.*

The nature of a right of quayage or wharfage considered. *Ib.*

1. Power reserved upon marriage settlement to tenants for life to grant or renew leases for lives, provided that a right of re-entry is reserved upon such leases for non-payment of rent, is well executed by lease for lives, provided a re-entry in case the rent remains in arrear fifteen days, and there is no sufficient distress on premises. *Smith* v. *Jersey* (*Earl*), 3 Bligh 290.

2. Toll reserved on a lease of a mine made by a tenant for life, and a power will go to the remainderman. *Basset* v. *Basset*, Amb. 843.

3. In a settlement, a power is reserved to tenant for life to make leases of all lands anciently demised, reserving the ancient rents, and of the other lands, reserving the best improved rents. Tenant for life being ill, and not having the counterparts of the old leases, makes a general lease to his sister of all the lands, paying for the lands that had been let the ancient and accustomed rents, and for the lands not usually let the full and improved rents and value thereof. Lease adjudged void by the Lord Keeper and Lord C. J. Trever; *contrà* the opinion of Lord C. J. Holt. *Orby* v. *Mohun*, 2 Vern. 531; Pre. Ch. 257; Gilb. Eq. Rep. 45. Affirmed 6 Bro. P. C. 145.

4. One having a power to lease at the most improved rent, agrees to grant a lease at a rent to be estimated at a fair valuation, without reference to improvements made by the lessee, but these improvements are deemed part of the consideration for the lease. *Quære*, whether such a lease is consistent with the terms of the power. *Price* v. *Assheton*, 1 Y. & Coll. 82; 4 L. J., N. S., Exch. Eq., 4.

5. A lease, under an unrestricted leasing power, including lands not comprised in the settlement, and by which one entire rent is not invalid; for, if the lessee be evicted, there would be an apportionment of the rent at law in favour of the person entitled under the settlement. *Muskerry* v. *Chinnery*, Ll. & G. *temp.* Sugd. 230. But see S. C. Ll. & G. *temp.* Plunk. 182.

Under a power to lease at any rent, a nominal rent may be reserved. *Id.* 225.

6. Under a power to lease at the best rent, the very highest rent that can be obtained is not required; and the true criterion is, whether the rent has been fairly obtained without any private advantage to the donee of the power: and therefore an agreement which the Court treated as subject to the same rule was enforced, though the rent obtained was below the offers made by less solvent tenants, and below the average at which the lands were valued, where the agreement was fairly made and was a prudent one. The cases on this subject reviewed. *Harnett* v. *Yielding* (2 Sch. & Lef. 29) commented on. *Dyas* v. *Cruise*, 8 Ir. Eq. R. 407; 2 J. & L. 460.

7. By a settlement made on the marriage of S., real estate was conveyed by him to trustees to his use until marriage, and after marriage to the use of B. and Y., their executors, administrators, and assigns, for the term of 500 years, upon trusts, and after the expiration or sooner determination thereof, and in the meantime subject thereto, to the use of S., the settlor, for life, without impeachment of waste, with remainder to other uses. The settlement contained a proviso that it should be lawful for S. during his life, from time to time, by deed, either referring or not referring to the power, to demise and lease the real estate for any term not exceeding twenty-one years, so that there should be reserved the best or most improved yearly rent, to be incident to the immediate reversion of the hereditaments so demised, that could be obtained for the same, and so that the lessee was not by any clause or words therein to be contained made dispunishable for waste, or exempted from punishment for committing waste. After the marriage S., by deed, leased part of the premises to the defendant for twelve years. The lease did not refer to the power, and the rent was reserved to S., his heirs and assigns. The defendant thereby covenanted to repair a blacksmith's shop, and all glass and leadwork of the windows, and all doors, locks, keys, fences, bridges, and works in such situation, manner, and form as should be determined by the surveyor of S., and to yield up the premises in repair to S., his heirs or assigns, at the expiration of the lease. S. covenanted with the defendant to maintain the messuages, buildings, and a draining mill in good and tenantable repair, except in respect of such repairs covenanted to be done by the defendant. S. died before the expiration of the lease, and the term of 500 years being still subsisting, the surviving trustee, at the expiration of the lease, brought an action against the defendant for breaches of covenant to repair and cultivate:—Held, that such action was not maintainable, for the lease, although good by way of estoppel between the parties to it, was void as between the plaintiff and the defendant, not being in accordance with the power; first, by reason of the rent being reserved to S., his heirs and assigns, instead of being incident to the immediate reversion; and secondly, by reason of the covenant by S. to repair, rendering the defendant dispunishable for waste to that extent. *Yellowly* v. *Gower*, 24 L. J., Exch., 289.

8. An agreement by trustees of two properties held on different trusts for a mining lease of both at a rent of so much per acre worked:—Held, a breach of trust, and specific performance at the suit of the trustees refused. *Tolson* v. *Sheard*, 46 L. J., Ch., 815.

9. Tenant for life of estate, on which were mines opened, with power to let leases in possession for twenty-one years, reserving best rent, leases the mines, opened and unopened, for twenty-six years, without reference to the power, and before the expiration of a former lease, reserving ore as rent to him, his heirs

after her death to himself during his life, and after the death of the survivor for the benefit of their children. The settlement contained a power to S. during his life, and after his death to the wife during her life, and after the death of the survivor to the trustee, to renew leases for lives, and take fines on renewals, but so that the usual rents were still reserved. And it was declared that the trustee should hold all fines which he might take in trust for the child or children who should be then entitled to the inheritance of the premises. S. subsequently assigned his interest under the settlement to B. by way of mortgage. The trustee of the settlement disputed the right of S. to take the fines for his own benefit, claiming them on behalf of the wife. S. accordingly filed a bill against the trustee and B., praying that he might be declared entitled to take the fines on renewals of leases for his own benefit. S. afterwards became bankrupt, and his assignee obtained a supplemental order to carry on the suit:—Held, first, that S. was entitled to take the fines on renewals for his own benefit. *Simpson* v. *Bathurst*, *Shepherd* v. *Bathurst*, 5 L. R., Ch., 193; 18 W. R. 772; 22 L. T., N. S., 29.

Held, secondly, that inasmuch as the legal estate was outstanding and beyond S.'s control, and the trustee had interfered with his power of granting leases, he was entitled to bring a suit in equity for declaration of his rights. *Ib.*

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A power required that, in leases of premises then in lease, the rent reserved should not be less than the rent then payable out of the same premises. A lease of 1767 had demised quays and other premises, with liberty to receive quayage not exceeding 2*d.* per ton. A lease of 1827, made under the power, demised the quays and premises described as in the leases of 1767 together with the wharfage and quayage of all ships and vessels resorting to the quays and docks (without any limitation of the rate per ton), at a rent of the same amount as was reserved in 1767, to which it was objected that the same rent was not reserved, as the renewal included additional premises:—Held, not a valid objection, as the rent was not reserved out of the quayage, and

by the removal of the restriction the lessor passed nothing new. *Ib.*

By a subsequent lease of 1831, reciting that the unlimited quayage was included by mistake in that of 1827, the premises, as originally leased, were demised at the same rent and fine as in the lease of 1827, and the unlimited quayage at a small additional fine and rent:—Held, that the lessee could rely on the lease of 1831, which would have been valid if made in 1827, when the principal sum was paid, though, perhaps, impeachable if originating in 1831. *Ib.*

The nature of a right of quayage or wharfage considered. *Ib.*

1. Power reserved upon marriage settlement to tenants for life to grant or renew leases for lives, provided that a right of re-entry is reserved upon such leases for non-payment of rent, is well executed by lease for lives, provided a re-entry in case the rent remains in arrear fifteen days, and there is no sufficient distress on premises. *Smith* v. *Jersey* (*Earl*), 3 Bligh 290.

2. Toll reserved on a lease of a mine made by a tenant for life, and a power will go to the remainderman. *Basset* v. *Basset*, Amb. 843.

3. In a settlement, a power is reserved to tenant for life to make leases of all lands anciently demised, reserving the ancient rents, and of the other lands, reserving the best improved rents. Tenant for life being ill, and not having the counterparts of the old leases, makes a general lease to his sister of all the lands, paying for the lands that had been let the ancient and accustomed rents, and for the lands not usually let the full and improved rents and value thereof. Lease adjudged void by the Lord Keeper and Lord C. J. Trever; *contrà* the opinion of Lord C. J. Holt. *Orby* v. *Mohun*, 2 Vern. 531; Pre. Ch. 257; Gilb. Eq. Rep. 45. Affirmed 6 Bro. P. C. 145.

4. One having a power to lease at the most improved rent, agrees to grant a lease at a rent to be estimated at a fair valuation, without reference to improvements made by the lessee, but these improvements are deemed part of the consideration for the lease. *Quære*, whether such a lease is consistent with the terms of the power. *Price* v. *Assheton*, 1 Y. & Coll. 82; 4 L. J., N. S., Exch. Eq., 4.

5. A lease, under an unrestricted leasing power, including lands not comprised in the settlement, and by which one entire rent is not invalid; for, if the lessee be evicted, there would be an apportionment of the rent at law in favour of the person entitled under the settlement. *Muskerry* v. *Chinnery*, Ll. & G. *temp.* Sugd. 230. But see S. C. Ll. & G. *temp.* Plunk. 182.

Under a power to lease at any rent, a nominal rent may be reserved. *Id.* 225.

6. Under a power to lease at the best rent, the very highest rent that can be obtained is not required; and the true criterion is, whether the rent has been fairly obtained without any private advantage to the donee of the power: and therefore an agreement which the Court treated as subject to the same rule was enforced, though the rent obtained was below the offers made by less solvent tenants, and below the average at which the lands were valued, where the agreement was fairly made and was a prudent one. The cases on this subject reviewed. *Harnett* v. *Yielding* (2 Sch. & Lef. 29) commented on. *Dyas* v. *Cruise*, 8 Ir. Eq. R. 407; 2 J. & L. 460.

7. By a settlement made on the marriage of S., real estate was conveyed by him to trustees to his use until marriage, and after marriage to the use of B. and Y., their executors, administrators, and assigns, for the term of 500 years, upon trusts, and after the expiration or sooner determination thereof, and in the meantime subject thereto, to the use of S., the settlor, for life, without impeachment of waste, with remainder to other uses. The settlement contained a proviso that it should be lawful for S. during his life, from time to time, by deed, either referring or not referring to the power, to demise and lease the real estate for any term not exceeding twenty-one years, so that there should be reserved the best or most improved yearly rent, to be incident to the immediate reversion of the hereditaments so demised, that could be obtained for the same, and so that the lessee was not by any clause or words therein to be contained made dispunishable for waste, or exempted from punishment for committing waste. After the marriage S., by deed, leased part of the premises to the defendant for twelve years. The lease did not refer to the power, and the rent was reserved to S., his heirs and assigns. The defendant thereby covenanted to repair a blacksmith's shop, and all glass and leadwork of the windows, and all doors, locks, keys, fences, bridges, and works in such situation, manner, and form as should be determined by the surveyor of S., and to yield up the premises in repair to S., his heirs or assigns, at the expiration of the lease. S. covenanted with the defendant to maintain the messuages, buildings, and a draining mill in good and tenantable repair, except in respect of such repairs covenanted to be done by the defendant. S. died before the expiration of the lease, and the term of 500 years being still subsisting, the surviving trustee, at the expiration of the lease, brought an action against the defendant for breaches of covenant to repair and cultivate:—Held, that such action was not maintainable, for the lease, although good by way of estoppel between the parties to it, was void as between the plaintiff and the defendant, not being in accordance with the power; first, by reason of the rent being reserved to S., his heirs and assigns, instead of being incident to the immediate reversion; and secondly, by reason of the covenant by S. to repair, rendering the defendant dispunishable for waste to that extent. *Yellowly* v. *Gower*, 24 L. J., Exch., 289.

8. An agreement by trustees of two properties held on different trusts for a mining lease of both at a rent of so much per acre worked:—Held, a breach of trust, and specific performance at the suit of the trustees refused. *Tolson* v. *Sheard*, 46 L. J., Ch., 815.

9. Tenant for life of estate, on which were mines opened, with power to let leases in possession for twenty-one years, reserving best rent, leases the mines, opened and unopened, for twenty-six years, without reference to the power, and before the expiration of a former lease, reserving ore as rent to him, his heirs

and assigns:—Held, first, the former lease shall be presumed surrendered; secondly, the lease shall bind the remainderman for twenty-one years; thirdly, ore is *quasi* rent of mines; fourthly, evidence let in to prove the lease engrossed and executed after it bore date; fifthly, the rent reserved not being a gross sum for all the mines, but separate on each, the power is well executed as to the open mines, though not of mines unopened. *Campbell* v. *Leach*, Ambl. 740.

1. M. devised estates to trustees for his daughter, an infant, with power to trustees to demise and lease the same for any term not exceeding twenty-one years, "at the best yearly rent that could be gotten for the same, without taking any fine or premium, with power to appoint new trustees. In pursuance of this power the trustees, some time afterwards, appointed R. sole trustee, and conveyed to him the devised estate upon the trusts and subject to the powers expressed and declared by the will of M., and for "no other trust, intent, or purpose whatsoever." By an indenture of lease between R. and B. certain part of the premises, said to be described in and devised by the will of M., was demised by R. to B. for twenty-one years in consideration of the yearly rent of 1,100*l.*, the first five years of which rent was to be paid in advance, in a manner therein provided, and the remainder after the expiration of such five years, by equal quarterly payments:—Held, first, that enough appeared from the evidence to fix B., the lessee, with notice of the trustees' title. *Booth* v. *A'Beckett*, 1 Moo. P. C., N. S., 201; 9 L. T., N. S., 68.

Held, secondly, that as the granting of such a lease was a breach of the trusts of the will of M., the same ought to be declared void and set aside, and the premises assigned to the persons to be appointed trustees of the will of M. *Ib.*

2. A testator devised his real estates in strict settlement, making M. first tenant for life without impeachment of waste, and, after giving to male tenants for life powers to jointure their wives and provide portions for younger children, proceeded to authorise the tenants for life when in possession and the guardians of infant tenants for life in possession to demise any parts of the estates, except the mansion-house, for any term not exceeding twenty-one years at the best rent without fine or premium. He then empowered such tenants for life and guardians to grant any lease or leases of any mines or collieries, or of any parcels of land, for the purpose of digging for, winning, or gaining minerals or coal in any part of his estates "for such terms or number of years, and under and subject to such rents or reservations and agreements, as to such tenant for life or guardian or guardians shall seem reasonable and proper," and also to grant building or repairing leases for any term not exceeding ninety-nine years without any fine or premium. In 1843 M., the tenant for life, by a deed reciting the leasing power, in consideration of 6,000*l.* paid to him by C., demised the mines included in a mining lease made by the testator to E. in 1829, which would expire in 1848, to C. for ninety-nine years at a peppercorn rent, subject to redemption on payment of 6,000*l.* and interest. The deed contained an appointment of a receiver of the rents and royalties, payable by the present and future tenants, and did not oblige C. to work the mines; but the tenant for life covenanted to grant, or concur in granting, such further leases as C. should require:—Held, that this deed was a valid exercise of the power of leasing mines, and created a good legal mortgage for an absolute term of ninety-nine years. *Taylor* v. *Mostyn*, *Mostyn* v. *Lancaster*, 23 L. R., Ch. D., 583; 52 L. J., Ch., 848; 48 L. T. 715; 31 W. R. 686. Affirming 51 L. J., Ch., 696; 46 L. T. 648; 31 W. R. 3.

V. REVERSIONARY LEASES.

3. If power be reserved to make leases by covenant without transmutation of possession, Chancery will not help. *Anon.*, Cary 29.

4. A. had a power to make leases for twenty-one years in possession; he made one to commence *in futuro*, in trust for payment of debts. This being for payment of debts, was supported in equity. *Pollard* v. *Grenville*, 1 Ch. Ca. 10; 1 Ch. Rep. 185.

5. Although a lessor has power to lease in possession only, and not in reversion, yet an agreement entered into between lessor and lessee a short period before the expiration of an existing lease, for a renewal of the lease upon the same terms as before, is reasonable, and may be enforced in equity as between the agreeing parties, provided the effect of the agreement is, that the rent and covenants in the renewed lease are conformable with the terms of the power. *Dowell* v. *Dew*, 1 Y. & Coll. C. C. 345; 12 L. J., N. S., Ch., 158; 7 Jur. 117.

6. A lessee taking a reversionary lease from an executor, with full notice, is bound to show that such lease was properly granted by the executor in the due administration of his office. *Keating* v. *Keating*, Ll. & G. *temp.* Sugd. 133.

7. Where reversioner upon an estate for life, made a settlement on herself for life with power for her, being sole, to make leases for three lives in possession: and she and her husband in the lifetime of the tenant for life, made a lease for twenty-one years, *habend.* from the date: it was held, not pursuant to her power; for by making the marriage she put herself under the control of her husband. *Antrim* (*Marquis*) v. *Bucks* (*Duke*), 1 Ch. Ca. 17; Salk. 276; 2 Freem. 168.

In this case Lord K. took a diversity between a naked power which flows from an interest. *Ib.*

8. One under a power to lease for twenty-one years in possession, but not in reversion, granted a lease to his only daughter for twenty-one years, to commence from the day of the date:—Held, to be a good lease. *Pugh* v. *Leeds* (*Duke*), Cowp. 714.

9. A tenant for life having power to grant leases in possession may bind himself by covenant to grant a lease in reversion expectant on the determination of a subsisting term; but a trustee having a similar power cannot, for he is bound to exercise the power for the benefit of the estate. *Moore* v. *Clench*, 45 L. J., Ch., 80; 1 L. R., Ch. D., 447; 24 W. R. 169; 34 L. T., N. S., 13.

VI. UNOPENED MINES.

1. Tenant for life of estate, on which were mines opened, with power to let leases in possession for twenty-one years, reserving best rent, leases the mines, opened and unopened, for twenty-six years, without reference to the power, and before the expiration of a former lease, reserving ore as rent to him, his heirs and assigns:—Held, first, the former lease shall be presumed surrendered; secondly, the lease shall bind the remainderman for twenty-one years; thirdly, ore is *quasi* rent of mines; fourthly, evidence let in to prove the lease engrossed and executed after it bore date; fifthly, the rent reserved not being a gross sum for all the mines, but separate on each, the power is well executed as to the open mines, though not of mines unopened. *Campbell* v. *Leach*, Ambl. 740.

2. A settlement contained a power for the trustees, with the consent of the tenant for life, to demise the whole or any part of the trust estates, and the coal, minerals, and stone within or under the same, whether together or separately, and also all or any of the hereditaments and premises to be taken in exchange under the power in the settlement contained, and the coal, minerals, and stone within and under the same, whether together or separately, "so as that the lessees should not by any clause in the lease be dispunishable by waste." At the date of the settlement there was an old mine on the estate, worked from a shaft in the adjoining land, but no other mine was opened:—Held, that a mining lease, with powers to open new mines, was a valid exercise of the power. *Daly* v. *Bockett*, 3 Jur., N. S., 754; 34 Beav. 114; 5 W. R. 514.

3. As a lease of land with the mines, where there are open mines, does not justify the lessee in working unopened mines, so a power to lease such land with the mines does not authorise a lease of unopened mines. *Clegg* v. *Rowland*, 2 L. R., Eq., 160; 35 L. J., Ch., 396; 14 W. R. 530; 14 L. T., N. S., 217.

Therefore, where land containing an open mine was settled, "with the mines and minerals thereunder," with a power to the trustees of the settlement to lease, at a rack-rent, the premises therein comprised (not mentioning the mines), subject to a proviso, that "no lessee should be made dispunishable of waste":—Held, that a lease of unopened mines was not authorised by the power. *Ib.*

Held, also, that a trustee appointed subsequently to the lease, and ignorant of its existence, was not liable for want of diligence in allowing the tenant for life to receive the rents. *Ib.*

4. Two contiguous estates were devised to trustees upon trust for distinct *cestuis que trustent*. By an order made under the Settled Estates Act, power was given to the trustees to grant mining leases in conformity with and subject to the provisions of the Settled Estates Act; such leases to be granted with the consent of the respective tenants for life if of age. The trustees and the two tenants for life entered into an agreement with the defendants to grant them a mining lease of the two estates for forty years (or fifty years if the Court should consent); both estates were intended to be comprised in the same lease, and the rents and royalties were to be reserved as if they were one estate, and there was to be one shaft for working the minerals under both estates; and it was also agreed that the lessors should be at liberty to apply to the Court under the Settled Estates Act for further powers of leasing:—Held, that the trustees had no power to grant such a lease of the two estates, and specific performance of the agreement was refused. *Tolson* v. *Sheard*, 5 L. R., Ch. D., 19; 25 W. R. 667; 46 L. J., Ch., 815; 36 L. T., N. S., 756.

VII. OTHER CASES.

5. Power to lease does not authorise a sale of leasehold. *Gurney* v. *Gurney*, 3 W. R. 353; 3 Drew. 208; 1 Jur., N. S., 208; 3 Eq. Rep. 569.

6. Testator devised an estate to several persons for their lives successively, with power to grant leases under certain restrictions. The first tenant for life grants a lease to a person who had no notice of the power, or that the lessor was tenant for life only. A subsequent tenant for life brings an ejectment against the lessee, on the ground that the lease was not made according to the power. The Court will not prevent the lessee from setting up an old outstanding term created by the testator. *Goleborn* v. *Alcock*, 2 Sim. 552.

7. A., seised of an undivided moiety of Whiteacre, conveys it on his marriage in 1775 to the use of his first and other sons, reserving to himself a power of leasing for three lives. A. having subsequently purchased the other undivided moiety of Whiteacre, in 1785 leased the entire of Whiteacre to B. for lives renewable for ever. In 1797, on the marriage of G., A.'s eldest son, Whiteacre was conveyed by A. to the use of A. for life, remainder to the use of G. for life, remainder to such of the sons of G. as G. should appoint to; and A., in his covenant against incumbrances, excepted leases *bonâ fide* made by him. G., having appointed Whiteacre to his son W., died in the lifetime of A., leaving W., his eldest son, him surviving. On the death of A., W. filed his bill to set aside the lease of the moiety of Whiteacre, comprised within the settlement of 1775, as contrary to A.'s leasing power:—Held, that W., as claiming under the settlement of 1797, was bound by the lease of 1785, and could not set it aside. *Steele* v. *Mitchell*, 2 Dr. & Wal. 568; 3 Ir. Eq. R. 1.

8. A. and B., under the power of leasing, demised part of the settled estates to S., the wife of B., by way of jointure:—Held, that S., in respect of her life interest, was not liable to contribute to the charges on the estates. *Evans* v. *Evans*, 22 L. J., Ch., 785.

9. After a bill of foreclosure filed by mortgagee, and a receiver appointed, tenant for life of the mortgaged premises, with leasing power, makes leases. A bill is filed by a judgment creditor, who moves to set the premises pending this clause. Ordered to set, without prejudice to any right the tenants may have against their lessor, and they, as tenants from year to year to the receiver, being entitled to notice to quit. *Mansfield* (*Lord*) v. *Hamilton*, 2 Sch. & Lef. 28.

10. A testator gave to his trustees a special

power of leasing at their absolute discretion; which formed part of a special scheme of management of his mansion-house and estate for a limited period:—Held, in a suit for the execution of the trusts of the will, that the court would compel the trustees to exercise the power of leasing. *Tempest* v. *Camoys* (*Lord*) (No. 1), 21 L. R., Ch. D., 576. n.

1. A tenant for life had entered into a binding agreement for a building lease under a power, and the intending lessee had done everything requisite to entitle him to acquire the tenant for life to grant him a lease. The tenant for life died, leaving an infant tenant in tail, during whose minority the trustees had a power of leasing:—Held, that the trustees had power to grant a lease in accordance with the agreement. *Davis* v. *Harford*, 22 L. R., Ch. D., 128; 47 L. T. 540; 31 W. R. 61; 52 L. J., Ch., 61.

2. A testator devised real estate, the legal estate in which was outstanding in a mortgagee, to trustees, as to one moiety for A. for life, with remainder to his children, and as to the other moiety to B. for life, with remainder to her children, and directed that the trustees, or the survivor of them, or the executors or administrators of the survivor, "should and might" lease the property at rack-rent for any term not exceeding twenty-one years. The trustees disclaimed. A., who was the testator's heir at law, granted a rack-rent lease for twenty-one years:—Held, that the lease was void, as having been granted by a stranger to the power. *Robson* v. *Flight*, 34 L. J., Ch., 226; 11 L. T., N. S., 725; 5 N. R. 344; 3 De G. J. & S. 608. Reversing 10 Jur., N. S., 1228; 12 W. R. 195.

XXI. Powers of and Trusts for Sale.

I. *Creation and Existence*, 5882.
II. *Discretionary and Interference by the Court*, 5885.
III. *Who may Exercise*, 5887.
IV. *Consents and Requests*, 5892.
V. *Who may Purchase*, 5897.
VI. *Property Subject to*, 5897.
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IX. *Investment of Proceeds*, 5911.
X. *Breach of Trust*, 5912.
XI. *Injunction against Sale*, 5913.
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XV. *Rents and Profits pending Conversion.* See CONVERSION—LIFE, ESTATE FOR, VI.
XVI. *By Mortgagees.* See MORTGAGE, XVI.
XVII. *By Executors.* See EXECUTOR AND ADMINISTRATOR, XXI. AND XXII.

I. CREATION AND EXISTENCE.

1. *In General*, 5882.
2. *Whether a Trust or a Power*, 5884.
3. *Insertion of in Mortgages under Powers*, 5884.
4. *Insertion of in Mortgages by Client to Solicitor.* See FRAUD, II. VII. 4.
5. *In Mortgages generally.* See MORTGAGE, XVI. I.
6. *When a Usual Power.* See TRUSTS (EXECUTORY).
7. *Where Charge or Trust for Payment of Debts.* See EXECUTOR AND ADMINISTRATOR, XXII.
8. *Conversion by.* See CONVERSION, I. II. 9.
9. *Perpetuity and Remoteness.* See PERPETUITY.

1. In General.

3. Testator devised his real estate to his wife "for her own sole and separate use, to dispose of as she should think proper," and "out of her real and personal estate to provide for his children in such manner as to her should seem meet":—Held, that the widow had power to sell the real estate. *Pratt* v. *Church*, 4 Beav. 177. n. S. P. *Wood* v. *Richardson*, *id.* 174; 5 Jur. 623.

4. Devise to testator's wife, she paying his debts and 15*l.* to A. B., if so much can be spared, and rest of estate to go to A. B., after her death, gives her the fee and power of sale. *Dolton* v. *Heven*, 6 Madd. 9.

5. A testator, by his will, after disposing of three one-fifths of his residuary real and personal estate, gave another one-fifth in trust for his son William and his children; and the remaining one-fifth in trust for his daughter till twenty-five or marriage, with a direction, that, if she married under that age, her fifth should be conveyed and settled upon the trusts therein mentioned; and he gave the trustees a general power of sale during the continuance of the trusts thereby reposed in them. William survived the testator, and died, leaving infant children: and, upon the daughter's marriage under twenty-five, a settlement was executed, which, reciting that no part of the real estate had been sold, although it was intended that the same should be sold under the power contained in the will, assigned to trustees, their executors, etc., all the daughter's share of the moneys to be produced by the sale of the real estate, upon certain trusts in favour of her intended husband, herself, and her issue:—Held, as to William's fifth, that the power of sale under the will continued after his death; and that, although, as to the daughter's fifth, the power had determined upon her marriage, yet the settlement created a new power of sale by implication. *Wood* v. *White*, 1 Myl. & C. 460; 8 L. J., N. S., Ch., 209; 3 Jur. 117; 2 Keen 664; 7 L. J., N. S., Ch., 203.

6. B., by the fourth clause of his will, says, "That my eldest son and his issue, etc., shall after my death have all my whole estate, real and personal, except what I have given to my wife, and shall still give by other dispositions to her," etc.:—Held, that the exception takes out of this residuary devise only the interest given to the wife, and not the things themselves. The directing the trustee to dispose of all his real and personal estate, does not import a power to sell, but to manage it to the best advantage for the family. *Sheffield* v. *Orrery* (*Lord*), 3 Atk. 287.

1. Purchaser not compelled to take a doubtful title, viz., by executing a power of sale, introduced under a direction by a decree, establishing a will, to the Master to approve a proper settlement: the will not authorising the insertion of such a power; nor could it be sustained under a power by a former settlement; which, if not extinct by the failure of the limitations, and the union of the estate for life with the reversion, could not be duly applied to purposes clearly foreign to its original object; and, though purchasers are not put to exercise a very nice and critical judgment with regard to the purposes for which powers are created, it could never be intended to refer to a perfectly new set of limitations, in a new settlement, at a long subsequent period, under a disposition by the will of the owner of the fee, to be exercised, not for any purpose in the least degree connected with the settlement, but avowedly as an expedient to supply the want of a valid power in that settlement, and enable those whom he had made only tenants for life to dispose of the estate. *Wheate* v. *Hall*, 17 Ves. 80.

2. A. being tenant in tail of an estate, in remainder expectant on the death of B., entered into articles on his marriage, by which, after reciting that it had been agreed that the estate should, subject to B.'s life interest therein, and to the raising, by mortgage or otherwise, of any sum or sums not exceeding 15,000*l*., for A.'s use, be settled to the uses thereinafter expressed, he covenanted that he would, subject to the raising, by any way or means, and at any time or times, he should think proper, of the sum or sums before mentioned, by mortgage, annuity, or otherwise for his own benefit, and to any deed or deeds he might make for securing the repayment thereof and interest to all necessary acts for settling the estate subject to B.'s life-interest in the manner agreed upon:—Held, that A. was authorised to raise the 15,000*l*. by sale, and that he was justified in selling his interest in remainder in the whole of the estate, as the 15,000*l*. was nearly the full value of such interest. *Tasker* v. *Small*, 6 Sim. 625; 5 L. J., N. S., Ch., 321.

3. C., a solicitor, and one of three executors and trustees for sale, acted professionally in the management of the personal estate, and, also, by the authority of his co-trustees, conducted an attempted sale by auction of the real estate. A., another of the trustees, hearing that his son was in treaty for the purchase of the estate, wrote to C. to say that he (A.) would not take any interest either directly or indirectly in the matter; C. then, with the concurrence of the co-trustee, contracted to sell the estate by private contract to another person. On a bill filed by the purchaser to compel performance of this contract:—Held, first, that C. had not derived any general authority to sell by private contract, by reason of his employment as solicitor to the trust estate, or as agent to sell by public auction; and, secondly, that he had derived no special authority from A.'s letter to sell to any one but to A.'s son. *Bulteel* v. *Abinger* (*Lord*), 6 Jur. 410.

Semble, under the circumstances, A. could not have delegated to his co-trustees an authority to sell to his son, without reserving to himself a veto upon the contract. *Ib.*

4. By an indenture of settlement, certain estates were settled upon A. B. for life, with remainder to his son for life, with remainders over. A power was also given to the trustees to sell the estate during the lives of A. B. and his son. By a subsequent deed, A. B. conveyed his life estate to his son, and after his death to remain and continue to the several uses and estates, and upon the powers, provisoes, declarations, and agreements, expressed and declared, of and concerning the said hereditaments, by the previous indenture, ulterior to the limitations therein for the respective lives of A. B. and his son:—Held, that it was not intended under this clause to limit a new life estate to the son, without the subsequent powers, during his life, but that the estate was still subject to those powers which, in the first deed, were to be found subsequent and in addition to the limitations to the son for life, and that the trustees consequently retained the immediate power of sale. *Morgan* v. *Rutson*, 16 Sim. 234; 17 L. J., N. S., Ch., 419; 12 Jur. 813.

5. Power given by will and codicil to sell to certain persons at a fixed price, revoked by a subsequent codicil devising the premises to trustees to be sold for the payment of debts, and subject thereto upon the limitations of the will. *Bridges* v. *Rice*, 1 Jac. & Walk. 74.

Whether power in a will to sell several estates to certain persons at a fixed price, is entirely revoked by a codicil devising one of the estates to different uses, *quære*. *Ib.*

6. A testator devised a farm to his two sons, with permission to dispose of it to certain persons, if they thought proper; but if it should not be sold, he bequeathed it, after the decease of either of his sons, to the survivor, and directed that, after the death of both, it should be sold, and the money divided equally between the children of his sons:—Held, that the sons were only joint-tenants for life, with a power of sale: that they could make a good title, and give discharges for the purchase money; that they were joint-tenants for life of the purchase money; and that, upon the death of the survivor, it would devolve to their children. *Breedon* v. *Breedon*, 1 Russ. & M. 413; 8 L. J., Ch., 104.

7. Devise in trust to sell, and a charge to pay debts, give equally a power of sale. *Elliot* v. *Merriman*, 2 Atk. 43; Barnard. 78.

8. Testator devises to A. and B. (whom he appoints his executors), upon trust, to sell for such purposes as he shall hereafter appoint, and then directs his debts to be paid by his executors. Under this devise A. and B. are authorised to sell for payment of debts. *Barker* v. *Devonshire* (*Duke*), 3 Meriv. 310.

9. When real and personal estate are blended in a devise, and under that devise it may be necessary to raise money out of the estate, there is no implied power to sell the real estate. *Curling* v. *Austin*, 2 Dr. & Sm. 129.

10. A declaration in a settlement, which contains a power to vary securities, that real estate, purchased with the trust funds, shall be considered personal estate for the purposes of the settlement, is sufficient to give the trustees a power of sale of such real estate. *Tait* v. *Lathbury*, 11 Jur., N. S., 991.

Where a settlement contained a power for the trustees to sell out the trust funds, and invest the produce in real estate, which was to be considered as personal estate, and go accordingly, and also contained a power for the trustees and their heirs, executors, or administrators, to sell any of the trust stocks, funds, and securities to be purchased under the trusts thereinbefore declared:—Held, that the trustees had a sufficient power of sale to enable them to sustain a suit for specific performance against a purchaser of real estate, which had been sold by them in exercise of the power. S. C. 1 L. R., Eq., 174; 14 W. R. 216.

1. A settlement of personal estate contained a power to alter and vary, and a covenant to settle future acquired real and personal estate on similar trusts:—Held, that a power of sale might be introduced into a settlement of subsequently acquired real estate. *Elton* v. *Elton*, 27 Beav. 634.

2. Power of sale in a settlement rectified, on proof that it was not conformable with the contract. As to the necessity of a reconveyance in cases of rectification of a settlement, and as to its retrospective operation. Form of decree in such a case. *Malmesbury* (*Earl*) v. *Malmesbury* (*Countess*); *Phillipson* v. *Turner*, 31 Beav. 407.

3. Testatrix, by her will, declared that every person thereby made tenant for life should have such and the like powers of leasing, selling, and exchanging any part of the devised estate as were by her father's will given to the tenants for life and in tail mentioned in his will, or to the trustees thereof. It appeared that the father's will did not give a tenant for life or in tail any power of the leasing, selling, or exchanging, but gave trustees full power to sell and exchange the hereditaments therein comprised, and to give receipts for the purchase money:—Held, that tenant for life in possession of the estate devised by the testatrix had the same powers of selling and exchanging that estate as were by the father's will given to the trustees; but that such powers did not extend to giving receipts; and, *semble*, that the difficulties which might be met with in exercising such power of sale, in the absence of a power to give receipts, might be removed by paying the money into court under the Trustee Relief Act, stat. 10 & 11 Vict., c. 96, and that upon such payment the purchaser might safely complete. *Cox* v. *Cox*, 1 Kay & J. 251.

4. Power to lease does not authorise a sale of leaseholds. *Gurney* v. *Gurney*, 3 W. R. 353; 3 Drew. 208; 1 Jur., N. S., 298; 3 Eq. Rep. 569.

See also EXECUTOR AND ADMINISTRATOR.

2. Whether a Trust or a Power.

5. The proprietor of a newspaper by his will gave all his real and personal estate, including the proprietorship of the newspaper, to his eldest son and two others, as trustees upon trust to carry on the trade during the life of his wife, and for that purpose to set apart annually, as a reserve fund, one-fourth of the profits, and to divide the remainder in equal sixth parts between his wife and five children. He then proceeded as follows: "And in case any of my children shall survive my wife and die before he or she shall have received his or her share of the trust estate, and without leaving lawful issue, then I give such share equally between my surviving children, and the lawful issue of my deceased child, such issue taking their, his, or their parent's share only, equally amongst them if more than one. And from and after the decease of my wife (or during her life, if she and the majority of my children and my trustees shall think it proper and expedient so to do), at the sole discretion of my trustees to sell and absolutely dispose of all my real and personal estate, and my trade or profession, and the goodwill thereof, and to divide the proceeds among my wife and children, and their lawful issue, if the division be made in the lifetime of my wife, but if the division be made after her death, then amongst my children and their lawful issue only. I further declare my will to be that in case under the clause hereinbefore contained, it shall be agreed, or my trustees shall decide, to sell my stock in trade and proprietorship of the newspaper, and my sons, or any of them, shall by writing offer to purchase and carry on the same, the trustees or trustee of my will may, and they are hereby authorised and requested to, sell the same at 500*l.* less than the market price of such trade or profession":—Held, that these words created, not a mere power of sale, but an absolute trust for sale, subject to a discretion in the trustees as to the manner and time in which the sale should be carried out. *Minors* v. *Battison*, 46 L. J., Ch., 2; 1 L. R., App. Cas., 428; 25 W. R. 27; 35 L. T., N. S., 1.

6. A testator devised his real and personal estate to trustees upon trust, that a piece of land, part of his real estate, might be absolutely sold as soon as conveniently might be after his death, in such mode as his trustees should decide upon, but in case it should so happen that at that time the complying with his will in that particular would be a sacrifice of property, then it was his will that the piece of land should not be disposed of until such time as his trustees should judge most beneficial for his estate; and when all his children attained the age of twenty-one, then he devised his real and personal estate to his children equally as tenants in common. All the children attained the age of twenty-one. The trustees did not sell the piece of land:—Held, that the trustee had a discretionary power and not a trust for sale, and that there was no constructive conversion of the piece of land; and that consequently the heir-at-law and not the next of kin of a deceased child was entitled to the share of such child. *Glover* v. *Heelis*, 32 L. T., N. S., 534; 23 W. R. 677.

See also CONVERSION, I. II. 9.

3. Insertion of in Mortgages under Powers.

7. An equitable mortgagee, having taken from the administratrix of the mortgagor a legal mortgage containing a power of sale, and having filed his bill to enforce specific per-

formance of a contract for sale under the power, the Court declined to entertain the suit in the absence of the administratrix and the parties beneficially interested under the mortgagor. *Sanders* v. *Richards*, 2 Colly. 568.

1. Leave given to insert in a decree for raising payment of debts and costs by mortgage of an infant's real estate, a direction that the mortgage might contain a power of sale if the mortgagee required it. *Selby* v. *Cooling*, 23 Beav. 418.

2. A power was contained in a settlement for the trustees "by sale or mortgage, or by both or either or any of these ways and means," to raise certain moneys. This power was executed by a mortgage containing a power of sale:—Held, that this was a valid execution of the power. *Bridges* v. *Longman*, 24 Beav. 27.

3. An institution was incorporated by royal charter and deed of settlement, authorising the council or managing body to hold lands, tenements, or hereditaments, and to sell, grant, demise, exchange, and dispose of the same; but no sale, mortgage, incumbrance, or other disposition of any such lands, tenements, or hereditaments to be made except with the approbation and concurrence of a general meeting of the proprietors of the corporation. At a general meeting of the proprietors the council was authorised to mortgage the property of the corporation:—Held, that the council had no power to grant a mortgage with a power of sale. *Clarke* v. *Royal Panopticon*, 4 Drew 26; 3 Jur., N. S., 178; 27 L. J., Ch., 207; 5 W. R. 332.

4. A power of sale is incident to a mortgage; therefore, where trustees are directed to raise money by mortgage, they are justified in inserting a power of sale. The Court will, however, see that the exercise of it is properly guarded. *Re Chawner*, 38 L. J., Ch., 726; 8 L. R., Eq., 569; 22 L. T., N. S., 262.

5. An executor or administrator may not only pledge or mortgage the assets, but may also give to the mortgagee of leaseholds a power of sale, and give valid receipts for the purchase money. *Russell* v. *Plaice*, 18 Beav. 21; 18 Jur. 254; 23 L. J., Ch., 441; 2 Eq. R. 1149.

6. An executor may create a mortgage of his testator's property, with power of sale. *Cruickshank* v. *Duffin*, 18 L. R., Eq., 555; 41 L. J., Ch., 817; 26 L. T. 121; 20 W. R. 354.

II. DISCRETIONARY AND INTERFERENCE BY THE COURT.

7. Real estate being devised in trust to sell at such times or time after the testator's death as should seem most advisable, either together or in separate parcels, by auction or private contract, the trustees to stand possessed of the produce of such sale, and the rents and profits accruing in the meantime, upon the trusts of the devise:—Held, that trustees have not an unqualified discretion as to sale, or to entitle them to retain the accumulation of the mesne rents and profits to answer the exigencies of the will, but that *cestuis que trustent* were entitled to receive their respective proportions of the accruing rents, etc., from the end of the year after the death of testator. *Noel* v. *Henley*, 7 Price 242.

8. Testator after devising his real estates in strict settlement, subject to the payment of his debts and legacies, empowered his trustees, if they in their discretion should think fit, absolutely to sell his estate at C., and directed them to apply the proceeds on certain trusts therein before declared of his residuary personal estate. The sale of the estate was not required for payment of debts and legacies:—Held, that the power of sale vested in the trustees was discretionary, and that the residuary legatee of the personalty could not compel a sale. *Shipperdson* v. *Tower*, 1 Y. & Coll. C. C. 441; 6 Jur. 658.

9. Where trustees have a power of selling a real estate, or keeping it in land, at their option, it will be subject to the same trust as the personal estate is applied to, whether converted into money or not. *Cook* v. *Duckenfield*, 2 Atk. 563.

Whosoever takes under a power, takes from the grantor, and not from the power itself. *Id.* 565.

A man, by empowering other persons to dispose of his estate, disinherits his heir as much as by his own actual disposition. *Id.* 567.

Where testator says, "I will my heir shall sell the land," without mentioning for what purpose, he is not obliged to sell; but if he appoints his executor to sell, it is turned into personal assets, and leaves no resulting trust in the heir. *Ib.*

10. E. D. was beneficially entitled, under his marriage settlement, to an estate for his life, and to the ultimate reversion in fee in default of issue male; and the trustees of the settlement had a power to sell at the request and by the direction of the tenant for life. There was issue of the marriage. E. D., acting as absolute owner, entered into a contract by correspondence to sell the estate to T., and the trustees afterwards refused to concur in the sale:—Held, on a bill for specific performance, the vendor was bound to perform; that the vendor ought not to be decreed to request or direct the trustees to execute a conveyance, unless the trustees ought to comply with the request; and that the trustees had a discretion, under the power of sale, which the Court had no power or jurisdiction to control. *Thomas* v. *Dering*, 1 Keen 729; 6 L. J., N. S., Ch., 267; 1 Jur. 211, 427.

11. M. devised all his real estate and hereditaments upon certain trusts, and desired that if his godson, C., should take orders, and be in the opinion of the trustees, or the major part of them, qualified to hold the rectory of Broome, they, or the persons for the time being entitled to present to that rectory, should present him thereto. By a codicil M., after reciting that he was owner of several other rectories, and that he had sold the next presentation to Broome, declared it to be his will that if, when C. was duly qualified to be presented, the trustees should be unable to present him to Broome, they should present him to the first of the other rectories which should fall vacant after his being qualified to hold the same:—Held, that the trustees had a discretionary power to sell the next presentation to any of the advowsons. *Cust* v. *Middleton*, 11 W. R. 456; 1 N. R. 508; 9 Jur., N. S., 709.

1. Where trustees, having a power of sale, disclaim, the Court can exercise the discretion of the trustees, and sell if necessary. *Browne* v. *Paull*, 16 Jur. 707.

2. If a trustee, having discretion to sell trust property, submit to a decree for sale, the Court is therefore bound to carry the sale into execution. *Polley* v. *Seymour*, 2 Y. & Coll. 708; 7 L. J., N. S., Exch. Eq., 12; 1 Jur. 958.

3. A testator gave all his property to trustees upon trust, as to the real estate, to manage and receive the rents, with powor to grant leases, and with power also (if they should consider it advisable, but not otherwise) to sell in such manner, at such time, and for such price as they should think proper, and to invest the proceeds, together with his residuary personal estate, in the securities therein mentioned. The income of the realty, until sale, and of the produce, if and when sold, together with the income of the securities arising from his residuary personalty, were given to the testator's widow for life, and after her death, the trustees were directed to sell so much of the said securities as would pay certain legacies; and the income of the remainder of the said securities and of his real estate, if not then sold, and until sale, and of the produce thereof, if and when sold, were given to A. for life, with remainders over:—Held, that the power of sale, though in terms discretionary, was conferred upon the trustees for the purposes of the will, and that, inasmuch as the proceeds of sale were applicable to the payment of the legacies, it was the duty of the trustees to exercise the power for the purpose of raising the legacies, the personal estate having proved insufficient. *Nickisson* v. *Cookill*, 2 N. R. 557; 9 Jur., N. S., 975; 32 L. J., Ch., 753; 11 W. R. 1082; 8 L. T., N. S., 778.

4. A direction by a testator that his trustees shall stand seised and possessed of his real and personal estate, upon trust to raise and pay an annuity, and subject thereto to raise out of his real and personal estate a sufficient sum to make up, with what his daughter A. had received on her marriage, an amount equal to the property his other children would be entitled to under his will, and a devise of all his real estate and the residue of his personal estate to his six other children, as tenants in common, and until a sale of all his real and personal estate should be made; and in order that no such sale should be required, to ascertain the amount of the share of his daughter A., he authorised his trustees, if they should think fit, to cause a valuation to be made of his real and personal estate, and according to its amount, after deducting debts, etc., to fix the share of his daughter A., which should be accepted by her; with a further direction that she should not be entitled to any interest on her share, until each of his other children had received interest on a sum equal to the amount previously advanced to her; and that no valuation should be required to be made until each of the other children had received such equal sum; and a clause declaring that the receipts of the trustees shall be sufficient discharges for any money payable to them under his will, and that the person paying it shall not be liable to ascertain the necessity or regularity of any mortgage, sale, or disposition under the trusts or the will:—Held, that the trustees had a power of sale of the whole real estate of the testator, which it was at their discretion to exercise in case they did not think fit to proceed by way of valuation. *Bird* v. *Fox*, 11 Hare 40.

5. A discretionary power of sale held not to have been put an end to during the life of the tenant for life by the fact that all the reversioners had acquired vested interests in their shares. *Biggs* v. *Peacock*, 20 L. R., Ch. D., 200; 51 L. J., Ch., 555; 46 L. T. 582; 30 W. R. 605. Affirmed 52 L. J., Ch., 1; 47 L. T. 341; 31 W. R. 148; 52 L. J., Ch., 1.

6. Two trustees having power to sell the freehold property of an infant at the request of the guardians, and one trustee having declined upon such request to exercise the power of sale, the Court refused to control the discretion of the trustees by ordering them to sell the estate—there being no absolute necessity for raising money and the existing income being sufficient to keep down the charges upon the estate—notwithstanding that the effect of the sale would be to increase very considerably the income of the property. *Camden* (*Marquis*) v. *Murray*, 16 L. R., Ch. D., 161; 50 L. J., Ch., 282; 43 L. T. 661; 29 W. R. 190.

7. Independently of the cumulative powers of sale given to tenants for life by the Settled Land Act 1882, the tenant for life, and the trustees under a will which gives them power to sell the estate at the request and by the direction of the person or persons for the time being entitled to the actual freehold of the devised property, will not be restrained from selling the estate at the request and for the benefit of the tenant for life on merely speculative evidence, adduced by the remainderman objecting to an immediate sale, of an expected future increase in the value of the property from the development of coal mines, and the construction of a railway through the estate. *Thomas* v. *Williams*, 24 L. R., Ch. D., 558; 52 L. J., Ch., 603; 49 L. T. 111; 31 W. R. 943.

8. Where absolute discretion has been given to trustees as to the exercise of a power the Court will not compel them to exercise it, but if they propose to exercise it, the Court will see that they do not exercise it improperly or unreasonably. Where the power is coupled with a trust or duty the Court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bonâ fide* exercise of it. *Tempest* v. *Camoys* (*Lord*) (No. 2), 21 L. R., Ch. D., 571; 51 L. J., Ch., 785; 48 L. T. 13; 31 W. R. 326.

A testator gave his trustees a power to be exercised at their absolute discretion of selling real estates, with a declaration that the proceeds should be applied, at the like discretion, in the purchase of other real estates. He also gave them power at their absolute discretion to raise money by mortgage for the purchase of real estates. A suit having been instituted for the execution of the trusts of the will, and a sum of money, the proceeds of the sale of real estate, having been paid into court, one of the trustees proposed to purchase a large estate and to apply the fund in court in part payment of the purchase money, and to raise the remainder of the purchase money by

mortgage of the purchased estate. The other trustee refused to concur in the purchase:—Held, that the Court could not control the dissentient trustee in the exercise of his discretion in refusing to make the purchase, or in refusing to exercise his power of raising money by mortgage for the proposed purpose. *Ib.*

1. The proprietor of a newspaper by his will gave all his real and personal estate, including the proprietorship of the newspaper, to his eldest son and two others, as trustees, upon trust to carry on the trade during the life of his wife, and for that purpose to set apart annually, as a reserve fund, one-fourth of the profits, and to divide the remainder in equal sixth parts between his wife and five children. He then proceeded as follows: "And in case any of my children shall survive my wife and die before he or she shall have received his or her share of the trust estate, and without leaving lawful issue, then I give such share equally between my surviving children, and the lawful issue of my deceased child, such issue taking their, his, or their parent's share only, equally amongst them if more than one. And from and after the decease of my wife (or during her life, if she and the majority of my children and my trustees shall think it proper and expedient so to do), at the sole discretion of my trustees, to sell and absolutely dispose of all my real and personal estate, and my trade or profession, and the goodwill thereof, and to divide the proceeds among my wife and children, and their lawful issue, if the division be made in the lifetime of my wife, but if the division be made after her death, then amongst my children and their lawful issue only. I further declare my will to be that in case under the clause hereinbefore contained, it shall be agreed, or my trustees shall decide, to sell my stock in trade and proprietorship of the newspaper, and my sons, or any of them, shall by writing offer to purchase and carry on the same, the trustees or trustee of my will may, and they are hereby authorised and requested, to sell the same to them at 500*l.* less than the market price of such trade or profession":—Held, that these words created not a mere power of sale, but an absolute trust for sale, subject to a discretion in the trustees as to the manner and time in which the sale should be carried out. *Minors* v. *Battison*, 46 L. J., Ch., 2; 1 L. R., App. Cas., 428; 25 W. R. 27; 35 L. T., N. S., 1.

Two of the trustees, during the life of the widow, filed a bill for administration of the estate, and for an inquiry whether it would be fit and proper, and for the benefit of all parties, that the business should be carried on:—Held, that by so doing they had surrendered to the Court their discretion to postpone the sale, if such discretion ever existed. *Ib.*

III. WHO MAY EXERCISE.

1. *In General*, 5887.
2. *On Appointment of New Trustees*, 5888.
3. *Surviving Trustee*, 5889.
4. *Assignee or Devisee of Surviving Trustee*, 5890.
5. *On Disclaimer by Trustee*, 5892.

1. In General.

2. Who is to execute power of sale of real estate, is implied to be in him through whose hands the fund is to pass. *Bentham* v. *Wiltshire*, 4 Madd. 44.

3. Lands are devised to A. and B., and to the heirs of the survivor, in trust to sell: though the inheritance be in abeyance, yet the trustees, by a fine, may make good title by estoppel. *Vick* v. *Edwards*, 3 P. W. 372.

4. Where one of two trustees is absent in America, the other is an "incapacitated" person under the London Bridge Acts, and consequently is invested with the power to sell, given to such persons by virtue of those Acts. *Exp. Tatham*, 3 Y. & Coll. 67; 7 L. J., N. S., Exch. Eq., 64; 2 Jur. 440.

5. The trustees of a settlement had vested in them a power of leasing during the minority of the beneficial owners, a power of sale and exchange at the request of the tenant for life, and a power to cut timber, but they had no legal estate, except to preserve contingent remainders. The first tenant for life demised his own estates to the trustees in fee, to the same uses and subject to like powers as the settled estates stood limited:—Held, that the powers over the devised estates were exercisable by the trustees of the settlement, and not by the trustees of the will. *Taylor* v. *Miles*, 29 Beav. 411.

6. A discretionary trust for sale cannot (as may a power simply collateral) be exercised by an infant. R. devised real estate to trustees, one of whom was an infant, for sale as they should think expedient. The trustees sold to K., who, upon disputes arising, filed a bill for specific performance:—Held, that the contract could not be enforced. *King* v. *Bellord*, 1 Hem. & M. 343; 32 L. J., Ch., 646.

7. In 1835 B. and his wife, who had power to appoint hereditaments, and who "were desirous of exercising the power of appointment," appointed and conveyed the hereditaments to two trustees, their executors, administrators, and assigns, only, upon the trusts therein declared for sale, and after the payment of a mortgage debt and expenses, for distribution of the proceeds, in seven equal parts, for the benefit of the seven children of B. and his wife. On the sale of the hereditaments, after the death of B. and his wife, the purchaser objected to the title, the word "heirs" having been omitted from the deed:—Held, that the intention of B. and his wife was to vest the legal estate in the trustees; that the heir-at-law was a trustee; and that the legal estate must by an order be vested in trustees to be appointed by the Court. *Dilrow* v. *Bone*, 8 Jur., N. S., 276; 3 Giff. 538; 10 W. R. 437; 6 L. T., N. S., 71; 31 L. J., Ch., 417.

8. A testator devised and bequeathed his real and personal estate to trustees for sale and conversion, with ample powers as to the time, mode of sale, etc. By a codicil he revoked the devise to the trustees and appointed other trustees in their stead; amongst them a lady, then a spinster, who afterwards married, before the exercise of the power of sale. The trustees subsequently put up part of the real estate for sale by public auction, and it was purchased. The vendors' solicitors delivered the abstract of title; the

purchaser was willing to accept it, and prepared the draft of the necessary conveyance. The vendors then objected that there was no contract, the husband of the married trustee not assenting thereto, and that the married trustee could not join in any conveyance:—Held, that it was not a binding contract on the husband and wife. *Avery* v. *Griffin*, 18 L. T., N. S., 849.

1. The concurrence of executors having under a will an implied power of sale for payment of debts is not necessary to a conveyance by a devisee in trust for sale under the same will. *Hodkinson* v. *Quinn*, 1 John. & H. 303; 7 Jur., N. S., 64; 30 L. J., Ch., 111; 9 W. R. 197; 3 L. T., N. S., 804.

2. A trustee, without the authority of his co-trustees, signed an agreement for the sale of trust property. In an action for specific performance, to which the co-trustees were not parties:—Held, that specific performance could not be ordered either as to the whole or as to the part in which the contracting trustee had a beneficial interest. *Naylor* v. *Goodall*, 47 L. J., Ch., 53; 37 L. T. 422; 26 W. R. 162.

3. A power of sale given by a testator to his executors or administrators may be exercised by an administrator *durante minore ætate*. *Monsell* v. *Armstrong*, 14 L. R., Eq., 423; 41 L. J., Ch., 715; 20 W. R. 921.

4. Where there is a general charge of debts, but no legal estate is given, the executors may have implied authority to convey the legal estate in order in raise the money to satisfy the charge; but where there is a devise of the legal estate to a particular person, and the estate is charged with payment of debts or legacies, the money must be raised through the instrumentality of the devisee, and he is the only person that can make a legal title. *Colyer* v. *Finch*, 5 H. L. Ca. 905; 3 Jur., N. S., 25; 25 L. J., Ch., 65.

5. Where a testator has charged his real estate with the payment of a sum of money, he is to be taken to have given an implied power of sale to some one. The donee of the power is to be ascertained from the whole of the will. *Hidgforth* v. *Armstead*, 2 Kay & J. 333; 25 L. J., Ch., 237; 4 W. R. 279.

A testator devised his real estate to the use of A. and B., during the life of C. (a married woman), upon trust for her, with remainder to the use of the right heirs of C., and charged such real estate with the payment of 700*l.* to D., on her attaining twenty-one:—Held, that A. and B. having occasion to sell the estate for the purpose of raising the amount, they had a power of sale during the life of C. *Ib.*

See also Executor and Administrator, XXXII.

2. On Appointment of New Trustees.

6. Power of sale to be exercised with consent of three trustees, their heirs and assigns, and the trustees or the survivor, his executors, to give receipts. A new trustee is appointed in the place of one who retires; another trustee dies. Whether the power can be exercised with the consent of the continuing and the new trustee, *quære*. *Hall* v. *Dewes*, Jac. 189.

7. A power of sale in a settlement was given to A. and B., the trustees, to preserve contingent remainders, and the survivor of them, and the executors and administrators of the survivor:—Held, that trustees appointed by the Court in the place of A. and B. could not exercise the power. *Newman* v. *Warner*, 1 Sim., N. S., 457; 20 L. J., N. S., Ch., 654.

8. By a settlement lands were assured to A. and B. upon certain trusts, with a power, in case they or either of them or any trustee or trustees to be appointed under the power should die, or become unwilling to act, for the settlor during his life, and after his decease for the acting trustees or trustee for the time being, or for the executors or administrators of any surviving trustee, to nominate any fit person or persons to supply the place of the trustees or trustee so dying or becoming unwilling to act. A. never executed the deed, nor acted. After A.'s death B., being desirous of retiring, nominated C. to be a new trustee, and conveyed to C. all the trust estate. After B.'s death, on account of doubts as to the validity of this appointment the executor of B. executed a deed appointing C. and D. to be trustees of the settlement in the place of the original trustees; and, by the same deed, C. conveyed the property to the use of himself and D. They then sold the trust estate under a power of sale in the settlement:—Held, that the two new trustees were well appointed, and had validly exercised the power of sale so as to exonerate the purchasers from responsibility. *Miller* v. *Priddon*, 1 De G. M. & G. 335; 21 L. J., N. S., Ch., 421. Affirming 18 L. J., N. S., Ch., 226.

The bill contained an allegation that the new trustee firstly appointed was, when the sales were made, the sole trustee of the settlement. *Semble*, that this allegation would not have precluded the plaintiff from insisting upon the invalidity of the appointment of that trustee if the appointment had been invalid. *Ib.*

9. Testator devised his real estates to A., B., C., and D., and their heirs, on certain trusts, which required the legal estate to be vested in them, and gave a power of sale to them or the survivors or survivor of them, or the heirs, etc., and declared their receipts or receipt to be good discharges to a purchaser; but if any of them should die or decline to act, that it should be lawful, and he thereby willed and directed, that the survivors of them should immediately, or within two months afterwards, by any deed nominate some fit person to be a trustee in his place. D. died; and A. and B. by one deed, and C. by another (both of which were executed more than two lunar months, but not less than two calendar months, after D.'s death), nominated a new trustee, but did not convey the legal estate to him. A., B., C., and the new trustee agreed to sell the estates to M., who objected to complete his purchase: first, because the appointment of the new trustee had not been made within two lunar months; secondly, because it had not been made by one single deed; and, lastly, because the power of sale was suspended during the vacancy in the trust. The Court overruled the objections, but held, that the new trustee had not been duly appointed, because no conveyance had been executed to him; notwithstanding which, that A., B., and C. could make a good

title, and give an effectual discharge for the purchase money. The Court held also that the new trustee, though not duly appointed, might join with A., B., and C. in a suit for a specific performance. *Warburton* v. *Sandys*, 14 Sim. 622; 14 L. J., N. S., Ch., 431; 9 Jur. 503.

1. Testator devised real estates to A., B., and C. in trust for sale, and directed that in case the trustees or any of them should die or be desirous of being discharged, or refuse or decline or become incapable to act, it should be lawful for the surviving or continuing trustees or trustee by deed, etc., to nominate, substitute, or appoint, any person or persons to be a new trustee or trustees, in the stead of the trustee or trustees so dying, etc. A. died in the testator's lifetime. After the testator's death, B. and C. declined to act in the trusts, and appointed D. and E. trustees in their place. Shortly after this appointment B. died, and D. had since died:—Held, that the appointment of D. and E. was invalid, and that a title could only be made to the property by C. appointing trustees in the room of A. and B., and that such new trustees and C., or such new trustees and a trustee to be appointed by them and C., in the room of C. retiring, could make a good title. *Nicholson* v. *Wright*, 5 W. R. 431; 26 L. J., Ch., 312; 3 Jur., N. S., 313.

2. Testator devised his real and personal estate to trustees, to be sold for the benefit of his children, and directed that their receipts should be sufficient discharges. The children filed a bill to have the will established and the trusts performed. At the hearing, the bill was dismissed against the heir, and the Court did not establish the will, but made a decree affecting the personal estate only. The suit afterwards became abated, and was not revived. On the death of the surviving trustee, another suit was instituted for the appointment of new trustees, which was done. The new trustees then sold part of the testator's real estates to the plaintiff, who filed a bill for a specific performance:—Held, that, the former suit having been dismissed as against the heir, without the will being established, no suit was pending for the administration of the testator's real estates, and that the new trustees had the same power of giving receipts as the original trustees had. *Drayson* v. *Pocock*, 4 Sim. 283.

3. Trustees had a power of sale over a real estate vested in them, and to give good discharges for the purchase money. The tenant for life had a power to appoint new trustees, and thereupon the trust estate was to be conveyed to the old and new trustees. In 1857 A. was appointed a new trustee, but before any conveyance had been made to him, the estate was sold, and conveyed to a purchaser, and the purchase money was paid to the old and new trustees:—Held, that the purchaser had obtained a good discharge for the purchase money. *Welstead* v. *Colvill*, 28 Beav. 537.

4. By marriage articles a power of disposition was given to the wife with the consent of the undersigned trustees:—Held, that new trustees appointed by the Court might give the required consent. *Byam* v. *Byam*, 3 W. R. 95; 19 Beav. 58; 24 L. J., Ch., 209; 1 Jur., N. S., 79.

5. A husband left real estate on trust for his wife for life, and, after her death, for his son for life, with further trusts, and made his wife and son executors, and appointed strangers trustees, giving the trustees a power of sale and power to appoint new trustees, the latter exercisable with the consent of the tenant for life for the time being. Shortly after his death the last remaining trustee appointed the wife and son to be trustees, and he and the wife died. The son then contracted to sell the estate under the power:—Held, that he could validly exercise the power of sale, for, though the Court will not appoint a tenant for life to be trustee, such an appointment out of court is valid; and there was nothing in the will specially disqualifying the son from becoming trustee. *Forster* v. *Abraham*, 43 L. J., Ch., 199; 17 L. R., Eq., 351; 22 W. R. 386.

6. Real estate was settled by will on D. for life, with remainders over, and the will appointed two trustees, and empowered them to sell at the request and by the direction of the person entitled to the actual freehold, with the usual provisions for reinvestment in land and interim investment in other securities. The will also gave a power to appoint new trustees vested in the same person. One of the trustees was dead, D., who was over eighty years of age, proposed to sell the estate. The remaindermen brought this action for the appointment of a new trustee, and to restrain the sale as improper, adducing evidence to show that the estate would sell to better advantage at a future date, owing to the existence of minerals at present unworked, and a projected railway which would pass through the estate. D. had no reinvestment in land in view, and proposed to invest in consols. After action brought, the Settled Land Act 1882 came into operation; and shortly before the action came on for trial D., under the power in the will, appointed a new trustee without referring the appointment to the Court. The trustees consented to the proposed sale:—Held, that D. was entitled to sell the estate as well under the power in the will as under the Settled Land Act. *Thomas* v. *Williams*, 24 L. R., Ch. D., 558; 52 L. J., Ch., 603; 49 L. T. 111; 31 W. R. 943.

Held, also, that the new trustee was properly appointed, notwithstanding the pending action. *Ib.*

3. Surviving Trustee.

7. Power of sale given to three trustees:—Held, not to be well executed by two surviving trustees. *Townshend* v. *Wilson*, 3 Madd. 261.

8. Testator appointed three persons and their respective heirs and assigns his executors, and gave to them and to their respective heirs and assigns all his real and personal estates, in trust for the purposes after set forth; and first, that they and their respective heirs and assigns should sell his real estates; and he empowered them and their respective heirs and assigns to convey the estates, and to give receipts for the consideration money. He then requested the executors of his will to sell his farming stock, furniture, etc., and out of the moneys so arising, and all other portions of his personal estate, he required them and their respective heirs and assigns to pay all his debts, etc.

One of the trustees and executors died. The two survivors agreed to sell the real estates. The Court, in a suit for a specific performance of the agreement, rejected the word "respective;" and held that the two surviving trustees and executors could sell and convey the estates to the purchaser; and that the debts were charged on the proceeds of the real estates, and, consequently, that the receipt clause was unnecessary. *Jones* v. *Price*, 11 Sim. 557; 10 L. J., N. S., Ch., 195; 5 Jur. 719.

1. A power of sale, and to give receipts in a mortgage given to the two mortgagees, their heirs and assigns, it being declared that the mortgage money was advanced by them out of moneys in their possession on a joint account:—Held, to be exercisable by the survivor. *Hind* v. *Poole*, 1 Kay & J. 383; 1 Jur., N. S., 371.

A fortiori where the proceeds of the sale were to be applied to reimburse "themselves and himself," all expenses which "he or they" should be put to in making the sale, etc., and then to reimburse "themselves and himself," the mortgage money and interest, and it was declared that the receipts of the "survivor" of them should be good discharges for the mortgage debt and interest. *Ib.*

2. A testator, in 1843, devised certain freehold estates, and all other his real and personal estate, to A. and B., their executors and administrators, upon trust to raise 2,000*l.*, and upon other trusts. A. survived B.:—Held, that A. could execute the power by selling part of the freehold estates. *Lane* v. *Debenham*, 1 W. R. 465.

Where there was a devise and a bequest of freehold and other property, and all other the testator's real and personal estate, to two persons, their executors and administrators, upon trust, by sale or otherwise, at their discretion, to raise and invest a certain sum of money, and apply the interest in the maintenance and education of the testator's daughter, until the age of twenty-one, and then pay the same to her for her separate use, one of the devisees in trust after the death of the other, but during the lifetime of the daughter, and while, therefore, it was necessary that the charge should be raised, proceeded to sell the estate:—Held, on the objection to the title, that the surviving devisee in trust might exercise the option of selling, and the power of sale; and that an application in such a case for the direction of a court of equity was unnecessary. S. C. 11 Hare 188; 17 Jur. 1005.

3. Testator, after directing all his just debts to be paid, gave his personal estate and a freehold house, of which he was seised in fee, to his wife for life, with liberty to sell it in case a good offer should be made, and to invest the proceeds in the funds for her benefit during her life; and he directed that, at his wife's death, the house, if not previously sold, should be sold (but without saying by whom), and that the proceeds, together with his personal estate, should be divided amongst the children of his brother and sister, and he appointed his wife his executrix, and requested J. H. F. and R. C. jointly with her to become the executors and trustees of the will. J. H. F. and the testator's widow proved the will; R. C. died in the lifetime of J. H. F. and the widow, without having proved it. The widow died twenty-five years after the testator:—Held, that J. H. F. had power to sell the house, and to give a receipt for the purchase money. *Forbes* v. *Peacock*, 11 Sim. 152; 9 L. J., Ch., 367; 6 Jur. 476.

4. Where a naked power is given to several, it cannot be exercised by the survivors; but if a power be annexed to an office, any person filling the office may execute it. *Brassey* v. *Chalmers*, 16 Beav. 231. S. C. on appeal, 4 De G. M. & G. 528.

Power "to my executors hereinafter mentioned, with the approbation of my trustees for the time being," to sell real estate:—Held, by the Master of the Rolls, upon the context, not to authorise a sale by the survivor of the executors; but the Lords Justices dissented from this decision. *Ib.*

5. The circumstance of the tenant for life of real estate being the sole surviving trustee in whom the power of sale is vested is no objection to a sale under the power. *Forster* v. *Abraham*, 22 W. R. 386; 43 L. J., Ch., 199; 17 L. R., Eq., 351.

6. A husband, after stating that he was desirous that a farm which he occupied should be carried on during the life of his wife for the maintenance, support, and benefit of herself and all his children, and that upon her death it be fairly and equally divided among "all" his children, and that the property which his three children by a former marriage had derived should be brought into hotchpot from the time of his death, so as to form one common fund, appointed his wife "and her two brothers, W. C. and R. C., trustees and executors" of that his will; and for the purpose of management authorised and empowered them to sell and convert into money all or any part of his real and personal estates, or to mortgage or let the same or any part, and invest the proceeds as therein mentioned. The testator directed and empowered his trustees and executors to carry on the farm by and out of his assets for the maintenance, support, and benefit of his wife and children; and subject thereto declared that his real and personal estate and the proceeds should be held in trust for all his aforesaid children in equal shares; the personal property to which the children by his first marriage had become entitled being brought into hotchpot, to be vested interests at twenty-one, or on death under that age leaving lawful issue:—Held, that upon the death of the widow the surviving trustees and executors had power to sell and convey the real estate without the concurrence of the children. *Re Cooke*, 4 L. R., Ch. D., 454.

4. Assignee or Devisee of Surviving Trustee.

7. A trust for sale vested in A. and his heirs cannot be executed by an assignee of A. *Bradford* v. *Belfield*, 2 Sim. 264.

8. Testator devised his real estates to A., B., and C., in trust that they, or the survivors or survivor of them, or the heirs of the survivor, should, as soon as conveniently might be after his decease, but at their discretion, sell the same; and he empowered them and their heirs to make contracts with and conveyances to the purchasers; and declared that the receipts of them, or the survivors or survivor of them, or

the heirs, executors, or administrators of such survivor, should be good discharges to the purchasers; and he directed that they, their heirs, administrators, and assigns should hold the proceeds of the sale upon certain trusts. A. and B. disclaimed, and C. alone acted. He devised the estates to M. and N., upon the trusts affecting the same. After his death, M. and N. agreed to sell the estates to P.:—Held, that M. and N. were not entitled to execute the trust for sale, as they were the devisees and not the heirs of C. *Cooke* v. *Crawford*, 13 Sim. 91; 11 L. J., N. S., Ch., 406; 6 Jur. 723.

1. A testator gave a power of sale to two trustees and the survivor, "his executors and administrators":—Held, that a title dependent on a sale by the devisee in trust of the survivor was too doubtful to force on a purchaser; and held, secondly, that the defect was cured, by the release of all the *cestuis que trustent* to the representatives of the surviving trustee. *Macdonald* v. *Walker*, 14 Beav. 556.

Consideration of the cases of *Cooke* v. *Crawford* (13 Sim. 91) and *Titley* v. *Wolstenholme* (7 Beav. 425). *Ib.*

2. Copyhold hereditaments were devised to three trustees and their "heirs, executors, and administrators," in trust for two tenants for life successively, with a power to the trustees and the survivors and survivor of them, his heirs, executors, or administrators, to sell the same. The survivor of the three trustees devised all estates vested in him as trustee to two trustees, whom he also appointed his executors, of whom one was his customary heir; the two contracted to sell, and the purchaser declined to complete. On a special case, stated for the opinion of the Court:—Held, that the title was too doubtful for the Court to compel the purchaser to take it. *Wilson* v. *Bennett*, 5 De G. & Sm. 475; 16 Jur. 966; 21 L. J., Ch., 741.

3. Devise to four trustees and the survivors and survivor of them, and the heirs and assigns of such survivor for ever, in trust, that they, the survivors and survivor of them, and the heirs and assigns of such survivor, should sell the devised estates. The devisees of the surviving trustee under A.'s will put up the property for sale. *Semble*, that they could make a good title under the trust to sell. *Cooke* v. *Crawford* (13 Sim. 91) observed upon. The plaintiff in a suit for specific performance averred that everything in respect of title that he was bound to show had been shown, at the time when notice to vacate the contract was given by the defendant, and having failed to substantiate this averment, the question of compensation which has not been raised by the bill cannot be entertained. *Ashton* v. *Wood*, 3 Jur., N. S., 1164; 3 Sm. & G. 436.

4. The administrator of an assign of a mortgagee who has obtained a conveyance from the heir of such assign to a trustee for himself, can exercise a power of sale given by the mortgage deed to the original mortgagee, his heirs, executors, administrators, and assigns, with a direction that the receipts of the same persons should be good discharges, for the legal representatives of an "assign" must be considered to be assigns within the meaning of such a power. *Cooke* v. *Crawford* (13 Sim. 91) distinguished. *Saloway* v. *Strawbridge*, 1 Kay & J. 371; 24 L. J., Ch., 393. Affirmed 1 Jur., N. S., 1194; 25 L. J., Ch., 121; 7 De G. M. & G. 594.

5. A power of sale given to trustees and the survivors of them, his heirs and assigns, may be exercised by the devisees of the surviving trustee. *Hall* v. *May*, 3 Kay & J. 585; 3 Jur., N. S., 907; 26 L. J., Ch., 791; 5 W. R. 869.

6. A., by his will, devised real estate to three trustees in fee, in trust that they, and the survivors and survivor of them, his heirs and assigns, should, at such time or times as they or he should think fit, sell and absolutely dispose of the same, and hold the sale moneys upon certain trusts. There was a power, in case of the death of any of the trustees thereby nominated, or any future trustees, for the surviving or continuing trustee to appoint by deed in the usual way. The surviving trustee devised all his trust estates to two persons upon the trusts upon which the same were respectively holden:—Held, that the devisees in trust could make a good title to the premises to a purchaser objecting; and the purchaser was made to pay the costs caused by his objection. *Titley* v. *Wolstenholme* (7 Beav. 425) followed.

Semble, the word "assigns" would have been sufficient for this purpose without the power to appoint new trustees. *Ib.*

7. Where real estate is devised to trustees and "their heirs" (omitting "assigns") in trust for sale, the trust must be considered as annexed, not to the person, but to the fee simple estate taken by the trustees, so that the trust can be executed by the devisees of trust estates of the surviving trustee. *Osborne* to *Rowlett*, 13 L. R., Ch. D., 774; 49 L. J., Ch., 310; 42 L. T. 650; 28 W. R. 365.

A testator, by his will, dated in 1845, devised and bequeathed his real and personal estate to his wife for life, subject to the payment of his debts, and from and after her decease to A. and B., "their heirs, executors, and administrators, upon trust to sell and dispose thereof at such times and in such manner as they my said trustees shall deem expedient." A. and B. both predeceased their tenant for life, B., the surviving trustee, having devised his trust estates. Upon the death of the tenant for life, B.'s devisees contracted to sell part of the real estate of the original testator:—Held, upon a summons under the Vendor and Purchaser Act 1874, that B.'s devisees could make a good title, and one which the Court would force upon a purchaser. *Ib.*

Cooke v. *Crawford* (13 Sim. 91) held to be overruled. *Ib.*

Observations on the duty of the Court to decide doubtful questions of title as between vendor and purchaser. *Ib.*

The question of costs as between vendor and purchaser where the title is disputed considered. *Ib.*

8. A testator devised his freehold and copyhold estates to trustees and their heirs, "upon trust that they his said trustees or the trustees or trustee for the time being of that his will," should sell the estates. He empowered "his trustees, or the trustees or trustee for the time being of that his will," to give receipts, and declared that if the trustees thereby appointed, or either of them, or any trustee or trustees to be appointed as thereinafter provided should die, or desire to be discharged, then and so often the

said trustees or trustee might appoint a new trustee or new trustees. The trustees having died, the customary heir of the survivor contracted to sell part of the copyholds:—Held, that the customary heir was competent to execute the trust for sale. *Re Morton and Hallett*, 15 L. R., Ch. D., 143; 49 L. J., Ch., 559; 42 L. T. 602; 28 W. R. 895.

Whether *Cooke* v. *Crawford* (13 Sim. 91) is to be treated as overruled, *quære*. *Ib.*

Osborne to *Rowlett* (13 L. R., Ch. D., 774; 46 L. J., Ch., 310; 42 L. T. 650; 28 W. R. 365) doubted. *Ib.*

5. On Disclaimer by Trustee.

1. One trustee for the sale of an estate, having released and conveyed it to his co-trustee, refused to join in the receipt of the purchase money; upon the special expression of the deed, the purchaser was not held to the agreement with the remaining trustee; it would have been otherwise if one had merely renounced. *Crewe* v. *Dicken*, 4 Ves. 97.

2. Trustee for sale, having renounced, is not necessary as party for conveyance, or in receipt for purchase money. *Adams* v. *Taunton*, 5 Madd. 435.

3. A testatrix devised and bequeathed her residuary real and personal estate, after payment of debts and legacies, to two trustees, and the survivor of them, and the heirs, executors, and administrators and assigns of such survivor, on trust to invest the same in the public stocks, government funds, or upon real security, or at their discretion to keep the same in their then present state of investment. The will then declared beneficial interests in the residue; one of the trustees disclaimed:—Held, that the other trustee had a discretionary power of sale over copyholds of the testatrix included in the residuary devise. *Affleck* v. *James*, 17 Sim. 121; 13 Jur. 759.

4. When lands are devised to trustees in fee upon trusts or with powers which require the exercise of judgment and discretion, and the trustees disclaim the devise, so that the legal estate in fee descends to the heir-at-law, such powers or trusts cannot be exercised or carried into execution by the heir, although he holds the estate subject to the trusts of the will. *Robson* v. *Flight*, 4 De G. J. & S. 608; 34 L. J., Ch., 226; 11 L. T., N. S., 725; 5 N. R. 344. Reversing 10 Jur., N. S., 1228; 12 W. R. 195.

A trust which gives the trustee no other duty to discharge than simply to clothe the equitable ownership with the legal estate may be performed by the heir. But whether a trust may be performed or a trust power exercised by the heir-at-law, which is obligatory on the trustees of the will, depends on the question whether in the exercise anything has to be supplied by the judgment, knowledge, and discretion of the person acting in the exercise of such trust or power. *Ib.*

A power to lease may be a trust power in the sense of its being the duty of the trustee to avail himself of it under proper circumstances, but it is to be exercised by a person selected for the purpose, and not by the individual on whom by reason of intestacy the law casts the estate. *Ib.*

5. Where trustees, having a power of sale, disclaim the Court can exercise the discretion of the trustees and sell if necessary. *Browne* v. *Paull*, 16 Jur. 707.

6. A., who was entitled to freehold property, subject to a mortgage in fee, by will devised his real estate to a trustee to sell, and hold the proceeds upon trust, and appointed the devisee in trust executor of his will. The devisee in trust disclaimed the trust, and also the executorship. The heir-at-law of the testator, who also took out letters of administration to the estate, with the concurrence of the mortgagee, and in exercise of the trust for sale contained in the will, and by virtue of every other power therein, and as heir-at-law, joined with the mortgagee in conveying the estate to the purchaser free from the mortgage:—Held, that the legal and beneficial interest in the property passed by the conveyance, and the purchaser, on reselling the property, could show a good title. *Austen* v. *Martin*, 7 Jur., N. S., 871; 9 W. R. 674; 4 L. T., N. S., 817. S. C. *nom. Austin* v. *Marten*, 25 Beav. 523.

7. A testator gave his real and personal estate to A. and B., whom he appointed his executors, as to the real estate in trust for sale, the proceeds to be considered as part of his personal estate; and gave his personal estate after the death of his wife (who died in his lifetime) to his son absolutely. A. died in the testator's lifetime. B. renounced probate in the common form, and survived the testator for three years and then died, without having acted as trustee:—Held, under the circumstances, that the renunciation of the probate operated as a disclaimer of the trusts of the will, so that the legal estate in land of which the testator died seised vested in his son as his heir-at-law. *Re Gordon, Roberts* v. *Gordon*, 46 L. J., Ch. D., 794; 6 L. R., Ch. D., 531.

IV. CONSENTS AND REQUESTS.

1. *Parties to Consent or Concur in the Sale. In General*, 5892.
2. *By Infant*, 5894.
3. *By Survivors of a Class*, 5894.
4. *Extinguishment of Power to Consent of Tenant for Life*, 5895.
5. *Sufficiency of Consent*, 5896.
6. *Requests*, 5896.

1. Parties to Consent or Concur in the Sale. In General.

8. Trustees whose consent was required to the exercise of a power of sale by tenants for life, submitting to act under the direction of the Court; on a bill for specific performance of a contract to sell, an inquiry into the propriety of the contract was ordered. *Doran* v. *Wiltshire*, 3 Swan. 699.

9. A power of sale and exchange was given to trustees, with the consent of tenant for life, against whom judgments were entered up. *Quære*, whether the trustees could sell without the concurrence of the judgment creditors. *Leigh (Lord)* v. *Ashburton (Lord)*, 11 Beav. 470.

10. Where a testator devised his realty, after his just debts, funeral and testamentary expenses should be paid thereout, to trustees

upon trusts for certain persons, and after the death of the survivor of those persons upon trust to sell, with power to give receipts:—Held, that the trustees, notwithstanding the preceding implied power in the executors, could make a good title without the executor's concurrence. *Hodkinson* v. *Quin*, 1 John. & H. 303; 7 Jur., N. S., 65; 30 L. J., Ch., 118; 3 L. T., N. S., 804.

1. A., as to the residue of his real estate, devised part to trustees at their entire discretion, either to sell and dispose of the real estate or any part, at any time or times previously to his youngest surviving child or grandchild attaining twenty-one, "but no sale to take place during the life of my wife without her privity and consent;" and after her death, "on the arrival at the age of twenty-one of my youngest surviving child or grandchild, I give and devise the whole or such part of my residuary real estate then undisposed of, unto and equally between all my children then living," and the lawful issue of any deceased child, as tenants in common, and not as joint tenants. There were three daughters living, all of whom had attained twenty-one, and six children of one of them, all infants:—Held, that the power of sale was exercisable with the consent of the widow. *Chapman* v. *Harris*, 8 L. T., N. S., 306.

2. The *cestuis que use*, under a settlement of real estate, are not the parties against whom a trust or power given to trustees to sell the estate for the discharge of incumbrances will be enforced. *Rooke* v. *Kensington* (*Lord*), 25 L. J., Ch., 366.

3. Powers of sale and exchange in settlements are only given to trustees for the benefit, and to be exercised with the consent, of the persons entitled to the estate under and by virtue of the settlement containing the power; and the devisees of the ultimate remainder in fee of the settlor, which was his own reversion, cannot be said to claim under the settlement. *Wolley* v. *Jenkins*, 3 Jur., N. S., 321.

Where a sale is to be made with the consent of the persons for the time being entitled to the receipt of the rents and profits, this means the persons beneficially entitled, and excludes mere trustees, *semble*. *Ib.*

Upon the marriage of A. and B., A.'s estate was settled upon him for life; remainder to the use, that if B. should survive, she should have a jointure of 600*l.* per annum; remainder to trustees for 500 years, to secure the arrears of jointure; remainder to trustees for 2,000 years, to raise portions for younger children; and subject thereto, the estate was limited to the issue of the marriage, with an ultimate remainder to A. in fee. The settlement contained a power to B., at any time after the marriage, to charge 2,000*l.* on the property, to be raised after her death, and for the benefit of her personal estate and for raising that sum she had power to create a term. There was in the settlement a power of sale and exchange given to trustees, to be exercised with the consent of A., and after his death, within twenty-one years thence, with the consent of the persons for the time being entitled to the rents and profits. There was no issue of the marriage, and A. died, living B., having devised the estate to trustees, upon trust to sell, and apply the proceeds as therein directed. It being desirable to sell a portion of the estate comprised in the settlement, free from the jointure and the power of B. to charge with 2,000*l.*, the trustees of the settlement entered into a contract to sell:—Held (affirming 23 Beav. 53; 26 L. J., Ch., 379), that, under the circumstances the power of sale in the settlement could not be exercised. *Ib.* But see *Vine* v. *Raleigh*, 24 L. R., Ch. D., 238; 49 L. T. 440; 31 W. R. 855.

4. Where an estate in remainder is vested in trustees with powers of sale, the *cestuis que trustent* are entitled to have the trustees cognisant of the sale and consulted with reference thereto; but if they subsequently adopt the sale, and it is acted upon, and the money received under it, the Court will confirm it. *Blackwood* v. *Borrowes*, 2 Con. & L. 459; 4 Dr. & War. 441.

5. A testator devised the lands to be purchased with the proceeds of certain estates sold in his lifetime, to the use of trustees and their heirs, upon trust, to pay the rents and profits to his daughter, whether married or unmarried, for her seperate use, and not subject to any debts or control of any husband; and after her decease, upon further trust, to convey the lands to such persons, etc., as his daughter should by will, attested by three credible witnesses, and whether married or single, appoint; and for want of such appointment, upon trust, to convey the freehold and inheritance of the lands to the right heirs of his daughter: and the testator further directed, that as to so much of such proceeds as should not have been laid out in lands, the trustees should invest the same in the public funds, and pay the dividends into the proper hands of his daughter, during her life, for her sole use and benefit, whether married or unmarried, and not subject to the debts or control of any husband; and after her decease, upon further trust, to pay and transfer the same to such persons, etc., as she should, by her last will and testament, and whether sole or covert, appoint: and in default thereof, in trust, to pay, transfer, and assign the same to the executors, etc., of his daughter. After the testator's death lands were purchased, and were conveyed to the trustees of his will, upon the trusts thereof. A contract having been subsequently entered into by the trustees for the sale of those lands, it was held, that the trustees, with the concurrence of the testator's daughter, could make a good title to the purchaser. *Webb* v. *Shaftesbury* (*Lord*), 3 Myl. & K. 599.

6. A testator devised lands—subject to a charge of 3,000*l.* for his wife, and a charge of debts, if his personal estate should be deficient—upon trust to pay rents and profits to his wife for life, and afterwards for the children of his brother, as the executor and trustee of the will should appoint, upon the youngest attaining twenty-one. The will also gave the trustee a power of sale. All the existing children having attained twenty-one (the widow and the brother still living), the trustee appointed in their favour. Thirteen years after testator's death he sold the premises by auction. The purchaser required the concurrence of the appointees, as beneficiary and necessary parties to the sale:—Held, on a suit for specific performance, that their concurrence was not

necessary, and the Court enforced the contract. *Greetham* v. *Colton*, 6 N. R. 311; 34 Beav. 615.

1. A trustee having a discretionary trust for sale of real estate under a will at such price as he should think reasonable, with power to postpone the sale, leased the property for thirty years with the concurrence of the beneficiaries. Before the lease expired the property was put up for sale by the lessee and the trustee conjointly, the facts being disclosed by the particulars of sale, and a sale having been effected, the purchase money was apportioned between the two interests according to the valuation of a skilled valuer:—Held, that the purchaser was not entitled to insist on the concurrence of the beneficiaries on account of the valuation not having been made before the sale, and that the title would be forced upon him. *Morris* v. *Debenham*, 2 L. R., Ch. D., 540; 34 L. T., N. S., 205; 24 W. R. 636.

2. On the sale by the Court of real estate vested in trustees having a power of sale, and being themselves beneficiaries:—Held, that a good title could not be made by the exercise of the power of sale without the concurrence of the assignee in insolvency of one of the trustees. *Young* v. *Tregear*, 21 W. R. 215.

3. A mortgagor and a mortgagee with a power of sale joined in demising the mortgaged hereditaments upon trust at the request of the mortgagee during the continuance of the security, and at the request of the mortgagor, after the satisfaction of the mortgage, to grant leases of the premises in such manner as the person making such request should appoint, and to permit the mortgagor to receive the rents until default was made in payment of the mortgage money or interest, and upon trust after default to receive the rents and apply the same in keeping down the interest upon the mortgage. These trusts were not declared to be subject to the power of sale in the mortgage:—Held, that they were so in effect, and that the trustee was bound without the concurrence of the mortgagor to join in conveying the hereditaments to a purchaser from the mortgagee under the power of sale. *King* v. *Heenan*, 3 De G. M. & G. 890.

4. A testator by his will devised his real estates to trustees for 1,000 years, and subject thereto in strict settlement. The trusts of the term were to pay the testator's wife a life annuity of 200*l.*, and subject thereto, for the persons entitled under the prior limitations. He also gave the trustees a power to sell the property, the power to be exercised during the life of any tenant for life, who should be for the time being entitled to the possession or to the receipt of the rents of the estates, with his consent. The sale moneys were to be reinvested in land. By a codicil he directed his trustees to stand possessed of the term, and of the like term to arise in the real estates which might be purchased under the trusts of the will, on trust to pay the surplus of the rents of all the estates (after paying the interest on his mortgage and other debts) to his wife, during her widowhood, in lieu of the annuity. In case she should marry again, the trust for payment of the annuity was to take the place of the trust for payment of the surplus rents. The debts having been all paid:—Held, that the trustees could exercise the power of sale with the consent of the tenant for life, the widow also consenting. *Robertson* v. *Walker*, 44 L. J., Ch., 220; 23 W. R. 224; 31 L. T., N. S., 817.

5. Sir T. N. devised his estates to trustees, in trust for A. for life, then for B. for life, and then for C. in tail, with a power of sale and enfranchisement with the consent of the person for the time being entitled as beneficial tenant for life; and directed that no repurchase or reinvestment should be made while there should be any person entitled as beneficial tenant for life or tenant in tail in possession, and of the age of twenty-one years, without the previous consent of such person. A. and B. were both dead, and C. was an infant:—Held, that the trustees could during the minority of C. exercise the power of sale and enfranchisement without consent, and make a good title. *Re Neave and Chapman, Re Neave's Trusts*, 49 L. J., Ch., 642; 43 L. T. 152; 28 W. R. 976.

6. One of three trustees, acting as if absolute owner, entered into a contract to sell the entirety of a freehold property (in one-fifth part of which he had a beneficial interest), describing the property as "The Jolly Sailor, offices, etc." The other trustees, afterwards, refused to concur in the sale. The vendee having brought an action for specific performance of the contract:—Held, that the contract for the sale of the entirety could not be enforced, and the property being trust property, it could not be enforced against the defendant as to his one-fifth share only. *Naylor* v. *Goodall*, 47 L. J., Ch., 53; 26 W. R. 162; 37 L. T., N. S., 422.

2. By Infant.

7. An infant can exercise a power, even though it be coupled with an interest, where an intention appears that it should be exercisable during minority. *Re Cardross*, 7 L. R., Ch. D., 728; 38 L. T., N. S., 778; 26 W. R. 389; 47 L. J., Ch., 327.

By a settlement made with the sanction of the Court, upon the marriage of a lady then, and therein described as, "an infant of seventeen years," funds belonging to her were vested in trustees upon trust to retain existing investments or reinvest with the consent of the lady and her husband during their joint lives; the lady taking the first life interest under the settlement:—Held, that the lady had a power to consent to a proposed reinvestment notwithstanding her minority. *Ib.*

3. By Survivors of a Class.

8. Power of sale under will to trustees, with consent of such of the beneficiaries as should be free from disability other than coverture; and if there were none, then at the discretion of the trustees. None of the persons who took under the will were under such disability, but one had died and devised his share to infants:—Held, that the trustees might exercise the power. *Arkell* v. *Henley*, 3 W. R. 259.

9. A. devised real estate to trustees, for sale, and he declared that no sale should take place

without the consent of his sons and daughters. By a subsequent clause in his will, he directed the shares of the children to be held in trust for them and their respective issue. One of the children died without having consented to a sale. The other children had issue, who were infants:—Held, that the power of sale could not be exercised by the trustees with the consent of the surviving children and the persons absolutely entitled to the share of the deceased child. *Sykes* v. *Sheard*, 9 Jur., N. S., 886; 11 W. R. 1014; 8 L. T., N. S., 820; 2 N. R. 540; 33 Beav. 114. See S. C. on appeal, 9 Jur., N. S., 1262; 12 W. R. 117; 33 L. J., Ch., 181; 9 L. T., N. S., 430; 2 De G. J. & S. 6; 3 N. R. 144.

4. Extinguishment of Power to Consent of Tenant for Life.

By Alienation.] 1. The trustees of a marriage settlement were empowered to invest the trust funds in land, and afterwards to resell the lands with the consent of the tenant for life. After the trustee had invested part of the funds in land, the tenant for life conveyed his interest under the settlement to a purchaser, by the description of all his life and other estate and interest in all the moneys, stocks, funds, and securities, and messuages, lands, tenements, and hereditaments into which the moneys, stock, funds, and securities were, or at any time thereafter might be, converted and changed:—Held, that the tenant for life's power to consent to a resale of the lands, was not destroyed by the alienation of his interest under the settlement. *Warburton* v. *Farn*, 16 Sim. 625; 18 L. J., N. S., Ch., 312; 13 Jur. 528.

2. The trustees of settled estates had a power of sale, to be exercised at the request and direction of the tenant for life, who was also entitled to the ultimate reversion in fee. The tenant for life made an absolute conveyance of all his interest to A. for value. Subsequently the trustees, by the direction of the tenant for life, purported to exercise the power of sale by conveying the estates to A.:—Held, that his power to consent was not extinguished by the absolute alienation of his life estate, and could still be exercised with the concurrence of the alienee. *Alexander* v. *Mills*, 6 L. R., Ch., 124; 40 L. J., Ch., 73; 24 L. T., N. S., 206; 19 W. R. 310. Reversing 39 L. J., Ch., 407; 18 W. R. 635; 22 L. T., N. S., 396.

Held, also, that there was nothing in the sale of the interest of the tenant for life, and the subsequent exercise of the power for sale to the assignee of the life interest, to raise suspicion of *mala fides*, or to put a purchaser on inquiry. *Ib.*

3. A settlement, by which real estates were limited to the use of A. for life, with remainder to her son in tail, contained a power of sale and exchange to be exercised during the life of the tenant for life, with her consent signified by writing under her hand and seal. By a disentailing deed, to which the tenant for life was a party, the tenant in tail, with the consent of his mother, the tenant for life, testified by her executing that deed, conveyed the settled estates, subject to her life estate therein, and also other hereditaments, of which he was tenant in tail in possession, to uses to bar dower in his own favour. This deed contained no recital of any contract, but in the operative part its object was stated to be, in order to defeat the estate or estates tail of the tenant in tail in the hereditaments therein comprised, and all other estates, powers, rights, and interests limited to take effect after the determination or in defeasance of such estate or estates tail, and to limit the fee simple in such hereditaments, as to such parts thereof as were vested in the tenant for life, subject to her life estate therein, to the uses thereinafter expressed:—Held, that the concurrence of the tenant for life in the disentailing deed did not bar her power of assenting to a subsequent exercise of the power of sale and exchange, because this was a power to raise a use paramount to the estate tail, and there was nothing in the frame of the deed from which a contract could be implied, that the tenant for life would not consent afterwards to the exercise of the power of sale and exchange. *Hill* v. *Pritchard*, 1 Kay 394; 2 Eq. Rep. 374; 2 W. R. 297.

By Bankruptcy.] 4. By a marriage settlement real estate was conveyed to trustees upon trust to pay the rents and profits to the husband for life; and after the death of the husband, or in case he should assign, charge, incumber, or otherwise anticipate the income, then, in either of those events, to pay the income to the wife for life, for her separate use; and after her decease, to the children of the marriage. Powers of sale were given to the trustees at the joint request and by the joint direction of the husband and wife during their joint lives:—Held, that the power of consenting to the sale by the trustees was not extinguished by the bankruptcy of the husband, but that, with the assent of the tenant for life and his assignees, a perfect title could be made under the power. *Holdsworth* v. *Goose*, 29 Beav. 111; 7 Jur., N. S., 301; 30 L. J., Ch., 188; 9 W. R. 443; 4 L. T., N. S., 196.

5. Power of sale of realty given to trustees with the consent of the tenant for life:—Held, exercisable after his bankruptcy, with the consent of the tenant for life and of all persons who had become interested in his estate. *Eisdell* v. *Hammersley*, 21 Beav. 255.

F., devised real estate to his widow E. for life, with remainder to R. in fee. R. married in 1838, and by a settlement the real estate was (subject to the estate for life of E.) settled upon R. for life, with remainder to trustees to preserve contingent remainders, with remainder to E. (the wife of R.) for life, with remainder to trustees to preserve contingent remainders, with remainder to the children of the marriage as the parents or the survivor of them should appoint, and, in default, to the children equally, as tenants in common in tail, with benefit of survivorship among them, and with an ultimate remainder, in default of issue of the marriage to R. in fee. The settlement contained a power for the two trustees of it, or the survivors or survivor of them, or the executors or administrators of such survivor, at the request or with

the consent in writing of R. and E. during their joint lives, and of the survivor of them, to sell the real estate, and to give receipts for the purchase money. In 1849 R. became a bankrupt; in 1850 the widow of the testator purchased from the assignees the interest of R. in the real estate under his marriage settlement. In 1855 the widow died, having by a codicil devised the life interest of R. so purchased by her to trustees for his benefit for his life, or until he should become bankrupt or alien the estate, but having made no devise of the ultimate fee in the real estate, and leaving C. her heir-at-law. In 1862 R. and his wife requested the surviving trustee of their marriage settlement to sell the real estate under the power of sale therein contained. Upon the question whether the power of sale in the settlement could be exercised:—Held, that the surviving trustee of the settlement, with the concurrence of R. and his wife, and that of the trustees of the will and the heir-at-law of the widow, could exercise the power. S. C. 6 L. T., N. S., 706.

5. Sufficiency of Consent.

1. K. had a power, with consent of trustees, to substitute other estates for the existing trust estates. The consent of the trustees was required to be signified by deed. They had seen a draft deed of substitution, had signified their assent thereto, but had executed it some time after the execution of it by K.:—Held, that there was a sufficient consent by the trustees. *Offen* v. *Harman*, 6 Jur., N. S., 487; 29 L. J., Ch., 307.

The evidence as to the consent of the trustees was adduced by way of an affidavit filed after the opening of the case before the Court of Appeal. The Court, therefore, gave no costs on either side. *Ib.*

2. Under a power of sale, with a consent of parties, testified by any writing, etc., under their and his hands, etc., attested by two or more witnesses; the attestation going only to sealing and delivery:—Held, not sufficient, nor a subsequent attestation that they also signed, but a case was directed. *Wright* v. *Wakeford*, 17 Ves. 454.

6. Requests.

3. By a marriage settlement, freehold estate and some personal estate were conveyed and assigned to trustees upon trust, on the request of the husband and wife, during their joint lives, and, after the death of either, upon the request of the survivor, to sell the estate, and to stand seised and possessed of the estate until sold, and of the purchase money, in case the same should be sold, upon trust for the husband for his life; and, after his decease, upon trust for the wife for her life; and after the death of the survivor of them to convey the estate, unless sold, and assign the personal estate unto the children and grandchildren of the marriage, born in the lifetime of the husband and wife, as they or the survivor should appoint; and, in default of appointment, unto and amongst the children of the marriage equally. The estate was taken by the corporation of London, under the London Bridge Act (4 Geo. 4, c. 50), and the price having been fixed by a jury, the purchase money was paid into court under the Act, the trustees of the settlement not making out a satisfactory title:—Held, that, in the absence of any conveyance by the trustees, the sale must be deemed to have been effected under the Act of Parliament only; and, therefore, that the purchase money was impressed with the character of real estate, under the 35th section of the London Bridge Act. *Re Taylor's Settlement*, 9 Hare 596.

That if there had been any conversion, it must have been by the conjoint operation of the articles and settlement and of the Act of Parliament, but that the settlement and Act of Parliament could not, in this case, have any conjoint operation. *Ib.*

That the estate, having been real when settled, it was not meant by the settlement that it should become personal, unless the husband and wife, or the survivor, requested it to be sold. *Ib.*

That the words of request should not be construed as merely intended to enforce on the trustees the obligation of sale, but as inserted for the purpose either of enforcing obligation or giving discretion, as the context of the instrument might require. *Ib.*

That the payment of money into court, owing to an objection to the title, and the application of the trustees and tenants for life for the dividends, did not tend to connect the sale with the trust, but led to a contrary conclusion, inasmuch as the city of London, having the power to require a perfect title under their act, would not be likely to prefer an imperfect one under the trust. *Ib.*

That there could be no sale pursuant to the trust without a conveyance of the estate by the trustees, and the payment of of the purchase money to them; and if, after fixing of the price by a jury, there had been a conveyance by the trustees, at the request of the tenant for life, the Court would have held the sale to have been under the trust, *semble*. *Ib.*

4. A power of sale and of exchange was given to trustees of a settlement, at the request of the person for the time being "seised of the freehold and inheritance of the manors":—Held, that reading the word "and" conjunctively, the power could not be exercised at the request of a tenant for life who (subject to intervening limitations) had the ultimate remainder in fee. *Malmesbury (Earl)* v. *Malmesbury (Countess)*, *Phillipson* v. *Turner*, 31 Beav. 407.

Held, also, that the word "and" could not be read disjunctively as "or." *Ib.*

5. A settlement contained the usual covenant by the husband and wife to assign after acquired property of the wife to trustees, with a proviso that it should be lawful for the trustees, at the request of the husband and wife, during their joint lives, and of the survivor during his or her life, and afterwards at the discretion of the trustees, to sell and dispose of such property, and invest the proceeds upon the trusts of the settlement. The wife afterwards became entitled to leaseholds and

specific personal chattels:—Held, that the trustees were not for the present to convert these things without the request in writing of the husband and wife. *Hope* v. *Hope*, 1 Jur., N. S., 770.

1. Lord S., being tenant for life under a settlement which contained a power to trustees to sell at his request, entered into a contract for the sale of part of the settled property; but this contract was not communicated to the trustees during his lifetime. Lord S. was also entitled to the reversion in fee, subject to a charge of 15,000*l.*, and to contingent remainders to his sons, which failed upon his death unmarried:—Held, that the purchaser was entitled to specific performance, if he was willing to treat the contract as one for a sale only of Lord S.'s interest in the property, but not otherwise, and that he was not entitled to any compensation or indemnity in respect of the charge of 15,000*l.* *Bainbridge* v. *Kinnaird*, 2 N. R. 5; 9 Jur., N. S., 862; 11 W. R. 608; 8 L. T., N. S., 447.

2. Trustees of a marriage settlement were empowered, upon the request of the tenant for life, to raise such sum of money as might be necessary to purchase a mansion-house, with a demesne attached, as a residence for the tenant for life; and it was declared that the mansion-house or lands, when so purchased, should be conveyed to the trustees, upon and for the same trusts, intents, and purposes, and with, under, and subject to the same powers, provisions, declarations, and agreements, as were in and by "these presents declared and contained, of and concerning the hereditaments and premises hereinbefore granted." The settlement contained a power to the trustees, with the consent of the tenant for life, to sell, by public auction or private contract, or to exchange the settled lands for such price in money, or equivalent in other lands, as to them should seem reasonable; or to resell the lands which might be so purchased, and to give discharges for the purchase money; and in order to effectuate such sales, to revoke the uses and trusts of the settlement, and to appoint any uses and trusts which should be thought necessary or expedient for effectuating such sale or exchange; and the trustees were authorised to invest the purchase money in lands, which were to be settled to the same uses and upon the same trusts, and subject to such and the same powers, as were declared as to the settled lands. In 1857 the trustees, with the consent of the tenant for life, purchased for 1,200*l.* a mansion-house, which was conveyed to them subject to such and the same trusts and powers as in the recited indenture limited of and concerning the lands therein mentioned. In 1858 the trustees, at the request of the tenant for life, sold the mansion by auction to B.:—Held, in a suit for specific performance of the contract for sale, that the trustees could make a good title to the mansion-house, and the purchaser was bound to accept it. *Clements* v. *Henry*, 10 Ir. Ch. R. 79.

V. WHO MAY PURCHASE.

3. A power of sale given without restriction to a party having a limited interest only, may well be held to import a negative upon the power by the same party to buy, for the power to sell is in the nature of a trust; but as the rule does not extend to prevent in all cases a party having a power to sell from becoming the purchaser, so neither where there is a restriction upon the power of sale, is the party having the power to sell in all cases at liberty to become the purchaser. It must in each case depend upon the circumstances under which, and the purposes for which, the power was given, and upon the nature and extent of the restrictions which are put upon the exercise of the power. *Beaden* v. *King*, 9 Hare 519; 22 L. J., N. S., Ch., 111.

In the proportion in which the power is restricted, the danger incident to allowing the donee to purchase is diminished. *Ib.*

4. If a trustee has a power or a trust to sell property, he must *bonâ fide* have some one to deal with in the sale of it. *Lewis* v. *Hillman*, 3 H. L. Ca. 607.

5. The doctrine that a tenant for life with a power to sell or lease, may sell or lease to a trustee for himself, is an established exception to the rule as to dealings by persons filling fiduciary positions. *Bevan* v. *Habgood*, 1 John. & H. 222. S. C. *nom.* *Beavan* v. *Habgood*, 8 W. R. 703.

Under a mortgage, power was reserved to the mortgagor until entry by the mortgagee to grant building leases:—Held, that the case fell within the principle of the above exception, and that a lease to a trustee for the mortgagor was good. *Ib.*

6. It is a well-settled rule that where trustees of a settlement have a power of sale and exchange over the settled estates, to be exercised at the request, or with the consent, of the tenant for life, they may sell to the tenant for life just as they may to any other person. *Dicconson* v. *Talbot*, 19 W. R. 138; 6 L. R., Ch., 32; 24 L. T. 49.

The reason for that rule is that the consent of the tenant for life to the exercise of the power is required for his own benefit, and does not place him in any fiduciary relation to the persons entitled in remainder. *Ib.*

Provided a sale by trustees to a tenant for life is *bonâ fide* and at a fair price, it is immaterial what was the object for which he made the purchase. *Ib.*

7. A power of sale and exchange vested in the trustees of a settlement, may be exercised by the trustees upon a sale to, or an exchange with, the tenant for life of the settled estates. Where, upon the exercise of such a power, it is declared, that the estate shall be vested in the purchaser, the purchase being made in the name of a trustee, an appointment to the trustee, in trust for the purchaser, is a valid execution of the power. *Howard* v. *Ducane*, T. & R. 81; 1 L. J., Ch., 85.

Purchase of Trust Property by Trustees.] See FRAUD, II. 11.

VI. PROPERTY SUBJECT TO.

1. *In General*, 5898.
2. *Copyholds*, 5898.
3. *Land Purchased in Breach of Trust*, 5899.
4. *Reversions*, 5899.

1. In General.

1. Testator gave his leasehold estates, and all other his estate and effects, to trustees, on certain trusts, for the benefit of his wife and daughters, and the children of the latter; and, in declaring the trusts, he used the term "rents," as well as dividends and annual proceeds; and he empowered the trustees of his will for the time being to sell his leasehold estates, and to invest the proceeds on mortgage of freehold or other leasehold estates, and to lease any part or parts of his said estates:—Held, in a suit to carry the trusts of the will into execution, that the leaseholds were not to be sold. *Bowden* v. *Bowden*, 17 Sim. 65.

2. Trustees were empowered by Act of Parliament to sell and exchange all or any of the hereditaments mentioned in the schedule to the Act, amongst which was a farm, called the Mountain Farm, parcel of the manor of W. In the body of the Act there was a proviso that the manor of W. should not be sold, the trustees having contracted to sell the Mountain Farm:—Held, that the purchaser was not bound to accept the title. *Lincoln* (*Earl*) v. *Arcedeckne*, 1 Colly. 98.

3. P. G., being entitled to two distinct interests in land called K., in the county of C., one a freehold interest derived under H. L., the other a chattel interest derived under B. B., which was not to commence until the determination of the freehold, made his will, and thereby desired that all his freehold interests in the counties of C. and W. (except his interest in K., which he held under B. B.) should be sold, and the proceeds of the sale be divided between his children. And in a subsequent part of the will he desired his chattel interest in the said lands of K. to be sold immediately upon the determination of the freehold interest therein, and the proceeds thereof to be divided in a certain manner:—Held, that the exception referred to the chattel interest in K. only, and that the freehold interest therein was to be sold immediately, against the claim of the heir-at-law of T. G. *Gurly* v. *Gurly*, 8 Cl. & F. 743. Affirming 2 Dr. & Wal. 463.

4. A private Act vesting lands in trustees on trust to sell, proceeding on the supposition that the lands are comprised in a settlement, does not bring the lands within that settlement if they were not in it previously. *Howard* v. *Shrewsbury* (*Earl*), 43 L. J., Ch., 495; 22 W. R. 290; 29 L. T., N. S., 862; 17 L. R., Eq., 387.

5. A marriage settlement of personalty empowered the trustees to sell it, and invest the produce in real estate. The estate was to be held on corresponding trusts and to be considered personal estate. There was an express power to sell the securities to be purchased, and to reinvest the produce, from time to time, but no express power to sell the purchased estate. The trustees invested the fund in a real estate:—Held, that they had a power of sale over it, and could give good receipts for the purchase money. *Tait* v. *Lathbury*, 35 Beav. 112; 1 L. R., Eq., 174; 14 W. R. 216; 11 Jur., N. S., 991.

6. Trustees of a marriage settlement were empowered, upon the request of the tenant for life, to raise such sum of money as might be necessary to purchase a mansion-house, with a demesne attached, as a residence for the tenant for life; and it was declared that the mansion-house or lands, when so purchased, should be conveyed to the trustees, upon and for the same trusts, intents, and purposes, and with, under, and subject to the same powers, provisions, declarations, and agreements, as were in and by "these presents declared and contained, of and concerning the hereditaments and premises hereinbefore granted." The settlement contained a power to the trustees, with the consent of the tenant for life, to sell, by public auction or private contract, or to exchange the settled lands for such price in money, or equivalent in other lands, as to them should seem reasonable; or to resell the lands which might be so purchased, and to give discharges for the purchase money; and in order to effectuate such sales, to revoke the uses and trusts of the settlement, and to appoint any uses and trusts which should be thought necessary or expedient for effectuating such sale or exchange; and the trustees were authorised to invest the purchase money in lands, which were to be settled to the same uses and upon the same trusts, and subject to such and the same powers, as were declared as to the settled lands. In 1857 the trustees, with the consent of the tenant for life, purchased for 1,200*l.* a mansion-house, which was conveyed to them subject to such and the same trusts and powers as in the recited indenture limited of and concerning the lands therein mentioned. In 1858 the trustees, at the request of the tenant for life, sold the mansion by auction to B.:—Held, in a suit for specific performance of the contract for sale, that the trustees could make a good title to the mansion-house, and the purchaser was bound to accept it. *Clements* v. *Henry*, 10 Ir. Ch. R. 79.

2. Copyholds.

7. A power in a will in the following form, viz., "I direct that the said A. B., and C., the executors of this my will, or the survivors or survivor of them, or the executors or administrators of such survivor, shall sell my copyhold messuages":—Held, within the 21 Hen. 8, c. 4, to authorise a sale by A. and B. on C. refusing to act, that Act extending to copyholds. *Peppercorn* v. *Wayman*, 5 De G. & Sm. 230; 16 Jur. 794; 21 L. J., Ch., 827.

8. A testator devised copyholds to such uses as A. and B., or the survivor of them, his executors or administrators should appoint, and subject thereto to the use of A. and B., their heirs and assigns for ever, upon certain trusts; and he directed his said trustees to sell the copyholds as soon as conveniently might be:—Held, that the trustees could make a good title to a purchaser without being admitted. *Glass* v. *Richardson*, 2 De G. M. & G. 658; 17 Jur. 926; 22 L. J., Ch., 105.

9. Power to a tenant for life, lord of a manor, to enfranchise, and for that purpose to convey the freehold to the customary or copyhold tenants, authorises a conveyance of the freehold to one who is equitably entitled,

and has been erroneously admitted, without a previous surrender by his trustees. *Wilson* v. *Allen*, 1 Jac. & Walk. 611.

3. Land Purchased in Breach of Trust.

1. Trustees under a will which contained a power to sell real estate, but no power of investing the trust funds in real estate, bought real estate, and had it conveyed to the trusts of the will:—Held, that they could sell and make a good title to the real estate wrongfully purchased with the trust funds on obtaining the concurrence in the sale of one of the persons beneficially interested in the trust funds. *Re Patton and Edmonton Union*, 52 L. J., Ch., 787; 48 L. T. 870; 31 W. R. 783.

4. Reversions.

2. Where a moiety of a reversion was settled, with power for the trustees to sell when in possession, and a covenant by the husband and wife, in the event of her acquiring any further interest in the estate, that it should be vested upon the same trusts, and with like powers, etc., as the moiety settled. The other moiety afterwards devolved to the wife, subject to a life interest:—Held, that it was equally saleable under the power. *Giles* v. *Homes*, 15 Sim. 359.

3. A. being tenant for life of certain lands, remainder to B., his daughter, in fee, articles were entered into on the marriage of B., when a minor, with C., an adult, for a settlement of her reversion, and it was provided that the trustees should have a power, with the consent of B. and C., to sell "the said lands of the said B.," the produce to be laid out in lands to be settled to the uses thereupon declared. In the settlement carrying those articles into execution, A., the tenant for life, joined, and the lands were limited to A. for life, remainder to the uses declared by the articles; and a power was given to the trustees to sell, with the consent of B. and C., the "said B.'s estate and interest in the said lands":—Held, that this power authorised a sale of the reversion in A.'s lifetime. *Blackwood* v. *Burrowes*, 2 Con. & L. 459; 4 Dr. & War. 441.

4. A reversion in fee expectant on the life estate was settled in strict settlement, and the trustees were empowered at any time thereafter, with the consent of the tenant for life under the settlement, to sell or exchange the lands for other lands in fee, in possession. The tenant for life in possession, together with the tenant for life under the settlement, and the trustees, by their agent, sold the estate for one entire sum. The purchaser objected that the power of sale could not be exercised until the reversion came into possession, but waived all other objections:—Held, that the power was well exercised, and that the purchaser, having waived all other objections, must agree with the vendors as to the appointment of the purchase money between the life estate in possession and the reversion, or that the appointment must be made by the Master. *Clark* v. *Seymour*, 7 Sim. 67.

5. A testator was entitled to an estate in fee in remainder after the life estate of A. By his will he devised the estate to trustees, in trust for B. for life, with remainders over; and he empowered his trustees, with the consent of the tenant for life or tenant in tail entitled in possession for the time being under the limitations contained in his will, to sell the estate and invest the proceeds. A. survived the testator, and surrendered her life estate to B. to enable the trustees to sell:—Held, that the power to sell was accelerated, and that the trustees, with A.'s consent, could sell the estate, and make a good title to the purchaser. *Truell* v. *Tysson* or *Tyssen*, 21 Beav. 437; 2 Jur., N. S., 630; 25 L. J., Ch., 801.

Distinction between accelerating powers to charge and powers of sale. *Ib.*

VII. DURATION AND TIME FOR EXERCISE.

1. *Duration and Determination of the Power*, 5899.
2. *Time for Exercise*, 5901.

1. Duration and Determination of the Power.

6. Where estate is devised in trust for two daughters for life, with remainder in each moiety for their children at twenty-one, and a power of sale is given to trustees, the power of sale subsists, though one daughter is dead, and her children have attained twenty-one. *Trower* v. *Knightley*, 6 Madd. 135.

7. A testator devised his real estate to trustees in fee, on trust to pay the income to his son W. for life, and after his death to convey it to W.'s children; and as to another fifth, to apply the income towards the maintenance of the testator's daughter until twenty-one or marriage; and on her attaining twenty-five, if unmarried, to convey the same to her, but if she should marry before that age, then to settle it in a particular way. The testator then gave his trustees a power of selling the property "during the lifetime or widowhood of his wife, or at any time afterwards, during the continuance of the trusts by his will reposed." The widow and W. died, and the daughter attained twenty-one and married, but no conveyance had been made by the trustees:—Held, that the power of sale could not then be exercised by the trustees, for though the trusts still "continued," yet they continued through the neglect of the trustees to convey, and not in the way contemplated by the testator. *Wood* v. *White*, 2 Keen 664; 7 L. J., N. S., Ch., 203; 4 Myl. & C. 460; 8 L. J., N. S., Ch., 209; 3 Jur. 117.

8. Real estate was given by will to trustees upon trust to sell at their discretion at any time before the youngest or youngest surviving child or grandchild of the testator should attain twenty-one; and such parts as should not be sold were given to the testator's wife for life, and after her death, on the arrival of the youngest or youngest surviving child or grandchild at the age of twenty-one, to such of his children as should be then living and the issue of such of them as should be dead, as tenants in common:—Held, that though all the persons presumptively entitled had attained twenty-one, the power of sale

was exercisable. *Chapman* v. *Harris*, 2 N. R. 56; 8 L. T., N. S., 306.

1. A power given by will to sell estates, which are the subject of a settlement which also contains a power of sale, is in abeyance so long as the limitations and trusts of that settlement remain unperformed. *Wolley* v. *Jenkins*, 5 W. R. 281; 3 Jur., N. S., 321; 23 Beav. 53; 26 L. J., Ch., 879.

2. By an indenture of March 1862 lands were conveyed by two tenants in common, L. and S., to a trustee to sell and to hold the proceeds for L. and S. in equal shares, and as to the share of S. for her separate use. The indenture contained powers of exchange and partition; and it was declared that until the sale the trustees should hold the lands as to one moiety for L. and as to the other moiety for S. for her separate use. By articles of agreement made in the following month, it was agreed that the trustee should allot the lands described in the first schedule to L., and those described in the second schedule to S., and should stand possessed of the allotments upon the same trusts as were by the deed of March 1862 declared of the respective moieties, but without prejudice to the powers vested in the trustee by that indenture. S. was a married woman, and her husband was an alien. By her will, made in August 1862, she gave all her landed property situated at E., being her allotment under the articles of agreement, which still remained unsold, to her husband for life, with remainder over:—Held, that the trust for sale had been put an end to by the agreement of April 1862; and that the property passed as real estate under the will of S. *Sharp* v. *St. Saveur*, 7 L. R., Ch., 343; 41 L. J., Ch., 576; 20 W. R. 269; 26 L. T., N. S., 142.

Held, also, that if the trust for sale had been still subsisting, S. had elected to take the property as real estate. *Ib.*

The Court of Chancery will enforce in favour of the Crown a trust of land for an alien created prior to the Naturalisation Act 1870. *Ib.*

3. A father, on the marriage of his daughter in 1806, settled real estate upon trusts for her separate use for life, with remainder, in case she survived her husband (which event happened), to her children, as tenants in common in tail, and limited the reversion to himself in fee. The settlement contained a collateral power of sale, not in terms restricted as to time. In 1850, the daughter's issue being spent, and she being a widow, and more than seventy, the trustees executed a deed purporting to be made in exercise of the power, and to be a conveyance of the fee simple:—Held, first, that the power was valid, and subsisting at the date of the deed of 1850. *Lantsbery* v. *Collier*, 2 Kay & J 709; 25 L. J., Ch., 672; 4 W. R. 826.

Held, secondly, that it was well exercised by that deed, although, under the trusts of the settlement, the effect of its exercise was to change the devolution of the property, passing it, in the events which had happened, to the daughter absolutely. *Ib.*

Observations on *Ware* v. *Polhill* (11 Ves. 257), and review of the authorities respecting collateral powers of sale, not in terms restricted as to time. The Court looks to the whole intent and purpose of the settlement, and, whether the reversion or remainder in fee-simple be limited after estates tail or after estates for life, will hold the power to be valid and subsisting until the estates tail (if any) are barred, or the fee simple vested in possession; in either of which events the purpose of the settlement is spent, and the power ceases. *Ib.*

4. A power given to the trustees of a settlement or will to sell land comprised in it can be exercised by them after the property has, under the trusts, become absolutely vested in persons who are *sui juris*, if on the construction of the instrument it appears to be the intention of the settlor or testator that it should be then exercised, provided that the power in its creation was not obnoxious to the rule against perpetuities, and that the *cestuis que trustent* have not put an end to the trusts by electing to take the property as it stands. *Re Cotton's Trustees and the School Board for London*, 19 L. R., Ch. D., 624; 51 L. J., Ch., 514; 46 L. T. 813; 30 W. R. 610.

5. A discretionary power of sale held not to have been put an end to during the life of the tenant for life by the fact that all the reversioners had acquired vested interest in their shares. *Biggs* v. *Peacock*, 20 L. R., Ch. D., 200; 51 L. J., Ch., 555; 46 L. T. 582; 30 W. R. 605. Affirmed 22 L. R., Ch. D., 284; 52 L. J., Ch., 1; 47 L. T. 341; 31 W. R. 148.

6. Under a settlement, dated in May 1860, the trustees were directed, "by sale of a competent part" of stock, "forthwith to raise a sum not exceeding 2,000*l.*, and pay the same to H. or his assigns," and also other sums as should be required for certain purposes. In July 1860 H. requested the trustees to raise for his benefit 1,391*l.* 17*s.* 7*d.*, and he subsequently applied to them to raise 608*l.* 2*s.* 5*d.*:—Held, that the request to the trustees to raise 1,391*l.* 17*s.* 7*d.* only did not limit their power, or diminish the amount of the fund impressed with a trust for H.'s benefit, and the Court declared that the trustees were at liberty to raise the residue. *Harrold* v. *Harrold*, 7 Jur., N. S., 1274; 4 L. T., N. S., 699; 3 Giff. 192.

7. A devise of real estate to the use of trustees and their heirs, upon trust, as to two undivided fifths, for two persons in fee, and as to the other three-fifths, upon trust for certain persons for life, with remainder to their children in fee. A power of sale was given to the trustees. The testator died in 1830. All the trusts were exhausted except those of one share. It was the intention of the testator to be gathered from the whole will, that the power of sale should extend to all the shares:—Held, that a good title could be made to the whole property under the power. *Taite* v. *Swinstead*, 5 Jur., N. S., 1019; 7 W. R. 373; 33 L. T. 312; 26 Beav. 525.

8. In pursuance of a power contained in a marriage settlement, lands were appointed, subject to life estates, among the five children of A., one-fifth to each of four as tenants in common, and the remaining fifth to E., the other child, for life, with remainder to the first four. E. was of unsound mind, not so found by inquisition:—Held, that a power of sale contained in the settlement was not destroyed by the appointment. *Re Brown*, 39 L. J., Ch., 845; 10 L. R., Eq., 349; 18 W. R. 945.

1. A testator devised and bequeathed his residuary estate (which comprised freehold lands, in respect of which a notice to treat was given by a railway company before the death of the testator) to the use of trustees and their heirs in trust for his wife for life, and after her death to pay and assure the same unto his two married daughters, in equal shares, for their separate use as tenants in common, with a gift over in favour of their respective issue in events which did not happen; "and for the purpose of division" he empowered his trustees to sell his residuary estate; and he declared that his trustees should be entitled to be paid for all business done by them in relation to his estate. The testator's wife, his two daughters and their husbands, all survived him; and after the death of the widow the trustees sold and conveyed the lands to a railway company for a price which had been determined by the valuation of two surveyors, as provided by the 9th section of the Lands Clauses Consolidation Act 1845, the trustees having first, for the purpose of making such valuation, appointed one of themselves as the surveyor on their behalf. One of the testator's daughters disputed the validity of the sale, and brought an action to restrain the company from taking or using the lands:—Held, the power of sale given to the trustees by the will did not determine on the death of the tenant for life, but might have been exercised within a reasonable time afterwards for the purpose of dividing the property. *Per* Jessel, M.R. But held by Hall, V.-Ch.:—That the power of sale given to the trustees by the will determined upon the death of the testator's widow, because the femes covertes then became absolutely entitled for their separate use, and the property was "at home."—*Peters* v. *Lewes and East Grinstead Railway Co.*, 18 L. R., Ch. D., 429; 50 L. J., Ch., 839; 45 L. T. 234; 29 W. R. 875. And see S. C. 16 L. R., Ch. D., 703; 50 L. J., Ch., 172; 44 L. T. 372; 29 W. R. 422.

2. Time for Exercise.

(*a*) *In General and Postponement of Sale by Trustees*, 5901.
(*b*) *Postponement by Order of the Court*, 5902.
(*c*) *In Relation to Other Estates and Interests*, 5902.
(*d*) *During Minority*, 5903.

(*a*) *In General and Postponement of Sale by Trustees.*

2. Where the testator directs a sale with all convenient speed after his death, and directs the produce to be invested, and the dividends to be paid to one for life, and the land remains unsold, the Court considers twelve months as a reasonable time within which the estates ought to have been sold and the produce invested, and will give to the tenant for life the rents of the unsold estate from that time. *Vickers* v. *Scott*, 3 Myl. & K. 500; 3 L. J., N. S., Ch., 223.

3. Trustees in exercise of a discretion are justified in not selling a reversionary interest in stock, at the end of one year, after the death of a testator. *Wilkinson* v. *Duncan*, 2 Jur., N. S., 530; 26 L. J., Ch., 495.

A tenant for life of funds to arise from the realisation of a reversionary interest, is entitled to an equivalent for the dividends which would have been received if the reversion had been realised, and the money invested in the funds. *Ib.*

4. A devise of real and personal estate to trustees, with a direction for sale with all convenient speed and within five years, and to apply the proceeds in payment of debts and legacies, and invest the residue upon trusts for the widow and children of the testator:—Held, to empower the trustees to sell after the five years had elapsed. *Pearce* v. *Gardner*, 10 Hare 287; 1 W. R. 98.

5. Devise in trust to sell in such manner, and at such times, as the trustees shall think proper. The period of conversion as between those entitled for life and in remainder, depends not upon an authority, discretion, nor even a sound discretion in each case, but upon some fixed rule ascertaining a given period, as upon a trust to sell with all convenient speed; controlled in this instance by consent. *Walker* v. *Shore*, 19 Ves. 387.

6. Trustees postponing or accelerating the sale of estates devised to them, will make no alteration in favour of the heir to the prejudice of the *cestui que trust*. *Hawkins* v. *Chappel*, 1 Atk. 623.

7. E. N. bequeaths leaseholds to trustees for sale, to pay the proceeds to his widow for life, and after in trust for the children; one executor proves; and his co-executor, the solicitor of the testator, finding himself involved in intricate transactions in respect of the leaseholds, proves also, and institutes a suit, and claims indemnity against liabilities in respect of the trust:—Held, that under the circumstances he was justified in filing the bill, and was entitled to indemnity and costs of the suit. *Semble*, the assent of one executor to specific bequests does not take away the right of the other to indemnity. *Turner* v. *Nicholls*, 1 W. R. 157.

Parties being *sui juris*, property devised for sale may remain unsold if it does not injuriously affect third persons. *Ib.*

8. A testator, entitled to realty and personalty, including a leasehold colliery, gave his general residuary estate to trustees, in trust to sell at a convenient time, with the approbation of his son, and out of the income to pay the testator's daughter for her life such an annuity as should be 200*l.* a year, over half the income of the residuary estate, but not to exceed 600*l.* a year; and so that any annual overplus, after paying 600*l.* a year to the daughter, and 400*l.* a year to the son, should go to the son, whom the testator constituted his residuary legatee, and appointed co-executor with the trustees. The trustees disclaimed. The son acted in the trusts, and did not sell the colliery, but carried it on till the mines were exhausted, paying out of his own moneys so much of the testator's debts, as the testator's personal property, other than the colliery, was insufficient to satisfy, and paying the daughter 600*l.* per annum, out of the profits of the colliery, so long as they lasted:—Held, first, that although the sale of the property was to take place with the son's approbation, he was not, after assuming

to act as sole trustee, entitled to postpone the sale to his sister's prejudice. Secondly, that the son was chargeable with the value of the colliery at the end of a year from the testator's death, and with interest at 4*l.* per cent., and that the value ought, under the circumstances, to be calculated at the aggregate amount of the actual annual profits treated as deferred payments. *Lord* v. *Wightwick*, 4 De G. M. & G. 803; 23 L. J., Ch., 235.

1. A public-house was devised to two trustees, upon trust, as soon as convenient after the death of the testator, to sell the same, invest the proceeds, and pay the income to C. for life, and after the death of C., to divide the capital among the children of the testator. The testator died in 1834. In 1836 an offer of 900*l.* was made for the public-house, but the trustees, having been so advised, did not accept this offer. Shortly afterwards the property became depreciated in value in consequence of a scheme to form a railway. One of the trustees died in 1842. The tenant for life died in the same year. The surviving trustee died in 1856. The property remained unsold. In 1856 a suit was instituted for the administration of the testator's estate, and the estates of the trustee were held liable for the difference between the present value of the property and the rents which had been received since the death of the tenant for life, and 900*l.* and interest at 4*l.* per cent. from the same date. *Fry* v. *Fry*, 5 Jur., N. S., 1047; 28 L. J., Ch., 591; 27 Beav. 144.

2. If trustees postpone a sale of land which is unproductive, with a view to obtain an increased price, it will not entitle a tenant for life to receive interest upon the purchase money from the death of the testator. *Yates* v. *Yates*, 6 Jur., N. S., 1023; 29 L. J., Ch., 872.

See also II. *supra.*

Of Sale of Residue and Wasting Property.] See LIFE, ESTATE FOR, VI.

(*b*) *Postponement by Order of the Court.*

3. Trustees for sale under a will were authorised by the Court to postpone sales beyond the time expressly limited in the will, that course being shown to be beneficial to the *cestuis que trustent*. *Cuff* v. *Hall*, 1 Jur., N. S., 972.

4. An infant *cestui que trust* aged ten years, who was entitled upon marrying or attaining twenty-one to the proceeds of certain real estate which was directed to be sold so soon as conveniently might be after the death of a tenant for life, filed her bill, upon the death of such tenant for life, praying that the trustees might be at liberty to postpone the sale, upon the ground that the property was likely to increase materially in value. Ordered, that the sale should be postponed until the further order of the Court. *Morris* v. *Morris*, 6 W. R. 493.

(*c*) *In Relation to Other Estates or Interests.*

5. Power of sale, in the event of two of testator's children disapproving of the manner of managing his lands and houses, does not arise upon their notifying their opinion that the executors are inadequate to the management, *semble*. *Patton* v. *Randall*, 1 Jac. & Walk. 189.

6. Where, in a suit to carry into effect the trusts of a will, one of which was for sale of an estate at the death of a particular person, a decree was made for sale during the life of such person, no special ground for such anticipated sale being shown, and some of the parties interested in the proceeds were infants: —Held, that a good title could not be made under the decree. *Blacklow* v. *Laws*, 2 Hare 40.

7. On devise of an advowson to trustees to be sold on the death of the incumbent:—Held, that although no sale after his death could be made until the benefice was filled, and a sale in his lifetime would be beneficial to the parties, the Court had no jurisdiction to authorise it. *Johnstone* v. *Baber*, 8 Beav. 233.

8. A. being tenant for life of certain lands, remainder to B., his daughter, in fee, articles were entered into on the marriage of B., when a minor, with C., an adult, for a settlement of her reversion, and it was provided, that the trustees should have a power, with the consent of B. and C., to sell "the said lands of the said B.," the produce to be laid out in lands to be settled to the uses thereupon declared. In the settlement carrying those articles into execution, A., the tenant for life, joined, and the lands were limited to A. for life, remainder to the uses declared by the articles; and a power was given to the trustees to sell, with the consent of B. and C., the "said B.'s estate and interest in the said lands": —Held, that this power authorised a sale of the reversion in A.'s lifetime. *Blackwood* v. *Burrowes*, 2 Con. & L. 459; 4 Dr. & War. 441.

9. A. devised freeholds and copyholds to his wife for life, with remainder to trustees in fee, to sell the freeholds "as soon as conveniently might be," and the copyholds "as soon as conveniently might be after his decease":— Held, that the absolute interest in the estate might be sold by the trustees in the life of the widow, with her consent. *Mills* v. *Dugmore*, 30 Beav. 104.

10. Testator after charging his real estate with payment of debts devised it to trustees upon trust for B. for life, and after her death to the use of her appointees by will, and in default of appointment to the use of her right heirs. The real estate was further charged with 700*l.* for C.:—Held, that the trustees had power to sell the estate in the lifetime of B. before her appointees could be ascertained, for the purpose of raising the charge. *Elitesford* v. *Armstead*, 4 W. R. 279; 2 Kay & J. 333; 25 L. J., Ch., 237.

11. A testator possessed of divers securities of foreign states, gave all his real and personal estate to trustees for his wife for life, and after her decease, for his sons and their children. He gave his trustees a discretion to postpone the conversion of his residuary estate, which he had directed to be sold, and he directed that his stocks in the foreign funds should not be sold out during the widowhood of his wife without her consent, his object being, that she might enjoy the income derivable from such foreign funds:—Held, that all the foreign

investments should be retained. *Ellis* v. *Eden*, 3 Jur., N. S., 950; 26 L. J., Ch., 533.

Held, also, that the certificates for Boston Water scrip and bonds of the Pennsylvanian Railroad Company were not within the meaning of the will, and that they must be sold. *Ib.*

1. Testator by his will gave all his property to his wife *durante viduitate*, with a direction in the following words:—"but further should T. R. B. survive my wife B. B., then after her and my decease" he directed the property to be sold, and gave the proceeds to his sisters. By a codicil to his will the testator revoked the gift for life to his wife, and gave her an annuity of 60*l.* per annum instead, and gave the overplus of the rents or profits of his estate to his sisters. The testator died in the lifetime of his wife:—Held, nevertheless, that upon the death of the wife the power of sale and the gift of the proceeds of the sale to his sisters took effect. *Tuer* v. *Turner*, 18 Beav. 185.

2. A., by will, gave to trustees all his real and personal estate upon trust for the maintenance of his wife and family during her widowhood; and if she should marry again, to pay her such proportion of the income as should be equal to a child's share; and subject to the wife's interest, upon trust for his children in equal shares when and as they should attain twenty-one; and he empowered the trustees at any time after his decease, as they in their discretion should think proper, to sell the real estate, the money to arise therefrom to be considered as personalty. The widow survived, and did not marry again; all the children attained twenty-one, except B., who died an infant:—Held, that B. took a vested interest in both the real and personal estate, that his share in the proceeds of real estate which had been sold formed part of his personal estate, and that the power was a valid power capable of being exercised during the lifetime of the widow or after her death. *Cowley* v. *Smith*, 2 W. R. 327.

3. A testator was entitled to an estate in fee in remainder after the life estate of A. By his will he devised the estate to trustees, in trust for B. for life, with remainders over; and he empowered his trustees, with the consent of the tenant for life or tenant in tail entitled in possession for the time being under the limitations contained in his will, to sell the estate and invest the proceeds. A. survived the testator, and surrendered her life estate to B. to enable the trustees to sell:—Held, that the power to sell was accelerated, and that the trustees, with A.'s consent, could sell the estate, and make a good title to the purchaser. *Truell* v. *Tysson*, or *Tyssen*, 21 Beav. 437; 2 Jur., N. S., 630; 25 L. J., Ch., 801.

Distinction between accelerating powers to charge and powers of sale. *Ib.*

4. A testator by his will, dated in 1858, gave all his real and personal estate to trustees upon trust, out of the proceeds of his personal estate, or if and so far as the same should be insufficient then out of the proceeds of his real estate, to pay his debts; and as to a certain house belonging to him, to permit his widow to occupy it during widowhood, and on her second marriage or death to sell the same. The usual decree for administration was made by the Court, and the chief clerk found that all the debts had been paid out of the personal estate. By an order subsequently made, on further consideration of the cause, it was ordered (with the consent of the widow, who was still living), that the said house should be sold; and a contract for sale was entered into. The purchaser having objected that a good title could not be made:—Held, that the trustees had no power of sale, and that the objection was valid. *Carlyon* v. *Truscott*, 20 L. R., Eq., 348; 44 L. J., Ch., 186; 32 L. T., N. S., 50.

5. A testator gave to his wife the personal use of a leasehold messuage for her life, she discharging the ground rent, and paying a yearly rent of 50*l.* to his trustees; and he declared that if she should not think fit to reside therein, then the premises should form part of his residuary estate. He then directed the conconversion of his real and the residue of his personal estate, and gave a power to postpone such conversion, directing the rents and profits in the meantime to be deemed annual income. Under the trusts of the residue the widow took one-fourth of the income. A railway company, having taken the premises under its compulsory powers while the widow was in occupation, made an agreement with her as to her interest, and a separate agreement with the trustees. The latter declined to assign on the ground that the trust for sale had not arisen, and required the consideration money to be paid into Court:—Held, that their contention was right, for though the house, subject to the interest of the widow, was part of the residuary estate, it would not be a proper exercise of the trust to sell during the continuance of the occupation of the widow. *Smith* v. *Great Northern Railway Co.*, 23 W. R. 126.

(*d*) *During Minority.*

6. On the marriage of a female infant who was a ward of Court, and entitled to a leasehold estate to her separate use, a settlement was made under the order of the Court, giving to the trustees a power of sale over the leasehold estate. A sale made by the trustees under the power, during the minority of the female infant, is not valid. *Simson* v. *Jones*, 2 Russ. & M. 365.

7. Upon a devise in trust for sale after the death of a party entitled to the rents and profits for life, and a sale under a decree during the life, some of the parties interested being infants, or not *sui juris*, the Court refused to compel the purchaser to accept the title; and held, that the condition of sale providing that the objections to title were to be taken within a stated time from the delivery of the abstract, was to be construed as from the delivery of a perfect one, and that an objection might be taken arising out of evidence called for before the expiration of the time limited; and that a statement that the *cestui que vie* proved the will, without stating the pleadings in the cause, or whether such tenant for life was living or dead, was not a sufficient intimation to the purchaser that the time of sale had been anticipated. *Blacklow* v. *Laws*, 2 Hare 40.

1. A. devised an estate to three trustees for sale, giving a discretion as to the time at which the sale was to be effected, and as to the mode of sale. Upon a bill by a purchaser of part of the estate to enforce specific performance of the contract for sale:—Held, that in consequence of the minority of one of the vendors, no valid contract for the sale existed. *King* v. *Bellord*, 11 W. R. 900; 8 L. T., N. S., 633; 1 Hem. & M. 343; 2 N. R. 442; 32 L. J., Ch., 646.

VIII. VALID EXERCISE OF.

1. *Conditions*, 5904.
2. *Price. In General*, 5905.
3. *Sale of Several Properties at an Entire Price*, 5905.
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1. Conditions.

2. On a sale by a trustee, he stipulated that his receipt should be deemed an effectual and conclusive discharge, and that the purchaser should not require the concurrence of the heir or *cestuis que trustent*. A decree was made for specific performance and reference as to title. The Master found in favour of the trustee; and upon exceptions, the purchaser contended that the rule as to the concurrence of the *cestuis que trustent* being one for their protection, it was a breach of trust to stipulate that they should not concur; but the Court held the point concluded by the decree. *Wilkinson* v. *Hartley*, 15 Beav. 183.

3. A. and B., trustees of a stock fund in trust for A. for life, with remainder over to unascertained persons, sold out part of the stock and lent it to B., who misapplied it. B. gave to A., by way of security and indemnifying her, an equitable mortgage by deposit. B. then became bankrupt, and A. and B.'s assignees applied to and obtained from the Court of Bankruptcy, on a statement of these facts, but without making the *cestuis que trustent* of the fund parties, an order for sale. They sold, with a special condition referring to the petition and order in bankruptcy, that the purchaser should only have the receipt and conveyance of A. and the assignees:—Held, that A. and the assignees could make a good title without the concurrence of the *cestuis que trustent* in the receipt or conveyance. *Groom* v. *Booth*, 1 Drew. 548; 17 Jur. 927; 22 L. J., Ch., 961.

4. Trustees for the sale of lands joined with the trustees for the sale of other lands, and with the absolute owner of other lands, in selling all the lands together. After entering into a contract for sale, they agreed as to the proportions in which they were to be entitled to the purchase money. The conditions for sale stated, that as to a part of the lands, the title was to commence in 1845 only. On investigation, this only related to a very small part:—Held, that so joining in the sale, and so apportioning the purchase money, was a breach of trust, and that the condition was depreciatory; and specific performance at the suit of the vendors refused. *Rede* v. *Oakes*, 10 Jur., N. S., 1246; 34 L. J., Ch., 145; 13 W. R. 303; 11 L. T., N. S., 549; 4 De G. J. & S. 505; 5 N. R. 209. Reversing 32 Beav. 555; 9 Jur., N. S., 765; 11 W. R. 795; 8 L. T., N. S., 784.

5. When a purchaser at an auction of trust property knows that he is buying from fiduciary vendors, if the conditions are depreciatory and unnecessary, the sale will be restrained, although the trustees had a special power to sell under such conditions as they thought fit. *Dance* v. *Goldingham*, 21 W. R. 761; 42 L. J., Ch., 777; 8 L. R., Ch., 902; 29 L. T., N. S., 166.

Trustees having power to sell under such special or other conditions or stipulations as they should think fit, sold by auction with a condition limiting the title to commence in 1858 (fourteen years previously). The next convenient root of title was a deed of 1819, from which a good title could be deduced, but the trustees could not find this deed, and had only recitals of its contents. There was also a condition that all recitals and statements in the deeds and particulars should be accepted as conclusive evidence:—Held, that the sale under such conditions was a breach of trust, and an injunction was granted at the suit of a *cestui que trust* to restrain completion. *Ib.*

Held, also, that such an injunction would be granted against an innocent purchaser. *Ib.*

The bill was filed in the name of an infant having a very small interest:—Held, that the Court could not look into the motives of the next friend. *Ib.*

Such a suit can be maintained by one *cestui que trust* without making the other parties. *Ib.*

6. Where trustees sell property with depreciatory conditions which render the sale liable to be impeached by the *cestuis que trustent*, the trustees cannot maintain an action for specific performance against the purchasers. *Dunn* v. *Flood*, 25 L. R., Ch. D., 629; 53 L. J., Ch., 537; 49 L. T. 670; 32 W. R. 197.

A testator devised real estate to trustees upon trust at their discretion, to sell the same and invest and deal with the proceeds in manner mentioned in his will. The real estate was put up for sale in lots by public auction in November 1882, and F. was the highest bidder and declared to be the purchaser of part. The sale was made subject to certain conditions of sale and "general conditions." The conditions of sale provided that the abstract of title to the property purchased by F. should commence with the conveyance to the testator, dated the 2nd October, 1872, and that every recital or statement in any abstracted document should be deemed conclusive evidence of the fact or matter recited or stated therein, or to be assumed or implied therefrom. F. refused to complete his purchase, and the trustees commenced an action for specific performance:—Held, that the conditions of sale were depreciatory, and rendered the sale liable to be impeached by the *cestuis*

que trustent, and that the plaintiffs were, therefore, not entitled to a decree for specific performance. *Dance* v. *Goldingham* (8 L. R., Ch., 902) followed. *Ib.*

1. Sale by administratrix of the intestate's property, to her own son under an open contract and for undervalue, set aside. The mere fact of this agreement being made with the son of the administratrix would have been sufficient to vitiate the sale, irrespective of the improvidence of the contract, which imposed no conditions on the intending purchaser, and of the undervalue. *John* v. *Jones*, 34 L. T., N.S., 570.

2. Trustees, as vendors, are not bound to state whether there exist any debts which make a sale necessary. *Flux* v. *Best*, 31 L. T. 645; 23 W. R. 228.

2. Price. In General.

3. Trustees, who were directed to sell an estate as soon as conveniently might be after their testator's death, refused, by the desire of one of the parties interested, an offer of 6,600*l.* for the estate; but they afterwards sold it for 3,600*l.* The Court charged them with the loss, but gave them their costs, as their conduct had not been wilful or perverse. *Taylor* v. *Tabrum*, 6 Sim. 281.

4. Trustees not to be compelled to perform an agreement entered into under mistake, to sell for an inadequate consideration. *Bridge* v. *Rice*, 1 Jac. & Walk. 74.

5. The duties of trustees selling under a trust or power to sell are not properly discharged by selling to the family solicitor without proper caution and previous inquiry as to the value, the sale being a contrivance to raise money to lend to one of the *cestuis que trustent*, to whom the trustees had power to lend it. *Robinson* v. *Briggs*, 1 Sm. & G. 188.

6. A testator gave to his son the option of purchasing an estate, at what to his trustees "should seem a fair and reasonable value." The trustees had a valuation made, which amounted to 1,500*l.*; the valuation made at the instance of the parties interested in the produce exceeded that by one-third:—Held, that the trustees having fixed what they considered "a fair and reasonable value," having authority to do so, it was incumbent on the plaintiff to show that it was fraudulent, in order to prevent the son's purchasing at 1,500*l.* *Edmonds* v. *Millett*, 20 Beav. 54.

7. A trustee for sale is bound to obtain the best price for the property. *Harper* v. *Hayes*, 2 Giff. 210; 6 Jur., N. S., 643; 8 W. R. 600.

Therefore where the trustee contracted to sell an estate, though with the consent of all the *cestuis que trustent*, except the assignee of one share, for less than was offered by such assignee, the Court annulled the contract, and deprived the trustee of the costs of the suit. *Ib.*

Real estate was conveyed to H. upon trust, and he was directed, immediately or as soon as conveniently might be after a certain event, to sell the same "for the most money and best price that could be gotten, either by public auction or by private contract." Soon after the occurrence of the event, there being a difficulty as to the title, H., with the concurrence of the *cestuis que trustent*, offered the estate to P. by private contract for 6,000*l.*; and he subsequently entered into a contract for pure chase, but, before the offer was accepted, the plaintiffs became the purchasers of the share of one of the *cestuis que trustent*. The offer made to P. was immediately countermanded, and notice given to him of the want of concurrence on the part of such *cestui que trust*; but P. on the following day accepted the offer. H. did not put the property up by public competition, or make further inquiry for a purchaser, but entered into an agreement with P. to sell the property to him for 6,000*l.* The plaintiffs thereupon filed a bill for the purpose of having the agreement set aside, and they stated their willingness to give more than 6,000*l.* for the property, and subsequently stated that they would have given 7,000*l.* H. supported the sale to P., alleging that the sale to the plaintiffs by one of the *cestuis que trustent* was of doubtful validity, and that all the other *cestuis que trustent* were desirous of completing the contract with P.:—Held, that the agreement for sale by H. was not binding. S. C. 7 Jur., N. S., 245; 9 W. R. 504; 3 L. T., N. S., 530.

The question whether P. was entitled to damages for the breach of the agreement, was not for an equity judge, but for a jury, under the direction of a common-law judge. *Ib.*

8. Executors and trustees, with power of sale, of a will, under which the plaintiff was sole *cestui que trust*, entertained the proposal of A. and B. for the purchase of the property, on the ground that they were connected and acquainted with the business of which it consisted. The plaintiff was in favour of another purchaser, C., who offered nearly equal terms. Ultimately the offer of A. and B. was accepted. The plaintiff filed a bill, alleging that C. would have made a higher offer if the negotiations had been continued, and praying that the trustees might be made liable for the loss:—Held, that the trustees could not be made liable; and that they ought to be allowed their costs of the suit. *Selby* v. *Bowie*, 11 W. R. 559; 8 L. T., N. S., 18; 9 Jur., N. S., 432; 2 N. R. 2; 1 N. R. 420.

9. Upon a bill filed against trustees, charging breaches of trust in selling at an undervalue, and upon the question whether a married woman, having separate estate for life, without power of anticipation, can be bound by a compromise to which she is a party relating to the *corpus* of the property:—Held, that the marketable value, and not a valuation, is the test of adequate price; and that a married woman, with separate property for life without power of anticipation, can bind the *corpus* of the property. *Wilton* v. *Hill*, 4 W. R. 66; 25 L. J., Ch., 156.

3. Sale of Several Properties at an Entire Price.

10. A contract made, by trustees for sale, for the sale of the trust property, conjointly with property not subject to the same trusts, will not be decreed to be specifically performed unless it appears to the Court, both that due precautions have been taken for preventing injury to the trust premises by the conjunction, and also that the terms of the contract furnish

means of ascertaining clearly the proportion of the proceeds of the sale to be attributed to the trust premises. *Rede* v. *Oakes*, 34 L. J., Ch., 145; 13 W. R. 303; 11 L. T., N. S., 549; 4 De G. J. & S. 505; 10 Jur., N. S., 1246; 5 N. R. 209. Reversing 32 Beav. 555; 9 Jur., N. S., 765; 11 W. R. 795; 8 L. T., N. S., 784.

But there is no general rule positively forbidding trustees to sell trust property conjointly with other property not subject to the trust, where the conjunction is beneficial and the proportion of the purchase money attributable to the trust property admits of satisfactory ascertainment, *semble*. *Ib.*

Property comprising three separate parcels held under different titles, and the bulk of which was vested in several sets of trustees, was agreed to be sold with the concurrence of all whose consent to a sale was necessary, at one gross sum, with stipulations, for commencement of titles at various periods, not distinguishing the several portions of the property to which the different roots of title applied, and the date of commencement of title being in one case as recent as 1845. Subsequently an agreement was made between the vendors for the apportionment of the purchase money. The purchaser afterwards refused to complete his purchase. A bill, against the purchaser, for specific performance of the agreement, was dismissed. *Ib.*

1. A reversion in fee expectant on the life estate was settled in strict settlement, and the trustees were empowered at any time thereafter, with the consent of the tenant for life under the settlement, to sell or exchange the lands for other lands in fee, in possession. The tenant for life in possession, together with the tenant for life under the settlement, and the trustees, by their agent, sold the estate for one entire sum. The purchaser objected that the power of sale could not be exercised until the reversion came into possession, but waived all other objections:—Held, that the power was well exercised, and that the purchaser, having waived all other objections, must agree with the vendors as to the apportionment of the purchase money between the life estate in possession and the reversion, or that the apportionment must be made by the Master. *Clark* v. *Seymour*, 7 Sim. 67.

2. It is the duty of trustees who, having a trust or power to sell the trust property, join with the owner of another property in selling both properties together, first, to see that such a mode of sale is beneficial to their *cestuis que trustent*; secondly, to see that their share of the purchase money is apportioned before the completion of the purchase, and to obtain payment of such apportioned share; and thirdly, to apportion the share themselves, taking care to act under proper advice. *Re Cooper*, 4 L. R., Ch. D., 802; 46 L. J., Ch., 133; 35 L. T., N. S., 890; 25 W. R. 301.

The proper mode of apportioning the prices of a life estate and reversion when sold together for a lump sum, is to value both interests separately, and not to put a value on one and deduct that from the total price. *Ib.*

A purchaser under such circumstances ought to see that the purchase money is properly apportioned before completion. *Ib.*

3. A messuage belonged to one who devised his real estate in trust for sale. An adjoining messuage was vested in the trustees of his settlement upon trust for sale, and the purchase money, subject to the payment of definite sums, belonged to the testator's estate. Under a decree for administering the estate the two messuages were put up for sale together in one lot, and it was provided that the purchase money should be paid into court to the credit of the cause, "the proceeds of the sale of the testator's real estate." The trustees of the settlement had obtained liberty to attend the proceedings as to the sale. The purchaser objected to the title on the ground that the two properties were sold together for one lump sum, without any provision for apportioning it, and that it was to be paid into court in a suit unconnected with the settlement:—Held, that this objection was not sustainable, for that the Court, having the money in its custody, would see it properly applied. The Court, however, for the satisfaction of the purchaser, ordered that the purchase money should be apportioned, and the part apportioned to the settled messuage paid into court to a separate account. *Cavendish* v. *Cavendish*, 10 L. R., Ch., 319; 33 L. T., N. S., 219; 23 W. R. 313.

4. A trustee having a discretionary trust for sale of real estate under a will at such price as he should think reasonable, with power to postpone the sale, leased the property for thirty years with the concurrence of the beneficiaries. Before the lease expired the property was put up for sale by the lessee and the trustee conjointly, the facts being disclosed by the particulars of sale, and a sale having been effected, the purchase money was apportioned between the two interests according to the valuation of a skilled valuer:—Held, that the purchaser was not entitled to insist on the concurrence of the beneficiaries on account of the valuation not having been made before the sale, and that the title would be forced upon him. *Morris* v. *Debenham*, 2 L. R., Ch. D., 540; 34 L. T., N. S., 205; 24 W. R. 636

5. H. was surviving executor and trustee for sale of freeholds, part of the proceeds of which were to be held on the trusts of his marriage settlement, his wife being the testator's daughter. The settlement contained a power to invest in land. H. put up the property for sale, and instructed his trustees to purchase five of the lots, and he instructed the auctioneer to put reserved prices on the lots. The lots were fairly valued, one of the lots (lot 3) being valued at 6,000*l.* H., acting as solicitor for the purchasers, instructed an agent to bid as far as 8,000*l.* for lot 3, and to buy the other lots for whatever price they would fetch. The agent bought lot 3 at 7,230*l.*, and the four other lots above the reserved prices, and H. then conveyed them to the trustees of his settlement:—Held, that the sale was unimpeachable. *Hickley* v. *Hickley*, 34 L. T., N. S., 441; 24 W. R. 604; 45 L. J., Ch., 401; 2 L. R., Ch. D., 190.

4. Biddings and Reserve.

6. An absolute power of sale given to trustees authorises them on a sale to fix

a reserved bidding. *Re Peyton*, 8 Jur., N. S., 453; 31 L. J., Ch., 440; 10 W. R. 515; 6 L. T., N. S., 883; 30 Beav. 252.

1. The fact that a trustee for sale by public auction, or private contract, has not promoted competition by asking one of two persons proposing to purchase by private contract to bid higher before closing with the rival bidder:—Held, not to be a ground for setting aside or cancelling the contract. *Harper* v. *Hayes*, 2 De G. F. & J. 542.

The practice adopted at sales by auction under the decree of the Court, of opening the biddings, after a sale, is not to be extended to sales by trustees under a power of sale conferred upon them. *Ib.*

2. A term of 200 years, of which only nine months remained unexpired, was vested in trustees, upon trust to sell. It was not known who was entitled to the reversion expectant on the determination of the term. Upon a bill by one of the *cestuis que trustent* the Court decreed a sale, giving all the *cestuis que trustent* liberty to bid, and directing advertisements to be issued for the representatives of the original lessor, who were to be at liberty to come in under the suit. *Edmunds* v. *Foley* (*Lord*), 7 Jur., N. S., 1268; 30 L. J., Ch., 887; 9 W. R. 859.

5. Authorised Payments in carrying out the Sale.

3. Real estates were conveyed to trustees, upon trust to sell in the usual form, and with power to enter into such arrangements with respect to any such sale as they might think fit, and to apply the proceeds of the sale upon certain trusts. The trustees sold part of the estates; and in order to satisfy the requisitions of the purchaser, paid off a legacy given by a former owner of the estates. Objection was made to the trustees being allowed this payment, on the ground that the legacy was not charged on the land:—Held, that even though the legacy were not charged on the land (which was doubtful) the trustees must be allowed the payment, as they had acted *bonâ fide* for the benefit of the estate. Trustees having a power to sell, have a reasonable discretion to make payments for the purpose of carrying out the sale. *Forshaw* v. *Higginson*, 5 W. R. 424; 26 L. J., Ch., 342; 3 Jur., N. S., 476.

4. The donees of a power of sale and exchange may pay money for owelty of exchange, although they are not expressly authorised so to do. *Bartram* v. *Whichcote*, 6 Sim. 86.

6. Sale by Trustees to pay Debts.

5. Testator devised his real estate to trustees in trust, during the first fifteen years after his death, to apply the rents in discharge of the charges and incumbrances on his estate, and also of the debts which he should owe at his decease; and if by any reason whatever, in the opinion of his trustees, a sale should become necessary of any of the estates for the purpose of raising any sums of money charged on his estates before the expiration of the fifteen years, then he authorised the trustees to make such sale, and to apply the produce in discharge of such incumbrances; and he declared that their receipt for any money payable to them under his will should discharge the persons paying the same from being answerable for the application thereof, or from being bound to inquire as to the necessity or expediency of any sale which might be made by the trustees. The testator's personal estate being insufficient to pay his debts, and the rents of his real estates being insufficient to pay the interest of the incumbrances thereon, the trustees sold the whole of the estate, and thereby raised considerably more than the amount of the incumbrances. The Court, in a suit for specific performance:—Held, that the power of sale depended on the opinion of the trustees that a sale was necessary, and decreed the purchaser to complete his purchase. *Rendlesham* (*Lord*) v. *Meux*, 14 Sim. 249.

6. Distinction between a devise of estates to trustees upon trusts for certain persons, subject to debts, etc., and a devise to trustees charged with debts, etc., with a direction for, or trusts which require, an out-and-out conversion; in the former case a mortgage may be a proper mode of raising the particular charge, in the latter a sale only is authorised. *Stroughill* v. *Anstey*, 1 De G. M. & G. 635; 22 L. J., N. S., Ch., 130; 16 Jur. 671

7. It is no objection, on the part of a purchaser of land sold by a Master, that more land is sold than is necessary for the purpose of testator's will. *Lutwych* v. *Winford*, 2 Bro. C. C. 248.

8. A. conveys lands to trustees, on trust to sell, if the unsatisfied debts of a partnership in which he had been concerned should at a given time exceed 40,000*l.*; the trustees sell and convey to the purchaser by a deed, which recites that the debts of the partnership exceeded the specified amount, and that A. had died intestate as to his real estates, and the heir-at-law of A. joins in that deed and enters into a covenant for the title of the trustees, a covenant against all acts done by heir or his father, and a covenant for further assurance; it afterwards appears to be uncertain whether A. had not devised his real estate, and the purchaser files a bill to have protection against, or remedy of, the alleged defect in his title, which this discovery created:—Held, that the purchaser is not entitled to have an account taken of the debts of the partnership, in order to establish the fact of their having, at the specified time, exceeded the specified amount; that he is not entitled to have the books and documents connected with the accounts of the partnership delivered to him or deposited for safe custody; and that he is not entitled to a covenant either from the heir or from any other person for the production of those books and papers. *Hallett* v. *Middleton*, 1 Russ. 243.

9. Where lands are devised in trust for the payment of the testator's debts generally, with a direction that his estate at A. shall first be sold for that purpose, and, if that be not sufficient, then his estate at B.: a good title cannot be made to the estate at B., unless the vendor shows clearly that the trust remains unsatisfied, and that the produce arising from

the sale of the A. property would, beyond all doubt, be insufficient for the purpose of the trust. *Pierce* v. *Scott*, 1 Y. & Coll. 257; 4 L. J., N. S., Exch. Eq., 36.

1. Testatrix gave, devised, and bequeathed all the rest, residue, and remainder of her estate, real and personal, not specifically disposed of by her will, after payment of her debts, etc., to trustees, upon trust to invest the same in the funds or on real security, or, at their discretion, to keep the same in their then state of investment; and, in a subsequent part of her will, she declared that the receipts of the trustees for the purchase money of any trust property sold by them under her will, should be good discharges to the purchasers of such property:—Held, that the trustees were authorised to sell a real estate comprised in the residuary devise, although all the testatrix's debts, etc., had been paid. *Affleck* v. *James*, 17 Sim. 121; 13 Jur. 759.

2. A., having a power to appoint realty among children, devised and bequeathed "all my real and personal estate whatsoever whereof I have power to dispose," upon trust to sell the realty and give valid discharges to purchasers, and to apply the proceeds of the realty and the personalty in payment of his debts, funeral and testamentary expenses, and then among his children in certain shares. It did not appear whether the personal estate was sufficient for the debts, and funeral and testamentary expenses; but he had no real estate of his own, except a contingent reversion in the subject of the power:—Held, that the trustees could not make a good title and give effectual receipts. *Cowx* v. *Foster*, 1 John & H. 30; 6 Jur., N. S., 1051; 29 L. J., Ch., 886.

3. Trustees, as vendors, are not bound to state whether there exist any debts which make a sale necessary. *Flux* v. *Blest*, 31 L. T., N. S., 645; 23 W. R. 228.

4. A husband devised his real estate to trustees upon trust to pay thereout his debts and legacies if his personal estate should prove insufficient, and directed that, if not previously sold, his widow should have the enjoyment of his freehold house called Essex Lodge during her life or widowhood, and that after her death or second marriage it should be sold, and the produce divided among his children. A suit was instituted for the administration of his estate, in the course of which the chief clerk certified that the testator's debts and legacies had been paid out of his personal estate, and an order was afterwards made, with the consent of the widow who was living and unmarried, for the sale of Essex Lodge:—Held, that an objection by the purchaser, that the Court had no jurisdiction to make the order directing the sale, was valid. *Carlyon* v. *Truscott*, 23 W. R. 302; 44 L. J., Ch., 186; 32 L. T. 50; 23 W. R. 302.

7. Mortgage under.

5. Power to sell implies power to mortgage. Dict. per Ld. Macclesfield in *Mills* v. *Banks*, 3 P. W. 9.

6. Power to sell authorises a mortgage. *Shaw* v. *Borrer* (1 Keen 557) approved of. *Ball* v. *Harris*, 3 Jur. 140.

7. Where there was a devise upon various trusts, but subject to a charge for payment of debts, with a power to sell, and to buy other lands to be held upon the trusts of the will, and the trustee sold part of the devised lands, and bought others:—Held, that the purchased lands were subject to the charge of debts, and might be mortgaged by the trustee. *Shaw* v. *Borrer* (1 Keen 557) approved of. *Ball* v. *Harris*, 8 Sim. 485; 4 Myl. & C. 264; 8 L. J., N. S., Ch., 114; 1 Jur. 706.

8. A trust "to make sale and dispose of" the testator's real estate, does not authorise a mortgage where an intention appears that the whole real estate should be converted, as in the case of a trust to apply the moneys arising from such sale in payment of debts, and then upon further trusts for the benefit of wife and children. *Haldenby* v. *Spofforth*, 1 Beav. 390; 8 L. J., N. S., Ch., 238; 3 Jur. 241.

9. A testator, by his will, after appointing three persons his executors, gave to them the residue of his personal estate, and directed them or other the trustees to be appointed under the provisions contained in his will to stand possessed of his residuary personal estate, upon trust at such time or times as to them should seem meet to sell and convert into money all such part thereof as should not consist of money, and invest the produce in securities, and to stand possessed of the same upon trust thereout to pay his funeral expenses and debts and certain large legacies which he specified, and to stand possessed of the residue for his two sons equally; and the will contained a clause which, according to the construction put on it by the Court, empowered the trustees to give receipts. Sixteen years after the death of the testator, the then acting trustees of the will, who were not the executors, raised money upon a deposit of the title deeds of two leasehold houses, part of the testator's residuary estate:—Held, dismissing a claim filed by the mortgagees to enforce their securities, that, inasmuch as the trusts of the will showed a conversion out and out of the testator's property to be absolutely necessary, the trustees were not authorised in raising money by mortgage. *Stroughill* v. *Anstey*, 1 De G. M. & G. 635; 16 Jur. 671; 22 L. J., N. S., Ch., 130.

A power of sale out and out, and having an object beyond the raising of a particular charge, does not authorise a mortgage; but where the power is for raising a particular charge, and the estate is settled or devised subject to that charge, it may be proper to raise the money by mortgage, and such a mortgage will be supported as a conditional sale. *Ib.*

Where a trust is created by will for the payment of debts and legacies, a purchaser or mortgagee is not bound to see to the application of the money raised, the principle referable to such a case being, that the testator has shown his intention to be to entrust the trustees with the power of receiving and applying the money. *Ib.*

Persons, however, who deal with trustees raising money at a considerable distance of time and without apparent reason for so doing, are under an obligation to inquire, and see that no breach of trust is being committed. *Ib.*

Distinction in reference to the raising of money not apparently for the payment of a charge, between the case of a man who is owner as well as trustee, and that of a man who holds the property merely as a trustee subject to a charge. *Ib.*

1. Trustees who are directed to sell an estate are not justified in raising money by mortgage, notwithstanding a discretion is given to them to postpone the sale. *Devaynes* v. *Robinson*, 24 Beav. 86; 3 Jur., N. S., 707; 27 L. J., Ch., 157; 5 W. R. 509.

2. A testator devised real estate to trustees, upon trust out of the rents and profits to pay annuities; and by the same ways and means, or by such other ways and means (except a sale or sales) as they might think proper, to raise such sum and sums as should be sufficient to discharge the several incumbrances thereon, and subject thereto, upon trust for the testator's grandsons successively in tail male. The will contained a power for the trustees to grant leases at a rack-rent, and without fine: —Held, that the trustees were precluded from raising the money by mortgage, the word sale virtually including mortgage. *Benett* v. *Wyndham*, 3 Jur., N. S., 1143; 5 W. R. 410.

Held, also, that the trustees had a discretion as well to the time as to the means of paying off the charges; and the testator showing an intention to benefit all the objects of his bounty equally, the Court referred it to itself in chambers to determine what proportion of the annual income ought to be applied in paying off the incumbrances. *Ib.*

3. Whether a sum directed to be raised out of the rents and profits of a real estate is to be raised by annual rents and profits, or by sale or mortgage, is a question of intention to be collected from the context of the will, and from the purposes to which the money is to be applied. *Wilson* v. *Halliley*, 1 Russ. & M. 590; 8 L. J., Ch., 121.

4. Reciprocal duties of trustees and *cestuis que trustent*, where it becomes necessary to raise money to discharge incumbrances on or otherwise deal with the trust property. *Marshall* v. *Sladden*, 7 Hare. 428; 19 L. J., N. S., Ch., 57; 14 Jur. 106.

5. Estates in D. were conveyed to trustees upon trust that they, or the survivor of them, or the heirs of the survivor, should, at the request of A. and B., or the survivor of them, or, if both should be dead, at the discretion of the trustees or trustee for the time being, "sell and dispose of all and singular the same hereditaments and premises, either together or in parcels, and either by public auction or by private contract." The trustees were directed to stand possessed of the proceeds upon the trusts, and for the intents and purposes, etc., declared by a deed of even date. The deed of even date was a settlement of certain estates in N. in strict settlement upon A. and B., and the son of B., in tail male. And the trusts, thereby declared, of the proceeds of the sale of the D. estates were for payment of certain sums of money, some of which were charged upon the N. estates. "And as to the residue (if any) of the money which should arise by such sale, remaining unapplied for the purposes aforesaid," to be applied in the purchase of lands to be settled to the same uses as the N. estates. And it was declared that the rents, issues, and profits of the D. estates, until the same should be sold, or so much thereof as should be remaining unsold, should be paid and applied to the same person, and for the same purposes, as the rents of the lands to be purchased with the residue of such trust money should be payable or applicable to, if such purchase were actually made:—Held, that this trust for sale authorised a mortgage of the D. estates for a sum sufficient to pay off all the charges thrown upon those estates. *Orford* (*Earl*) v. *Albemarle* (*Earl*), 17 L. J., N. S., Ch., 396; 12 Jur. 811.

6. A trust for sale of real estate held not to authorise a mortgage. *Page* v. *Cooper*, 16 Beav. 396; 1 W. R. 136.

Real estate was conveyed to trustees upon trust to "sell and dispose" thereof, and, out of the money to arise, "levy, raise, and pay, two sums of 150*l.* and 1,000*l.*, and invest the residue of the moneys to arise, for the husband and wife for their lives, and afterwards for their children, and, in default, as the wife should appoint by will:—Held, that the trustees were not justified in raising these two sums by mortgage, inasmuch as a conversion of the estate into money, out and out, was intended. *Ib.*

7. When a small estate was settled in strict settlement, and the settlement contained power for the trustees during minorities to repair and rebuild, and to pay the expenses out of the rents and profits, but no power to borrow on mortgage, the Court, on being satisfied that it was for the benefit of all parties, and notwithstanding that some interested were infants, gave the trustees leave to borrow money on mortgage, not exceeding a sum fixed by the Court, to rebuild the house, as no repairs would render it habitable. *Frith* v. *Cameron*, 19 W. R. 886.

By Executors.] See EXECUTOR AND ADMINISTRATOR, XXII.

8. Severance of Minerals.

8. A power to sell or convey in exchange all or any part of the manors, lands, tenements, hereditaments, and premises, and the inheritance thereof, will not enable trustees to sell the lands, with an exception or reservation of the mines and minerals under the same. *Buckley* v. *Howell*, 7 Jur., N. S., 536; 30 L. J., Ch., 524; 4 L. T., N. S., 172; 29 Beav. 546; 9 W. R. 544.

Order for. Under 25 & 26 Vict., c. 108.] 9. Under 25 & 26 Vict., c. 108, s. 2 the Court will make an order, on petition authorising the sale of land with a reservation of the minerals, or of the minerals apart from the land, in general terms without reference to any particular sale. *Re Willway*, 32 L. J., Ch., 226; 1 N. R. 469.

Upon any application to the Court by trustees or other persons under the above section, the consent of the parties beneficially interested is necessary. S. C. 1 N. R. 469.

10. The Court has power under the Confirmation of Sales Act, 25 & 26 Vict., c. 108, to give a general direction that persons having powers

of sale and exchange in a settlement or will which do not expressly authorise the reservation of mines and minerals on a sale of the settled property, or the sale of minerals apart from the land, may exercise the powers as if they did authorise such reservation or separation. *Re Wynn*, 16 L. R., Eq., 237; 21 W. R. 695; 43 L. J., Ch., 95.

1. Where a petition is presented by trustees under 25 & 26 Vict., c. 108, it is necessary that the beneficiaries should be served with and appear on the petition. *Re Brown*, 9 Jur., N. S., 349; 32 L. J., Ch., 275; 7 L. T., N. S., 346; 1 N. R. 13; 11 W. R. 19.

2. The *cestuis que trustent* ought to be made parties to an application under 25 & 26 Vict., c. 108, s. 2, for sale of the surface apart from the minerals. *Re Palmer*, 13 L. R., Eq., 408; 41 L. J., Ch., 511.

3. A petition under 25 & 26 Vict., c. 108, s. 2, by trustees of settled land with power of sale, exercisable with the consent of the tenant for life, for leave to sell the land and minerals separately, need not be served on the beneficiaries entitled in remainder. *Re Pryse*, 10 L. R., Eq., 531; 39 L. J., Ch., 760; 18 W. R. 1064.

4. A petition was presented, under the Confirmation of Sales Act, 25 & 26 Vict., c. 108, by trustees with a power of sale, and the first tenant for life, and the tenant for life in remainder, for leave to sell the land and minerals separately:—Held, that the next remainderman need not be served with the petition. *Re Powell*, 23 W. R. 151.

5. A petition under 25 & 26 Vict., c. 108, s. 2, by trustees having power to sell settled lands with the consent of the tenant for life, for leave to sell the land and minerals separately, need not be served on the remaindermen. *Re Nagle*, 6 L. R., Ch. D., 104.

6. The Court allowed a schedule of considerable length to be appended to an order made for a sale of minerals under the Act 25 & 26 Vict., c. 108. *Re Roper's Estate*, 2 N. R. 442.

By Mortgagees.] 7. Mortgagees are within the Confirmation of Sales Act, 25 & 26 Vict., c. 108, and may have liberty to sell under their power of sale, with a reservation of the mines and minerals in the land sold, and incidental powers of working them. *Re Beaumont*, 12 L. R., Eq., 86; 40 L. J., Ch., 400; 19 W. R. 767.

It is not necessary for mortgagees, in order to exercise the power of selling with such a reservation, to serve the petition or any subsequent incumbrances. *Ib.*

8. Mortgagees in possession, with a power of sale, after filing a bill for foreclosure, and setting down the cause for hearing on motion for a decree, presented a petition, not entitled in the cause, but in the matter of the 25 & 26 Vict., c. 108, for liberty to sell the surface, excepting the mines and minerals, of the hereditaments comprised in the mortgage deed:—Held, that they were entitled to the order asked. *Re Wilkinson*, 13 L. R., Eq., 634; 41 L. J., Ch., 392.

9. Pending Suit.

9. Where sale before Master is directed by decree, a contract by trustee for private sale would not be enforced. *Raymond* v. *Webb*, Lofft. 66.

10. Pending a suit, and although no decree has been made, it is proper that trustees should obtain the sanction of the Court to their exercise of powers of sale and leasing. *Turner* v. *Turner*, 30 Beav. 414.

10. Other Cases.

11. Where the plaintiffs were devisees of a leasehold, in trust to sell, and also executors, and, being unable to sell, had agreed to underlet the premises to the defendant:—Held, that being *primâ facie* inconsistent with the trust for sale, the Court could not compel performance of the agreement in a suit to which the *cestuis que trustent* were not parties. *Evans* v. *Jackson*, 8 Sim. 217; 6 L. J., N. S., Ch., 8.

12. Under a devise of manors, lands, etc., to A., his executors, etc., for a term of eleven years, in trust to receive the rents, issues, and profits of the premises that should from time to time accrue and become due, and dispose of the same for the benefit of a *cestui que trust*, A. may, by the direction of the *cestui que trust*, and for his benefit, assign the advowson of a rectory appendant to a manor to a purchaser, for the said term of eleven years, to intent that purchaser may present for the next turn, in case of an avoidance before the expiration of term; and in case of such avoidance, the purchaser may present accordingly. *Albemarle* (*Earl*) v. *Rogers*, 7 Bro. P. C. 522.

13. Contract by trustees under power of sale, though by subsequent events it cannot be executed by the power, shall be made good in equity by the effect of the interest acquired in the estate, bound by the contract. *Mortlock* v. *Buller*, 10 Ves. 315. Affirmed 2 Dow 518.

14. An absolute alienation by trustees of a charity, may be valid, if beneficial to the charity. *Att.-Gen.* v. *Warren*, 2 Swan. 302; 1 Wils. 387.

15. A tenant for life of leasehold lands, with remainder to himself in fee, subject to a term for raising a jointure and portions, exchanged in fee for other lands with B., whose heir afterwards agreed for the sale of them. The purchaser having objected that A. had no power to exchange in fee, B.'s heir procured the execution of new deeds, with the view of bringing the exchange within the terms of a power of sale and exchange given to the trustees by the settlement:—Held, that such transaction not being a direct sale or exchange under the settlement, but done to satisfy what had been imperfectly done before, it was very doubtful whether it was a proper exercise of the power, though the surviving trustee was a party. *Cowgill* v. *Oxmantown* (*Lord*), 3 Y. & Coll. 369; 3 Jur. 313.

16. A rent charge, till a debt paid, granted by a tenant for life having a power to raise, by sale or mortgage, a certain sum for payment of his debts, a good execution of the power, though referable to his interest as well as to his power. Parol evidence to show that the deed was not intended to be in execution of the power, inadmissible as going to con-

tradict it. *Blake* v. *Marnell*, 2 Ball & B. 35. Affirmed 4 Dow P. C. 248.

The recital of a power not necessary to the due execution of it. *Id.* 44.

1. By settlement on marriage it was provided, that the plaintiff, tenant for life, should have power to contract for the sale of and to convey any part of the lands in settlement, in case the same should, by virtue of any powers to be contained in any Act of Parliament, be required for the purposes of any railroad, canal, or other undertaking, etc. By an Act of Parliament, passed on the 15th July, 1837, and subsequently to the date of the settlement, certain persons, as an incorporated body, had power and authority given them to treat and contract for, and purchase and hold, lands for the purpose of making a cemetery:—Held, that the making of a cemetery was an undertaking authorised by Act of Parliament, under the words of the settlement; and that the plaintiff was entitled to a specific performance of a contract for sale by him to the company of part of the lands in settlement. *Kensington* v. *West London Cemetery Co.*, 7 L. J., N. S., Ch., 251; 8 L. J., N. S., Ch., 81; 2 Jur. 959.

2. A trustee of a sum of money charged on real estate, who is also owner of the estate subject to the charge, is entitled to sell any portion of the estate discharged from the trust, provided he reserves a portion sufficient to answer the charge; and the estate so sold cannot be followed into the hands of a purchaser with notice of the trust. *Grundy* v. *Heathcote*, 1 Hem. & M. 172.

3. Under a trust to sell property which was subject to a mortgage, and out of the proceeds to pay off the mortgage, and pay the surplus to the mortgagor:—Held, that a sale subject to the mortgage was valid. *Manser* v. *Dix*, 8 De G. M. & G. 703; 3 Jur., N. S., 252.

4. A trustee having power to sell land in order to raise 600*l.*, and the expenses, put it up to sale in two lots, and sold the first for 600*l.*, and the second for 510*l.* The second lot consisted of more than three acres of land, and was described in the particulars of sale as readily convertible into building ground:—Held, that the sale of the second lot was not improper, and that the purchasers must pay the costs of a suit for specific performance brought against them by the trusteee. *Thomas* v. *Townsend*, 16 Jur. 736.

5. Lands were devised to a trustee and his heirs to the use of A. for life, without impeachment of waste, with divers remainders over; and a power was given to the trustee, with the consent of the tenant for life in possession, to sell the property or any part of it, and to lay out the money in the purchase of other lands, to be settled to the same uses, and in the meantime to invest it in the public funds, and for the purposes of such sale to revoke the original uses, and appoint new uses. A contract was entered into for the sale of the estate for 13,400*l.*, exclusive of the timber, which was to be taken at a valuation; and it being conceived that the tenant for life, without impeachment of waste, was entitled to receive for his own benefit the amount of the valuation of the timber, a deed was executed by which he, in consideration of 2,448*l.* conveyed the timber to the purchaser; and the trustee, in consideration of 13,400*l.*, conveyed the land, exclusive of the timber. Many years afterwards, the tenant for life, being advised that he was not entitled to the amount of the valuation of the timber, transferred to the trustee as much 3 per cent. stock as 2,448*l.* would have produced at the time of the sale. After the death of A., the next remainderman, though he had concurred in proceedings in which the fund produced by the sale was treated as applicable to the purposes of the testator's will, brought a writ of formedon, and obtained judgment on the ground that the power of sale was not well executed:—Held, that a court of equity ought not to interfere by injunction to deprive him of the benefit of that judgment *Cockerell* v. *Cholmeley*, 3 Russ. 565; Taml. 435. Affirmed 1 Cl. & F. 60; 6 Bli. N. S. 120.

6. A sale made of settled estates under a power by a party having no authority to sell was, under the circumstances, refused to be set aside by the Court, the sale having been made *bonâ fide*, and the money being obtainable from the parties who received it, or their estates. *Hope* v. *Liddell*, *Liddell* v. *Norton*, 2 Jur., N. S., 105; 25 L. J., Ch., 90.

A sale made by a tenant for life, and adopted by a trustee acting under a power to sell, will be supported in equity against tenants in tail in remainder, although the contract was made in consideration of payments to be made to the tenant for life at long and indefinite periods, but for which the trustee gave a receipt at the time, though the money was not then paid. *Ib.*

What acts will amount to acquiescence so as to bind tenants in tail, and deprive them of settled estates and compel them to follow the money for which they were sold. *Ib.*

With what previous notice of title a purchaser will be allowed to retain an estate purchased from persons having no right or power to sell. *Ib.*

IX. INVESTMENT OF PROCEEDS.

7. Purchases held not a substitution for estates sold, under a power in a settlement, to sell and invest the money in estates to be settled to the same uses, there being no original trust, subsequent agreement, nor representation relied on. *Denton* v. *Davies*, 18 Ves. 499.

8. A settled estate is sold, but no part of the money is laid out in other lands; yet this Court will, under certain circumstances, presume an agreement between the parties interested, that it would be so laid out, and upon such presumption will decree the money to that person who would have been entitled to the land if any purchase had been made. *Newton* v. *Newton*, 6 Bro. P. C. 408.

9. Trustees, with the consent of A. B., the tenant for life, had a power to sell the trust estate and invest the produce in other real estate. In 1810 A. B., with the concurrence of the trustees, sold the estate for 8,440*l.*, and received the purchase money about the same time, but whether with the concurrence of the trustees was not proved. A. B. purchased an estate for 17,400*l.* Of the 8,440*l.*, 8,124*l.* was paid by A. B. in part payment for the second estate; the remainder was paid partly out of A. B.'s moneys, and partly by moneys

raised by a mortgage of the estate. The estate was conveyed to A. B. in fee. No acknowledgment or declaration of trust was ever made by A. B., and he retained possession of the estate till thirty years after, when he became bankrupt. The Court, against A. B.'s assignees, presumed, under these circumstances, that the purchase had been made under the power, for the benefit of the trust, and held that there had been no such adverse possession, and no such aquiescence on the part of the trustees, so as to preclude the Court making a declaration that they had a lien on the estate to the extent of the trust moneys invested in its purchase. *Price* v. *Blakemore*, 6 Beav. 507.

1. An inclosure under the provisions of the General Inclosure Act 1845 (8 & 9 Vict., c. 118), is not a purchase of other hereditaments within the meaning of the usual power of sale and exchange. *Vernon* v. *Manvers* (*Earl*), 1 N. R. 117.

2. An Act of Parliament, after reciting that certain lands in the neighbourhood of Leeds were in strict settlement, and that the ultimate remainderman was an infant, and that many persons were desirous of erecting buildings on the said lands, and that it would be advantageous to the parties interested in the lands if the same could be sold and the proceeds be invested in other real estate, to be settled to the like uses, vested the lands in certain trustees on trust to sell the same, either together or in parcels, the purchase moneys to be paid into the Bank of England. The Act contained no express power to expend any portion of the purchase moneys in setting out the lands or in making roads:—Held, that having regard to the objects of the Act, namely, the sale of the property as building land, such power ought to be implied, and that the trustees and their agents ought to be allowed all sums properly expended by them in making roads to the several allotments, and in bringing the land into a fit state for the market. *Cookson* v. *Lee*, 23 L. J., Ch., 473.

3. The S. estates were by Act of Parliament vested in trustees upon trust to sell, with the consent of the earl, the tenant for life in possession, and to invest the sales moneys in the purchase of other lands convenient to be held with the bulk of the property. Under these trusts certain outlying portions of the estates were, by a contract between the trustees, the earl, and P., contracted to be sold to P. for 29,000*l.*, and 5,000*l.* was paid by P. to the earl as deposit, to be paid by him to the trustees when a proper purchase should be fixed upon in which to reinvest the sales moneys according to the trust. The purchase was never completed, and the 5,000*l.* thus left in the Earl's hands was forfeited, and the same lands were, some years afterwards, sold for 22,000*l.*:—Held, that the 5,000*l.* belonged to the settled estates, and not to the earl absolutely. *Shrewsbury* (*Earl*) v. *Shrewsbury* (*Countess*), 18 Jur. 397.

4. A reversion in fee expectant on the life estate was settled in strict settlement, and the trustees were empowered at any time thereafter, with the consent of the tenant for life under the settlement, to sell or exchange the lands for other lands in fee in possession. The tenant for life in possession, together with the tenant for life under the settlement, and the trustees by their agent, sold the estate for one entire sum. The purchaser objected that the power of sale could not be exercised until the reversion came into possession, but waived all other objections:—Held, that the power was well exercised, and that the purchaser having waived all other objections, must agree with the vendors as to the apportionment of the purchase money between the life estate in possession, and the reversion, or that the apportionment must be made by the Master. *Clark* v. *Seymour*, 7 Sim. 67.

5. Under a settlement, real estate was limited to such uses as A. and B. should by deed jointly appoint, and subject thereto, to the use of A. for life, with remainder to the use of B. for life, with remainder to the first and other sons of B. in tail, with divers remainders over; and there was a power of sale vested in four trustees, and exercisable at the request of A. and B., and the survivor of them. By a deed (which contained a recital that A. and B. were desirous of selling part of the settled property, and with a view to facilitate the sale and conveyance thereof to the respective purchasers had agreed to execute the deed), A. and B., in exercise of the joint power of appointment, appointed part of the settled property to trustees upon trust for sale; and it was declared that the trustees should stand possessed of the proceeds upon the trusts intended to be declared by a deed of even date. No deed declaring the trusts was ever executed, and there was evidence to show that the deed of appointment was executed with the view of avoiding the trouble and expense of an application to the trustees to exercise the power of sale:—Held, that the disposition of the proceeds of sale was a question of intention; and that both on the terms of the deed of appointment (independently of the evidence) and also having regard to the evidence, the proceeds of sale remained subject to the trusts of the settlement. *Biddulph* v. *Williams*, 1 L. R., Ch. D., 203.

6. A power to sell in a deed with a direction to reinvest in lands does not make it compulsory upon the trustees to reinvest, and if they retain the fund as personalty it is to be so regarded. *Atwell* v. *Atwell*, 20 W. R. 108; 25 L. T., N. S., 526; 41 L. J., Ch., 23; 13 L. R., Eq., 23.

7. Trustees under a will which contained a power to sell real estate, but no power of investing the trust funds in real estate, bought real estate, and had it conveyed to the trusts of the will:—Held, that they could sell and make a good title to the real estate wrongfully purchased with the trust funds on obtaining the concurrence in the sale of one of the persons beneficially interested in the trust funds. *Re Patten and Edmonton Union*, 52 L. J., Ch., 787; 48 L. T. 870; 31 W. R. 785.

X. BREACH OF TRUST.

8. Construction of a power of sale and exchange, and circumstances in which the exercise of a power of sale, although not inconsistent with the terms of the power, would, nevertheless, be a breach of trust. *Marshall* v. *Sladden*, 7 Hare 428; 19 L. J., N. S., Ch., 57; 14 Jur. 106.

On a mortgagee of settled estates requiring to be paid off, or to have the interest increased, the tenant for life proposed a new mortgagee at the same rate. The trustees insisted on being the proper persons to carry the transaction into effect, and procured another mortgagee, but at a higher rate; and in order to raise the expenses thereby incurred, they proceeded to sell the estate under the ordinary powers of sale and exchange in the settlement, whereupon the tenant for life filed a bill to restrain the sale:—Held, that the conduct of the trustees was unjustifiable, and that they ought to pay all the costs of the suit. S.C. 4 De G. & Sm. 468.

1. Where sale by trustee to purchaser with notice of trust, is set aside, neither purchaser nor trustee pays interest on rents. *Macartney* v. *Blackwood*, 1 Ridgw. L. & S. 602.

2. The Court will not enforce a contract involving a breach of trust. *Wood* v. *Richardson*, 4 Beav. 174; 5 Jur. 623.

3. The Court will not decree a specific performance which involves a breach of trust. *Maw* v. *Topham*, 19 Beav. 576.

4. Where act of sale by trustees takes place, under circumstances of breach of trust, Court will not decree specific performance in favour of *bonâ fide* or innocent purchaser. *Ord* v. *Noel*, 5 Madd. 438.

5. Course adopted where a literal compliance with the terms of the power would be mischievous to the estate, so as to save the trustees from responsibility. *Cuff* v. *Hall*, 1 Jur., N. S., 972.

6. A testator, who died in 1841, directed his trustees to sell his real estate, and gave them some discretion therein. Instead of selling, they mortgaged and retained the estate:—Held, that they had committed a breach of trust, and the estate having become depreciated, that they were liable for the loss. *Devaynes* v. *Robinson*, 24 Beav. 86; 3 Jur., N. S., 707; 27 L. J., Ch., 157; 5 W. R. 509.

Held, also, that the mortgage was void as against the mortgagee with notice, but that he was entitled to stand as a creditor on the produce of the estate, to the extent to which the mortgage money had been properly applied. *Ib.*

Where a loss, occasioned by a breach of trust, does not happen until after the death of the trustee, his assets are equally liable. *Ib.*

7. W. H. by will, after giving several legacies, left the remainder of his property to his wife for life to be invested in the public funds, and at her demise to be equally divided between his children and the heirs of their bodies. The estates were retained unsold, and a bill filed raising the questions, whether there was a direction to convert, whether a surviving trustee was liable for non-sale, or what was meant by "heirs of the bodies":—Held, that there was a direction to convert, but inasmuch as loss was not caused by non-sale, the trustee was not liable, but the estate of the widow; and that the words "heirs of their bodies" meant "children," and were substitutionary, and the children of a deceased child were equally entitled. *Pattenden* v. *Hobson*, 1 W. R. 282; 17 Jur. 406.

8. A testator devised certain estates by name, together with his farming stock and furniture, to his beloved wife, to sell, to discharge all his creditors, and he constituted his wife and T. W. his executors, whom he appointed to sell and dispose of all his estates and chattels, in such manner as they should jointly agree upon, or not to sell if it seemed most advisable to keep them, or in any way they should think proper, so that every creditor had his money, and, if sold, all overplus to his wife, towards her support and her family:—Held, upon demurrer, that the testator's children had such an interest in the devised estates, as enabled them to sustain a bill against the widow and he co-executor, impeaching a sale on the ground of fraud, and praying an account of the rents and profits. *Woods* v. *Woods*, 1 Myl. & C. 401.

Payment of Purchase Money to Solicitor.] See VENDOR AND PURCHASER.

XI. INJUNCTION AGAINST SALE.

9. On a trust to sell, a suggestion in the bill of improper conduct of the trustees, in not giving sufficient notice of the sale, is not a ground for an injunction to stop the intended sale. *Peshel* v. *Fowler*, 2 Anstr. 549.

10. To a bill, by one of the successive tenants for life under the limitations, against the trustees of the term and the tenant for life in possession, to restrain the trustees from raising the 30,000*l.* by sale or mortgage of the estate, until the timber of full growth (of which it was alleged that a large quantity was standing on the estate) had been cut and applied towards that purpose, demurrers were allowed. *Marker* v. *Kekewich*, 8 Hare 291; 14 Jur. 544.

11. Some of the clauses which are frequently introduced into the deeds of trust for sale are of such a kind, that a court of equity will not act upon them, where the trustee for sale is also the creditor for whose benefit the trust is created. The Court will not restrain trustees for sale from completing a sale on the ground that they cannot show a good title. *Roberts* v. *Bozen*, 3 L. J., Ch., 113.

12. A prayer for an injunction to restrain a trustee from selling, involves relief, although nothing substantial is asked against him. *March* v. *Keith*, 30 L. J., Ch., 127.

13. Trustees under a marriage settlement, having no power to invest in land, purchased copyholds with the trust money, the husband and wife agreeing that the trustees should have power to sell, and indemnify themselves. The trustees were also charged with other breaches of trusts. The surviving trustee proceeded to sell the copyholds, which were worth much more than the original purchase money, and claimed to indemnify himself out of the surplus. He was restrained from selling until it was ascertained when it would be for the benefit of the persons interested not *sui juris* that the sale should take place. *Wiles* v. *Gresham*, 17 Jur. 779.

Quære, whether he would be allowed so to indemnify himself. *Ib.*

See also II. *supra.*

XII. DISCHARGE OF LAND FROM TRUSTS.

1. Where lands are devised to trustees to raise money for several purposes, and they raise the money out of the profits, the land is thereby discharged, and the persons concerned must resort to the trustees. *Juxon* v. *Brain*, Pre. Ch. 143.

2. Trustees appointed for raising and paying a portion of 500*l.* to A. Trustee enters and gives judgment to A. for paying the 500*l.* to A. when raised; the trustee raises the 500*l.* and more, and becomes insolvent; whether the land is discharged. *Harrison* v. *Cage*, 2 Vern. 85.

3. Land settled in trust to pay debts is discharged as soon as the money is raised, though misapplied by the trustees. *Anon.*, 1 Salk. 153.

4. An estate having once borne a charge in favour of legatees or creditors is discharged, though the fund has been misapplied by the trustees. *Omerod* v. *Hardman*, 5 Ves. 736.

5. The appointment of a trustee by creditors to receive rents for the payment of debts, discharges the estate from any loss arising from the failure of the trustee. *Hutchinson* v. *Masareene*, 2 Ball & B. 49.

6. If lands are appointed to pay debts, the heir is entitled to them when the debts are paid; and if to be sold, he is entitled to the surplus; but if there be any abuse, his remedy is against the trustee, and not against the purchaser. *Culpepper* v. *Aston*, 2 Ch. Ca. 115. *Sed quære*, if a purchaser with notice might not be affected.

XIII. COVENANTS FOR TITLE.

7. Estates were devised to A. for life, remainder to his sons successively in tail male. A. and B., during the infancy of B.'s eldest son, obtained an Act of Parliament, vesting the estates in trustees in trust to sell:—Held, that A. and B. must covenant with the purchaser for the title. If settled estates are sold under a power to sell them, with the consent of the tenant for life, he must covenant for the title. *Re London Bridge Acts*, 13 Sim. 176.

8. An estate was being sold, with the approbation of the Court, by trustees of a settlement under a power of sale and exchange contained in the settlement, to raise a sum to which, in the events which had happened, the tenant for life was entitled:—Held, that the tenant for life must enter into covenants for title. *Poulett* v. *Hood*, 37 L. J., Ch., 224; 5 L. R., Eq., 115; 16 W. R. 323; 17 L. T., N. S., 486.

XXII. Power to give Receipts.

I. *When Implied*, 5914.
II. *Who may Exercise*, 5915.
III. *Discharge of Purchaser*, 5916.
IV. *In Case of Executors.* See EXECUTOR AND ADMINISTRATOR, XXII. IV.

I. WHEN IMPLIED.

9. Power given to trustees to sell lands and divide the profits amongst the *cestuis que trustent*, some infants, enables trustees alone to give effectual receipts to purchasers. *Sowarsby* v. *Lacy*, 4 Madd. 142.

10. Where trustees for sale are to apply produce for infant, power of giving receipts to purchasers is necessarily incident. *Lavender* v. *Stanton*, 6 Madd. 46.

11. Power to trustees to lay out money on securities, includes power to give discharges to borrowers. *Wood* v. *Harman*, 5 Madd. 368.

12. Objection to title by purchaser, under a trust to sell, as bound to see to the application of the money in satisfaction of scheduled creditors and others, coming in within a limited time after the date of the deed or disabilities removed; overruled upon the tenor of the deed implying that the receipt of the trustees should be a discharge. *Balfour* v. *Welland*, 16 Ves. 151.

13. A clause in a will enabling trustees to give receipts in a particular case specified, construed in favour of the intention of the testator to confer a power to give receipts generally. *Stroughill* v. *Anstey*, 1 De G. M. & G. 635; 16 Jur. 671.

14. Estates were limited to the use of R. K. C. for life, with remainders to the use of his daughters A. M. C. and M. A. C., their heirs and assigns, as tenants in common. A. M. C. devised her undivided moiety of the estates to her sister M. A. C. for life, with divers remainders over, and declared that every person thereby made tenant for life should have such and the like powers of leasing, selling, and exchanging any part of the devised estate as were by the will of R. K. C. given to the tenants for life and in tail in his will mentioned, or to the trustees thereof. The will of R. K. C. did not contain any power authorising a tenant for life or in tail to ease, sell, or exchange the property thereby devised; but full powers to lease, sell, and exchange, and to give receipts for purchase money, were by such will given to the trustees thereof. R. S. C. was tenant for life of the estates devised by R. K. C., and was also entitled in remainder expectant on the decease of M. A. C. to the moiety of the estates devised by A. M. C. On bill filed by R. S. C. seeking for a declaration that a power of sale and exchange was, under the will of A. M. C., vested in M. A. C. as to the moiety devised by A. M. C., and that such power of sale and exchange so conferred by the will of A. M. C. was co-extensive with the power of sale and exchange created by the will of R. K. C.:—Held, that M. A. C. had the same powers of sale and exchange over the moiety of the estate devised by A. M. C. as were by the will of R. K. C. given to the trustees of his will, but that M. A. C. had no power to give receipts to purchasers. And *semble* that any purchaser from M. A. C. might remove all difficulty by paying his purchase money into court under the Trustee Relief Act, 10 & 11 Vict., c. 96. *Cox* v. *Cox*, 1 Kay & J. 251.

15. A testator devised certain freehold estates to trustees, for 500 years, upon trust that they should by sale, demise, or mortgage of all or any part of the estates, for all or any part of the term, or by other lawful means, levy and raise 2,400*l.*, and when so raised, upon trust that they should put and place out the same at interest, upon Government or real

security, and call in and replace the same from time to time as they should think proper, and upon trust to pay the proceeds to the testator's daughter for her life; and should after her decease call in the 2,400*l.*, and pay the same to the daughter's appointees; and, in default of appointment, among her children. The trustees borrowed the 2,400*l.*, and executed a mortgage for the same, on which they indorsed a receipt for the amount. The tenant for life died; the mortgagee transferred the mortgage to the plaintiff. On a bill to foreclose the mortgage, one of the defendants entitled to the 2,400*l.* under the trusts of the will, suggested that the trustees never received the mortgage money, and that the mortgagee was, under the trusts of the will, liable for its misapplication; but held, that the trust implied an authority to receive the 2,400*l.*, and that the trustees having given a receipt, it was not necessary for the mortgagee to show that the money reached the hands of the trustees. And further, the plaintiff being a transferee for value, having the legal estate, he was not bound to inquire; and the Court made a decree for a foreclosure. *Locke* v. *Lomas*, 5 De G. & Sm. 326; 16 Jur. 813; 21 L. J., Ch., 503.

1. The question whether an executor or trustee who sells an estate, can give a good receipt for the purchase money, is not a question of conveyance, but of title. *Forbes* v. *Peacock*, 12 Sim. 528; 13 L. J., N. S., Ch., 46; 7 Jur. 688. And see S. C. 6 Jur. 476. And on appeal 1 Ph. 717; 15 L. J., N. S., Ch., 31.

2. The doctrine of *Forbes* v. *Peacock* (12 Sim. 528; 13 L. J., Ch., 46; 15 L. J., Ch., 371) amounts only to this, that where prior to 22 & 23 Vict., c. 35, and 23 & 24 Vict., c. 145, there is a trust to sell real estate, and pay debts and legacies out of the proceeds, there is also an implied power in the trustees to give receipts for the purchase money. There is nothing in that case authorising trustees, by reason merely of such a charge, to sell a settled estate. *Carlyon* v. *Trustcott*, 20 L. R., Eq., 348; 44 L. J., Ch., 186; 32 L. T., N. S., 50.

3. A testator, "in case his personal estate should be insufficient for the payment of his debts," charged them upon his real estate:—Held, that the executor had an implied power to sell and give valid receipts for the purchase money without showing the insufficiency of the personal estate. *Greetham* v. *Colton*, 34 Beav. 615; 11 Jur., N. S., 848; 13 W. R. 1009; 13 L. T., N. S., 34.

Held, also, that the lapse of thirteen years between the death and the sale did not affect the executor's power. *Ib.*

4. Where there is a power of sale for the purpose of making certain payments, a power to give receipts and discharges may be inferred. *Greville* v. *Browne*, 5 Jur., N. S., 849; 7 W. R. 673.

II. WHO MAY EXERCISE.

5. Trustee for sale renouncing, is not necessary party in conveyance, or in receipt for purchase money. *Adams* v *Taunton*, 5 Madd. 435.

6. One trustee for the sale of an estate having released and conveyed to his co-trustee, refused to join in the receipt of the purchase money. Upon the special expression of the deed, the purchaser was not held to the agreement with the remaining trustee; it would have been otherwise if one had merely renounced. *Crewe* v. *Dicker*, 4 Ves. 97.

7. A joint and several receipt for purchase money given by three persons, only one of whom has power to give a receipt, is a valid receipt by such one who has power. *Miller* v. *Priddon*, 1 De G. M. & G. 713; 21 L. J., N. S., Ch., 421.

8. Testator devised his real and personal estate to trustees, to be sold for the benefit of his children, and directed that their receipts should be sufficient discharges. The children filed a bill to have the will established and the trusts performed. At the hearing the bill was dismissed against the heir, and the Court did not establish the will, but made a decree affecting the personal estate only. The suit afterwards became abated, and was not revived. On the death of the surviving trustee, another suit was instituted for the appointment of new trustees, which was done. The new trustees then sold part of the testator's real estates to the plaintiff, who filed a bill for a specific performance:—Held, that the former suit having been dismissed as against the heir, without the will being established, no suit was pending for the administration of the testator's real estates, and that the new trustees had the same power of giving receipts as the original trustees had. *Drayson* v. *Poocock*, 4 Sim. 283.

9. Testator devised his estates to trustees in trust to sell, and declared their receipts to be sufficient discharges, and he directed his trustees to complete any contracts for the sale of his estates, entered into during his lifetime, and remaining incomplete at his death:—Held, that his executor was the proper party to give receipts for the purchase moneys of the estates contracted to be sold by the testator. *Eaton* v. *Sanater*, 6 Sim. 517; 3 L. J., N. S., Ch., 197.

10. A testator ordered his debts to be paid by his executors, and after giving legacies he gave the residue of his real and personal estate, subject as aforesaid, to A., and he appointed A. and B. executors:—Held, that if the legacies were charged on the real estate, the debts must also be charged thereon, and that therefore A. was able to give valid receipts for the purchase money of the real estate, which relieved a purchaser from the necessity of seeing to its application. *Dowling* v. *Hudson*, 17 Beav. 248.

11. Where estates are devised in trust for sale, and payment of produce (subject to certain charges) to several persons named, and it is declared that trustee's receipts shall be sufficient discharge, etc.; it is not necessary that persons entitled to purchase money should be parties to conveyance, nor need they enter into covenants as to title. *Rutland* (*Duke*) v. *Wakeman*, 8 Bro. P. C. 145.

Exception that the persons entitled to the purchase money, subject to the charges, not parties to the conveyance, overruled. S. C. 3 Ves. 504.

Bill by devisees, in trust to sell, for specific performance of an agreement to purchase,

exception to the report in favour of the title, that the persons entitled to the purchase money, subject to debts, legacies, and other charges, were not parties to the suit; the Lord Chancellor was of opinion they ought not to be parties to the conveyance, and if they were, their covenant ought to extend only to their own acts, and those of the devisor, not to a general warranty, without a special contract for it, but as the point must come properly upon objections to the conveyance, the exception was overruled upon the form. *Id.* 233.

III. DISCHARGE OF PURCHASER.

1. The rule which relieves a purchaser from seeing to the application of the purchase money when the estate is subject to a primary general charge of debts, has reference to the time of the testator's death, and does not cease to be applicable though the debts be subsequently paid; and, therefore, where an estate so charged was sold by the trustee, it was held that the *cestuis que trustent* were not necessary parties to the conveyance, though the sale did not take place till twenty-five years after the testator's death, and the vendor, on being asked by the purchaser whether all the debts were not paid, had refused to answer the question. *Forbes* v. *Peacock*, 1 Ph. 717; 15 L. J., N. S., Ch., 371. Reversing 12 Sim. 528; 13 L. J., N. S., Ch., 46; 7 Jur. 688. And see S. C. 6 Jur. 476.

2. Where land is directed by will to be sold generally, and the money to form part of the personal estate, the purchaser is not bound to see to the application of the money. *Smith* v. *Guyon*, 1 Bro. C. C. 186.

3. Where the purchase money is to be laid out again by the trustees generally, the purchaser need not look to the application. *Doran* v. *Wiltshire*, 3 Swan. 699.

4. Where there is a trust for sale of realty, with power to give receipts and divide the proceeds amongst certain persons, whereof the trustee is one, and the trustee has judgments registered against him, the existence of such judgments cannot prejudice the other *cestuis que trustent*. *Drummond* v. *Tracy*, Johns. 608; 6 Jur., N. S., 369; 29 L. J., Ch., 304; 8 W. R. 207.

A testator devised and bequeathed his real and personal estate to his daughter, upon trust to sell the realty, with power to give receipts, and declared she should stand possessed of the personalty and proceeds of realty upon trust for herself and her two sisters. The daughter contracted to sell the estate, and, pending the carrying out of the sale, judgments were registered against her husband:—Held, that the daughter's receipts were sufficient discharges to a purchaser. *Ib.*

5. Trustees with a power to sell and to invest the proceeds in Government or real securities, sold the estate and received only part of the purchase money, but executed a conveyance to the purchaser, on the back of which was indorsed a receipt for the whole sum, which was signed by them all. This deed, and the other deeds, they retained as a security for the unpaid purchase money with interest, and they entered into a written agreement with the purchaser that the deeds should remain with them as such security, and that he should, if required, execute a proper mortgage; this agreement was signed by the purchaser, and by the trustee in whose custody the deeds were placed. Eight years afterwards the purchaser paid the principal and interest of his debt to this trustee and received from him the deeds, including the conveyance, with the receipt indorsed:—Held, that by such payment the purchaser did not discharge himself of his liability incurred by participation in the breach of trust, and the trustee who received the money having misapplied it and absconded, the purchaser was made to pay it over again. *Webb* v. *Ledsam*, 1 Kay & J. 385; 1 Jur., N. S., 775.

6. S. devised all his real and personal estate to G., his heirs, etc., charged with his debts; plaintiffs were bond creditors, and received their interest of G., as executor, regularly for sixteen years, but never asked for the principal, and G. during this interval made several sales of the testator's estate:—Held, that the purchaser shall not be disturbed after a quiet possession of so many years. *Elliott* v. *Merriman*, 2 Atk. 41; Barnard. 78.

7. Devise of real estate to trustees, to sell and pay debts and legacies generally; trustees sell and embezzle part of the money; the purchasers not liable to the debts. An estate charged with debts not liable in hands of purchaser, unless debts specified no more than estate devised to be sold. *Rogers* v. *Skillicorne*, Ambl. 188.

8. When a trustee has a power of sale over real estate, with power to give receipts, and it is declared that the purchaser shall not be liable for the misapplication of the purchase money, the payment to the authorised agent of the trustee, even though he is tenant for life, is not a breach of trust or invalid. *Hope* v. *Liddell*, 21 Beav. 183; 2 Jur., N. S., 105; 25 L. J., Ch., 90.

In 1799 a testator devised an estate in trust for his daughter and her husband successively for life, with remainder to their children, and he gave to the trustee a power of sale. The trustee died in 1806, and the trust descended on his heir A. Immediately afterwards B., acting without authority as trustee, sold the estate to a purchaser with notice, and allowed the purchase money to be received by the daughter's husband. The husband died in 1837, and in a suit instituted by one of the children, his estate was declared liable for the purchase money in his hands. The daughter died in 1845, and in a suit by her representatives, the estate of B. was held liable for the trust money to the extent of the daughter's interest only, and relief was refused to the children, who were the defendants. Between 1826 and 1830 the children had executed deeds reciting the sale, etc. In 1851 some of them instituted a suit to recover the estate itself from the purchaser:—Held, that they were entitled to no relief; and in a cross-suit by the purchaser, the children were decreed to make good his title. *Ib.*

Where A. (a stranger to the trust), assuming to exercise a trust for sale, conveys the estate to a purchaser, if the Court afterwards compels the purchaser to restore the land to the *cestui que trust*, the purchaser will be entitled to all the assistance which the Court or the *cestui*

que trust could give him, to recover from the self-constituted trustee the purchase money still in his hands, or for which he might remain liable. *Ib.*

The case of *Hicks* v. *Sallitt* (3 De G. M. & G. 782) distinguished. *Ib.*

Perpetual injunction granted, under the circumstances, to restrain the remaindermen from proceeding at law to recover the estate. *Ib.*

1. On a sale by a trustee, he stipulated that his receipt should be deemed an effectual and conclusive discharge, and that the purchaser should not require the concurrence of the heir or *cestui que trust*. A decree was made for specific performance and reference as to title. The Master found in favour of the trustee; and upon exceptions, the purchaser contended that the rule as to the concurrence of the *cestui que trust* being one for their protection, it was a breach of trust to stipulate that they should not concur; but the Court held the point concluded by the decree. *Wilkinson* v. *Hartley*, 15 Beav. 183.

2. Trustees had a power of sale over a real estate vested in them, and to give good discharges for the purchase money. The tenant for life had a power to appoint new trustees, and thereupon the trust estate was to be conveyed to the old and new trustees. In 1857 A. was appointed a new trustee, but before any conveyance had been made to him, the estate was sold, and conveyed to a purchaser, and the purchase money was paid to the old and new trustees:—Held, that the purchaser had obtained a good discharge for the purchase money. *Welstead* v. *Colvill*, 28 Beav. 537.

Where Trust for Payment or Charge of Debts.] See EXECUTOR AND ADMINISTRATOR, XXII. III.

By Payment to Solicitor.] See VENDOR AND PURCHASER.

POWER OF ADVANCEMENT.

See TRUSTS.

POWER OF APPOINTMENT.

See POWER.

POWER OF APPOINTMENT OF NEW TRUSTEES.

See TRUSTS.

POWER OF ATTORNEY.

— *Form and Validity on Payment out of Court to Attorney.* See PRACTICE (PAYMENT OUT OF COURT).
— *Swearing Answer by Attorney.* See PRACTICE (ANSWER).
— *Swearing Affidavit by.* See PRACTICE (AFFIDAVITS).
— *Substituted Service on Persons holding Power of Attorney.* See PRACTICE (SERVICE).
See also FORGERY—PRINCIPAL AND AGENT—STOCK EXCHANGE.

I. VALIDITY AND EXECUTION, 5917.
II. GENERAL OPERATION, 5918.
III. EXTENT OF AUTHORITY, 5918.
IV. REVOCATION, 5920.
V. STAMPS, 5921.

I. VALIDITY AND EXECUTION.

3. A power of attorney from a creditor resident abroad to sign the bankrupt's certificate, is sufficiently authenticated by the attestation of a notary public, without any affidavit to verify the signature. *Exp. Myers*, 2 Dea. & Ch. 406.

4. A power of attorney to sign a bankrupt's certificate, executed by a creditor resident abroad, is sufficiently authenticated if attested by the British consul. *Exp. Wilkinson*, 2 Dea. & Ch. 585; Mont. & Bli. 257.

5. Power of attorney to sue in plaintiff's name need not be stated in bill, but if stated, proof will be directed of it before Master in taking the accounts. *Edney* v. *Jewell*, 6 Madd. 165.

6. Where a power of attorney has been executed before a notary public in a British colony, an affidavit verifying the notarial signature is not necessary under 15 & 16 Vict., c. 86, s. 22. *Re Goff* or *Goss, Liddal* v. *Nicholson*, 12 Jur., N. S., 595; 14 L. T., N. S., 727.

7. It is not necessary that the notarial seal or signature mentioned in 15 & 16 Vict., c. 86, s. 22, should be verified, and the section applies to the notarial attestation of a power of attorney to be used in the Court of Chancery. *Haywood* or *Hayward* v. *Stephens*, 36 L. J., Ch., 135; 15 L. T., N. S., 173.

8. In an action brought to recover a piece of land in Lower Canada, the pleadings challenged a strict proof of the title. The land had been devised to Mary, the wife of "James" L. The plaintiff claimed the land under a power of attorney executed by "Alexander" L. and Mary his wife; and on the face of the power of attorney it was stated that this Alexander L. was the same person who in the will was called James, but no other evidence of their identity was produced. To the power of attorney there were two attesting witnesses, one of whom was a notary public of Upper Canada. Neither of these witnesses was produced, but a certificate that the notary public had been duly appointed was put in:—Held, that the plaintiff had failed to make out his title, because the notarial certificate was not sufficient proof of the execution of the power of attorney. *Nye* v. *Macdonald*, 3 L. R., P. C.

331; 39 L. J., P. C., 34; 23 L. T. 220; 18 W. R. 1075.

1. *Semble*, that churchwardens and overseers, having no corporate seal, have no power to execute a power of attorney, authorising a party to continue receiving the dividends of stock, notwithstanding the fluctuations in the number and identity of the numbers of the corporation. *Exp. Annesley*, 2 Y. & Coll. 350; 6 L. J., N. S., Exch. Eq., 81.

Notarial Acts Generally.] See PRACTICE (NOTARY) — PRACTICE (PAYMENT OUT OF COURT).

II. GENERAL OPERATION.

2. A legacy of 100*l.* was ordered to be paid to a person having a general power of attorney from the legatee, without any power authorising him to receive this legacy specifically. *Carr* v. *Eastabrook*, 2 Cox 390.

3. Where a creditor gave a power of attorney in general terms, but without any express power to consent to a supersedeas, and the signature of the creditor himself to such consent was easily attainable:—Held, that his own signature ought to be procured. *Re Sampson*, 3 Dea. & Ch. 198.

4. A person acting under a letter of attorney from administrators, may be sued by them in their own right as their bailiff or receiver, and they need not name themselves as administrators. *Hudson* v. *Hudson*, 1 Atk. 462.

5. Power of attorney to a creditor to receive a debt not accompanying any assignment of it, nor making part of any security given, but with declarations, that it was to enable the creditor to apply the money to his debt, not an appropriation; and therefore failed by the death of the debtor. *Lepard* v. *Vernon*, 2 Ves. & B. 51.

6. A power of attorney to receive rents, accompanied by an agreement that it should be irrevocable until the principal and interest of a loan, and the premiums on a policy of assurance effected to secure it, should be paid off by instalments, as specified in the agreement, is irrevocable, and amounts to an equitable mortgage, and the mortgagee is entitled to priority over a subsequent creditor by judgment, affecting the legal estate in possession by a receiver. *Whitworth* v. *Gaugain* (3 Hare 421) approved of. *Abbott* v. *Stratten*, 9 Ir. Eq. R. 233; 3 J. & L. 603.

7. Transactions with a foreign prince and his government do not concern the trade of merchandise. *Sturt* v. *Mellish*, 2 Atk. 612.

A letter of attorney from one merchant to another to get in the debts will not make the person so deputed a merchant within the exception of 21 Jac. 1, c. 16, s. 3. *Ib.*

8. A. having joined as a surety for B. in a bond to C. for securing the payment of the interest of a principal sum secured by a mortgage from B. to C., and having also executed a warrant of attorney as a collateral security with the bond, afterwards executed to C. a letter of attorney authorising C. to take possession of a rectory and glebe lands, of which A. was the incumbent, and of certain freehold lands and hereditaments of which he was seised in fee simple, and to hold such possession, and receive and take the tithes, fees, perquisites, emoluments, rents, and profits thereof, until thereby and therewith, or otherwise, he should be paid the interest secured by the bond and warrant of attorney: Held, that the letter of attorney operated not merely as a letter of attorney, but also a charge on the freehold estates, and that C. was entitled to retain possession of the freehold estates until, by means of the rents and profits, all arrears of the interest should be satisfied, notwithstanding the death of A., and the revocation by that event of the power of attorney. *Spooner* v. *Sandilands*, 1 Y. & Coll. C. C. 390.

9. P. being seised under a lease of lives renewable for ever of premises in Dublin, and being indebted to F. in 448*l.*, in order to secure the repayment executed a power of attorney, whereby he authorised F. to mortgage the premises, and which power of attorney he declared to be irrevocable until F. should have received the whole of his account against P., or payment of any bill, promissory notes, or bills of exchange for which P. is or shall become liable to or on behalf of F.:—Held, that the power of attorney constituted an equitable mortgage of the premises. *Re Parkinson*, 13 L. T., N. S., 26.

10. Where there is a power of attorney to do a particular act, followed by general words, the general words are not to be extended beyond what is necessary for doing the particular act. *Perry* v. *Holl*, 6 Jur., N. S., 661; 29 L. J., Ch., 677; 8 W. R. 570; 2 De G. F. & J. 38.

III. EXTENT OF AUTHORITY.

11. *Semble*, that a power of attorney to transact any business in the courts of law authorises the attorney to apply for a supersedeas. *Exp. Crowther*, 4 Dea. & Ch. 31.

12. Where all creditors consent to supersedeas except A., who is abroad, and B. holds power of attorney from A., authorising him to consent:—Held, B. was entitled to consent, and an attested copy of power ordered to be filed with the proceedings. *Exp. Hamilton*, 2 Dea. & Ch. 139.

13. Where the plaintiff, resident abroad, and appointed special administrator in a foreign court of the goods of a deceased native subject, appointed the defendant in this country his attorney, to receive moneys due here to the deceased, and he obtained administration in the Prerogative Court limited to receive the fund, and "until the plaintiff should obtain administration to the deceased":—Held, that he might pay over the money received to the plaintiff, although he had not obtained such administration. *De la Viesca* v. *Lubbock*, 10 Sim. 629.

14. Under a general power to sell, assign, and transfer, an agent cannot pledge for his own debt. *De Bouchout* v. *Goldsmid*, 5 Ves. 211.

15. An agreement for a lease made with an agent who acts under a power of attorney, and a lease executed by such agent in pursuance of the agreement, shall effectually bind the

principal. *Hamilton* v. *Clanricarde* (*Earl*), 1 Bro. P. C. 341.

1. A partnership, consisting of A. and B., was in insolvent circumstances, the separate estates of the partners being also insolvent. On the 14th September B. executed a power of attorney to C., authorising him in general terms to deal with his property. The power contained no reference to the partnership. It contained express powers as to a ship which was in reality partnership property; though the fact did not appear in the power. On the same day B. left England, under circumstances which constituted his departure an act of bankruptcy. In November A. and C. (as B.'s attorney) executed a mortgage of all the partnership property to S., a creditor of the partnership, and also a separate creditor of both parties, to secure all the past debts and such future advances as might be made. At the same time a bill of sale of the ship was executed by A. and C. (as attorney), in consideration of a sum of money paid by S. on account of the partnership. In April A. and B. were both adjudicated bankrupts. S., at the date of the deeds, knew the circumstances under which B. had left England, but he declared in his evidence that he did not infer that B. had any intent to delay or defeat his creditors, and therefore did not know that he had committed an act of bankruptcy:—Held, that the execution of the mortgage by C. as B.'s attorney, was void, as not being within the scope of the power of attorney. *Exp. Snowball, Re Douglas*, 41 L. J., Bky., 49; 7 L. R., Ch., 534; 26 L. T., N. S., 894; 20 W. R. 786.

2. Where a person on leaving this country has authorised another, either in writing or verbally, to act for him generally in his absence, the latter has authority to instruct a solicitor to appear on behalf of the former to show cause against an adjudication of bankruptcy against him. *Exp. & Re Frampton*, 1 De G. F. & G. 263.

3. The plaintiff executed a general power of attorney, authorising P. to act in and manage his affairs during his absence from England, to receive his rents and official salary, to repair his property, and to sell or exchange his real estates, and, for all or any of the purposes aforesaid, to do all acts as amply and effectually as the plaintiff himself could have done, the plaintiff thereby ratifying and confirming, and promising at all times to ratify and confirm, all and whatsoever P. should lawfully do or cause to be done. P. had in his possession a policy of insurance belonging to the plaintiff, and assigned it by way of mortgage to H., the greater portion of the consideration being moneys belonging to H., which had come to the possession of P. in his professional capacity. P. became insolvent. The subsequent correspondence between the plaintiff and P., in which he requested the latter to raise a sum of money upon the policy, showed that he always believed that he had authorised the raising of money upon the policy. In one of the letters he refers to the power in these terms—"When you get the money, which I trust you will be able to do on the power of attorney you have of mine." On a bill filed by the plaintiff claiming to have the mortgage set aside:—Held (affirming 6 Jur., N. S., 491; 29 L. J., Ch., 677; 8 W. R. 291; 2 Giff. 138), upon the correspondence, in connection with the power of attorney, that the plaintiff was precluded from saying that what had been done was without his authority. *Perry* v. *Holl*, 6 Jur., N. S., 661; 29 L. J., Ch., 677; 8 W. R. 578; 2 De G. F. & J. 38.

The transactions between P. and H. amounted to a *bonâ fide* payment of the consideration for the mortgage. *Ib.*

The doctrine approved, that where there is a power of attorney to do a particular act, followed by general words, those general words are not to be extended beyond what is necessary for doing the particular act. *Ib.*

Actual payment of money to an attorney under a power is not requisite to enable him to give a discharge. *Ib.*

4. A. gave a power of attorney to P., authorising him to manage his affairs whilst he was residing abroad. P. kept an account at a bank in A.'s name, and, being agent for the estate of M., obtained 1,500*l.* from it, and paid it into A.'s account at the bank. A., whilst abroad, was induced by P. to execute an assignment to him of a policy of insurance as a security for an alleged debt of 1,500*l.* due from A. to P., but this allegation was subsequently by A. discovered to be untrue. M. appointed P. and B. his executors, and P., having become insolvent, deposited the policy of insurance and the assignment with B. to secure 1,500*l.*, and B. claimed to hold the documents against A. as a security for that sum:—Held, that they must stand as a security in B.'s hands for only what, if anything, might be found due from A. to P., there being nothing to show that any payment had been made to A., he being ignorant of the circumstances, and P. having had full control over the banking account in A.'s name. *Perry* v. *Parkinson*, 6 Jur., N. S., 493.

5. A joint power of attorney from husband and wife, to receive and to sue for moneys belonging to them or either of them, is not sufficient authority to justify the attorney in maintaining an administration suit in respect of a legacy given to the wife for her separate use. *Kenrick* v. *Wood*, 39 L. J., Ch., 92; 9 L. R., Eq., 383; 19 W. R. 57.

6. A. executed a voluntary settlement in favour of his wife and children, with a power of sale; and afterwards executed a power of attorney authorising B. to sell any of his lands, and then went abroad. B., as A.'s attorney, agreed to sell part of the settled property to C., who next day contracted to sell it to D. D. objected to the title on the ground that the sale was unauthorised by the power of attorney, and sued C. for the deposit and for damages, C. making a counter-claim for specific performance. In another action to administer the trusts of the settlement, an order was made confirming the sale to C., and for a conveyance by another person for A.:—Held, that the power of attorney did not authorise the sale of any of the settled land; that the 27 Eliz., c. 4, did not apply; and that D. was not affected by the order in the other action, but could recover the deposit, with damages limited to the conveyancing cost. *General Meat Supply Association* v. *Bouffler*, 40 L. T. 126. Affirmed 41 L. T., N. S., 719.

7. A power of attorney giving the agent

full powers as to the management of certain specified real property, with general words extending those powers to all the property of the principal of every description, and, in conclusion, authorising the agent to do all lawful acts concerning all the principal's business and affairs of what nature or kind soever, does not authorise the agent to indorse bills of exchange in the name of his principal. *Esdaile* v. *La Nauze*, 1 Y. & Coll. 394. S. C. *nom. Esdaile* v. *Lanoge*, 4 L. J., N. S., Exch. Eq., 46.

1. The payee of promissory notes of the East India Company, by a power of attorney authorised his agents at Calcutta to "sell, endorse, and assign" the notes. These notes were transferable by endorsement, payable to bearer. The agents, in their character of private bankers, borrowed money of the Bank of Bengal, offering as security these promissory notes. The bank made the advance, and the agents endorsed the notes, such endorsement purporting to be as attorney for their principal, and deposited them with the bank, by way of a collateral security for their personal liability, at the same time authorising the bank, in default of payment, to sell the notes in reimbursement of the advances. The agents afterwards became insolvent, and default having been made in payment, the bank sold the notes, and realised the amount of their loan:—Held, that the endorsement of the notes by the agents of the payee to the bank was within the scope of the authority given to them by the power of attorney, and that the payee could not recover in detinue against the bank. *Bengal (Bank)* v. *Macleod*, 7 Moo. P. C. 35; 13 Jur. 945.

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5. A power of attorney authorised the holder "from time to time to negotiate, make sale, dispose of, assign, and transfer" a promissory note:—Held, that the holder had no authority to pledge the note. *Jonmenjoy Coondoo* v. *Watson*, 9 L. R., App. Cas., 561; 53 L. J., P. C., 80; 50 L. T. 411.

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8. A., having an interest in a fund, executes to the trustee of the fund a power of attorney to sue in respect of it, and afterwards takes the benefit of the Insolvent Act; his interest in the fund is thereby devested out of him, and the power of attorney is recalled. *Dawson* v. *Sexton*, 1 L. J., Ch., 185.

9. The bill of sale passes the absolute property in a ship at sea, subject only to be devested in case of the endorsement on the certificate of registry not being made within ten days after the return of the ship to port. Power of attorney to sign an endorsement on the certificate, not revoked by bankruptcy of the vendor subsequent to the execution of the power, but previous to the endorsement, being a power only to do a mere formal act, which the bankrupt himself might have been compelled to execute, notwithstanding his bankruptcy, and for a valuable consideration. Therefore, in this case, the endorsement on the certificate being made within the ten days, under a power of attorney, the grantor of which had since become bankrupt:—Held, a sufficient compliance with the terms of the Registry Act. *Dixon* v. *Ewart*, 3 Meriv. 322; Buck 94.

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certificated bankrupt, executes a power of attorney to A. B. to receive the dividends on his debt for the bankrupt's use, the bankrupt undertaking to pay the debt in full, and for that purpose giving the creditor a bill of exchange, which is, however, never paid. A second commission issues against the bankrupt, under which the assignees claim to be entitled to the dividends under the first commission, by virtue of the power of attorney:—Held, that the power of attorney was revocable by the creditor, the consideration failing for which it was given; and the creditor, and not the assignees under the second commission, was entitled to the dividends. *Exp. Smithers*, 1 Dea. 413.

1. Where A., acting under a power of attorney of creditor, assented to an arrangement by which the joint liability of two debtors of his principal was transferred to one, who afterwards became bankrupt, and the principal was afterwards found, under a commission, to have been a lunatic previous to the date of his power, and A. was appointed his committee, and proved as such under the above arrangement against the separate estate, the Court upheld the proof against the petition of other creditors, lunacy not being *per se* a revocation of a power. *Exp. Bradbury, Re Walden*, Mont. & Ch. 625; 4 Dea. 202; 9 L. J., N. S., Bky., 7; 3 Jur. 1108.

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5. A demurrer will not lie to a bill for specific performance of an agreement to buy land on the ground that the present mental incapacity of a necessary party to the conveyance, to join therein or to concur in a parol variation of the original written contract, appears on the face of the bill. Whether an attorney can act under a power of attorney during the mental incapacity of the principal —*quære*. *Beaufort (Duke)* v. *Glynn*, 3 W. R. 463; 1 Jur., N. S., 888. S. C. on appeal 3 W. R. 502.

6. A., being entitled to a life estate in lands, with remainder to his wife B. for life, and C. being entitled to an annuity, and D. having a judgment against A. and a policy of assurance, A., B., C., and D., in consideration of 350*l.* advanced to A., conveyed to E. the lands, annuity, and policy of assurance, subject to redemption; and it was provided, that A. should become tenant to E. of these lands, at a yearly rent, in case of nonpayment of the interest and premiums on the policy; and A., B., and C. appointed F. irrevocably their attorney, to receive the rents of the mortgaged premises and the annuity, for the purpose of paying (after receiver's fees and outgoings) the interest and premiums of the policy; and for the purpose, out of the annuity, of investing a sum to form a fund for payment of the principal, and of paying the balance of the annuity to C., and of the rents to A.; and the sums secured by the judgment and policy of assurance, when they should be paid, after deducting the 350*l.* and interest, were to be applied by E. to pay D. any demand due to her by A., and the balance to A.; and it was provided, that F. should not act as receiver until the interest or premium on the policy should be in arrear. F. entered into receipt of the rents (as he alleged, under a subsequent power of attorney from A.) and of the annuity, no portion of which he invested to form the fund for payment of the annuity, and applied the rents for the purposes of A., and in payment of the interest of a mortgage due to himself, F., by the directions of A.; and the annuity in payment of the interest on the 350*l.*, with the consent of C., who had, before such consent, taken the benefit of the Insolvent Act:—Held, that A. could not revoke the power of attorney in the mortgage deed. *M'Dowell* v. *Reede*, 14 Ir. Ch. R. 190.

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POWER OF MANAGEMENT AND REPAIRS.

See TRUSTS.

POWER OF REVOCATION AND OF REVOCATION AND NEW APPOINTMENT.

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— *By Mortgagee.* See MORTGAGE, XVI.
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PRACTICE AND PLEADING.

See VOLUME V. AND SPECIFIC TITLES.

PRECATORY TRUSTS.

See WILL.

PRECEDENT CONDITION.

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See DECISIONS.

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— *Legacy of Right of.* See WILL.
— *Right of Selection by Specific Legatee.* See LEGACY.
— *In Case of Sales or Leases.* See VENDOR AND PURCHASER
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PREROGATIVE.

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— *Effect of Bankruptcy on Property of Principal in Hands of Agent.* See BANKRUPTCY, XVII. iii. 1, 5—XIX. xii.—XXV. xi.
— *Agents of Trustees and Executors.* See EXECUTOR AND ADMINISTRATOR—TRUSTS.
— *Promoters and Directors of Companies.* See COMPANY, I. II.—VIII.
— *Contracts by Agents of Public Company.* See COMPANY, VI. II.
— *Infringement of Patent by Agents.* See PATENT, VII. IV.
— *Notice to Principal through Agent.* See NOTICE.
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I. GENERAL PRINCIPLES.

1. Amongst the most important duties of an agent are those which require him to give to his principal the free and unbiassed use of his own discretion and judgment, to keep and render just and true accounts, and to keep the property of his principal unmixed with his own or the property of others. *Clarke* v. *Tipping*, 9 Beav. 284.

2. The Court deals severely with any irregularities on the part of an agent, and requires him to act strictly in all matters relating to such agency, for the benefit of his principal. *Gray* v. *Haig*, *Haig* v. *Gray*, 20 Beav. 219.

It is imperative upon an agent to preserve correct accounts of all his dealings and transactions; and the loss, and, still more, the destruction of such evidence by the agent, falls most heavily upon himself. *Ib.*

If an agent, by his own conduct, makes it impossible to ascertain the amount of profit realised, he will be disallowed the commission, which, otherwise and according to the contract, he would be entitled to claim. *Ib.*

3. An agent is bound to act in the best manner he can for his principal, and in matters which are left to an agent's discretion he can only act for the benefit of his principal. *Pariente* v. *Lubbock*, 20 Beav. 588; 8 De G. M. & G. 5.

A foreign merchant directed his correspondent in England to treat any consignment as his son's (who was in England and superintended the sales and purchases), and to acknowledge him owner of the money, so that he might dispose thereof as if it was his own money. By the direction of the son, moneys in the hands of the correspondent, belonging to the father, were applied by him in paying a private debt of the son to the correspondent:—Held, that the transaction was valid. *Ib.*

4. Where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burthens. *Bristowe* v. *Whitmore*, 4 L. T., N. S., 622.

5. The possession of an agent is the possession of the principal; and the principal may acquire a possessory title to real estate by receiving the rents for twenty years through an agent, although that agent is the person really entitled to the estate. *Williams* v. *Pott*, 12 L. R., Eq., 149; 40 L. J., Ch., 775.

A person claiming, without any real title, to be entitled to land is a person wrongfully claiming within the meaning of 3 & 4 Will. 4, c. 27, s. 9; and that section applies, although the claim may be put forward under a mistake, and without any improper intention to deprive others of their property. *Ib.*

6. The powers of an agent are limited by the limitation of the powers of the principal. *Montreal Assurance Co.* v. *M'Gillivray*, 8 W. R. 165; 13 Moo. P. C. 87.

Contracts which would not be binding on a principal, as *ultra vires*, do not become binding by means of their having been entered into through the medium of an agent. *Ib.*

7. An insurance company entered into an agreement with a party that he should act as their agent for five years at a salary of 500*l.* a year, and also a commission of 10 per cent. per annum on the net profits of each year to be made from the business. Less than two years after the agreement was entered into the company resolved to wind up voluntarily:—Held, that he was not entitled to any damages by reason of the company having put it out of their power to make any profits. *Re English and Scottish Marine Assurance Co., Maclure's claim*, 18 W. R. 1122; 39 L. J., Ch., 685.

II. AGENCY—HOW CONSTITUTED.

8. A mortgagor, tenant for life, and a mortgagee having a charge on his interest, and also

on the reversion, join in the appointment of receiver, who was to apply the rents partly in payment of other charges as well as those of the mortgagee, but chiefly in payment of the interest on his incumbrance; mortgagee dies, and then mortgagor:—Held, that receipt by executrix of the mortgagee of some payments from the receiver, after the death of the mortgagor, did not of itself constitute the receiver her agent, so as to make her responsible for his defaults, but that it was ground for inquiry, whether she had in fact adopted him as her agent. *Jones* v. *Smith*, 1 Hare 43; 11 L. J., N. S., Ch., 83; 6 Jur. 8. Affirmed 1 Ph. 245; 12 L. J., N. S., Ch., 381; 7 Jur. 431.

1. A person appointed agent to pay the head-rent on the part of lessee for lives, with covenant for perpetual renewal, is the agent of the lessee, so that a demand and notice upon him will be binding upon the lessee, although he reside abroad, and be admittedly ignorant of the facts. *Butler* v. *Portarlington* (*Earl*), 1 Dr. & War. 20; 1 Con. & L. 1; 4 Ir. Eq. R. 1.

The presumption is, that the tenant is acquainted with the title under which he claims, and the circumstances connected with it; and this holds until the contrary is proved. *Ib.*

2. Payment by an under-tenant C. to A. the head landlord, with the assent of B. the intermediate landlord, of the head-rent reserved by the lease from A. to B., does not of itself make C. such an agent to B. as to induce the Court to decree a reversionary lease of the premises obtained by C. from A. a trust for B. *Maunsell* v. *O'Brien*, 1 Jones 176.

3. Held, that, in a sale under a decree, the solicitor of the plaintiffs, having the management of the sale, is to be considered, as between the vendors and the purchaser, to be the agent of all the parties to the suit. *Dalby* v. *Pullen*, 1 Russ. & M. 296; 8 L. J., Ch., 74.

4. Authority of agent may be by parol, though the agreement must be by writing. *Mortlock* v. *Buller*, 10 Ves. 311. And see *Coles* v. *Trecothick*, 9 Ves. 234; 1 Smith 233.

5. A purchaser alleged, by his answer to a suit for specific performance, that he acted as a puffer in bidding for one lot, and also as a puffer in bidding for another lot, which was knocked down to him, and that he therefore purchased the lot, and signed the agreement for the purchase, as the agent of the vendor; but the statement in his depositions of the circumstances attending the signature was somewhat different from that in his answer, and he had signed an order on his attorney for payment of the deposit money:—Held, that there was not sufficient evidence of agency, and the defendant was held to have purchased on his own account. The Court cannot speculate on the damages which a jury might have given for the breach of an agreement, nor on the damage caused to property by failure of a sale: therefore the specific performance of an agreement for the sale of hereditaments, where the consideration money is 50*l.*, is not too small a matter for the jurisdiction of the Court. The exercise of the jurisdiction is discretionary in the Court; but the discretion is not arbitrary, but must be exercised according to the circumstances of the case. *Bennett* v. *Smith*, 16 Jur. 421.

6. Where the mortgagor is himself a solicitor and prepares the mortgage-deed, the mortgagee employing no other solicitor, the mortgagor must be considered to be the agent or solicitor of the mortgagee in the transaction, although the mortgagor acting as such solicitor is not paid by the mortgagee, for the nature of the transaction is, that all expenses are borne by the mortgagor. *Hewitt* v. *Loosemore*, 9 Hare 449; 21 L. J., N. S., Ch., 69; 15 Jur. 1097.

It does not necessarily follow in such a case, because the mortgagor is the solicitor of the mortgagee, that therefore the mortgagee has constructive notice of facts connected with the title which are known to the mortgagor. *Ib.*

7. No one can become the agent of another except by the will of the principal, manifested in writing, or orally, or by his being placed in a situation in which, according to the ordinary usages of mankind, he would be understood to represent and act for the principal. *Pole* v. *Leask*, 9 Jur., N. S., 829; 8 L. T., N. S., 645; 33 L. J., Ch., 155.

Where one has so acted as from his conduct to lead another to believe that he has appointed some one to act as his agent, and knows that that other person is about to act on that behalf, then, unless he interposes, he would, in general, be estopped from disputing the agency, though, in fact, no agency existed. *Ib.*

The burthen of proof is on the person dealing with any one as an agent, through whom he seeks to charge another as principal. He must show that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it. *Ib.*

If a merchant constitutes any one his general agent for buying and selling in the market, either through a particular broker or otherwise, then, until revoked, the agency will continue, and the principal will be bound by his acts; and the fact that such general agency once existed would be admissible as *primâ facie* evidence of its continuance, and the burthen would be thrown on the principal to show that it had been determined; but unless the agency was a general continuing agency to endure until revoked, the fact that there had been separate agency in any number of previous cases would afford no evidence of agency in any subsequent transaction, however closely it may resemble all which may have gone before. *Ib.*

8. R., after some negotiations, contracted with the assignees of Messrs. E. for the purchase of certain claims of the bankrupts against the estate of G. F. B. He represented that he acted on behalf of himself and M., who was clearly cognizant of the negotiations and contract. Several documents passed between the parties, and finally a draft of a deed was prepared, which recited that the contract was a joint purchase by R. and M. This was submitted to M., who approved of it; and at that time he was willing to adopt the contract, but subsequently, upon an alteration of circumstances, M. objected to the contract, and refused to join in the purchase:—Held, that there was no evidence that M. had entered into any agreement, or that R. acted as his agent; and that the recital of an agreement in a document intended to be executed, would not bind a party who had done nothing to recognise it, though at one time it was apparent that he was willing to execute it, and the bill was

dismissed against M. with costs; but as R. admitted the plaintiff's case, a decree was made against him, without costs. *Foligno* v. *Martin*, 22 L. J., Ch., 502.

1. Answer of defendant read against co-defendant, whose agent he was, to prove the execution of an agreement by the agent, but not to prove his authority. *Fagan* v. *Howard*, Wall. Lyn. 33.

2. When a person has goods consigned to him to sell, and he is bound, if he sells, to pay a fixed price to his employer at a fixed time after sale, he may sell to his customers at any price and upon any credit he pleases; though he may be called an agent, yet the legal relation of principal and agent does not exist between him and his employer; on the contrary, the relation between him and his employer is that of purchaser and vendor, and a separate relation of vendor and purchaser exists between him and the persons to whom he sells, and the moneys which come to his hands by means of the sales which he effects are his own moneys, and are not impressed with any trust for his employer. *Exp. White, Re Nevill*, 19 W. R. 488.; 40 L. J., Bky., 73; 24 L. T., N. S., 45; 6 L. R., Ch., 397.

3. The relation of principal and agent requires the consensus of both parties. There must be an express or implied assent to, or a subsequent ratification of, that relation. *Markwick* v. *Hardingham*, 15 L. R., Ch. D., 349; 43 L. T. 647; 29 W. R. 361.

Contracts relating to Sale of Land.] See VENDOR AND PURCHASER.

III. AUTHORITY OF AGENT.

1. *Scope of*, 5925.
2. *Delegation*, 5929.
3. *Ratification*, 5930.
4. *Personal Liability of Agent*, 5930.
5. *Wrong Doers*, 5931.
6. *Disputing Title of Principal*, 5931.
7. *Revocation*, 5932.

1. Scope of.

4. Agents permitted under circumstances to sign petition, principals being in the country. *Re Boldero*, 1 Rose 231.

5. The agent employed by a miner in the management of his mines, and in his communications with the commissioners for setting out the metes and bounds, and fixing the rents and duties in respect thereof, is not therefore the agent of the miner for the purpose of making a contract with the commissioners not within the powers which had been conferred upon them in that character. *Att.-Gen.* v. *Jackson*, 5 Hare 365.

6. Where a party, dealing with others through an agent, intrusts the agent with a written consent on his part to do a particular act, and privately instructs him not to give the consent except upon certain conditions not specified in it, and the agent gives the consent unconditionally, the principal cannot, subsequently, undo the effect of the consent so given on the ground that the agent exceeded his authority; and it is the same if the principal signed the consent at the suggestion of his agent, without examining its contents, and supposing that the conditions were virtually, if not actually, comprehended within it. *Neeld* v. *Beaufort (Duke)*, 5 Jur. 1123. Affirmed *sub nom. Beaufort (Duke)* v. *Neeld*, 12 Cl. & F. 248; 9 Jur. 813.

7. Where the Irish agent of an English banking house received payments in Irish currency, and upon the footing of Irish interest, on account of a debt which, upon the construction of the contract, was decided to be payable in English currency:—Held, that the right of the banking house to receive payment in such currency was not prejudiced by the conduct of their agents. *Noel* v. *Rochfort*, 10 Bli. N. S. 483; 4 Cl. & F. 158.

8. Where a creditor addresses a written request to assignees, in general terms, to pay the dividends made on the bankrupt's estate to A. B., the assignees are justified in paying subsequent dividends to A. B. until they have notice from the creditor that he has revoked A. B.'s authority. *Exp. Bright*, 2 Dea. & Ch. 8.

9. An objection to title on purchase having been waived, an offer of compensation made by a clerk of the vendor's solicitor, without express authority, is of no effect. *Burnell* v. *Brown*, 1 Jac. & Walk. 168.

10. The question as to the authority of an agent to sign, denied by the answer and by his deposition, stating his declaration to the contrary at the time of execution, is to be determined by an issue; the evidence of a witness, impeaching the instrument he has attested, as a witness to a will denying the sanity of the devisor, etc., being admissible, but to be received with the most anxious jealousy. *Howard* v. *Braithwaite*, 1 Ves. & B. 202.

Specific performance of a contract concerning land not decreed on the signature of an agent without authority. *Ib.*

Distinction between a general and special agent as to their powers to bind the principal. *Id.* 209.

11. Agent, authorised to make agreements for leases for lives or years, makes an agreement in which the term of the proposed lease is not mentioned. This is an agreement not pursuant to his authority, and not binding on his principal. *Clinan* v. *Cooke*, 1 Sch. & Lef. 32.

12. Purchaser under particulars giving a false description, not bound at law or in equity, or by any act of his agent, without a fresh authority. *Deverell* v. *Bolton (Lord)*, 18 Ves. 509.

Parol authority sufficient for a written agreement by an agent. *Ib.*

13. Though an agent may, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts, evidence of his declarations is confined to what is either by the statement itself, or as tending to determine the quality of cotemporary acts, the foundation of, or inducement to, the agreement. *Fairlie* v. *Hastings*, 10 Ves. 123.

Letter by an agent is not evidence against the principal of a pre-existing agreement, though it may be of an agreement contained in that letter. *Id.* 128.

14. A principal is answerable for the act of his agent in concealing or suppressing deeds, though not done with the knowledge of the principal. *Bowles* v. *Stewart*, 1 Sch. & Lef. 209.

1. Baron and feme, having joint power to sell an estate of the wife's, give authority to an agent to sell by auction. He sells by private contract for more than the price they required. The buyer shall not compel specific performance. Husband delivering his wife's compliments in a letter to the agent is no proof of her joining in giving authority to agent. *Daniel* v. *Adams*, Ambl. 495.

2. A., on behalf of himself and certain other persons resident in Scotland, his constituents, by deed engaged B. and C. to act as agents and managers in New South Wales, empowering them to purchase sheep, cattle, and land on behalf of A. and his constituents, for which purpose certain sums were remitted to the colony to be invested for them and placed to their individual interest, and the proceeds of the stock, etc., were to be remitted to their respective credits. B. and C. were to receive for their trouble and expense one-third of the proceeds of the stock. With the money remitted, B. and C. bought stock and lands, and conducted the establishment in the colony in their own names. B. and C. afterwards became embarrassed, and contracted liabilities in the management of the property, and drew bills on A. on account of the establishment, which bills were endorsed by D. and other parties in the colony; these bills being dishonoured, and B. and C. being pressed by the indorsees, they executed a deed of assignment, and conveyed the whole of the trust property, and some property of their own, to D., for himself and other indorsees. D. had notice of the deed appointing B. and C. agents and managers, and that there was no authority on the part of B. and C. to draw bills on behalf of their constituents which could personally bind them. Upon a bill filed by A. and his constituents against B., C., and D., to set aside the deed of assignment as fraudulent and void, and for an account, the Supreme Court at Sydney held that the plaintiffs were not entitled in equity to relief, and that their remedy was to sue D. at law :—Held, by the Judicial Committee of Privy Council, reversing such decree, first, that the decree was erroneous in declaring that the relief sought by the bill was not of a proper equitable character; and secondly, that, under the circumstances, B. and C. had, as such agents and managers, authority to dispose of the property entrusted to them, in discharge of the debts incurred by them on behalf of A. and his constituents, in the management of such property; and that the deed of assignment was valid as against A. and his constituents to the extent of subjecting such joint property to the payment of the debts and liabilities contracted, but null and void as to the residue; and an account directed to be taken in the court below of such debts and liabilities. *Bute* (*Marchioness*) v. *Mason, Exp. Heard*, 7 Moo. P. C. 1.

3. See the case of the liability of the great Duke of Marlborough to the contract for building Blenheim House, from the circumstance of a person giving directions to workmen as his agent. *Marlborough* (*Duke*) v. *Strong*, 1 Bro. P. C. 175.

4. A steward has a general authority to contract with tenants, etc. This will not bind the lord without his consent, nor unless part of the bargain is executed. *Anon.*, 5 Vin. Abr. 522, pl. 35.

5. Defendant had stock in the East India funds, in trust for plaintiff, and a bond in his own name from the company, but in trust for plaintiff. Paintiff being abroad drew a bill on defendant, and promised to send him effects to pay it; defendant accepted the bill; but before it was due, plaintiff failed. Defendant thereupon sold the stock and bond to pay the bill, at a great discount, though at the current price. Two years afterwards the stock and bond having risen in value, plaintiff went to defendant, and desired him to sell and reimburse himself. On a bill by plaintiff for an account :—Held, that the want of effects was sufficient to justify defendant in the sale without orders, for as much as would pay the bill; but it appearing that the produce of the stock alone was sufficient to answer the bill, defendant was decreed to account for the bond according to the value at the time plaintiff gave directions for the sale. *Henriques* v. *Franchise*, Pre. Ch. 205.

6. Under a general power to sell, assign, and transfer, an agent cannot pledge for his own debt. *De Bouchout* v. *Goldsmid*, 5 Ves. 211.

7. A person allowing a voluntary bond to remain in the hands of his agent, for the purpose of raising money on it, is bound by his agent's acts, though he never receives any of the money raised; but the assignee of it can only hold it as security for the amount actually advanced on it to the agent. *Tottenham* v. *Green*, 1 N. R. 466.

8. A purchaser of land from a railway company under a condition prohibiting building thereon without the certificate in writing of the company's principal engineer, proceeded to build upon the unwritten licence of one of the company's resident engineers :—Held, that the company were not bound, and the building was restrained. Upon a prayer to restrain the erection of "new" buildings, the completion of half-built houses was restrained. *Att.-Gen.* v. *Briggs*, 1 Jur., N. S., 1084.

9. A general demurrer for want of equity allowed to a bill, alleging, that the defendant, who was the agent of A., and had in his hands moneys and effects of A., had written a letter to a creditor of A., in which he promised to honour, on presentation, certain bills of exchange, drawn by that creditor, at A.'s request, upon the defendant, and praying that the defendant might be decreed to pay the bills of exchange out of the moneys and effects of A. in his hands, or otherwise, out of his own moneys. *Baillet* v. *Mitchell*, 1 L. J., Ch., 197.

10. A commission to sell and transfer stock "when the funds should be at 85 per cent. or above that price," is a particular commission under which an agent is bound to sell when the funds reach 85; and has not a general authority to act for his employer, so that he may defer selling till the funds should reach a higher price than 85. A mercantile house that had accepted such a commission, and had not sold when the funds reached 85 :—Held, therefore, in equity, to have made the stock their own from that time, and ordered to account to their employer for the price of it, with interest; he in return accounting to them for the dividends he had subsequently received in ignorance of the fact of the funds having reached that price. *Bertram* v. *Godfray*, 1 Knapp 381.

1. A life policy was subject to a condition making it void if the assured went beyond the limits of Europe without licence. An assignee of the policy, on paying the premium to a local agent of the assurance society, at the place where the policy had been effected, informed him that the assured was resident in Canada. The agent stated that this would not avoid the policy, and received the premiums until the assured died:—Held, that the society was precluded from insisting on the forfeiture. *Wing* v. *Harvey*, 5 De G. M. & G. 265; 18 Jur. 394; 23 L. J., Ch., 511; 2 W. R. 370; 2 Eq. Rep. 553.

2. What are circumstances sufficient to establish an agent's authority, and a contract made in the exercise of it. *Ridgway* v. *Wharton*, 6 H. L. Ca. 238; 27 L. J., Ch., 46.

Specific performance of an agreement to lease refused, when the alleged contract was founded upon expressions in a letter written by the defendant's agent to the intended lessee, to the effect that instructions had been given for the preparation of the lease in conformity with terms arranged; no agreement having been actually signed. S. C. 3 De G. M. & G. 677.

The owner of an estate, in answer to an enquiry from an intending lessee, said, "A. B. manages all my affairs, and you are to treat with him." This does not imply that A. B. had authority to enter into a binding agreement. *Semble*. *Ib.*

3. A power to a land agent to "manage and superintend estates," authorises him, on behalf of his principal, to enter into an agreement for the usual and customary leases, according to the nature and locality of the property. *Peers* v. *Sneyd*, 17 Beav. 151.

4. Where a general authority is given to an agent this implies a right to do all subordinate acts incident to, and necessary for, the execution of that authority, and if notice is not given that the authority is specially limited, the principal is bound. *Collen* v. *Gardner*, 21 Beav. 540.

A steward has no general authority to enter into contracts for granting leases of farms for a term of years. *Ib.*

Where therefore a steward and land agent, whose powers were specially limited, had in the absence of the owner entered into a written agreement with a farmer to grant him a lease for twelve years, but without communicating to him the fact that his power was specially limited:—Held, that the agreement did not bind the owner. *Ib.*

5. An agent of an insurance company is not necessarily authorised to contract for the grant of policies. *Linford* v. *Provincial Horse and Cattle Insurance Co.*, 5 N. R. 29; 34 Beav. 291; 10 Jur., N. S., 1066; 11 L. T., N. S., 330.

6. The powers of an agent are limited by the limitation of the powers of the principal. *Montreal Assurance Co.* v. *M'Gillivray*, 8 W. R. 165; 13 Moo. P. C. 87.

Contracts which would not be binding on a principal, as *ultra vires*, do not become binding by means of their having been entered into through the medium of an agent. *Ib.*

An assurance company was incorporated by a colonial ordinance and statute, by which it was provided that all policies of insurance should be subscribed by three directors, countersigned by the secretary and manager, and the seal of the corporation. By a by-law of the company made in pursuance of the powers conferred by the colonial ordinance and statute, a resolution to the same effect was passed. H. mortgaged a house in the colony to R.; some time afterwards his representative, being dissatisfied with the security, applied for repayment of the mortgage money, when H. agreed to insure the premises for the benefit of the mortgagee's representative. In pursuance of this arrangement, H. applied to the company through M., their manager and agent, to insure the premises against fire. H. was unable to pay the premium, and proposed to M. that the company should take his promissory note payable in twelve days. This was agreed to by M., and a note given M. at the same time, promising to send the policy. The particulars of the policy were entered in the books of the company, but the note being dishonoured when due the entry was erased. The policy was never issued; shortly afterwards the premises were burnt down:—Held, first, that the powers of M. as manager, being public, must be taken to have been known to H. the insurer, and that the acts of M. in the transaction were *ultra vires* and void, not being within the scope of his general authority as manager, and therefore not binding upon the company. *Ib.*

7. The ordinary import of language of a letter giving full authority to deal with the property of another, ought not to be cut down or restricted by merely ambiguous or uncertain expressions in other parts of the document. *Pariente* v. *Lubbock*, 8 De G. M. & G. 5; 20 Beav. 588.

Where, therefore, a foreign merchant wrote to his English correspondent, directing the latter to consider any consignment from him as the property of his son, who was residing in England, so that the son might place and dispose of the father's money as if it was the son's own property, and stating that, as the son informed the father of everything, the consignor would not continue writing, but that whatever the son said for him was to be the same as if he said it himself, and must guide the consignee:—Held, first, that the son was thus constituted, not merely an agent with full powers to act for his father, but that the consignee was justified in setting off, with the son's concurrence, a debt due to the father against one due to the son. *Ib.*

Held, secondly, that, although on one or two occasions the consignee had required a written authority from the son before so acting, neither this circumstance nor the terms of the letters rendered any writing necessary, but that a verbal direction or subsequent adoption by the son was sufficient. *Ib.*

Held, thirdly, that, the circumstance of the consignee's firm having been changed by the death of a member of it, subsequently to the date of the letters, made no difference in these respects, the letters having imposed a duty on the consignee's house, which continued as long as the relation between the plaintiff and it, however it might be composed. *Ib.*

8. The plaintiff claimed 37*l.* from the defendant for the use and occupation of a house, and authorized him to pay the amount to a person whom he named. She called on the defendant, and he then expressed his readiness

to pay the amount, but she (having also an interest in the property) refused to receive it. No actual tender was made. The plaintiff sued the defendant for the use and occupation, claiming 238*l.* The defendant paid 37*l.* into court:—Held, that as soon as the defendant expressed to the agent his readiness to pay the 37*l.* there was a concluded agreement between him and the plaintiff for that amount, and that the plaintiff could not recover more. *Gretton* v. *Mees*, 7 L. R., Ch. D., 839; 26 W. R. 607; 38 L. T., N. S., 506.

Held, also, that the defendant was entitled to the costs of the action from the time of the payment into court. *Ib.*

1. Where an agent is clothed with ostensible authority, no private instructions prevent his acts within the scope of that authority from binding his principal. Where his authority depends, and is known to those who deal with the agent to depend, on a written mandate, it may be necessary to produce or account for the non-production of that writing in order to prove what was the scope of the agent's authority. *Semble*, *National Bolivian Navigation Co.* v. *Wilson*, 5 App. Cas. 209; 43 L. T. 70.

2. If a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bonâ fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized, because he meant the order to be read in another sense of which it is equally capable. *Ireland* v. *Livingstone*, 5 L. R., H. L., 395; 41 L. J., Q. B., 201; 27 L. T. 79. Reversing 5 L. R., Q. B., 516; 39 L. J., Q. B., 282.

L. sent an order by letter to T. & Co., commission agents at the Mauritius, to ship him 500 tons of sugar at a certain price,—"fifty tons more or less of no moment, if it enables you to get a suitable vessel." T. & Co. purchased and shipped about 400 tons, construing the letter as an order to purchase up to 500 tons, and assuming that the words "fifty tons more or less" had reference only to the capacity of the ship. L. refused to take the sugar, on the ground that his letter was an order for a shipment by one vessel of at least 450 tons and not more than 550 tons:—Held, that as the letter was capable of the construction T. & Co. had put upon it, L. was bound to accept the sugar. *Ib.*

3. In an action for a malicious prosecution against an incorporated banking company the jury found that the same had been authorized on behalf of the bank by W., the acting manager, and were directed by the judge that it was to be inferred from W.'s position as manager that he had sufficient power under the circumstances for directing a prosecution. A rule nisi to enter a nonsuit or for new trial was discharged:—Held, on appeal, that assuming the prosecution to have been authorized by W., the direction to the jury to the effect that it was to be inferred from W.'s position that he had authority to direct the prosecution was on the evidence incorrect. *New South Wales (Bank)* v. *Owston*, 4 L. R., App. Cas., 270; 48 L. J., P. C., 25; 40 L. T. 500.

The arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and therefore not within the ordinary scope of a bank manager's authority. Evidence accordingly is required to show that such arrest or prosecution is within the scope of the duties and class of acts such manager is authorized to perform. That authority may be general, or it may be special and derived from the exigency of the particular occasion on which it is exercised. In the former case it is enough to show commonly that the agent was acting in what he did on behalf of the principal: but in the latter case evidence must be given of a state of facts which shows that such exigency is present, or from which it might reasonably be supposed to be present. Rule made absolute for a new trial. *Ib.*

4. The extent and nature of the authority of an agent may be defined by writing, by oral instruction, or by the course of dealings between the parties. *Pole* v. *Leask*, and *Leask* v. *Pole*, 28 Beav. 562; 6 Jur., N. S., 1104; 29 L. J., Ch., 888.

When the authority to an agent is general, it will be construed liberally, but according to the usual course of business in such matters. *Ib.*

When the authority is given by parol and is ambiguous, it is to be construed according to the course of trade in such matters, and where it is unexpressed, it is to be ascertained by investigating the course of dealing pursued between the several parties to the transactions. *Ib.*

Where an express authority is given, an authority is implied combined with it, to do all acts which may be necessary for the purpose of effecting the object for which the express authority is given. *Ib.*

A general parol authority may be enlarged by parol, or even an additional authority superadded to it, by the employment of the parties known to and acquiesced by them. For instance, a merchant may authorize a clerk to accept or indorse bills of exchange for him; but this will not, of itself, authorize his paying or receiving money due on such bills. But if, in the course of his employment, the clerk has, with the knowledge of the merchant, been allowed to do so, this will constitute a sufficient authority for that purpose, and will discharge the holders of the bills. *Ib.*

An agent employed to negotiate and conclude contracts, is not thereby authorized to pay or receive money which becomes due under such contracts, but the course of employment may justify the agent in so paying or receiving the money, if known to the principal, and not objected to by him. *Ib.*

P. authorized L., a fruit and colonial broker, to purchase and sell goods for him upon instructions to be given by A., their agent. P. insisted that the authority to A. was limited to one article, namely, currants; but L. insisted that the authority was general. The authority being by parol only, and there being a conflict of evidence, the Court, from the practice and conduct of the parties, came to the conclusion, that the authority of A. was general, that it extended to all such articles as the broker was in the habit of dealing in, and that it authorized A. to settle accounts with the broker, and receive the balance due in respect of the transactions. *Ib.*

5. The appointment of a general agent for the sale of goods implies an authority to sell

according to the ordinary course of trade. Where, therefore, an agent sold timber of his principal at one of a number of sales, held at the same place and by the same person, on behalf of himself and other vendors, at which it was alleged to be the custom that the purchasers should be liable for the purchase money to the holder of the sale only, and not to the real vendor; and it was proved that the agent had himself sold goods on his own account in conformity with this alleged usage:—Held, that the principal vendor was entitled to look for his purchase money beyond the holder of the sales, to the real seller of the timber. *Exp. Howell, Re Williams*, 12 L. T., N. S., 875.

1. An association was not registered under the Companies Acts. Persons became members by effecting mutual policies; members were empowered also to effect "special rate policies." The applicants, De W. & Co., were not members, but had taken out a "special rate policy," signed per procuration by J. & S., the managers, who gave and accepted on their personal liability a bill of exchange for the amount assured. In a similar case, the amount assured had been disallowed by the Appeal Court as a claim made on the association. J. & S. became insolvent, and their acceptance was dishonoured. De W. & Co. claimed that the amount of the premiums should be repaid them by the members of the association:—Held, that they were not entitled to have the premiums repaid, because, first, as they well knew, J. & S. had no power, as agents, to grant such a policy to non-members; and, secondly, there was no failure of consideration, as J. & S. had made themselves personally liable. *Re Arthur Average Association, De Winton & Co.'s case*, 34 L. T. 942.

2. Although a person who as principal employs a broker to transact business for him in a particular market is bound by the usage of that market, though unknown to him, provided the usage is one that merely regulates the mode of performing the contract, and does not change the intrinsic character of the contract, yet where the usage is one which gives the broker an interest at variance with his duty, as by converting him into a principal instead of a mere agent to establish privity of contract between two principals, such a usage is not binding on a principal who, being ignorant of the usage, employs a broker to whom the usage is known to perform the ordinary and accustomed duties belonging to the office or employment of a broker. The principal is not bound to inquire what the usage may be, or whether there is any particular usage affecting the market in which he proposes to deal. *Robinson* v. *Mollett*, 7 L. R., H. L., 802; 44 L. J., C. P., 362.

A Liverpool merchant employed brokers of London to buy tallow for him in the London tallow market. They having other orders, bought in their own name a quantity sufficient to cover all their orders, and by letter they informed the merchant that they had bought on his account so many tons; but they did not mention the name of the seller. A few days after they sent him notice that they were ready to deliver to him so many casks of tallow in fulfilment or part fulfilment of his order, but they did not allude to any third party as the seller. He acknowledged the receipt of these notices without observation. There is a custom on the London tallow market for brokers when they receive orders to contract in their own names, and if their principals refuse to accept or deliver, to buy or sell against them, and charge them with the loss. The merchant was ignorant of this custom. On becoming aware of it, and of the mode in which his orders had been executed, tallow having in the meantime fallen, he refused to take the tallow:—Held, that as the brokers were employed to act as brokers only, the custom which converted them into principals was inconsistent with the employment, and as the merchant was ignorant of it when he gave his orders, he was not bound by the custom. *Ib.*

Held, also, as the first notice sent by the brokers was that they had bought on his account, he was not thereby put on inquiry as to the custom or as to the name of the seller, and he was not bound to accept when it turned out that his own brokers might in fact be the vendors, or to pay them the difference between the price at which they bought and that at which they sold in consequence of his having refused the contract. *Ib.*

3. The Queensland Constitution Act 1867, by s. 6, enacts that any person who shall, directly or indirectly, hold or enjoy any contract for or on account of the public service, shall be incapable of sitting or voting as a member of the legislative assembly; and s. 7 imposes a penalty on any person so disqualified so sitting or voting. The respondent, being part-owner of a ship which had been chartered by the Government, sat and voted as a member of the legislative assembly. The respondent had instructed his agents, who were also part-owners, not to charter the ship to the Government, and that if they did, the contract should be made with such part-owners only who should be held to have chartered the respondent's share at a rate fixed independently of such contract. The Government had no knowledge that the respondent was a part-owner:—Held, that under these circumstances the respondent was not liable to the penalties imposed by the Act. *Freeman* v. *Cooke* (2 Exch. 654) approved. *Miles* v. *Mollwraith*, 8 L. R., App. Cas., 120; 52 L. J., P. C., 17; 48 L. T. 689; 31 W. R. 591.

4. K. entered by letter into a contract with the plaintiff for the sale of 300 tons of muriate of potash. At the commencement of the letter, K. said that he bought as agent for the defendant. Delivery at the rate of 50 tons per month. Cash payment to be made by K. fourteen days from receipt of bills of lading. A commission of 1 per cent. to be paid to K. The letter was not signed by him as agent:—Held, that on the true construction of the contract, whatever K.'s position might be, the defendant was the buyer, and therefore liable to the plaintiff. *Concordia Chemische Fabrik auf Actien* v. *Squire*, 34 L. T. 824.

2. Delegation.

5. An authority given to A. to draw bill in the name of B. may be exercised by the clerk of A. *Exp. Sutton*, 2 Cox 84.

6. Vendor is bound by signature of agent's clerk thus: "Witness, E. P., for Mr. S., agent

for the seller," upon evidence of assent; but clerks in general have no authority to bind the principal. *Coles* v. *Trecothick*, 9 Ves. 234; 1 Smith 233.

1. A., tenant for life, with a power to lease by deed, duly executed under her hand and seal, reserving the best yearly rent. Plaintiff enters into possession, and expends money in building, under an agreement for a lease evidenced only by the memorandum in writing entered in the book of A.'s authorised agent, signed not by the agent himself, but by his clerk, although in evidence to have been approved by him, and according to the usual course of business. A. dies, and on a bill for specific performance against the remainderman:—Held, first, no sufficient agreement in writing; second, the plaintiff not entitled to compensation from A.'s representatives for money laid out by him on the faith of the alleged agreement. *Blore* v. *Sutton*, 3 Meriv. 237.

2. Though an agent cannot delegate his authority, yet there are many acts which he must necessarily do through the agency of other persons, and which are valid when so done. *Rossiter* v. *Trafalgar Life Assurance Association*, 27 Beav. 377.

3. Ratification.

3. An act done by an agent of the Government, though in excess of his authority, being ratified and adopted by the Government:—Held, to be equivalent to a previous authority. *Secretary of State for India* v. *Kamachee Boye Sahaba*, 7 Moo. Ind. App. 476; 13 Moo. P. C. 22.

4. By agreement made between J. S. and T. J. S. of the one part, and the plaintiff of the other part, J. S. and T. J. S. (father and son), as mortgagees with power of sale, agreed to sell to the plaintiff all their estate and interest in a piece of land adjoining other land of the plaintiff. This agreement was signed by the plaintiff, and by T. J. S. for himself and his father. The father and son, subsequently to the date of this agreement, sold the property to B., with notice of the agreement. Upon a bill filed by the plaintiff for specific performance:—Held (affirming 3 Sm. & G. 592; 4 Jur., N. S., 108, 6 W. R. 173), that, although the evidence was insufficient to show any antecedent authority in the son to bind the father, yet the latter had, by his subsequent conduct, ratified the contract. *Bigg* v. *Strong*, 4 Jur., N. S., 983; 6 W. R. 536.

5. The relation of principal and agent requires the consensus of both parties. There must be an express or implied assent to, or a subsequent ratification of, that relation. *Markwick* v. *Hardingham*, 15 L. R., Ch. D., 349.

4. Personal Liability of Agent.

6. Agent not responsible if he names his principal as the person to be responsible. *Exp. Hartop*, 12 Ves. 352.

7. A. articles on behalf of B. to purchase some houses, and covenants to pay 800*l.* for the same, and the houses are afterwards destroyed by an earthquake. Though A. had no effects of B.'s in his hands, yet the Court decreed him to pay the 800*l.* *Cass* v. *Rudele*, 2 Vern. 280.

8. An attorney on behalf of his client, the defendant, promises to pay 500*l.* to plaintiff; this being done by the authority of the client, attorney not liable, but only client; otherwise, if the attorney had no authority from client to make the engagement. *Johnson* v. *Ogilby*, 3 P. W. 277.

9. Attorney as agent, on sale of an estate, not disclosing to the buyer an incumbrance, and leading him to suppose the title would be a good one, held liable to make satisfaction in default of the vendor. *Arnot* v. *Biscoe*, 1 Ves. 95.

10. A solicitor who attends a sale, and bids for his client, is responsible for the payment of the deposit, and will be attached if it is not paid. *Hobhouse* v. *Hamilton*, 1 Hog. 401.

11. Where agent was obliged as such to indorse bill, and fact was known to indorsees; injunction was granted to restrain proceedings thereon against him. *Kidson* v. *Dilworth*, 5 Price 564.

12. B. became the purchaser of premises at an auction, declaring himself the agent of C. in C.'s presence, but the vendor's solicitor required B. to sign the agreement, and declined to substitute the name of C. Communications afterwards took place between the vendor's solicitor and C. with reference to the title. The vendors afterwards brought their bill against B. and C. for specific performance of the contract:—Held, that supposing B. to be the agent of C., yet the signature of B. to the contract made him personally liable to perform it; that the communication between the vendor's solicitor and the solicitor of C. with reference to the title, was not an adoption of C. as the purchaser in the place of B., but should be assumed to be made in furtherance of the original contract, in which, according to B.'s representation, he was (as between himself and C.) only a formal party; that the acceptance of the title by C. in such communications would not be binding upon B., for such acceptance would be regarded as having been made in C.'s own right as claiming through B., and not as agent for B. *Chadwick* v. *Maden*, 9 Hare 188.

13. Upon allegations, that, under the decrees of the Cortes and orders of the Spanish government, the plaintiff had a lien for the payment of a debt due to him on a certain portion of stock, which, along with other stock, had been, by the commissioners of the Spanish government, placed at the disposal of, and sold by, certain agents here, a bill is filed praying an account (amongst others) against the agents:—Held, that a good and complete defence may be made to such a bill by a plea, stating matter from which it appears that the stock placed at the disposal of these agents was intended for special purposes, unconnected with the satisfaction of the plaintiff's demand, and did not include the stock specifically appropriated to meet his demand; and that it is no objection to the plea, that after the special purposes are answered, there may be in the hands of the agents a surplus in which the plaintiff may have an interest. *Jabatt* v. *Campbell*, 3 L. J., Ch., 8.

A creditor cannot file a bill for an account

against the agent of the principal, against whom his claim is, unless he makes out a case of collusion between the principal and agent. *Ib.*

1. The creditors of A. having issued a fiat in bankruptcy against him, and having at the close of the proceedings under the fiat, received notice, by means of the examination of the bankrupt and others, that A. was only the agent of B. & Co., proceeded nevertheless to sign A.'s certificate :—Held, that this was not an election by the creditors to treat A. as their sole debtor. *Taylor* v. *Sheppard*, 1 Y. & Coll. 271.

5. Wrong Doers.

2. The widow of the testator employed A. to collect some of the debts due to the testator's estate, which A. accordingly collected and paid over to the widow, believing that she was the administratrix. The widow subsequently died without having obtained letters of administration :—Held, that A. was liable for the money, and that the liability was not avoided by the suggestion that A. acted as the agent of the widow, inasmuch as the acts of the widow and A. in reference to the testator's estate were the acts of wrong doers, and the law does not recognise the relation of principal and agent as existing among wrong doers. *Sharland* v. *Mildon*, 5 Hare 469 ; 15 L. J., N. S., Ch., 434 ; 10 Jur. 771.

3. All persons directly concerned in the commission of a fraud are principals. A contract of agency cannot impose an obligation on the agent to commit a fraud. *Cullen* v. *Thompson*, 4 Macq. H. L. Ca. 441 ; 9 Jur., N. S., 85.

4. There is no agency as between wrong doers ; each of them is personally liable. *Hough* v. *Abergavenny* (*Earl*), 23 W. R. 40.

Therefore, where there was a dispute between the plaintiff and one of the defendants about a weir situate on the plaintiff's land, and the other defendant was charged with intending to enter forcibly on the land and destroy the weir :—Held, that the last-mentioned defendant could not sustain a demurrer to a bill for injunction on the ground that he had no interest in the subject-matter of the dispute, and was a mere agent acting on the orders of the principal defendant. *Ib.*

6. Disputing Title of Principal.

5. In a case where A. had agreed to remit certain consignments to B., and B. had agreed to account with A. for the proceeds of such consignments :—Held, that it was not competent at any time afterwards for B. to assert a paramount title to the proceeds of such consignments. *Zulueta* v. *Vinent*, 1 De G. M. & G. 315.

A mining company in Cuba had for some time been accustomed to consign its ore to Z., in London, who furnished the money for the necessary supplies. A considerable debt having thus become due from the company to Z., the ore was suddenly consigned to Z. in the name of V., who brought an action against Z. for the proceeds. Z. thereupon filed his bill against the company and V., alleging that the last consignments were the property of the company, and though made in the name of V., were made by the company, and on their account, and for their benefit, and placed to their account ; and seeking to restrain the action and have the account taken :—The Court held, that the bill stated a sufficient equity, and overruled a demurrer of V. to the bill. S. C. 13 Beav. 215.

6. An agent in this country for a foreign principal having in his possession goods which by the act of the principal have been so appropriated as to be in equity the property of a third person in this country, and having notice of the rights of the third person, cannot resist the demand of that third person for the goods, on the ground that they are held by the agent in his capacity of agent, or impose on the third person, the rightful owner, unreasonable conditions as the price of their delivery to him, because the foreign principal has directed him so to do. Application of this principle in the case of disputed rights as to cargoes of timber and the bills of lading representing them. *Dresser* v. *Hoare*, 26 L. J., Ch., 51 ; 2 Jur., N. S., 1151.

7. An agent cannot get an adverse title, unless he can distinctly show that the acts on which he relies are in respect of title, and not in respect of agency. *Att.-Gen.* v. *London* (*Corporation*), 2 Macn. & G. 247 ; 2 H. & Tw. 1 ; 19 L. J., N. S., Ch., 314 ; 14 Jur. 205.

8. Where a consignor had purchased goods on account of and at the risk of his correspondent, and delivered them to the carrier :—Held, that he could not afterwards, on any disagreement, depart from his duty, and deliver them to another person ; and the latter taking the goods with knowledge of the circumstances would do so subject to the rights of the correspondent. *Green* v. *Maitland*, 4 Beav. 524.

9. A wharfinger received notice that goods deposited at his wharf were marked with a fraudulent imitation of a trade-mark, and that the owner of the trade-mark was about to apply to the Court of Chancery for an injunction to prevent the sale of the goods ; after the injunction had been granted, but before the wharfinger had notice that it had been granted, he refused to deliver the goods to the owner :—Held, that he was justified in equity in such refusal, and that the owner of the goods would be restrained from suing him at law for a wrongful conversion of the goods. *Hunt* v. *Maniere*, 33 Beav. 157 ; 11 Jur., N. S., 28, 73 ; 34 L. J., Ch., 142 ; 13 W. R. 363 ; 11 L. T., N. S., 723 ; 5 N. R. 181.

10. A contract, establishing between the contracting parties the relation of principal and agent, is made absolute in law by the latter acting under it ; and an insurance broker cannot, as an agent, dispute the claim of his only known principal on the ground that other persons were interested in the subject-matter of the insurance ; their claims would be a question between the assured and the persons so claiming to be interested. *Roberts* v. *Ogilby*, 9 Price 269.

11. Although in certain cases a bailee may set up the *jus tertii*, yet if he accepts the bailment with full knowledge of an adverse claim, he cannot afterwards set up the existence of such claim as against his bailor. *Exp. Davis*

Re Sadler, 19 L. R., Ch. D., 86; 45 L. T. 632; 30 W. R. 237.

1. After the filing of a liquidation petition the holder of a registered bill of sale executed by the debtor instructed an auctioneer to take possession of the chattels comprised in it. The auctioneer took possession, and advertised the goods for sale on behalf of the bill of sale holder. The sale was stopped by injunction, and the auctioneer remained in possession of the goods on behalf of the receiver under the petition. On the appointment of a trustee the auctioneer held possession for him, and ultimately by his directions advertised the goods for sale, the advertisements and the catalogues of the goods being headed "In liquidation. By order of the trustee." The goods were sold, and the proceeds of sale were received by the auctioneer. The bill of sale holder gave him notice not to pay them to the trustee, and he declined to pay them over. The trustee applied to the Court of Bankruptcy for an order for payment to him, serving notice of his motion on the auctioneer only. On the hearing of this motion an order was made by consent that the money should be paid into court, and the hearing adjourned, notice being meanwhile given to the bill of sale holder. Notice was served on him, but not a four-days' notice as required by rule 50 of the Bankruptcy Rules 1870, and he did not appear on the adjourned hearing. He had meanwhile commenced an action against the auctioneer for the proceeds of sale:—Held, that the Court of Bankruptcy ought to exercise its jurisdiction under s. 72 of the Bankruptcy Act 1869, and that the money must be paid out to the trustee, on the ground that the auctioneer had, with full knowledge of the adverse claim, deliberately elected to sell the goods for the trustee, and was, therefore, estopped from denying his title. *Ib.*

Biddle v. *Bond* (6 B. & S. 225) distinguished. *Ib.*

7. Revocation.

In General.] 2. An agent imposed by will upon the devisee of an estate may be removed by this Court if he conduct himself improperly. *Lawless* v. *Shaw*, Ll. & G. *temp.* Sugd. 172.

3. A grant was made by Dr. Y., bishop of Ely, in 1801, to P. for his life of the ancient office of receiver of the rents of the lands belonging to the see of Ely. For a long series of years the receiver for the time being had not only received the rents, but had prepared leases, surrenders, and counterparts of leases, had registered leases and assignments of leases in a register kept by the bishop, and had made searches in the muniment room in the residence of the bishop whenever requested by persons requiring information contained in the register and records belonging to the bishop, for all which duties he received fees. In 1836 Dr. A., immediately after his appointment as bishop, sent a notice to P. not to prepare any more leases, surrenders, or counterparts of leases, and not to receive any more rents. P. filed a bill against Dr. A., praying that it might be declared that P. was entitled to exercise all the duties and receive the perquisites hitherto exercised and received by the receiver, and that the bishop might be restrained from interfering with such exercise and enjoyment:—Held, that whatever might be the legal right of P. to the office, and to its alleged appurtenances, no relief could be given to him in equity, on the grounds of the hardship of forcing the services of a stranger in an office of trust upon the bishop and the want of mutuality; the nature of the duties and services asserted by the plaintiff being such as to preclude the possibility of a decree in this court against him compelling their specific performance. *Pickering* v. *Ely* (*Bishop*), 2 Y. & Coll. C. C. 249; 12 L. J., N. S., Ch., 271; 7 Jur. 479.

4. The duties of an agent of a limited company being in the nature of personal services, and as such incapable of being enforced in equity, the Court refused to restrain the directors from acting upon or enforcing the resignation of A., whose management and agency were made a prominent condition in the prospectus on the formation of the company, and expressly provided for by the articles of association. *Mair* v. *Himalaya Tea Co.*, 1 L. R., Eq., 411; 11 Jur., N. S., 1013; 14 W. R. 165.

In refusing to grant the injunction, the Court put the directors upon an undertaking not to take advantage, in proceedings at law to recover the amount due on A.'s shares, of his resignation, which was alleged by him to have been wholly conditional on his being relieved from all liability in respect of shares. *Ib.*

5. Auctioneers advanced a sum of money to S., who agreed to put a miscellaneous collection of property in their hands for sale, from the proceeds of which they were to retain the money advanced. A part only of the property was delivered and sold, but it realized less than the sum advanced; S. refused to part with the remainder of his collection:—Held, that the Court would not compel the performance of the contract for an agency; that S., if he satisfied the claims of his agents, was at liberty to countermand the sale of his property, that the advance of the money to S. was not made on the security of the property mentioned in the contract, and that the claims of the agents must be determined in a court of law. *Chinnock* v. *Sainsbury*, 30 L. J., Ch., 409; 6 Jur., N. S., 1318; 9 W. R. 7; 3 L. T., N. S., 258.

6. In a suit by a plaintiff, alleging that the defendant had been employed by him as his agent for the sale of horses, and that, being unable to obtain from the defendant the particulars of the transactions as to the sales and purchases, he (the plaintiff) had served the defendant with notice to determine the agency, and had subsequently removed several horses from his premises, upon which the defendant had commenced an action of trover. Injunction to restrain the action, on the ground that the Court of Chancery ought to ascertain the questions of fact or direct an issue, refused, with costs. *Curlewis* v. *Carter*, 9 L. T., N. S., 407.

7. M., the manager of E.'s business, was allowed by him to send out bills to the customers in his (M.'s) own name alone. M. afterwards locked E. out of the business premises, and E. several times had to break the lock to get in. M. made an assignment of the premises and stock in trade to P., and P. advertised them for sale. E. filed a bill against M. and P. to restrain the exclusion and the sale. The defendants demurred for want of

equity, and the demurrer was overruled with costs. *Eachus* v. *Moss*, 14 W. R. 327.

1. An agent who has the business taken out of his hands before completion is by the custom of merchants entitled to half the commission which he would have earned by completing it. *Spain* (*Queen*) v. *Parr*, 39 L. J., Ch., 73.

On Bankruptcy.] 2. A London house guaranteed certain payments to be made by a Paris house. The solvency of the Paris house becoming doubtful, the London house duly authorised the creditor to act according to the best of his discretion in the settlement of the affairs. The creditor accordingly went to Paris and entered into a composition for the debt with the Paris house. After the departure of the creditor from England, and previous to the composition, a commission of bankruptcy issued against the London house, of which fact the parties of the composition were ignorant:—Held, that the bankruptcy did not determine the authority. *Exp. & Re M'Donnell*, Buck 399.

3. The bankruptcy of an agent is not *per se* a defence to an action for wrongful dismissal, even though the agent is to receive moneys on account of his principal. The fitness of the agent to perform his duties is a question for a jury. *M'Call* v. *Australian Meat Co.*, 19 W. R. 188.

4. Where authority had been given previous to an act of bankruptcy by the bankrupts to the defendant in the course of mutual dealings to receive the purchase money of their estate, and to place it to their account, and such authority had been acted upon before notice of an act of bankruptcy:—Held, that such authority was not revoked by the act of bankruptcy; that the payment thereof to the defendant was a rightful payment; that being so received it became a debt and an item in the account between him and the bankrupts before notice of any act of bankruptcy, and that the defendant was entitled to set off against it, in an action brought by the trustee in bankruptcy, the debt due from the bankrupts to him. *Elliott* v. *Turquand*, 7 L. R., App. Cas., 79; 51 L. J., P. C., 1; 45 L. T. 771; 30 W. R. 477.

On Determination of Principal's Business.] 5. When two parties mutually agree, for a fixed period, the one to employ the other as his sole agent in a certain business at a certain place, the other that he will act in that business for no other principal at that place, there is no implied condition that the business itself shall continue to be carried on during the period named. *Rhodes* v. *Forwood*, 1 L. R., App. Cas., 256; 47 L. J., Exch., 396; 24 W. R. 1078; 34 L. T., N. S., 890. Reversing 33 L. T., N. S., 314.

A. and B. agreed, "in consideration of the services and payments to be mutually rendered," that for seven years, or as long as A. should continue to carry on business at the town of Liverpool, A. should be the sole agent there for the sale of B.'s coals, and that B. would not employ any other agent there for that purpose. There were stipulations in the agreement that B. should have the entire control over the prices for which, and the credits at which, the coals were to be sold: and that if A. could not sell a certain amount per year, or B. could not supply a certain amount per year, either party might, on notice, put an end to the agreement. At the end of four years, B. sold the colliery itself. In an action by A. for damages for breach of the agreement thereby occasioned:—Held, that the action was not maintainable; for that the agreement did not bind the colliery owner to keep his colliery, or to do more than employ the agent in the sale of such coals as he sent to Liverpool. *Ib.*

6. An insurance company entered into an agreement with a party that he should act as their agent for five years at a salary of 500*l.* a year, and also a commission of 10 per cent. per annum on the net profits of each year to be made from the business. Less than two years after the agreement was entered into the company resolved to wind up voluntarily:—Held, that he was not entitled to any damages by reason of the company having put it out of their power to make any profits. *Re English and Scottish Marine Assurance Co.* v. *Maclure's claim*, 5 L. R., Ch., 737; 39 L. J., Ch., 685; 23 L. T. 685; 18 W. R. 1122.

IV. LIEN OF AGENT.

7. A business, the property of A., was carried on with his capital and for his profit by B., his agent, in the name of the latter, at a fixed salary. A. having become bankrupt, B. filed his bill, stating, that by reason of the use of his name he had become liable to a heavy amount for the concern, which was insolvent, notwithstanding the bankruptcy of A., and praying for an injunction to restrain the assignees from in any way intermeddling with the concern:—Held, that B. had a lien on the business, to the extent of his liabilities, and an injunction was granted. *Foxcroft* v. *Wood*, 4 Russ. 487.

8. An action at law being brought to recover the produce of some foreign specie remitted by a merchant abroad to an agent in London, the agent filed his bill, alleging generally that there were mutual dealings and transactions between the parties, and praying that an account might be taken of them, and for an injunction; a demurrer was allowed. *Frietas* v. *Dos Santos*, 1 Y. & J. 574.

9. Where agents abroad are in disburse for their principal, and, upon being doubtful of his circumstances, make bills of lading to their own order indorsed in blank; notwithstanding these bills of lading come to the principal's hands; yet, if the agents' partner in London writes them word that their principal is become bankrupt and desires them to send the bills of lading, and an order to the captain to deliver the goods to him, he may retain them for himself and company against the assignees under the commission till paid and reimbursed so much as the partnership is in advance. *Snee* v. *Prescot*, 1 Atk. 245.

10. The indemnity of the trustees under a deed of trust does not give the persons employed by them a right as creditors against the trust fund. *Worrall* v. *Harford*, 8 Ves. 4.

11. The assignee of an agent cannot retain bills sent to the agent, with a direction to hand them over to a third party, to whom notice is also given of the appropriation. In this case the parcel containing the bills and letters, though sent before the bankruptcy of the agent, was not received till afterwards. *Exp. Cot-*

terill, Re Douglas, 3 Mont. & A. 376; 3 Dea. 12; 7 L. J., N. S., Bky., 2; 1 Jur. 825.

1. M. & Co. abroad, through the agency of A. & Co., procure B. to consign goods to them. M. & Co. remit to A. & Co. bills, specifically appropriating them to pay B., and also write to B. to say they have done so. Before payment A. & Co. became bankrupt:—Held, that as the original transaction was through the agency of A. & Co. they must be considered as agents throughout the transaction, and that there was sufficient privity to entitle B. to recover the bills from them, although M. & Co. were indebted to A. & Co. at the time. *Exp. Thompson, Re Douglas*, 2 Jur. 734.

2. Bill sent by a correspondent to a merchant to be applied to a particular use; if merchant becomes bankrupt before the money is received, the correspondent has a special lien and shall be preferred to the general creditors; *aliter* where bills are sent on a general account. *Exp. Ourcell*, Ambl. 297.

3. A custom of exchanging acceptances existed between the bankrupt and the other houses through the agency of B.; notes were sent by the petitioner to B., but never exchanged, as bankruptcy intervened, and they were stolen from B., and never formed any item in any settlement of accounts between B. and the assignees:—Held, the petitioner could not recover the value of the notes from the assignees. *Exp. Watson, Re Maberly*, 1 Mont. & A. 685.

4. A firm of merchants at Hamburgh, in June 1857 directed their correspondents, a firm of merchants in London, to purchase Mexican bonds, which passed by delivery, upon certain terms, the bonds when purchased to be held at the disposal of the Hamburgh firm. On the 2nd of July the London firm wrote to announce that the bonds had been purchased, and enclosing the account of the transaction, the amount of which they would reimburse themselves on the following day, and on the 3rd of July they wrote to apprise the Hamburgh firm of bills drawn upon them for the amount by which they "balanced the transaction." On the 4th of July the Hamburgh firm wrote to state, that they would honour the drafts, advice of which they expected, and requested the London firm in the meanwhile to keep the bonds in safe custody, and to give them the numbers of the same. On the 6th of July the London firm wrote to state, that until further order they would retain for safe custody the bonds, and giving the numbers of the bonds. The bills were accepted by the Hamburgh firm, and at maturity were paid. On the 19th of November the Hamburgh firm wrote to request that the bonds might be sent to them by post; but on the same day the London firm wrote to announce that they had stopped payment, but that the Mexican bonds lying with them were unjeopardized. The Hamburgh firm afterwards stopped payment, and in a suit by the representatives of the Hamburgh firm for the delivery of the bonds:—Held, that the bonds were not subject to a lien for the general balance of account between the two firms. *Bock* v. *Gorrissen*, 30 L. J., Ch., 39; 3 L. T., N. S., 424; 7 Jur., N. S., 81; 9 W. R. 209; 2 De G. F. & J. 434.

A general lien cannot be obtained according to the law of principal and agent. *Ib.*

The law does not favour general liens, and a general lien can only be claimed as arising from dealings in a particular trade or line of business, such as wharfingers, factors, and bankers, in which the existence of a general lien has been judicially acknowledged, or in other trades where there is express evidence of custom. *Ib.*

5. A mercantile house at Newry directs a house at Quebec to contract for the building of a ship, for which they (the Newry house), would send out the rigging. The Quebec house enters into a contract with some ship builders accordingly. The Newry house then direct their correspondent at Liverpool to send out the rigging; he does so; and it having been actually delivered to the Quebec house:—Held, that the property in it was vested in the Newry house, and that the Quebec house had a right to retain it against the Liverpool correspondent, on account of their lien on it for advances made to the builders, and payment of custom-house expenses, although previously to the delivery they had obtained an assignment of the ship to themselves from the builders, and had registered it in the name of one of the partners in their house. *Rogerson* v. *Reid*, 1 Knapp 362.

6. W. was appointed agent of a company for the sale of goods manufactured by it. Part of the arrangement was that the company should draw on W. against the goods assigned to him as agent. W. accepted a bill for 200*l.* at four months' date; before the bill arrived at maturity the company was ordered to be wound up, and the goods then in possession of W. were taken by the liquidators and sold by them. W. honoured the bill when it arrived at naturity:—Held, that W. had a lien on the goods to the extent of the payment by him in respect of the bill, and that he was entitled to be repaid the amount paid by him out of the proceeds of the sale of the goods. *Re Pavy's Patent Felted Fabric Co.*, 45 L. J., Ch., 318; 1 L. R., Ch., 631; 24 W. R. 507.

7. S., who had for many years traded as a timber merchant in his own name, entered into an agreement with F. & Co., who were also timber merchants, to carry on his business thenceforth as their agent at a remuneration by way of a share of profits. The business was thenceforth carried on under this agreement, but in the name of S. as before. S. dealt with the timber in his possession as if he were the absolute owner of it (except as between himself and F. & Co.), and there was nothing done to inform the outside world of the change which had taken place. In the course of the business F. & Co. drew bills on S., which he accepted in his own name to be protected by F. & Co. Both F. & Co., and afterwards S., filed liquidation petitions. Before S.'s liquidation F. & Co.'s trustee demanded the timber in his hands, which was refused:—Held, that to the extent of the current bills S.'s estate had a lien on the timber. *Exp. Buck, Re Fawcus*, 3 L. R., Ch. D., 795; 34 L. T. 807.

V. INDEMNITY TO AGENT.

8. A merchant in London sold on commission for a merchant in Sweden three cargoes of timber not arrived in England, and the Swedish merchant drew on the London merchant a bill of exchange for part of the produce. The

Swedish merchant then consigned two of the cargoes to H. & Co., of London, directing them to deliver to the London merchant the bills of lading, on the latter making acknowledgments (which the Swedish merchant was not entitled to require), and on accepting a bill of exchange for the remaining produce of the three cargoes, according to an account made out by himself (the Swedish merchant). The London merchant gave a notice to H. & Co. that he claimed the bills of lading without performing any part of the conditions, and on a subsequent occasion obtained possession of the bills of lading on the understanding that he would perform the conditions, and although he did not give the required acknowledgment, he accepted the bill, which H. & Co. negotiated, and paid over the proceeds to the order of the Swedish merchant:—Held, in a suit instituted by the London merchant against H. & Co. and the Swedish merchant, that H. & Co. were bound by notice of the London merchant's rights, who was entitled to be reimbursed by H. & Co. to the extent of the money received on the bill, the moneys paid by him for or in respect of the three cargoes, so far as these sums were not covered by the proceeds of the two cargoes received. *Dresser* v. *Hoare*, 2 Jur., N. S., 1151; 26 L. J., Ch., 51.

1. A principal is liable to reimburse his agent for the amount of damages incurred by him in defending an action on behalf of his principal, if the agent can show that the loss arose from the fact of his agency, that he was acting within the scope of his authority, that if he exceeded his instructions in the contract he entered into, such excess has been waived and the contract ratified by the principal, and that the loss was not attributable to any fault or laches on his own part. *Frixione* v. *Tagliaferro*, 4 W. R. 373.

2. In equity the liability of a principal to indemnify his agent is not confined to actual losses, but extends to all the liabilities of the agent incurred on behalf of the principal. *Lacey* v. *Hill, Crowley's claim*, 43 L. J., Ch., 551; 22 W. R. 586; 18 L. R., Eq., 182; 30 L. T. 484.

C., broker for H., entered into contracts for purchase of stock for the next settling day, 15th July 1870. The contracts were in the usual form, subject to the rules and usages of the Stock Exchange, and the broker's notes from time to time sent to H. also had these words. When that day arrived C., by request of H., and relying on a promise of H. to settle on that day the amount then due to C. for brokerage and losses, continued the contracts till next settling day. H. did not settle his account on the 15th. On the 16th the Norwich Bank, in which he was partner, stopped payment, and H. became in fact insolvent. C. was thereupon declared defaulter on the Exchange. According to the rules, all his transactions were immediately closed. No loss accrued to the principal by the closing of the transactions before the next settling day. Subsequently C. was readmitted to the Stock Exchange, on payment of a composition, but not the full amount of his debts. After such re-admission, members of the Stock Exchange were in effect forbidden by the rules of the Exchange to sue him for the balance of previous losses without the leave of the committee, which was rarely, if ever, granted, but no legal release was given to him. In a creditors' suit instituted for administering the estate of H., C. claimed for the whole amount shown to be due to him for brokerage and losses, by an account made up on the footing of all transactions being closed on the day of the insolvency of H., the amount of claim being calculated on the full amount of the liabilities of C. in respect of the contracts for stocks, and not the amount that he had actually paid on those contracts:—Held, first, that on the insolvency of H., the transactions might be closed according to the rules of the Stock Exchange, without affecting the right of C. to an indemnity from H. *Ib.*

Held, secondly, that C. not having had a legal release from claims under the contracts, but being still liable in law for the full amount, was entitled to claim against the estate of H. for the full amount of losses on the contract, including not only what he had actually paid, but also the amount for which he was legally liable. *Ib.*

3. *Quære*, whether a commission agent is entitled to be indemnified out of the proceeds of his principal's goods sold by him against all liabilities incurred by him on account of his principal, including the amount of an accommodation bill drawn by the principal and accepted by such agent. *Hood* v. *Stallybrass*, 3 L. R., App. Cas., 880; 38 L. T., N. S., 826; 27 W. R. 1.

VI. COMMISSION.

4. A confidential agent is in that character bound to keep regular accounts; having neglected to do so, and to preserve vouchers against himself, though he had preserved those in his own favour, on the ground of gross neglect of duty, was not allowed a charge in respect of bills of costs for business done as a solicitor. *White* v. *Lincoln* (*Lady*), 8 Ves. 363.

5. Reasonable commission, 2*s.* 6*d.* per cent., allowed to a country agent on discounts, though for a person resident in London, and paid through a banker there, if not colourable. *Exp. Jones*, 17 Ves. 332; 1 Rose 29.

6. A reasonable commission beyond legal interest, for extra incidental charges, as upon agency in the remittance of bills, not usurious. *Baynes* v. *Fry*, 15 Ves. 120.

7. Claim by the agent for expenses on account of the principal, which from the conduct of the agent undertaking the business without authority or agreement, could not be ascertained, disallowed. *Beaumont* v. *Boultbee*, 11 Ves. 358.

8. An executor in India is entitled to a commission of 5*l.* per cent. on all assets of a testator collected by him there, including the assets which he retains in respect of a legacy to himself, not given to him in the character of executor, and including moneys belonging to the testator, which were in the hands of a commercial house in which the executor was, and the testator had been, a partner. *Cookerell* v. *Barber*, 2 Russ. 585; 1 Sim. 23; 1 L. J., Ch., 77.

9. In taking the accounts between three partnerships, the first of A. & B., the second of A. B. & C., the third of B. & C., the partnership of B. & C. cannot charge commission for collect-

ing the debts of the other two partnerships. *Whittle* v. *M'Farlane*, 1 Knapp 311.

1. An agent named executor is not entitled to charge commission on business done subsequently to the testator's death. *Sheriff* v. *Axe*, 4 Russ. 33.

2. Agents, being also appointed executors of the principal, are not entitled to commission upon remittances from India by the testator, not received till after his death. *Hovey* v. *Blakeman*, 4 Ves. 596.

3. In a suit by a principal against his steward and agent, the decree, in conformity to the prayer of the bill, directed an account to be taken of rents, profits, and timber money received by the defendant on the plaintiff's account; and also directed the Master, in taking the accounts, to make the parties all just allowances. The defendant was a solicitor, and had acted as such for the plaintiff, during his stewardship, and bills of course were due to him from plaintiff. The Master, at the plaintiff's request, taxed the bills, and in taking the accounts under the decree, included the reduced amounts of them amongst the just allowances to which defendant was entitled. The plaintiff excepted to the report on that account, and the Court allowed the exceptions. *Jolliffe* v. *Hector*, 12 Sim. 398.

4. The charge of 10*s.* per cent. for commission, besides the legal interest, on a loan of money, is not usurious, if it is referable to trouble and expense *bonâ fide* incurred by the lender; although he may not be a banker, or a person engaged in trade, or although the money lent is his own, and not that of other person. *Exp. Gwyn*, 2 Dea. & Ch. 12; 1 L. J., N. S., Bky., 73.

5. Property was assigned to the plaintiff (who was known to the assignor to be an auctioneer, though not described in the deed as such), upon trust to sell by public auction or private contract, and out of the sale moneys to pay the costs, charges, and expenses of preparing for, making, and completing such sales, "including the usual auctioneer's commission":—Held, that the plaintiff, if he acted as auctioneer at the sale, could retain his own commission. *Douglas* v. *Archbutt*, 2 De G. & J. 148; 27 L. J., Ch., 271.

6. Real estates, subject to encumbrances, the interest of which more than exhausted the rents, were conveyed by the mortgagor to trustees, upon trust for his creditors. After the execution of this creditor's deed, one of the trustees thereof was employed by the mortgagees as their agent to collect the rent:—Held, that he could not be allowed any commission out of the rents. *Nicholson* v. *Tutin*, 3 Kay & J. 159; 3 Jur., N. S., 235.

7. The plaintiffs appointed the defendant their agent for the sale of spirits at a commission. The defendant had made profits by the sale of the plaintiffs' goods, for which he had not given credit; he had also made profits by selling his own spirits mixed with those of his principals, and he had destroyed books of account pending the litigation. A court of equity disallowed him, in taking the accounts, the amount of commission, which, by the contract, he would have been entitled to if his conduct had been proper. *Gray* v. *Haig*, 20 Beav. 219.

A charge, made by an agent for the sale of goods against his principal, for an allowance in respect of warehousemen's salaries, disallowed, no such claim having been made in the accounts for fourteen years. *Ib.*

8. A land agent misconducting himself in the management of property, although receiving and accounting for the rents, may be disallowed his fees on the sum received by him. *Palmer* v. *Goodwin*, 13 Ir. Ch. R. 171.

9. The ordinary commission receivable by an agent on goods sold by him was 2½ per cent. Before actual sale by the agent, the goods were removed out of his hands by order of the principal:—Held, that the agent was entitled to one-half of the ordinary commission, being 1¼ per cent. *Spain* (*Queen*) v. *Parr*, 21 L. T., N. S., 555; 18 W. R. 110; 39 L. J., Ch., 73.

Merchants at Manilla received instructions from the government there to undertake the transport and shipment of a quantity of tobacco to merchants in London, to effect the insurance, and to pay all the necessary charges and expenses in relation thereto. The merchants at Manilla were to be entitled to charge 2½ per cent. on the amount, valued at about 47,000*l.* The supreme government of Spain, considering the officer at Manilla had acted incautiously in this respect, refused to allow the amount of the ordinary commission in the account, having directed the tobacco to be sold by their own agents here:—Held, that the consignees were entitled to a moiety of the amount of the ordinary commission, being 1¼ per cent. instead of 2½ per cent. *Ib.*

10. B. was an auctioneer. C. put a ship into his hands for sale, and it was agreed that if it was not sold by auction, but if a subsequent sale were effected to any person, led to make an offer "in consequence of B.'s mention or publication for auction purposes," he was to be entitled to a commission. The ship was not sold by auction, but afterwards P., having been present at a conversation which led him to believe that S. would purchase the ship, wrote to B., "noting that he had the ship in his hands," to inquire the price, etc. P. then communicated with S., who ultimately became the purchaser, but not through the agency of P.:—Held, that there was evidence to go to the jury that the sale was effected in consequence of B.'s mention or publication, within the meaning of the agreement, and that B. was entitled to his commission. *Bailey* v. *Chadwick*, 39 L. T. 429. Reversing 37 L. T. 593; and affirming 36 L. T. 740.

11. A company engaged a person to act as their agent for five years at a fixed salary, and also for a commission of 10 per cent. on the net profits in each year. The company was wound up before the termination of the five years:—Held, that he was not entitled to any compensation by way of damages for loss of commission during the unexpired part of the five years. *Re English and Scottish Marine Insurance Co., Maclure's claim*, 5 L. R., Ch., 737; 39 L. J., Ch., 685; 23 L. T. 685; 18 W. R. 1122.

12. An agent who has the business taken out of his hands before completion is by the custom of merchants entitled to half the commission which he would have earned by completing it. *Burdick* v. *Garrick*, 30 L. J., Ch., 369; 5 L. R., Ch., 233.

See also AUCTION AND AUCTIONEER, III.

VII. ACCOUNTS.

1. *How taken*, 5937.
2. *Right to Discounts*, 5937.
3. *Secret Profits*, 5938.
4. *Interest*, 5940.
5. *Suits for, by Agent against Principal*, 5941.
6. *Suits for, by Principal against Agent*, 5942.
7. *Period*, 5945.
8. *Costs*, 5946.
9. *Settled Accounts.* See ACCOUNT, II.

1. How taken.

1. An account decreed against a land agent for twenty-seven years previously to the filing of the bill under circumstances, but refused, as to certain gratuities received from tenants by the agent with the knowledge of the principal, which were charged to be extortionate, but by the exorbitance of which the principal was not proved to have been a loser, except so far as they were taken as fines. *Palmer* v. *Browne*, Beat. 540.

2. Account between principal and agent settled from loose papers, the agent having kept no regular books; after his death, liberty was given to surcharge and falsify upon allegation of errors since discovered. *Hardwicke (Lord)* v. *Vernon*, 4 Ves. 411.

3. Agent or bailiff, confounding his principal's property with his own, charged with the whole, except what he can prove to be his own; and in this instance, the case of a breach of the terms upon which the Court dissolved an injunction, the inquiry was directed with costs. The Court refused in such a case a prospective direction to admit books, not legal evidence, though usual in a fair case, as where from want of notice of an adverse claim a strict account cannot be given; merely giving liberty to apply upon any question of evidence. *Lupton* v. *White*, 15 Ves. 432.

4. Agent acting gratuitously charged with loss arising from failure of his bankers, having paid in the moneys to his own account. Agent depositing money with a banker to his own account cannot relieve himself from liability, by informing his principal of the payment, without a correct specification of the particulars. *Massey* v. *Banner*, 1 Jac. & Walk. 241. Affirming 4 Madd. 413.

5. Upon a bill filed against the executors of a land steward and paid agent, it was held, that his estate was liable to make good such sums as, but for his wilful neglect and default, he might have received. *Salisbury* v. *Morrice*, 11 L. J., N. S., Ch., 114.

6. The plaintiff was the commercial agent of the East India Company at Amboyna. It was his duty to send his account to Jones, the company's agent at Banda, to examine and transmit to the governor of Madras. On the plaintiff's accounts there appeared a balance of 1,325 dollars against him; but on reference to the accounts kept by Jones of the same transactions, instead of a deficiency, 4,771 dollars appeared due to the plaintiff. The company then allowed the 1,325 only:—Held, that this was not a sufficient admission and recognition of the correctness of Jones's accounts as to entitle the plaintiff, without further evidence, to the 4,771 dollars. *Farquhar* v. *East India Co.*, 8 Beav. 260.

7. M. employed R. & Co., bankers in Edinburgh, to obtain for him payment of a bill drawn on a person resident at Calcutta. R. & Co. accepted the employment, and wrote promising to credit him with the money when received. R. & Co. transmitted the bill in the usual course of business to C. & Co., of London, and by them it was forwarded to India, where it was duly paid. R. & Co. wrote to M. announcing the fact of its payment, but never actually credited him in their books with the amount. The house in India failed:—Held, that R. & Co. were the agents of M. to obtain payment of the bill; that payment having been actually made, they became *ipso facto* liable to him for the amount received; and that he could not be called on to suffer any loss occasioned by the conduct of their sub-agents, as between whom and himself no privity existed. *Mackersy* v. *Ramsays*, 9 Cl. & F. 818.

8. In a suit for an account against an agent, an admission by him in his answer that he had sold property of the principal on credit, which he insisted was according to the usual way of business, and the principal making out no case to the contrary, was held no sufficient ground for an inquiry as to wilful default. *Pelham* v. *Hilder*, 1 Y. & Coll. C. C. 3.

9. A commission to sell and transfer stock "when the funds shall be at 85 per cent. or above that price," is a particular commission under which an agent is bound to sell when the funds reach 85; and has not a general authority to act for his employer, so that he may defer selling till the funds should reach a higher price than 85. A mercantile house that had accepted such a commission, and had not sold when the funds reached 85, held therefore, in equity, to have made the stock their own from that time, and ordered to account to their employer for the price of it, with interest, he, in return, accounting to them for the dividends he had subsequently received in ignorance of the fact of the funds having reached that price. *Bertram* v. *Godfrey*, 1 Knapp 381.

10. The defendant, in a suit instituted against him as agent for an account, moved that certain accounts alleged in the bill to contain false entries might be produced, on an affidavit that the vouchers were lost, and that he could not otherwise put in a sufficient answer:—The motion was refused with costs. *Turner* v. *Burkinshaw*, 4 Giff. 399.

11. If a decree in any original suit merely directs a common account against an agent, a decree charging him with what he might without wilful default have received cannot be made in a supplemental suit. *Connor* v. *Reeves*, 16 Ir. Ch. R. 398.

12. An agent employed by a testator to collect rents, and continued in that employment by his trustees after his death, furnished accounts showing only the sums received and the names of the tenants who paid them:—Held, that the trustees were entitled to require such an account as would identify the particular properties from which the rents arose. *Finch* v. *Burden*, 12 L. T., N. S., 302.

2. Right to Discounts.

13. The 10 per cent. discount usually allowed

by insurance companies on punctual payment of the premiums belongs, in the absence of agreement to the contrary, not to the insurance agent but to his principal. *Spain (Queen)* v. *Parr*, 39 L. J., Ch., 73.

1. The defendant, being an accoutrement maker, East India and general agent, was instructed to provide a cavalry outfit for the plantiff's son. The defendant obtained very large discounts from the tradesmen supplying the goods, but charged in his accounts with the plaintiff the full prices as if actually paid by him:—Held, that, although the defendant did not charge any general commission as agent, the amount of the trade discounts must be disallowed. *Turnbull* v. *Garden*, 20 L. T., N. S., 218.

3. Secret Profits.

2. Injunction until answer, restraining a transfer of stock standing in the name of a steward, on strong evidence, by affidavit, that it was the produce of his master's property, viz., rents, etc., received for many years without account; refused, as to money at his banker's in his name. *Chedworth (Lord)* v. *Edwards*, 8 Ves. 46.

3. If an agent employed to purchase an estate becomes the purchaser for himself, he is to be considered as a trustee for his principal. *Lees* v. *Nuttall*, 2 Myl. & K. 819. Affirming 1 Russ. & M. 53; Taml. 282.

4. An agent who was to have an emolument beyond his salary, decreed to account for profit made by a clandestine sale to his principal, on his own account, of timber purchased for a colliery: before it was applied to the use of the colliery, some of the owners retired, and it was paid for by those only who remained; the former owners are not necessary parties to a suit by those who remained, against the vendor on account of that sale. *Massey* v. *Davies*, 2 Ves. J. 317.

5. A covenanted servant of the East India Company, being a senior merchant, and acting as agent of the company (as resident or chief at one of their factories), is incapable of forming any contract whatsoever, in which the company is interested; so as to derive profit to himself, or any otherwise however than for the profit and advantage of the company. And if any such contract be actually made between him as a merchant dealing for himself, and the company board of trade in India, in which contract undue advantage is taken by him, by means of his knowledge and influence as resident at the factory, he cannot demur generally on ground of want of equity, to bill for discovery and relief by company. *Henchman* v. *East India Co.*, 8 Bro. P. C. 85; 1 Ves. J. 289.

6. A person employed, on behalf of himself and co-partners, in negotiating the term of a lease, is not entitled to stipulate clandestinely with the lessors for any private advantage to himself. Where, therefore, a sum of 12,000*l.* was paid in pursuance of such a stipulation, the party receiving it was declared to hold it in trust for the partnership. Before the transaction was discovered, one of the partners withdrew; and subsequently, another partner assigned a share in the stock, and in his proportion of the claim, to persons then admitted into the concern:—Held, that the retired, the continuing, and the new partners were properly joined as co-plaintiffs in a suit to have the trust declared. *Fawcett* v. *Whitehouse*, 1 Russ. & M. 132; 4 L. J., Ch., 64; 8 L. J., Ch., 50.

7. An agent employed to purchase cannot buy his own goods for his principal, neither can an agent, employed to sell, purchase for himself his principal's goods. Principals may either repudiate such transactions altogether, or adopt and take the benefit of them. *Bentley* v. *Craven*, 18 Beav. 75.

8. C. was appointed manager of a bank in London, with permission to carry on his separate trade as a merchant. In that character he dealt with the bank of which he was manager on the terms usual between banker and customer. Upon one transaction in his separate trading, being possessed of certain bills for his own benefit, drawn and accepted by two firms reputed to be in good credit, he deposited them with the bank (not indorsing them), and obtained an advance upon them. The transaction was therefore not a discount but a loan. The drawers and acceptors of the bills subsequently became bankrupt:—Held, that C. was liable to make good the loss. *Gwatkin* v. *Campbell*, 1 Jur., N. S., 131.

A manager of a bank is not entitled to grant himself the same accommodation in respect of his separate trade which he might obtain from an independent banker; and it would be necessary for him, in order to sustain any such transaction, to show that he had brought the whole circumstances most fully and fairly before the directors. It is not enough to show merely that he had not concealed anything. If he could show that he had so brought the circumstances to their knowledge, or that the directors had sanctioned the proceeding subsequently, such a proceeding might, however, be permitted to stand. *Ib.*

9. A director of a railway company, who was also a member of a mercantile firm, entered into a contract *qua* director with such firm for the supply of certain iron chairs at a fixed price:—Held, that such a contract, although it might be enforced at law, was illegal in equity, upon general equitable principles, and would be set aside; and that no question could be raised as to the fairness or unfairness of a contract so entered into. *Aberdeen Railway Co.* v. *Blaikie*, 2 Eq. Rep. 1281.

In such a case the law of Scotland differs in no respect from the law of England. *Ib.*

10. The European Society, through their paid and confidential agent C., negotiated with the Etna Company, through their paid and confidential agent O., a transfer by the latter of a branch of their business to the former for 15,000*l.*; C. claimed from the Etna company, as a commission or a bonus for his services in the transaction, 2,000*l.*, which the latter having refused, he contrived that the purchase-money to be paid by his employers should be increased to 17,000*l.*, out of which the Etna Company secretly agreed to pay him the 2,000*l.* On the winding-up of the affairs of the Etna Company, O., alleging that there was an agreement between C. and him that he should get half the commission or bonus, made a claim of 1,000*l.* against the latter company:—Held, that such a claim could not be allowed. *Re Owens*, 7 Ir. R., Eq., 235. Affirmed 7 Ir., Eq., 424.

11. An agent for sale who takes an interest in a purchase negotiated by himself is bound

to disclose to his principal the exact nature of his interest; and it is not enough merely to disclose that he has an interest, or to make statements such as would put the principal on inquiry. *Dunne* v. *English*, 18 L. R., Eq., 524; 31 L. T., N. S., 75.

In such a case the burden of proving that a full disclosure was made lies on the agent, and is not discharged merely by the agent swearing that he did so, if his evidence is contradicted by the principal, and not corroborated. *Ib.*

1. Although a confidential relation subsists between the beneficial owner and an agent employed by the trustee for the management of the trust property, yet there is no actual incapacity in the agent to purchase from the beneficial owner, even though the latter has not had the advantage of independent professional advice; in such a case, however, it is not sufficient for the agent to show that he gave the full value, he must go further, and show that he dealt with the beneficial owner at arm's length, and after a full disclosure of all that he knew with respect to the property. *King* v. *Anderson*, 8 Ir. R., Eq., 147.

2. Commission received by an agent or a trustee of a purchaser from a vendor without the knowledge of his principal is a bribe; it is a profit which the principal has a right to extract from the agent whenever it comes to his knowledge. *Phosphate Sewage Co.* v. *Hartmont*, 5 L. R., Ch. D., 394, 457.

3. The plaintiff, in 1868, consigned a ship to G. & Co., in China, for sale, fixing a minimum price of $90,000, and requiring cash payment. G. & Co. employed the defendant in Japan to sell the ship, with the same instructions. This was done with the knowledge and consent of the plaintiff. The defendant, having vainly attempted to sell the ship on the terms mentioned, took her himself for $90,000, and about the same time resold her to a Japanese prince for $160,000, payable as to $75,000 in cash, and the rest on credit. The plaintiff was not informed that the defendant had purchased the vessel himself, or that he had resold it, till June 1869, after the transaction was completed. The defendant paid $90,000 to G. & Co., who remitted it to the plaintiff, and eventually obtained the whole amount of $160,000 from the Japanese prince. In 1873 the plaintiff filed a bill in chancery to compel the defendant to account for the profit made by him in the resale of ship:—Held, first, that the relation of agent and principal was established between the defendant and the plaintiff, and existed at the time of the purchase and resale of the ship by the defendant, and that he was therefore liable to account to the plaintiff for the profit made by him in the transaction. *De Bussche* v. *Alt*, 8 L. R., Ch. D., 286; 47 L. J., Ch., 381; 38 L. T., N. S., 370.

Held, secondly, that there had been no such acquiescence or laches on the part of the plaintiff as to disentitle him to relief. *Ib.*

4. An agent cannot turn himself into a principal and deal with his real employers or principals on that footing without full and fair disclosure. *Williamson* v. *Barbour*, 9 L. R., Ch. D., 529; 50 L. J., Ch., 147; 37 L. T. 698.

A firm of merchants, formerly carrying on business at Calcutta, sued a firm at Manchester, who had acted as their agents on commission for the purchase and shipping to India of Manchester goods, to have the settled accounts between the parties, extending back for a period of nearly twenty years, opened; and to obtain repayment of certain alleged overcharges made by the defendants in their accounts with the plaintiffs. The defendants were charged with having bought goods at one price and invoiced them to the plaintiffs at an increased price; that having been instructed to buy white goods, they purchased grey goods and got them bleached, charging the plaintiffs more than the price of the grey goods plus the cost of bleaching; that they had not credited the plaintiffs with the discounts allowed to themselves; that they had charged for insurances that they had never effected; that they had sold their own goods to the plaintiffs at a profit; and that they had overcharged the plaintiffs in other ways. The main defences raised were, that the plaintiffs knew of the charges, and that they were in accordance with the custom of the Manchester trade, and that as regarded the insurances which had been charged for but not effected, the defendants had themselves insured:—Held, that the plaintiffs did not know of the overcharges, and that there was no custom of the Manchester trade to make such overcharges. *Ib.*

Held, also, that in a case between principals and agents, one case of proved fraudulent overcharge is sufficient to open the accounts between the parties, and that in the present case far more than enough had been proved to induce the Court to open the accounts, and that the usual decree for that purpose must be made. *Ib.*

5. The plaintiff, a merchant at Manchester, from time to time consigned, for shipment and sale abroad, goods to the defendants, a firm of traders at Manchester, who, with another person, were merchants in India. The defendants shipped their own and the plaintiff's goods to India, where they were sold by the member of the firm there, who purchased with the proceeds of sale other goods, which he remitted to the defendants at Manchester. He also sent to the defendants at Manchester an account, in which the plaintiff's goods sold in India were placed to his credit, and certain bills of exchange for the amount of proceeds of sale, less commission, were debited. These bills, in fact, never existed, but the defendants, in their statements of account with the plaintiff, placed the amount of the imaginary bills to his credit, debiting him with the cash advances made to him on the goods, and paying him the balance:—Held, that the plaintiff was not entitled to an account of the profits on the goods purchased in India with the proceeds of the plaintiff's goods, the defendants being commission agents only. *Kirkham* v. *Peel*, 44 L. T. 195. Affirming 43 L. T. 171; 28 W. R. 941.

6. It is no answer to the rule, that persons standing in the situation of trustees or agents must account to their *cestuis que trust* or principals, or for all benefit which they themselves obtain by virtue of that character, that in the course of acquiring the benefit which has been derived by the trustee or agent, he incurred a possibility of loss; it is sufficient, if the transaction has resulted in gain obtained by virtue of the trusteeship or agency, to give the benefit to the *cestui que trust*. *Williams* v. *Stevens*, 1 L. R., P. C., 352; 15 W. R. 409; 36 L. J., P. C., 21; 4 Moo., P. C., N. S., 235.

1. The rule that an agent must account to his principal for any secret profit made in the course of his agency does not apply where the principal is aware that the agent is remunerated by some allowance from the other parties, but is under a misapprehension (but not misinformed) as to its actual extent. *Great Western Insurance Company of New York* v. *Cunliffe*, 43 L. J., Ch., 741; 9 L. R., Ch., 525; 31 L. T., N. S., 661.

A marine insurance company in New York employed merchants in this country as their agents to settle claims and grant insurances, and also to effect re-insurances. A percentage was paid by the company on the first two classes of business, but the agents were remunerated as to the re-insurances by the brokerage allowed to them by the underwriters. They charged the company the full amount of the premiums, but were allowed by the underwriters, first, 5 per cent. on the premiums; and, secondly, 12 per cent. on the balance (if any) payable by them to the underwriters on the account for the year, crediting the underwriters with the premiums (less the 5 per cent.), and debiting losses. This was according to the usual custom on the credit system as between brokers and underwriters, but the 12 per cent. allowance was for some time unknown to the company:—Held, that the agents were entitled to both the percentages. *Ib.*

A claim against an agent in the nature of damages for neglect of duty cannot be passed as an item in taking an account between principal and agent, but must be enforced in an action at law. *Ib.*

2. It is an inflexible rule of a court of equity that no agent can be allowed, in the matter of his agency, to make any profit for himself without the knowledge and consent of his principal, and the fact that the principal did not suffer any injury by reason of the dealing of the agent, cannot be taken into consideration in the application of the rule. *Parker* v. *McKenna*, 44 L. J., Ch., 425; 10 L. R., Ch., 96; 31 L. T., N. S., 739.

3. B. having bought shares in a company at 2*l.* per share, and knowing that K. was desirous to buy such shares, represented that he knew of some shares which were to be had for 3*l.* or less, and requested K. to give him authority to buy at that price. K. gave him authority, but told B. to do his best for him, and to get them for less if possible. B. transferred his shares to K. at 3*l.* per share, pretending that another person was the vendor:—Held, that B. must account to K. for the difference between the price at which he bought and the price at which he sold the shares to K. *Kimber* v. *Barber*, 8 L. R., Ch., 56; 27 L. T. 526; 21 W. R. 65.

4. When an agent for the sale of an estate colludes with a purchaser, and in consideration of a bribe or honorarium allows the purchaser to obtain the estate at less than its value, with a view to a sale at a higher price to a sub-purchaser, and the transaction is concealed from the vendor, both agent and purchaser will be held jointly and severally liable to pay to the vendor the increased amount obtained by the sub-sale. *Morgan* v. *Elford*, 4 L. R., Ch. D., 352.

On appeal, the Court, being of opinion on the evidence and correspondence that the bargain between the agent and the owner was that the agent should have whatever the estate fetched above a certain price, dismissed the bill without giving any opinion on the above points. *Ib.*

4. Interest.

Right of Agent against Principal.] 5. The defendant wrote to his receiver and professional agent as follows:—"If you will remit the 400*l.*, I can give you a note for it when you come to London." The money was advanced, but no note signed:—Held, that a special contract must be inferred, and that interest was payable by the defendant. *Rhoades* v. *Selsey* (*Lord*), 2 Beav. 359.

6. An agent, who managed the money matters and investments of his principal, rendered accounts charging interest on the mortgages as received, and representing that there were no arrears. He also paid over the balances appearing due on such accounts:—Held, that the agent could not, on the death of the principal, charge his estate with the interest, on the plea that it had not been actually received from the mortgagors, but had been advanced by the agent to the principal for his accommodation. He was, however, allowed to use the name of the representatives of the principal to recover what might be due from the mortgagors on giving an indemnity. *Owens* v. *Kirby*, 30 Beav. 31.

Right of Principal against Agent.] 7. Public accountants must account for interest made by them on any considerable balances in their hands of money, being the proceeds of public property sold by them pursuant to appointment, although they have necessary payments to make in course of their duty, if their instructions direct payment of proceeds into bank, and point out course of supplying themselves for such necessary payments. *Crawfurd* v. *Att.-Gen.*, 7 Price 2.

8. Interest and costs decreed against a steward upon fraud, wilful concealment, etc., and in such cases, generally, there is no limitation of time. *Hardwicke* (*Earl*) v. *Vernon*, 14 Ves. 504.

9. Agent by the desire of his principal keeping large sums in his hands, for which he was to be responsible from time to time, and duly accounting, not liable to interest even supposing he employed it. *Chedworth* (*Lord*) v. *Edwards*, 8 Ves. 48.

10. Agent of an administrator keeping money of the intestate's in his hands, which he had proposed to his principal to lay out in the funds, ordered to pay interest with annual rests. *Brown* v. *Southhouse*, 3 Bro. C. C. 107.

11. Scrivener, etc., receiving money, and giving a note to place it out at interest, is bound to do so, and is not discharged from paying interest for it, unless his employer accepts the security and interest; balance of an account stated by such scrivener, etc., will carry interest. *Barwell* v. *Parker*, 2 Ves. 364.

12. The captain of a ship dies leaving money on board, the mate becomes captain, and improves the money, he shall, on allowance made him for his care in the management of the money, account for the profits and not the interest only. *Brown* v. *Litton*, 1 P. W. 140.

13. An agent had for several years stated

accounts with his principals, in which he was not charged with interest on the balances in his hands, but in the last account, settled previous to his discharge, was debited with interest on several half-yearly balances; on his discharge he furnished an account not charging himself with interest; but on a bill filed to enforce payment of the balance then due, interest was given on it. *Batemans* v. *M'Elligott*, 7 Ir. Eq. R. 471.

1. A firm in India collected the estate of a deceased person in that country under power of attorney from the administratrix in England, and remitted the amount to their agents, a firm in London, with an order to pay it to the administratrix upon receiving a proper discharge. The London firm declined to pay over the fund to the administratrix, on the ground that the letters of administration which she had obtained did not bear a sufficient stamp. A suit was soon afterwards instituted by other persons, claiming to be next of kin of the intestate, for the administration of the estate and to restrain the payment to the intestate. The London firm were defendants to the suit. No application was made to pay the money into court for upwards of ten years, and during the whole of this period it remained in the hands of the London firm, mixed with their own moneys:—Held, that the London firm was not liable to pay interest on such moneys. *Wolfe* v. *Findlay*, 6 Hare 66; 16 L. J., N. S., Ch., 241; 11 Jur. 82.

2. An agent had the entire management of the affairs of his principal for several years, during which he was never called upon to account; errors were then discovered in some accounts furnished by him, and he paid a small sum admitted to be due, alleging that this was a final settlement, and that only a small sum, if anything more, was due. On a bill being filed, and the accounts being taken, a large sum was found due from him:—Held, that, under the circumstances, fraud not being proved, he was not chargeable with interest on the balances in his hands until the date of the certificate. *Turner* v. *Burkinshaw*, 2 L. R., Ch., 488; 15 W. R. 753.

3. To a bill against an agent for an account and payment of balance due, the defendant answered, that he had paid over more than he had received, and he claimed a balance due to him. It being proved that the balance was against him:—Held, that he must pay, in addition to the balance due from him, the costs of suit. *Fry* v. *Fry*, 10 Jur., N. S., 983.

The bill did not pray interest, but held, that the defendant was chargeable with interest at 5*l.* per cent. from the filing of the bill. *Ib.*

4. An agent, who was a solicitor in London, held a power of attorney from his principal in America to sell his property and invest the proceeds in his name. The agent received certain moneys under the power and paid them into his own banker's to the general account of his firm. The principal died in 1859 intestate. In 1867 his widow took out administration to his estate, and in 1868 she filed a bill against the agent for an account. There being no proof that the agent had made any interest or profit by the money in his hands, he was charged with simple interest at 5*l.* per cent. *Burdick* v. *Garrick*, 5 L. R., Ch., 233; 39 L. J., Ch., 369.

5. Suits for, by Agent against Principal.

5. It does not follow that, because a principal is entitled to have an account taken in equity as against his agent, the agent has a similar right against his principal, for the right of the principal rests on the trust and confidence reposed in the agent, but the agent reposes no such trust or confidence in the principal. *Padwick* v. *Stanley*, 9 Hare 627; 16 Jur. 586.

Plaintiff had advanced to the defendant various sums of money, and procured other sums to be advanced to him on bills and notes on which the plaintiff was liable. These transactions extended over a long time, and the defendant had the documents necessary to take the accounts satisfactorily. The bill thereupon prayed an account and discovery, and to have the bills, etc., paid off, and the plaintiff discharged from his liability:—Held, on demurrer, that these were not such accounts as entitled the plaintiff to relief, whatever might have been the event had discovery alone been prayed. *Ib.*

Complication of accounts, where the receipts have been all on one side, if it ever alone constitutes sufficient ground for the intervention of a court of equity, must show a very strong case of entanglement. *Ib.*

6. Where a salary is payable to a servant in proportion to the profits of his employers, the question whether the servant has a right to come into equity for an account and payment, in lieu of suing at law, depends upon whether the accounts are of a too complicated nature to be gone into by a jury. *Harrington* v. *Churchward*, 6 Jur., N. S., 576; 29 L. J., Ch., 521; 8 W. R. 302.

7. An agent entitled to receive a commission on business done for his principal cannot, on those grounds alone, maintain a bill for an account against the principal. *Smith* v. *Leveaux*, 1 Hem. & M. 123; 9 Jur., N. S., 1140; 12 W. R. 31; 33 L. J., Ch., 167; 9 L. T., N. S., 313; 3 N. R. 18. Reversing 2 N. R. 267.

A trading firm agreed to give to an agent a commission on orders obtained by himself, and a commission at a different rate on orders not obtained by him, but given by persons first introduced by him:—Held, that the fact that the agent must in general be ignorant of the latter class of orders did not entitle him to file a bill against his principals for an account of what was due to him for commission, but that his remedy was at law. S. C. 2 De G. J. & S. 1.

8. An action at law being brought to recover the produce of some foreign specie remitted by a merchant abroad to an agent in London, the agent filed his bill, alleging generally that there were mutual dealings and transactions between the parties, and praying that an account might be taken of them, and for an injunction:—A demurrer was allowed. *Fristas* v. *Dos Santos*, 1 Y. & J. 574. See also 2 Y. & J. 33.

9. If A. is employed by B. as his agent at a fixed salary, A. may nevertheless enter into a contract, apart from his ordinary duties, to perform works for B., and may come to the court for an account of moneys received by B., to which he considers himself entitled under the contracts. *Waters* v. *Shaftesbury (Earl)*, 12 Jur., N. S., 311; 14 W. R. 572; 14 L. T., N. S., 184.

Two deeds were executed between a company, a landowner, and the agent or steward of the latter, the effect of which would have

been to constitute the agent contractor for the execution of improvements upon the land, which were about to be effected, for a certain sum of money, to be advanced by the company to the landowner for the purpose. The works having been completed under the agent's superintendence for a less sum, the agent filed a bill against the landowner, claiming as contractor's profit the difference between the actual cost and the sum actually advanced to the landowner by the company:—Held, on appeal, that it was competent to the defendant to show that the intention of the parties, when the deeds were executed, was that the plaintiff should be only nominally the contractor, and the evidence establishing this, that he was not entitled to the profit he claimed. S. C. 15 W. R. 289; 15 L. T., N. S., 489.

1. A party filed a bill against persons who claimed various interests in a fund then in his hands, praying for an account, and that the rights of such persons might be ascertained; and for an injunction to restrain an action which had been brought against him by one of such persons for the recovery of the fund, to which action the plaintiff had pleaded equitable pleas. The plaintiff admitted by his bill that he held the fund as agent or trustee, and himself claimed an interest:—Held, that he was entitled to maintain his bill, being in the nature of a bill of interpleader, to ascertain his rights as well as those of third parties. *Blyth* v. *Whiffin*, 27 L. T. 330.

An agent cannot file a bill against a principal, or a principal against an agent, for an account, except in the case of complicated accounts, where there is an insufficient remedy at law. *Ib.*

2. The fact of a person receiving money from his principal and paying money for him or to him, and lending him money, where the account consists simply in receipts and payments by the agent to or on behalf of the principal, does not constitute a case of mutual accounts, so as to justify the agent in filing a bill against his principal for an account. *Padwick* v. *Hurst*, 18 Beav. 575; 18 Jur. 763; 23 L. J., Ch., 657.

3. A., by his bill, alleged that he was employed by the defendants to obtain orders for goods on commission; that orders had been given to the defendants in consequence of his introduction, the commission on which they refused to pay; and he prayed for discovery and an account:—A demurrer, on the ground that an account might be taken at law, and that the Court had no jurisdiction, was overruled, with costs. *Shepard* v. *Brown*, 9 Jur., N. S., 195; 11 W. R. 162; 7 L. T., N. S., 499.

6. Suits for, by Principal against Agent.

4. Bill for account will lie by principal against agent. *Mackenzie* v. *Johnston*, 4 Madd. 373. See S. P. *id.* 417.

5. A man swears he received money as a menial servant, and paid it over to his master. He shall not account for it again. *Anon.*, 1 Vern. 136. S. P. *Potts* v. *Potts*, *id.* 207. But see *id.* 95.

6. To sustain bill for account there must be mutual demands. The case of dower stands on its own specialities; so the case of a steward, etc. *Dinwiddie* v. *Bailey*, 6 Ves. 141.

7. Bill for an account by a principal against his agent and a person employed by the latter as his sub-agent dismissed as against both, notwithstanding the sub-agent had had the entire management of the principal's affairs, and had communicated with him directly on the subject of them. *Lockwood* v. *Abdy*, 14 Sim. 437; 9 Jur. 267.

8. The bare relation of principal and agent is not sufficient to entitle the former to relief in equity if the account can be fairly tried at law. *King* v. *Rossett*, 2 Y. & J. 33. And see 1 G. & J. 574.

9. A. had long employed B. as his steward, professional adviser, and general confidential agent; disputes having arisen between them, an agreement was entered into between B., and a clergyman acting on behalf of A., by which a gross sum was to be paid to B., in lieu of all his claims; but no accounts or vouchers were rendered or produced by A., nor any bill of costs delivered: that agreement will not protect B. from rendering an account to his principal. *Jenkins* v. *Gould*, 3 Russ. 385.

Disputes existing between A. and his solicitor, receiver, and confidential agent, B., which involved long and intricate matters of account, an authority was given by A. to a third person, to settle any account in which he, A., had an interest, and to compromise any claims which he might have; such an authority will not empower that third person to make an agreement, without the production or examination of any account, that a gross sum should be paid to B. in lieu of all his demands on A. *Ib.*

10. Where notice is given by a party to his agent in a particular adventure, that another person is jointly interested with him in the adventure, this *primâ facie* imposes upon the agent the necessity of accounting with such other person for his share of the adventure; but this obligation ceases to exist if the transaction shows that it was the intention of such other person, and of the party originally interested in the adventure, that the agents should account solely with the latter. *Killock* v. *Greg*, 4 Russ. 285.

11. On suspicious circumstances in the answer, a general account was decreed against a steward, notwithstanding a receipt in full, which was allowed only as proof of the particular payment, not of a general release or discharge upon an account stated; though under circumstances it might have that effect, as upon proof that the principal never would give any vouchers, and an account kept by the steward. *Middleditch* v. *Sharland*, 5 Ves. 87.

12. Servant taking by collusion more than belongs to his office must account; so must a stranger upon a bargain with a servant, which is a fraud on the master. *East India Co.* v. *Henchman*, 1 Ves. J. 289.

13. Account opened, and general account decreed against an agent who was also tenant to his principal, in respect of fraud; and laches in landlord under the circumstances, not an objection. *Beaumont* v. *Boultbee*, 7 Ves. 599; 5 Ves. 485.

14. A receiver to the guardian of an infant, who has his account allowed him by the guardian, shall not be obliged to account over again to the infant when he comes of age. *Clavering's case*, Pre. Ch. 535.

15. A trustee empowered S. to manage a trust estate. S. accounted to him. The trustee

died, yet S. was decreed to account again to *cestui que trust*. *Pollard* v. *Downes*, 2 Ch. Ca. 121.

1. Account against a confidential agent in possession of estates since 1780, without giving any account to his principal, residing in Ireland, and an inquiry into the circumstances of a lease granted under his direction, and in which he took an interest. *Ormond* (*Lady*) v. *Hutchinson*, 13 Ves. 47. Affirmed 16 Ves. 94.

2. If an agent does not render his accounts within a reasonable time, he must bear the costs of a suit instituted to have the accounts taken, and it will not be any excuse for him that he offered to pay on account a gross sum, which it turns out would have covered all that was due from him. *Collyer* v. *Dudley*, T. & R. 421.

3. A broker or agent being employed by a customer to sell foreign stock, on a day specified by him in a letter of instructions, purchased the stock in the name of his partners, a firm in Paris, at the market price of the day. Being also employed to purchase foreign stock and bonds for his customer, according to his, the agent's, recommendation, he transmitted accounts of the transactions to his employer, with broker's notes, etc., as if he had purchased the stock of third persons. In fact, no stock or bonds were purchased; no transfers were made; no broker's notes passed; but the sales were nominal of stock and bonds remaining in the hands of the agent and his partners, and not set apart to nor appropriated to the customer. In order to effect these purchases, loans of money were made by the agent to the customer, upon agreement that the stock and bonds should remain as a deposit in the hands of the agent, to secure the repayment of money advanced. The stock and bonds were afterwards sold at a loss under the advice of the agent. In 1819 an account of these transactions was rendered, and settled between the customer and the agent; and great loss having been incurred upon the transactions, a large balance was paid by the customer to the agent. Upon bill filed in 1824 all the transactions were set aside, and an account decreed against the agent. *Rothschild* v. *Brookman*, 5 Bli. N. S. 165; 2 Dow & Cl. 188. Affirming 3 Sim. 153; 7 L. J., Ch., 163.

4. A bill for account will lie against a banker by his customers. A mere general charge that accounts are intricate, and cannot be taken without the assistance of a court of equity, is not sufficient to sustain a bill for an account, unless the bill states circumstances from which it may fairly be presumed that the charge is true. *Bowles* v. *Orr*, 1 Y. & Coll. 464.

5. An account between a banker and his customer consisting of three items only, and interest:—Held, not to be a proper subject for a bill in equity. *Foley* v. *Hill*, 1 Ph. 399; 13 L. J., N. S., Ch., 182; 8 Jur. 347.

6. M., owner of a ship, lets it to the commissioners of the navy, and appoints T. his factor and attorney, with power to receive the freight and profits, and to compare and transact with the commissioners. T. settled the account, and took a navy bill for the money to M.; he then sells it, and indorses it as attorney for M. *Quære*, whether M. bound. *Ekins* v. *Macklish*, Ambl. 184.

7. Infant cannot be made to account as factor. *Smally* v. *Smally*, 1 Eq. Ab. 6.

8. Receiver of a public trust, having a salary, making interest of balances in his hands, is accountable to the trustees for interest made ultra, notwithstanding prior accounts settled without demanding it. *Lonsdale* (*Earl*) v. *Church*, 3 Bro. C. C. 4. See 7 Price 45.

9. A. appoints B. his deputy in the execution of an office, and by articles it is agreed, that B. shall account with A. for all fees, etc., according to the table of fees belonging to the office, and pay him three-fourth parts thereof and retain the other fourth part for his trouble. Certain fees are received by B., which he insists upon being solely entitled to, because not contained in the table:—Held, that B. should account with A. for all fees ascertained by the table, according to the table, and for all fees not mentioned therein according to his receipts, and pay over three-fourths of the whole to A. *Machen* v. *Stanyon*, 1 Bro. P. C. 133.

10. A servant and agent had been in the habit of rendering accounts from time to time of his receipts and expenses, which were duly entered in the books of his principals. Having left their service, he brought an action against them for salary. They thereupon filed a bill for an account, claiming also damages, and denying that the salary was due:—Held, that the accounts could not be opened, that the question of damages and salary was a legal question, and that the bill could not be maintained. *Hunter* v. *Belcher*, 10 Jur., N. S., 663; 12 W. R. 782; 2 De G. J. & S. 194.

11. The plaintiff, a merchant in India, consigned goods to A., of Liverpool, to sell on his account, and drew bills against the goods, which A. accepted. A. then placed the goods in the hands of B., his correspondent in London, with instructions to sell them or cause them to be sold, and drew a bill upon B. for 1,680*l.*, which B. accepted on the security of the goods, but with notice that the plaintiff had consigned the goods to A. for sale on his account. A. became insolvent, leaving the bills drawn by the plaintiff unpaid. B. paid the bill for 1,680*l.*, and then sold the goods for 1,300*l.* A bill filed by the plaintiff against A. and B. for an account and payment, by B., of the proceeds of the goods, was dismissed with costs. *Navulshaw* v. *Brownrigg*, 1 Sim. N. S. 573; 21 L. J., N. S., Ch., 57; 15 Jur. 985. Affirmed 2 De G. M. & G. 241; 16 Jur. 979; 21 L. J., Ch., 908.

A bill for an account, by a principal against his agent, is not sustainable where the transaction to which it relates is a single transaction not tainted with fraud, and the plaintiff has a remedy at law. *Ib.*

12. A. having admitted B. to an interest in an adventure, B. makes remittances to the agent of the concern in London, which he directs to be carried to the account of A., and he also remits money to A., for A. to remit to the agent on his account; the agent kept the account with A. only:—Held, that B. could not sustain a bill for an account against the agent. *Maxwell* v. *Greg*, 6 L. J., Ch., 128.

13. A. had a title to some houses which, on going abroad, he committed to the care of his brother, who afterwards becoming a prisoner, defendant entered and enjoyed several years:—Decreed, he should account to A. *Lister* v. *Lister*, Ca. *temp.* Finch. 285.

14. It is no objection to a claim or bill filed for an account against a confidential agent

that he has been also employed as a solicitor in respect of the same matter. *Oddy* v. *Secker*, 2 Sm. & G. 193.

1. The bare relation of principal and agent does not entitle the principal to come into equity for an account, if the matter can be fairly tried at law. *Barry* v. *Stevens*, 31 Beav. 258; 31 L. J., Ch., 785; 10 W. R. 822; 6 L. T., N. S., 568.

2. Where the relation between a principal and an agent partakes of a fiduciary character, the Court has jurisdiction, and will direct an account, though the receipts and payments are all on one side. *Hemmings* v. *Pugh*, 4 Giff. 456; 9 L. T., N. S., 283; 12 W. R. 44; 9 Jur., N. S., 1124.

Demurrer to a bill alleging that the defendant had received sums of money as agent for the plaintiff, the particulars and amount of which were unknown to the plaintiff, and praying for an account and full discovery of every sum of money received by the defendant for the plaintiff, allowed. *Ib.*

3. When a bill against an agent for an account alleges certain specific questions that have arisen as the ground for taking the account, and these questions are decided against the plaintiff, the bill will be dismissed. *Great Western Insurance Company of New York* v. *Cunliffe*, 9 L. R., Ch., 525; 43 L. J., Ch., 741; 31 L. T. 661.

4. When a defendant, who was agent for trustees of a trust estate, admitted that he was liable to account, and that he had in his possession securities belonging to the trust estate, the Court, on motion by the trustees, notice of which was given to the defendant, made an order directing him to account and to hand over the securities. *Rumsey* v. *Reade*, 1 L. R., Ch. D., 643; 45 L. J., Ch., 489; 33 L. T. 803; 24 W. R. 245.

5. Overseers of a parish appointed the defendant collector of the rates. The defendant entered into a bond with the overseers by name, the condition being, that he should duly account to the then overseers and their successors in office. The defendant, having accounted to the overseers who appointed him, retired from office. The plaintiffs came into office as overseers after the defendant's retirement. They filed a bill for an account, and for delivery up of the parish rate-books. The defendant refused to account to them, on the ground that he was not their agent, or liable to account to them, and also on the ground that he had already accounted to the persons who employed him. A decree was made for an account and delivery up of the books, but no accounts settled between the defendant and the late overseers to be opened. *Sellar* v. *Griffin*, 9 Jur., N. S., 612; 33 L. J., Ch., 6; 32 Beav. 542.

6. A principal cannot file a bill against an agent for an account, except in the case of complicated accounts, where there is an insufficient remedy at law. *Blyth* v. *Whiffin*, 27 L. T., N. S., 330.

7. The character of the defendant as agent, accompanying him in his situation as tenant, deprives him of the benefit of an objection that might be competent to another person; as the neglect of the plaintiff in not bringing forward the demand at an earlier period. *Beaumont* v. *Boultbee*, 5 Ves. 485; 7 Ves. 599.

Account opened, and general account decreed, against an agent who was also a tenant to his principal, in respect of fraud; and laches in landlord, under circumstances, not an objection. *Ib.*

8. A. placed moneys in the hands of her solicitor, who acted also for her as a money scrivener, undertaking to find securities for her. He placed the moneys out on insufficient securities, misrepresenting to her their character:—Held, that as against him, if living, it would have been, and as against his estate after his death it was not a matter for an action for negligence, but a matter of account between principal and agent, and the client had a right to reject the charges for disbursements on the insufficient securities. *Smith* v. *Pococke*, 2 Drew. 197; 18 Jur. 478; 23 L. J., Ch., 545.

9. The plaintiff, a solicitor, employed the defendant for some years as an occasional clerk and to collect rents, without having fixed the terms of his remuneration; and it appeared that there were mutual receipts and payments of money. Upon motion for injunction to restrain the defendant's action at law:—Held, that the plaintiff was not entitled to an injunction. The mere fact of mutual receipts and payments cannot be said to give the right to an account in equity. The account must be not merely from the number of items, but from its own nature, so complicated that it could not be taken in a court of law. *Fluker* v. *Taylor*, 3 Drew. 183.

10. A principal is not estopped from obtaining relief in equity against his agent, on the ground that he has remedy at law. *Williams* v. *Trye*, 18 Jur. 442; 23 L. J., Ch., 860.

The illegality of a transaction between principal and agent is not necessarily a bar to a suit in equity seeking for an account of such transactions. *Ib.*

11. The plaintiffs were a company of shipowners, on whose behalf the defendant, as their broker, had effected policies. The Company had instituted proceedings in a competent court in Genoa against the defendant for an account, to which suit he had appeared. Before final decree in the foreign court, he commenced actions in England against the insurers upon one of the policies which had resulted in a loss:—Held, that it was competent for the company to file a bill to restrain the action, and to have a receiver of the policy moneys pending the foreign litigation. *Transatlantic Co.* v. *Pietroni*, 1 Johns. 604.

12. The nature of the employment of a confidential steward or agent imposes upon him the duty of keeping and rendering proper accounts of all his dealings and transactions with his employer; and where no regular settlement of accounts has taken place between the employer and such steward or agent, there is a right to have the accounts taken under a decree of the Court; but a bill by an administrator for such an account was dismissed, with costs, it appearing that the defendant had not undertaken the duty of keeping accounts, and that his education and capacity, as well as the course of dealing between him and his employer, were inconsistent with the notion of his keeping regular accounts. *Tindall* v. *Powell*, 4 Jur., N. S., 944; 6 W. R. 850.

13. An agent who is empowered to retain in his own hands his principal's money, for the purpose of investment, is a trustee for his prin-

cipal, and cannot set up the Statute of Limitations as a bar to a suit for an account. *Burdick* v. *Garrick*, 39 L. J., Ch., 369; 5 L. R., Ch., 233.

A gentleman resident in America, by power of attorney authorized two people in England, one of whom was a solicitor, to get in and sell his property here and reinvest the proceeds, and generally deal with it for his benefit; he died intestate in 1859, whereupon the agents pay the moneys which they had then received under the power, and which had not been reinvested, into a bank to the account of the firm of which the solicitor was a member; in 1867 letters of administration were taken out to the intestate by his widow, who filed a bill against the agents for an account:—Held, that the agents were trustees for their principal, and could not set up the Statute of Limitations against his personal representative. *Ib.*

1. A government which *de facto* succeeds to any other government, whether by revolution or restoration, conquest or re-conquest, succeeds to all the public property of the displaced power, and it would have the right to call to account any fiscal or other agent who had been the agent of such displaced government. *United States of America* v. *McRae*, 20 L. T., N. S., 476; 8 L. R., Eq., 69; 38 L. J., Ch., 406; 17 W. R. 764.

But in a suit by a foreign government against such an agent for an account, it must be alleged and proved that such government has an equity, and not simply a legal right to the moneys or goods, which such agent is alleged to have had come into his hands in his character of agent for such displaced government. *Ib.*

2. As a general rule a bill for an account lies in equity by a principal against his agent, the fiduciary character of the relation between the parties being sufficient to support the bill. In such a case it is immaterial that there is no reciprocity of receipts and payments. Observations on *Phillips* v. *Phillips* (9 Hare 471). *Makepeace* v. *Rogers*, 11 Jur., N. S., 215; 34 L. J., Ch., 896; 13 W. R. 450, 566; 12 L. T., N. S., 12, 221; 4 De G. J. & S. 649; 5 N. R. 199.

A landowner may maintain a suit in equity against the agent and manager of his estates, if the object of such suit is either to obtain an account (and in that case allegations of fraud or special circumstances are necessary), or to obtain the delivery up by the agent of documents in his hands belonging to the landowner. *Ib.*

A bill by a landowner and principal against his receiver and agent alleged the receipt by the latter of rents, purchase moneys of real estates, and dividends on stock and shares, and charged possession of documents belonging to the principal. An account and delivery of the documents were prayed. Demurrer to the bill overruled, with costs. *Ib.*

The prayer for the delivery of documents would of itself have been sufficient to sustain the bill. *Ib.*

7. Period.

3. Interest and costs decreed against a steward upon fraud, wilful concealment, etc., and in such cases generally there is no limitation of time. *Hardwicke* (*Earl*) v. *Vernon*, 14 Ves. 504.

4. An account decreed against a land agent for twenty-seven years previous to the filing of the bill under the circumstances, but refused as to certain gratuities received from tenants by the agent with the knowledge of his principal, which were charged to be extortionate, but by the exorbitance of which the principal was not proved to have been a loser, except so far as they were taken as fines. *Palmer* v. *Browne*, Beat. 540.

5. Fraudulent accounts between a principal and factor opened from the beginning, the Court holding that the relief ought not, under such circumstances, to be limited to a right to surcharge and falsify. *Clarke* v. *Tipping*, 9 Beav. 282.

6. A. filed a bill against B., who had been his commercial traveller, charging misconduct and asking for an account during the term of service and payment by way of damages, and stating that in 1861 he had written to B., directing him to send him a special account. B., who denied the misconduct, stated that he had always given A. a general account:—Held, that A. was only entitled to an account since the date of the letter requiring B. to keep an account prospectively. *Hunter* v. *Belcher*, 12 W. R. 121; 9 L. T., N. S., 501; 10 Jur., N. S., 663.

Held, also, that even if any particular damage or misconduct had been proved, the Court had no jurisdiction over such a matter. *Ib.*

7. If a company does not discover, and has not the means of discovering, the correctness of entries in a succession of accounts rendered by their agent, they are not, after the decease of the agent, precluded by lapse of time, or by certain shareholders omitting, against opposition, to press for explanations previously asked, from showing that such entries are not only erroneous but fraudulent. *Stainton* v. *Carron Co.*, 24 Beav. 346; 3 Jur., N. S., 1235; 27 L. J., Ch., 89.

Where the accounts of an agent acting for a company have been improperly kept, or mystified, and not duly rendered and explained when asked for, the Court will direct them to be taken through a period of twenty-five years, though accounts sent in had been acted on, and though shareholders who asked for further information and explanation on such accounts did not persevere to obtain them. *Ib.*

A large shareholder was the manager of the affairs of a company. He rendered accounts regularly from 1826 to his death in 1851. These accounts were not challenged in his life, but after his death items exceeding 2,000*l.* a year were questioned by the company, for which no vouchers could be produced and no satisfactory explanation given. The account was opened for the whole period of twenty-five years, and it was directed to be taken with special directions. *Ib.*

Distinction between the cases where the business of a company is conducted by a mere agent and where it is managed by a shareholder who is a *quasi* co-partner. *Ib.*

A decree was made in a suit for taking and adjusting a complicated series of accounts. The decree was limited to 1825, under the impression that all previous accounts were correct.

Upon discovery that errors existed in the earlier accounts, another suit was instituted, and after proceedings had been taken a compromise was made, under which a sum of 220,000*l.* was paid by the plaintiffs. On motion for an injunction to restrain proceedings in Scotland, a question was made, whether the order for compromise precluded the taking of accounts prior to 1825, or whether that order included all the accounts between the parties. Romilly, M. R., decided that the earlier accounts must be taken, and for that purpose he set aside the compromise. On appeal:—Held, that the compromise was binding from 1825, and the defendants electing to so consider it, the Court varied the order of Romilly, M. R., by directing the accounts prior to 1825 only to be taken. S. C. 7 Jur., N. S., 645; 30 L. J., Ch., 713; 4 L. T., N. S., 659; 6 Jur., N. S., 360; 29 L. J., Ch., 587.

1. An agent who is empowered to retain in his own hands his principal's money, for the purpose of investment, is a trustee for his principal, and cannot set up the Statute of Limitations as a bar to a suit for an account. *Burdick* v. *Garrick*, 5 L. R., Ch., 233; 39 L. J., Ch., 369.

2. When accounts are impeached and it is shown that they contain errors of considerable extent both in number and amount, whether caused by mistake or fraud, the Court will order such accounts, though extending over a long period of years, to be opened, and will not merely give liberty to surcharge and falsify; and supposing a fiduciary relation to exist between the parties, the Court will make a similar order if such accounts are shown to contain a less number of errors, or if they contain any fraudulent entries. *Williamson* v. *Barbour*, 9 L. R., Ch. D., 529; 37 L. T. 698; 50 L. J., Ch., 147.

Semble, in an action between principals and agents impeaching the agents' accounts, actual knowledge of antecedent fraud in the agents by one who subsequently became a member of the firm of the principals would not, if proved, be any bar to their claim. *Ib.*

8. Costs.

3. If an agent does not render his accounts within a reasonable time, he must bear the costs of a suit instituted to have the accounts taken, and it will not be any excuse for him that he offered to pay on account a gross sum, which it turns out would have covered all that was due from him. *Collyer* v. *Dudley*, T. & R. 421; 2 L. J., Ch., 15.

4. A collector of parish rates appointed by one set of overseers is accountable to their successors in office for moneys received prior to the appointment of the latter. *Sellar* v. *Griffin*, 32 Beav. 542; 9 Jur., N. S., 612; 33 L. J., Ch., 6.

An account was directed against the collector, not disturbing accounts settled with the predecessors, with liberty to surcharge, and the defendant, who resisted the account, was ordered to pay the costs to the hearing. *Ib.*

5. To a bill against an agent for an account and payment of balance due, the defendant answered, that he had paid over more than he had received, and claimed a balance due to him. It being proved that the balance was against him:—Held, that he must pay, in addition to the balance due from him, the costs of suit. *Fry* v. *Fry*, 10 Jur., N. S., 983.

The bill did not pray interest, but held, that the defendant was chargeable with interest at 5*l.* per cent. from the filing of the bill. *Ib.*

6. In an action against an agent for account the plaintiff alleged an open account, and in general terms falsification. The defendant pleaded settled accounts, and required specific statements of falsification. At the trial the judge held the accounts were settled, and gave the defendant costs of the trial, but allowed the plaintiff to amend within fourteen days by stating specific instances of falsification. *Moxley* v. *Cowis*, 47 L. J., Ch., 271; 38 L. T. 908; 26 W. R. 854.

VIII. PAYMENT TO AGENT.

1. *Discharge of Debtor*, 5946.
2. *Rights of Principal against Agent*, 5947.

1. Discharge of Debtor.

7. An agent having been employed to transact loans of money, and having lent money and taken a bond from the borrower, which he delivered to his principal, and having afterwards been repaid the money and misapplied it, but continuing to make good the interest, the obligor was held liable, although more than twenty years had elapsed without payment of interest by him, to pay the bond. If the agent had been permitted to hold the instrument, *quære*. *Curtis* v. *Drought*, 1 Moll. 487.

8. It is the rule of the court, that if the scrivener have the custody of the security, payment of the interest is good; if he delivers it up, being a bond, payment of the principal is good: but on payment of the principal, in case of a mortgage deed, the giving up the deed is not sufficient to restore the estate; there must be a re-conveyance. So payment of interest good, if mortgagee consents, or after his death his executor, either expressly or by implication, as if he accept the money afterwards of the scrivener, though the scrivener have not possession either of deed or bond. *Whitlock* v. *Waltham*, 1 Salk. 157; 1 Vern. 150.

9. Scrivener puts out money on bond, and receives the interest from time to time, and then receives part of the principal, the bond remains in the obligee's custody. No good payment. *Roberts* v. *Matthews*, 1 Vern. 150. See 1 Salk. 157.

10. S. having borrowed 100*l.* of A. on a bond, B., the scrivener, when the bond was sealed, delivered it to A. S. paid many years' interest, and 50*l.* of the principal to B., which he paid over to A.; but the remaining 50*l.* which S. paid to B. was not paid over to A. when B. failed. *Per curiam*, though B. received the interest so long, and 50*l.* of the principal, it did not imply he had any authority from A.; and as S. could not prove he had any such authority, he shall pay the last 50*l.* again. *Wolstenholm* v. *Davies*, 2 Freem. 289.

1. If one trusts his scrivener (who puts out money for him) with the custody of his bonds, and the scrivener receives the money, and delivers up the bond, the obligee is barred as against the obligor for ever. *Secus*, in case of a mortgage, because a legal estate is vested which cannot be devested without assignment. *Martyn* v. *Kingsly*, Pre. Ch. 209.

2. One of the assignees having the sole charge of paying the dividends pays the dividend of a creditor to a person who is not duly authorized to receive it. The two other assignees are equally responsible to the creditor for the amount of the dividend. *Exp. Winnall*, 3 Dea. & Ch. 22.

3. When a creditor addresses a written request to assignees, in general terms, to pay "the dividends made on the bankrupt's estate" to A. B., the assignees are justified in paying subsequent dividends to A. B., until they have notice from the creditor that he has revoked A. B.'s authority. *Exp. Bright*, 2 Dea. & Ch. 8.

4. Where the plaintiff employed an agent to sell an estate, which he accordingly sold to the defendant, and on the settlement of the purchase-money the defendant set off a debt due to him from the agent and paid over the balance :—Held, that the plaintiff was not precluded, by having executed the conveyance in ignorance of the arrangement by his agent, from recovering from the defendant the sum so set off. *Young* v. *White*, 7 Beav. 506 ; 13 L. J., N. S., Ch., 419 ; 8 Jur. 654.

5. If a man authorizes his agent to receive money, intending that the agent should thereout pay himself his own debt, he thereby gives the agent authority to receive payment to the extent of his own debt, in any manner he may think fit; consequently, the amount of the agent's own debt may be written off in account between him and the debtor. *Barker* v. *Greenwood*, 2 Y. & C. 414 ; 1 Jur. 541 ; 6 L. J., N. S., Exch. Eq., 54.

A debtor who pays the amount of his debt to the agent of his creditor, must pay it in cash unless he can show that the agent had authority to receive payment in any other way. *Ib.*

6. The defendant, through the agency of one Yates, granted to the plaintiff an annuity redeemable at six months' notice. In May 1830 notice was given to re-purchase in November, and in August 1830 the defendant entrusted Yates with the money for the re-purchase. In October Yates prevailed on the plaintiff to execute the deed of re-assignment, dated in November and indorsed on the annuity deed, without receiving the re-purchase money; but the plaintiff did not sign any receipt for the money. Yates afterwards produced the deed to the son of the defendant, to satisfy him of the payment, and it was handed back to Yates to be kept by him with the defendant's other documents. Yates acted in the transaction as agent of both parties. He retained the money, and to deceive both, continued the payment of the annuity, but afterwards died insolvent. The defendants subsequently obtained possession of the deed :—Held, under the circumstances, that the defendant was not discharged, but was bound to pay the plaintiff the re-purchase money with interest, from November 1830, the plaintiff accounting for the subsequent receipts of the annuity. *Vandaleur* v. *Blagrave*, 6 Beav. 565 ; 7 Jur. 1002. Affirmed 17 L. J., N. S., Ch., 45 ; 11 Jur. 935.

7. The possession by a vendor's solicitor of an executed conveyance for purchase of lands, with the signed receipt for the consideration money indorsed, is not in itself an authority to the solicitor to receive the purchase money. *Viney* v. *Chaplin*, 27 L. J., Ch., 434.

8. A person owing money to an agent, knowing him to be an agent, must pay in such a manner as to facilitate the money reaching the principal's hands, and cannot pay by a settlement of accounts between himself and the agent. *Pearson* v. *Scott*, 38 L. T., N. S., 747 ; 26 W. R. 796 ; 9 L. R., Ch. D., 198 ; 47 L. J., Ch., 705.

The plaintiffs, as executors, instructed S., a solicitor, to have some stock and shares sold, and in effect authorized him to receive the proceeds as money. S. employed the defendant, a stock and share broker, with whom he had at the time a current account for differences upon private speculative transactions on the Stock Exchange. The defendant having sold the property paid a part of the proceeds to S., and by his directions placed the balance to the credit of S. in the current account. S. never paid the balance to the plaintiffs, but subsequently absconded and was declared bankrupt. The defendant had notice of the agency of S. :—Held, that he was liable for the balance. *Ib.*

A custom whereby a London stockbroker, who has notice that the person instructing him is an agent, is bound only to recognize the person actually employing and instructing him, and to obey the directions of that person only as to the mode of payment, and as to the application and disposal of the proceeds of sale, is unreasonable in the absence of knowledge in the principal. *Ib.*

Rights of Principal against Agent.

9. There is a remedy in equity as well as at law, by a principal against his broker or agent, to recover a sum of money paid to the broker on his untrue representation, that he had entered into a contract for his principal, which alleged contract had in fact no existence. *Wilson* v. *Short*, 6 Hare 366 ; 12 Jur. 301 ; 17 L. J., Ch., 289.

10. M. employed R. & Co., bankers in Edinburgh, to obtain for him payment of a bill drawn on a person resident at Calcutta. R. & Co. accepted the employment, and wrote promising to credit him with the money when received. R. & Co. transmitted the bill in the usual course of business to C. & Co. of London, and by them it was forwarded to India, where it was duly paid. R. & Co. wrote to M. announcing the fact of its payment, but never actually credited him in their books with the amount. The house in India failed :—Held, that R. & Co. were the agents of M. to obtain payment of the bill; that, payment having been actually made, they became *ipso facto* liable to him for the amount received; and that he could not be called on to suffer any loss occasioned by the conduct of their sub-agents, between whom and himself no privity existed. *Mackersy* v. *Ramsays*, 9 Cl. & F. 818.

IX. FRAUD AND MISREPRESENTATION.

1. *Liability of Agent*, 5948.
2. *Liability of Principal*, 5948.
3. *Rights of Principal against Third Parties*, 5949.
4. *By Sub-agents*, 5950.
5. *Constructive Fraud*. See FRAUD, II. v.

1. Liability of Agent.

1. An agent, charged with personal fraud, cannot, by disclaiming interest, avoid answering fully. *Bulkeley* v. *Dunbar*, 1 Anstr. 37.

2. The rule that an agent, who induces persons to deal with his principal by means of false representations, is personally liable to make good his representations, does not extend to an incorrect statement of a matter of law. *Beattie* v. *Ebury* (*Lord*), 27 L. T., N. S., 398; 20 W. R. 994; 7 L. R., Ch., 777; 41 L. J., Ch., 804. Affirmed 7 L. R., H. L., 102; 44 L. J., Ch., 20; 30 L. T. 581; 22 W. R. 897.

Three directors of a railway company, by a letter to the company's bankers, requested them to honour the cheques of the company signed by two of the directors, and countersigned by the secretary of the company. Cheques to a large amount were accordingly drawn, signed in this manner, and were paid by the bank:—Held, that this letter did not amount to more than a representation that the directors had the ordinary authority of railway directors to bind their company, and that it did not render the directors personally liable to the bank for the moneys paid in respect of such cheques. *Ib.*

3. All persons directly concerned in the commission of a fraud are to be treated as principals, and must not be permitted to excuse themselves on the ground that they acted as the agents or servants of others; for the contract of agency or of service cannot impose any obligation on the agent or servant to commit or assist in the committing of fraud. *Cullen* v. *Thompson*, 4 Macq. H. L. Ca. 441; 9 Jur., N. S., 85.

4. In the absence of fraud, an agent acting within the scope of his authority is not personally liable for a misrepresentation made by him on behalf of his principal. *Eaglesfield* v. *Londonderry* (*Marquis*), 26 W. R. 540; 38 L. T. 303. Affirming 4 L. R., Ch. D., 693; 25 W. R. 190; 38 L. T., N. S., 303.

5. Where two agents conspire to defraud their principal, the estates of both the agents will be liable in equity to the estate of the principal, in respect of the fraud so committed. *Walsham* v. *Stainton*, 12 W. R. 63.

In such a case an agent is considered as a trustee for his principal, and lapse of time is no bar. *Ib.*

6. As a general rule one agent is not responsible for the fraudulent acts of the other unless he does something which makes himself a principal in the fraud. *Cargill* v. *Bower*, 10 L. R., Ch. D., 502; 47 L. J., Ch., 649; 38 L. T. 779; 26 W. R. 716.

2. Liability of Principal.

7. A. usually employed B. as his agent to buy hops of the several planters in and about Canterbury, but having in a particular season omitted to give him any orders at the usual time, B. enters into a partnership with three others, for purchasing hops of that year for their mutual benefit. The hops are accordingly purchased, but A., having intelligence of this transaction before they were delivered, prevails upon B. to declare to the planters, that he bought them as A.'s agent, and by that means A. got the hops delivered to him:—Held, that this was a fraud upon the partners of B., and that A. should account for the value of the hops, according to the highest price for which he sold them. *Hunter* v. *Sheppard*, 4 Bro. P. C. 210.

8. A principal is answerable for the act of his agent in concealing or suppressing deeds, though not done with the knowledge of the principal. *Bowles* v. *Stewart*, 1 Sch. & Lef. 209.

9. The arrangements for a deed between A. and B. were negotiated on A.'s behalf by C. his solicitor. B. cannot maintain a bill to have the deed set aside, on the ground that C., knowing material circumstances, concealed the same from him, unless he shows that A., the principal, at the same time had the same knowledge. But the knowledge of the principal would be the knowledge of the agent. *Solomon* v. *Honywood*, 3 N. R. 605.

10. A master is answerable for every such wrong of his servant or of his agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master is proved; and there is no distinction between the case of fraud and the case of any other wrong. *Mackay* v. *Commercial Bank of New Brunswick*, 5 L. R., P. C., 394; 43 L. J., P. C., 31; 22 W. R. 473; 30 L. T., N. S., 180.

When one has suffered, and another has profited by, the fraudulent representation of an agent of the latter, made within the scope of his authority, the former is entitled to recover damages. *Ib.*

An action of deceit may be maintained against a company, whether it is incorporated or not incorporated, in respect to the fraud of its agent. *Ib.*

An officer of a banking corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a representation to A., which, by omitting a material fact, misled him, and induced him to accept a bill in which the bank was interested; and he was compelled to pay the bill:—Held, that he could recover from the bank the amount so paid. *Ib.*

In an action of deceit, whether against a person or against a company, the fraud of the agent may be treated, for the purposes of pleading, as that of the principal. *Ib.*

11. A corporation of itself cannot be guilty of fraud, but where it can only accomplish the object for which it was formed through the agency of individuals who act fraudulently, the corporation stands in the same situation with respect to the conduct of its agents as a private person would have stood, had his agent so misconducted himself. *Ranger* v. *Great Western Railway Co.*, 5 H. L. Ca. 72.

1. S., who was agent of F., and practically carried on his business, sent to S. and Co., in the ordinary course of business, an account showing that certain advances had been made for goods on their account, and drew a bill on them for the amount, which was duly honoured. The advances had not been made, and S. had appropriated the amount to his own use. In an action brought by S. & Co. against F. to recover the amount of the bill:—Held, that S. & Co. were entitled to recover. *Swire* v. *Francis*, 37 L. T., N. S., 554.

2. Knowledge of a particular fact relating to the accounts, by one director of a banking company, is not notice to the company, where that director had no voice in the management of the accounts, and the money transactions of the company were conducted exclusively by a manager under three directors, of whom the director possessing the knowledge was not one. *Re Carew*, 31 Beav. 39.

When a director is about to commit a fraud, it is to be presumed that he will not disclose the circumstance to his colleagues. *Ib.*

A. fraudulently obtained possession of acceptances from C., and he got them discounted and carried to his account by a banking company, to which he was largely indebted, and of which he was a director and local manager:—Held, under the circumstances, that the bank had notice, and could not be considered *bonâ fide* owners. *Ib.*

3. The shares of a proprietor in a joint-stock company were sold out without his authority, and not in conformity with the provisions of the deed by which the company was constituted. On a bill filled by the shareholders, alleging that the sale was the fraudulent act of the secretary of the company, and sanctioned by the directors, but assuming the transaction to be valid, as against the transferee, and praying that the loss might be made good out of the assets of the company; demurrer for want of equity allowed, on the ground that the bill stated no case for making the company liable in damages. *Duncan* v. *Luntley*, 2 Macn. & G. 30; 2 H. & Tw. 78; 14 Jur. 318.

4. R. was induced by W., the secretary to a railway company, to advance money to the company upon the security of a Lloyd's bond, which he represented as being a valid and legal security, at a time when the company had in fact no borrowing power, and the bond was therefore invalid:—Held, that even assuming that W. was acting as the agent of the directors in making the representation, R. had no equity to make the directors, who authorised the issuing of the bond, recoup the money advanced by him. *Rashdall* v. *Ford*, 35 L. J., Ch., 796; 2 L. R., Eq., 750; 14 W. R. 950.

5. A principal agent is not responsible for the act of a sub-agent with respect to a representation made in favour of his principal; and therefore the directors of a company cannot be held personally liable for a fraudulent representation made by an agent of the company, unless they have induced or authorized him to make it. *Bear* v. *Stevenson*, 30 L. T. 177.

A company was in negotiation with S. for an advance upon the security of sheep and wool, the property of the company; an agent of the company wrote, in answer to a question of S., "The mortgage to N. is the only incumbrance on the sheep and wool": in fact, there were two other outstanding incumbrances, but at the time of writing the agent had them both in his possession on behalf of the company, under an agreement that they should be paid off out of the advance to be made by S., which was in fact done:—Held, that there was no evidence that the agent was guilty of making a false representation of the position of the company. *Ib.*

6. A secretary and financial agent of a company, having authority to get bills discounted, forged bills and got them discounted. He paid the proceeds into a bank to the account of a firm to which he belonged, and in his character of a member of that firm drew cheques on the account in favour of the company; and it was alleged, that, out of the amounts so drawn, he actually made payments for the benefit of the company. The bill discounter had not negotiated the bills. In the winding-up of the company, the discounter asked for an inquiry, what amount of proceeds of the bills had thus reached the company, and asking to claim for the amount when ascertained:—Held, that an inquiry must be directed what amount of the proceeds of the bills had been applied, directly or indirectly, for the benefit of the company, and that a claim for the amount when ascertained would be good. *Exp. Shoolbred, Re Japanese Curtains and Patent Fabric Co.*, 28 W. R. 399.

3. Rights of Principal against Third Parties.

7. Bill for the delivery up of specific chattels deposited by the plaintiff with A., his agent, which A. fraudulently contracted to assign to B., and B. advertised to be sold; and for an injunction to restrain the sale by B., and to restrain A. and B. from parting with the goods, the goods being still in the possession of A., the agent. Demurrer by B. overruled. *Wood* v. *Rowcliffe*, 3 Hare 304; 13 L. J., N. S., Ch., 293; 8 Jur. 771.

8. A person who receives, by way of security, from a defaulting agent, a deposit of money, which turns out to have been withdrawn from the funds of his principal, cannot, where circumstances are suspicious, be allowed to insist on his ignorance of the truth. *Berwick (Mayor)* v. *Murray*, 3 Jur., N. S., 1.

9. Servant taking by collusion more than belongs to his office, must account; so must a stranger upon a bargain with a servant, which is a fraud on the master. *East India Co.* v. *Hensham*, 1 Ves. J. 289.

10. Where an agent has made an agreement with a contractor which amounts to a fraud on his principal, the principal may rescind the contract with the contractor and receive back money paid under it. *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha, and Telegraph Works Co.*, 10 L. R., Ch., 515; 45 L. J., Ch., 121; 32 L. T. 517; 23 W. R. 583.

A telegraph works company agreed with a telegraph cable company to lay a cable, the cable to be paid for by a sum payable when the cable was begun, and by twelve instalments payable on certificates by the cable company's engineer, who was named in the contract. Shortly afterwards the engineer,

who was engaged to lay other cables for the works company, agreed with them to lay this cable also for a sum of money to be paid to him by instalments payable by the works company when they received the instalments from the cable company :—Held, that under the circumstances, the agreement between the engineer and the works company was a fraud, which entitled the cable company to have their contract rescinded, and to receive back the money which they had paid under that contract. *Ib.*

Any surreptitious dealing between one principal to a contract and the agent of the other principal is a fraud in equity, and entitles the first-named principal to have the contract rescinded, and to refuse to proceed with it in any shape. Per James, L.J. *Ib.*

As the works company had by their fraudulent conduct prevented the cable company from having the full benefit of the contract, the cable company was entitled to have the contract rescinded. Per Mellish, L.J. *Ib.*

1. When an agent for the sale of an estate colludes with a purchaser, and in consideration of a bribe or honorarium allows the purchaser to obtain the estate at less than its value, with a view to a sale at a higher price to a sub-purchaser, and the transaction is concealed from the vendor, both agent and purchaser will be held jointly and severally liable to pay to the vendor the increased amount obtained by the sub-sale. *Morgan* v. *Elford*, 4 L. R., Ch. D., 352.

On appeal, the Court, being of opinion on the evidence and correspondence that the bargain between the agent and the owner was that the agent should have whatever the estate fetched above a certain price, dismissed the bill without giving any opinion on the above points. *Ib.*

2. A husband, being about to leave England for a residence in India, executed an assignment by deed to his wife, who was to remain in England, of a leasehold dwelling-house, "to hold the same unto" the wife, "her executors, administrators, and assigns, as her separate estate." No trustees were appointed, the husband and wife being the only parties to the deed. The title deeds were allowed to remain in the possession of the wife :—Held, that the deed of assignment operated as a valid declaration of trust in favour of the wife. *Fox* v. *Hawks*, *Hawks* v. *Fox*, 13 L. R., Ch. D., 822 ; 49 L. J., Ch., 579 ; 42 L. T. 622 ; 28 W. R. 656.

The wife, having parted with possession of the deeds (all but the assignment) to an agent, in order to raise a sum of 200*l.* upon them for her use, and having asked for a return of the deeds without success, the agent, by forging the name of the husband to a mortgage deed and other instruments, raised a sum of 1,200*l.*, which he appropriated to his own use :—Held, that there was no negligence on the part of the wife so as to bar her title to relief against the mortgagees. *Ib.*

4. By Sub-agents.

3. A principal agent is not responsible for the act of a sub-agent with respect to a representation made in favour of his principal ; and therefore the directors of a company cannot be held personally liable for a fraudulent representation made by an agent of the company, unless they have induced or authorised him to make it. *Bear* v. *Stevenson*, 30 L. T., N. S., 177.

A company was in negotiation with S. for an advance upon the security of sheep and wool, the property of the company ; an agent of the company wrote, in answer to a question of S., "The mortgage to N. is the only incumbrance on the sheep and wool ;" in fact there were two other outstanding incumbrances, but at the time of writing the agent had them both in his possession on behalf of the company, under an agreement that they should be paid off out of the advance to be made by S., which was in fact done :—Held, that there was no evidence that the agent was guilty of making a false representation of the position of the company. *Ib.*

4. S. & Co. employed F. as their agent to make advances on goods. F. employed a sub-agent to make such advances, with power to draw on S. & Co. for the amount. The sub-agent fraudulently drew on S. & Co. for an amount not advanced :—Held, that such sub-agent was acting within his authority, and that F. was liable for the act of his sub-agent. *Swire* v. *Francis*, 47 L. J., P. C., 18 ; 3 L. R., App. Cas., 106.

5. As a general rule one agent is not responsible for the fraudulent acts of the other unless he does something which makes himself a principal in the fraud. *Cargill* v. *Bower*, 26 W. R. 716 ; 47 L. J., Ch., 649 ; 38 L. T., N. S., 779.

X. SUITS.

1. *Right of Agent to Sue*, 5950.
2. *Right of Principal to Sue*, 5950.
3. *Parties.* See PRACTICE (PARTIES).

1. Right of Agent to Sue.

6. Agents must sue in name of principal. *Leigh* v. *Thomas*, 2 Ves. 313.

7. A firm abroad drew bills on one of its own partners, trading on his account in England, payable to an agent of the foreign government. The bills were not paid, process of insolvency issued against the foreign firm, and a commission against the English partner :—Held, the agent may prove under the commission, but will be restrained from receiving dividends, unless he elect not to prove under the insolvency abroad. *Exp. Mattos*, *Re Venzeller*, 1 Mont. & A. 345. Affirming *Exp. Cotesworth*, 1 Dea. & Ch. 281 ; Mont. & Bli. 92 ; 2 L. J., N. S., Bky., 18.

8. An agent, who insures for another with his authority, may sue for the insurance money in his own name. *Provincial Insurance Company of Canada* v. *Leduc*, 6 L. R., P. C., 224 ; 43 L. J., P. C., 49 ; 31 L. T. 142 ; 22 W. R. 929.

2. Right of Principal to Sue.

9. The rule that an undisclosed principal may sue and be sued upon mercantile contracts made by an agent in his own name, subject

to any defences or equities which without notice may exist against the agent, is applicable to policies of marine insurance under the Canadian as well as under the English law. *Browning* v. *Provincial Insurance Company of Canada*, 5 L. R., P. C., 263.

1. A. in France employs B. in England to sell wines by commission, as well as to purchase other wines on A.'s account in London, for which he furnished him with letters of credit. The wines were generally bought and sold by B. in his own name; part of the wines consigned by A. were in the dock warehouses, standing in B.'s name, and part formed one indiscriminate stock in B.'s cellar. A. closes the connection with B., and requires him to deliver up all the wines, but B. neglects to comply with this requisition, and shortly afterwards became bankrupt:—Held, that A. might sue the purchaser of the wines in the name of B. or his assignees, and that no order could be made for the payment to A. of any moneys, the produce of the wines, if mixed with the other moneys of B. at the time of his bankruptcy. *Exp. Moldaut*, 3 Dea. & Ch. 351.

2. It is settled law that an undisclosed principal can sue in respect of a contract entered into in his behalf between stockbrokers, though by the rules of the Stock Exchange the brokers, as between themselves, are personally responsible. *Langton* v. *Waite*, 37 L. J., Ch., 345; 18 L. T., N. S., 880; 16 W. R. 508; 6 L. R., Eq., 165.

3. A. desiring to become an underwriting member of Lloyd's, B. gave a guarantee to the committee of that body on behalf of A., in which he held himself responsible "for all his engagements in that capacity." When the guarantee was given, Lloyd's was a voluntary association, managed by a committee, to whom the guarantee was given. A few years after the members of this association were incorporated by a special Act of Parliament under the name of Lloyd's, and the rights of the committee were vested in the corporation:—Held, that the committee of Lloyd's, and the corporation of Lloyd's as their successors, were trustees of the benefit of the guarantee for all the persons, whether members or outsiders, with whom the son had contracted engagements as an underwriting member, and that the corporation could maintain an action to enforce the guarantee against the father's estate for the benefit of all those persons; on the ground, as to the outsiders, that the brokers, through whom the son's engagements with them were contracted, were trustees for their principals of the right which they themselves had to call on their own agents, Lloyd's, to enforce the guarantee for their benefit. *Lloyd's* v. *Harper*, 16 L. R., Ch. D., 290; 50 L. J., Ch., 140; 43 L. T. 481; 29 W. R. 452. Affirming 49 L. J., Ch., 217; 42 L. T. 218; 28 W. R. 419.

4. Merchants in London, upon the instruction of shipping agents at Havannah with respect to a cargo of tobacco to be consigned to the London merchants, and after receiving the shipping documents, effected policies of marine insurance in the ordinary form on behalf and for the benefit of all parties whom it might concern. The Havannah agents shipped and consigned the tobacco in their own names, but were in fact acting as commission agents for Havannah merchants to whom the tobacco belonged; and the London merchants before effecting the policies had notice that the Havannah agents had an unnamed principal. A total loss having occurred, the London merchants received the policy moneys, but before receipt had notice that the moneys were claimed by the Havannah principals:—Held, that an action lay by the Havannah principals against the London merchants for the policy moneys; that the London merchants were not entitled to a lien upon the moneys for the balance of their general account with the Havannah agents, and could not in that action set off their claim to that balance, or set off anything, except the premiums, stamps, and commission in respect of the insurance. *Mildred* v. *Maspons*, 8 L. R., App. Cas., 874; 32 W. R. 125. Affirming S. C. *sub. nom. Hermano* v. *Mildred*, 9 L. R., Q. B. D., 530; 51 L. J., Q. B., 604; 47 L. T. 318; 30 W. R. 862.

Held, also, that the case fell within the Factors Act, 6 Geo. 4, c. 94, s. 1. *Sed quære. Ib.*

XI. BROKER.

1. *In General*, 5951.
2. *Commission*, 5952.
3. *London Brokers*, 5952.
4. *Stock Broker*. See STOCK EXCHANGE.

1. In General.

5. A. agrees with B.'s broker for 500*l.* stock; the broker, according to usage, made an entry of this agreement in his pocket-book; it being no otherwise reduced into writing, is within the Statute of Frauds. *Mussell* v. *Cooke*, Pre. Ch. 533.

6. Dividend warrants on which the bankrupts in their character of stockbrokers were intrusted to receive the dividends, and which they had pledged for their own debt, were ordered to be delivered up to trustees, who had employed the bankrupts as their brokers. *Exp. Gregory, Re Wakefield*, 2 M. D. & De G. 613.

7. Where a broker being authorised to effect an insurance by one of several partners afterwards received the insurance money; after which one of the others demanded his proportion, and commenced an action against the broker to recover it, the party directing having also demanded payment over to him:—Held, a proper case for the bill of interpleader. *Stuart* v. *Welch*, 4 Myl. & C. 305.

8. The bankrupt was employed as broker by petitioner, and sold goods for him nominally to A., as appeared by sold note, but really to A. and himself on a joint account, as appeared by bought note, and became bankrupt:—Held, a fraud, and sale void, and so much of the goods as then remained in his hands were ordered to be specifically delivered up to petitioner. *Exp. Huth, Re Pemberton*, Mont. & Ch. 667; 4 Dea. 294.

9. *Quære.* Whether an insurance broker is a trader. *Exp. Stevens*, 4 Madd. 256.

10. Brokers very often transfer stock without the principal being so much as mentioned, and

yet he may maintain an action against the person to whom the stock was transferred. *Linnett* v. *Reave*, 2 Atk. 394.

1. A. and B., stockbrokers, borrowed on behalf of the plaintiff a sum of money for a term of three months, from the defendants, who were also stockbrokers, upon the security of certain railway stock, which was transferred by the plaintiff into the name of one of the defendants' firm. At the expiration of the term the loan was repaid with interest, and the defendants, who, pending the loan, had sold the plaintiff's stock, purchased other stock, and re-transferred a similar amount to the plaintiff. The plaintiff claimed to be entitled to the amount of profit which the defendants had realized:—Held, that he was entitled to sue as principal in the transaction; that the defendants were not justified, either by law or by the custom of the Stock Exchange, in parting with the security during the currency of the loan, but were bound to return the identical stock pledged; and that he was entitled to recover from the defendants the amount of profit realised by their dealings with the stock. *Langton* v. *Waite*, 6 L. R., Eq., 165; 37 L. J., Ch., 345; 18 L. T., N. S., 81; 16 W. R. 508.

2. A person who employs a broker to transact business for him in a market, with the usage of which the principal is unacquainted, gives him authority to contract upon the footing of such usages, provided they are only such as relate to the mode of performing the contract, and do not change his intrinsic character. *Robinson* v. *Mollett*, 7 L. R., H. L., 802; 44 L. J., C. P., 362; 33 L. T., N. S., 544.

R. employed M. to buy tallow for him in the London market. There is a custom in this market for brokers to contract in their own names, and, if their principals refuse to accept or deliver, to sell or buy against them, and charge them with the loss, if any. R. was ignorant of this custom, and, on becoming aware of it, refused to accept the tallow; M. sold it, and brought an action for the loss he sustained by so doing, tallow having fallen:—Held, that the effect of the custom being to change the character of M. from an agent to buy for his employer into a principal to sell to him, R. could not be held to have agreed to be bound by it merely by employing M., to whom it was known, to perform the ordinary duties of a broker, being himself ignorant of it. *Ib.*

3. L. instructed his brokers to apply for fifty shares at 1*l.* each in a company which he named. They by mistake applied for and obtained an allotment to L. in another company. L. repudiated the shares, but his name was placed on the register. The company had at that time a very large number of shares unallotted, and in the opinion of the Court the shares were unsaleable in the market. The company was soon afterwards wound up, and the name of L. was removed on his application from the list of contributories. The official liquidator then claimed 50*l.* from the brokers by way of damages for their misrepresentation of authority:—Held, that the general rule as to measure of damages for breach of warranty of authority was applicable; that the liquidator was entitled to recover from the brokers the amount which the company had lost by losing the contract with L.; and that as L. was solvent and the shares unsaleable in the market, that loss was represented by the whole sum of 50*l.* payable for the shares. *Exp. Panmure, Re National Coffee Palace Co.*, 24 L. R., Ch. D., 367; 32 W. R. 236.

See also XIII. 6 *post*.

2. Commission.

4. Where brokers are directed by the order of the Court to take possession, for the purpose of selling property:—Held, that they were entitled to the ordinary remuneration, notwithstanding they happen to be mortgagees. *Arnold* v. *Garner*, 2 Ph. 231; 16 L. J., N. S., Ch., 329; 11 Jur. 339.

5. The charge of 10*s.* per cent. for commission, besides the legal interest, on a loan of money, is not usurious, if it is referable to trouble and expense *bonâ fide* incurred by the lender, although he may not be a banker, or a person engaged in trade, or although the money lent is his own, and not that of other persons. *Exp. Gwyn*, 2 Dea. & Ch. 12; 1 L. J., N. S., Bky., 73.

6. A bill broker, in order to get a bill discounted at 4 per cent., takes upon himself the responsibility of indorser, and charges his principal 5 per cent. discount, which is the lowest sum at which he could have done the business, except for his indorsement:—Held, that although he also charged 10*s.* per cent. for his trouble, etc., it was not usury, and that he was entitled to do so for his *del credere* commission. *Exp. Goss*, 2 Dea. & Ch. 240.

3. London Brokers.

7. Brokers in the city of London being directed to purchase iron delivered to the buyer bought notes, purporting to be notes of the contract for the iron, not disclosing the name of the seller, the brokers guaranteeing the performance of the contract; and the buyer paid the brokers their commission, together with a deposit in part payment of the price of the iron. The buyer afterwards discovered that there was no principal seller of the iron other than one of the firm of brokers, who intended himself to perform the contract; and upon a bill filed by parties from whom the buyer of the iron had obtained money on the security of the contracts, the deposits were ordered to be repaid with interest. If in such a case the plaintiffs had, before the bill was filed, abandoned all interest in the contracts for the iron, they could not afterwards sue for the recovery of the deposits; that the cancellation of certain letters, which gave the plaintiffs an interest in the contract as against the brokers, the plaintiffs being at the time of such cancellation ignorant, and the brokers knowing the truth of the case, does not in equity protect the brokers from the claim of the plaintiffs for the recovery of the deposits. If the plaintiffs had known that the brokers were also the sellers of the iron, or if the plaintiffs were otherwise not deceived by their representations, they would not have been entitled to relief in equity. Knowledge by the buyer of the fact that there was not any seller of the iron other

than the brokers, would not affect parties advancing money to the buyer on the faith of representations made to them by the brokers that the contract was regular and valid, nor deprive such parties of their right of rescinding the transaction, and recovering payments which had been made. *Wilson* v. *Short*, 6 Hare 366; 17 L. J., N. S., Ch., 289; 12 Jur. 301.

1. A broker of the city of London may maintain an action on a contract, or sustain a proof for a debt, arising out of transactions as a merchant, although such transactions are in contravention of the regulations under which he derives his office, and to the condition of the bond which he executes, and to the oath which he takes on his appointment: not, however, if the debt or contract arises out of a transaction in which he has acted both as broker and principal, that being void upon principles of common law. *Exp. Dyster*, 2 Rose 349; 1 Meriv. 155.

2. A broker in the city of London must answer a bill of discovery in aid of an action brought against him by his employer for misconduct, although the discovery will subject him to the penalty of a bond given by him to the corporation on his admission. *Green* v. *Weaver*, 1 Sim. 404; 6 L. J., Ch., 1.

3. A person who holds himself out as a broker of the city of London, and is employed by a person who believes him to be such, cannot, when sued by his principal for an account of his transactions as such broker on the principal's behalf, protect himself from discovery in a suit in equity, on the ground that it may render him liable to penalties for having acted as a broker without having been duly admitted as such, imposed by the 57 Geo. 3, c. 60. *Robinson* v. *Kitchin*, 2 Jur., N. S., 294; 25 L. J., Ch., 441. Affirming 21 Beav. 365; 2 Jur., N. S., 57; 25 L. J., Ch., 354.

Quære, whether it would make any difference that the principal, at the time of employing the broker, knew that he was not duly admitted. *Ib.*

4. A stock and sharebroker of the city of London gave a bond to the Corporation for due performance of his office. He appropriated to his own use large sums of money intrusted to him for investment. After his decease, upon a claim filed by a simple contract creditor:—Held, that the defrauded creditors had no priority by virtue of the bond, and that the amount due upon such bond was equitable assets for the benefit of all the creditors. *Naish* v. *Bryant*, 4 Jur., N. S., 550; 27 L. J., Ch., 748; 25 Beav. 533.

5. According to the usage of the London dry goods market, a broker who buys for an undisclosed principal is personally liable to the seller for the price of the goods. *Imperial Bank* v. *London & St. Katherine's Dock Co.*, 46 L. J., Ch., 335; 5 L. R., Ch. D., 195; 36 L. T., N. S., 233.

D., a broker, bought of C., for undisclosed principals, a quantity of gum sandrac then lying at the St. Katherine's Dock, to be paid for on Saturday, March 18th, and obtained a delivery order from C., which he gave to his principals on the faith of their representation that the goods were wanted for immediate shipment. D.'s principals, however, pledged the delivery order with a bank, and on the evening of March 17th they stopped payment. On the morning of March 18th the bank sent the delivery order to the dock office in the city, with a request for a warrant, which they were told would be ready on Monday. Notice of the delivery order having been lodged was sent by the dock company in due course to their warrant office at the dock, where, through a mistake of the messenger, it did not arrive until 3 p.m.; and in the meantime a clerk of D., who had, in accordance with the usage of the trade, paid the price of the goods to C. that morning, applied at the warrant office in C.'s name for a warrant for the goods, which was made out and given to him, as the goods were clear in the cargo ledger. C. indorsed the warrant to D., and in consequence of what had happened, the dock company, on the Monday, refused to act on the bank's delivery order. In an action by the bank against the dock company, D., and C.:—Held, that D. was entitled to the goods, for the bank had never obtained either actual or constructive possession of the goods, and that D., having paid the price of the goods as surety for his principals, was, notwithstanding his prior application for the delivery order and indorsement thereof, entitled by virtue of s. 5 of the Mercantile Law Amendment Act, 19 & 20 Vict., c. 97, to the benefit of the unpaid vendor's lien subsisting in C. *Ib.*

XII. DEL CREDERE AGENT.

6. The plaintiff employed the defendant, who was a corn factor, to sell a cargo of corn, which he accordingly sold to C. on the 15th May. Information was afterwards received that before this sale the corn had already been sold on the 24th April, by the captain of the vessel chartered by the plaintiff. This was not known at the time to either of the parties. C. subsequently gave notice to the defendant that he repudiated the contract, on the ground that the cargo did not exist at the time of the sale to him. The plaintiff sought to recover the price of the cargo from the defendant, who was a factor, on a *del credere* commission:—Held, that the defendant was not liable for the amount, as it was the sale of a cargo which did not exist at the time. *Couturier* v. *Hastie*, 5 H. L. Ca. 673; 2 Jur., N. S., 1241; 25 L. J., Exch., 253; 8 Exch. 40.

7. *Semble*, a contract for a *del credere* agency is not a promise to answer for the debt of another within the 4th section of the Statute of Frauds, on the authority of *Couturier* v. *Hastie* (8 Exch. 40), and observations on that case. *Wickham* v. *Wickham*, 2 Kay. & J. 478.

8. In an action by the assignees of a bankrupt underwriter against a broker for premiums due to the bankrupt; *semble*, that the broker cannot set off a loss on a policy effected by him as agent, without a commission *del credere*, where there has been no adjustment, though the loss took place before the bankruptcy. *Baker* v. *Langhorn*, 2 Marsh. 215.

9. A factor has a personal remedy against his principal, as well as a lien on the goods for advances made by him on account of the goods, and this is not altered by his having a *del credere* commission; but in that case he must be charged with the price of all goods sold by him, whether he receives such price

from the purchasers or not. *Graham* v. *Ackroyd*, 1 W. R. 197; 17 Jur. 657; 10 Hare 192; 22 L. J., Ch., 1046.

1. Where a mercantile firm in England borrows money of another firm, and both have a common agent abroad, if that agent credit the lending firm with sums received for the borrowing firm, in pursuance of an agreement between them, that credit is not a payment. If an agent, in anticipation of the receipt of the amount of sales for his principal, remit such amount, and the purchasers fail to pay, it is not the loss of the agent, but the loss of the principal; *contrà* if the agent sells on a *del credere* commission. The transfer from one account to another in the books of an agent is not payment as between the agent and the transferee of such account, and the entry is not an acknowledgment unless the transferee is informed of the fact. *McLarty* v. *Middleton*, 6 W. R. 379, 853.

XIII. FACTOR.

1. *Authority*, 5954.
2. *Pledge by*, 5954.
3. *Lien*, 5956.
4. *Accounts*, 5957.
5. *Set-off*, 5957.
6. *Suits by and against*, 5958.

1. Authority.

2. Mere advances made by a factor, whether at the time employed as such or subsequently, cannot have the effect of altering the revocable nature of an authority to sell, unless the advances are accompanied by an agreement that the authority shall not be revocable. *De Comas* v. *Prost*, 2 Moo. P. C., N. S., 158; 11 Jur., N. S., 417; 13 W. R. 595; 12 L. T., N. S., 682.

Whether such an agreement has been made, or may be properly inferred, is a question upon the evidence for the jury. *Ib.*

The judge directed the jury, that by the mere relationship of factor, the factor did not, by making advances, acquire any right in derogation of the rights of his principal to give directions as to the time and manner of sale, and that any such right on the part of the factor must be made out by an agreement, which might be inferred from the evidence, or might be implied by the proof of usage:—Held, that there was no misdirection. *Ib.*

2. Pledge by.

3. Under the Factors Act (5 & 6 Vict., c. 39), a contract with an agent for the pledge of goods will be valid as against the principal, though the person dealing with the agent knows him to be only an agent in respect of the goods pledged, provided that the person so dealing acts *bonâ fide* and without notice that the agent is acting *malâ fide* and beyond his authority. *Navulshaw* v. *Brownrigg*, 2 De G. M. & G. 441; 16 Jur. 979; 21 L. J., Ch., 908.

To deprive the pledgee of the protection of the Act, he must be fixed with knowledge that the agent is so acting as above stated, and no mere suspicion will amount to notice; nor will the knowledge that the agent has power to sell the goods constitute notice that he has not power to pledge them. *Ib.*

4. A merchant who has enabled his factor to raise money fraudulently can claim no redress against the party who has *bonâ fide* made the advance. *Vickers* v. *Hertz*, 2 L. R., H. L. (Sc.), 113.

The goods or symbols of property entrusted to the factor may be regarded by unsuspecting third parties as his own, and dealt with accordingly under the Factors Act, 5 & 6 Vict., c. 39. *Ib.*

5. M., a merchant and factor of London, employed by V., a merchant in Holland, to negotiate sales as a commission agent, obtained and transmitted to V. an offer from L. & F. to purchase a quantity of oil. V. accepted the offer, and subsequently shipped a quantity of oil in pursuance of the contract, and sent the bill of lading, specially indorsed to L. & F., to M. in order that it might be exchanged for L. & F.'s acceptance of V.'s draft. Before this, M., without any authority from V., agreed to cancel the contract with L. & F., and when the bill of lading arrived M. procured L. & F. to indorse it in blank and deliver it to him, by falsely representing that the special indorsement had been made by mistake. M. then caused the oil to be warehoused in his own name, and immediately pledged it to the plaintiff as security for an advance of 350*l.*:—Held, that the pledge was not protected by the Factors Acts (6 Geo. 4, c. 94, and 5 & 6 Vict., c. 39). *Vaughan* v. *Moffat*, 38 L. J., Ch., 144.

6. Where an agent entrusted with a document of title to goods pledges it *malâ fide*, or without authority, it is necessary, in order to deprive the transaction of the protection given by 5 & 6 Vict., c. 39, s. 1, and to bring it within the proviso of s. 3, that the jury should find categorically that the lender had notice of the agent's *mala fides* or want of authority. *Gobind Chunder Sein* v. *Ryan*, 8 Jur., N. S., 343; 10 W. R. 155; 5 L. T., N. S., 559; 9 Moo. Ind. App. 140.

7. A foreign owner of goods consigned them to a factor in London to whom he indorsed the bill of lading in blank, and transmitted it, with instructions to receive and sell the goods. The factor received the goods, paid the freight and charges thereon, and entered them in his own name at the Custom House; by reason of which, and without the privity or express assent of the owner, he obtained a dock warrant, which he pledged for advances beyond the amount, for which, as a factor, he had a lien on the goods:—Held, that, under these circumstances, he was not intrusted with the dock warrant within 6 Geo. 4, c. 94, s. 2. *Hatfield* v. *Phillips*, 12 Cl. & F. 343.

8. The 5 & 6 Vict., c. 39 (Factors Act), applies only to mercantile dealings, and does not give a lien for advances on goods and furniture used in a furnished house,—not in the way of trade,—of which the apparent owner was merely agent of the true owner. Such furniture:—Held, not to be "goods and merchandise," within the meaning of the 5 & 6 Vict., c. 39, nor the "agent" an agent within the statute, entitling him to make pledge of such goods for advances made. *Wood* v. *Rowcliffe*, 6 Hare 191; 11 Jur. 707, 915.

1. H., a speculator in cotton, in July 1864 requested W. to purchase for him, in W.'s name, 400 bales of Egyptian cotton, for delivery in the September following. W. assented, employing for the purpose (with the knowledge of H.), as his broker, C., who knew that W. was acting as agent, and W. became liable on a series of contracts, the first of which was due on the 9th September. The price of cotton falling, C. refused to take up the contracts unless he was secured from loss, and W. applied to H., who, on the 8th September, promised to give some security, and on the 26th September deposited with W., and W. deposited with C., with unconditional power of sale, a bill of lading of a cargo of Surat cotton; of which H. was the consignee from the plaintiffs, a firm at Bombay, as their factor, but H. was not known either to W. or to C. to be other than the true owner. On the same day, C. made a first payment on account of W.'s indebtedness under the contracts; and he continued to make other payments, W. not advancing anything. In October H. stopped payment, and the proceeds of the cargo of Surat cotton were now claimed by the plaintiffs:—Held, that the deposit of the bill of lading by H. was not made in respect of an antecedent debt of H. and W., within the meaning of the Factors Acts (4 Geo. 4, c. 83; 6 Geo. 4, c. 94; and 5 and 6 Vict., c. 39); and that having been made by H. in respect of an advance by C. on behalf of W., within the meaning of the same Acts, it was binding on the plaintiffs. *Jewan* v. *Whitworth*, 2 L. R., Eq., 692; 14 W. R. 1020; 36 L. J., Ch., 127.

2. A factor by pledging goods in his possession or under his control, as agent, for an amount which does not exhaust their value, has not thereby parted with his control over the goods, so as to preclude himself from making a further pledge for the balance of their value, which shall be valid as against the principal under the Factors Acts (6 Geo. 4, c. 94, and 5 & 6 Vict., c. 39). *Portalis* v. *Tetley*, 5 L. R., Eq., 140; 37 L. J., Ch., 139; 16 W. R. 503; 17 L. T., N. S., 344.

Cotton was consigned for sale by A. to B. B. deposited the bill of lading with C., a broker, and authorized him to receive and sell the cotton, and subsequently made a further pledge to D. of the balance of the net proceeds of the cotton by order in writing communicated to and assented to by C.:—Held, that the pledge to D. was valid as against A. under 5 & 6 Vict., c. 39. *Ib.*

3. The Factors Act (5 & 6 Vict., c. 39) does not apply to pledges for antecedent liabilities (whether they may or may not have ripened into debts), where no actual advance is made at the time of the pledge. *Macnee* v. *Gorst*, 4 L. R., Eq., 351; 15 W. R. 1197.

Therefore, where H., a factor, pledged goods of his principal to G.: first to secure the payment of an acceptance of H. in G.'s hands, not then due, which had been given to protect G.'s liability on a contract as H.'s broker, and, secondly, to repay to G. his loss on a resale of goods which G. had purchased for H. in his own name:—Held, that the transaction was not protected by 5 & 6 Vict., c. 39. *James* v. *Whitworth* (2 L. R., Eq., 692) explained. *Ib.*

4. Where there is a power by law to sell, a purchaser may obtain from the vendor, even as against the true owner, a good title, but that cannot extend by implication to a pledge. Barrow was a leather merchant in London. Bonnell was a tanner in Canada. Barrow agreed to pay Bonnell 1½*d.* per pound for every hide tanned by Bonnell in the mode of the country, and Bonnell was to procure freight, and send back the hides. Barrow sent out a large number of the hides; they were tanned, and freight was procured for them, but in the meantime Bonnell had obtained from the Toronto Bank advances, on his own account, on bills, and hypothecated the hides to the bankers as security for such advances, engaging to hand over to them the bills of lading if his bills of exchange were not duly honoured. They were not duly honoured, and the bankers (who had acted in entire ignorance of the transactions between Barrow and Bonnell) claimed to retain the bills of lading and the hides until their demands were satisfied:—Held, that, under the circumstances of the case, Bonnell could not, under any law, English or Canadian, claim to be a factor or agent of Barrow entitled to pledge Barrow's goods, and that consequently the bankers could not set up any title to the goods, as derived from him, against the real owners. *City Bank* v. *Barrow*, 5 L. R., App. Cas., 664; 43 L. T. 393.

5. A wool broker gave to a bank, to secure an advance, a letter of hypothecation on certain wools, promising to lodge warehouse warrants for them next day. The bank made repeated application for the warrants, but did not obtain them. After a few days, the broker having left his house, the bankers by pressure obtained the keys of his warehouse, where the wool was stored, and took possession. Part of the wool had belonged to a customer of the broker, but he was under advances and made no claim:—Held, that the bank acquired a valid charge on the wool under the provisions of the Factors Act, 6 & 7 Vict., c. 39. *Exp. North-Western Bank, Re Slee*, 15 L. R., Eq., 69; 42 L. J., Bky., 6; 27 L. T. 461; 21 W. R. 69.

In leaving his house the broker was, as it turned out, absconding:—Held, that the bank had no notice of this. *Ib.*

6. K., in Singapore, was in the habit of consigning goods to M. in London for sale. M. employed L. and P., London brokers, in the sale of these goods, and in other extensive sales and purchases, and died in May 1880, heavily indebted to them on the balance of his account. Shortly before M.'s death K. had consigned cargoes to M. by several different ships. M. put them in the hands of L. and P. for sale, and pledged to them the several bills of lading for separate advances made by them to him on the respective cargoes. As between K. and M. these pledges were unauthorized and improper; but L. and P. had no notice of any impropriety. One cargo had been sold before M.'s death, but not delivered nor paid for. The others remained unsold at his death, and were not sold until after the commencement of an action by K. to recover them. L. and P. claimed a general lien on the balances of the proceeds of all the cargoes after repayment of the specific advances, resting their claim on an alleged agreement with M. to that effect, and on mercantile usage:—Held, by the Court of Appeal, that neither such agreement nor such usage was established in evidence, and that if

they had been, such a general lien could not be claimed under the Factors Act:—Held, that apart from the Factors Act, K., an undisclosed foreign principal, could not sue L. and P. for the proceeds of goods properly sold by them in M.'s lifetime, or, if he could, he could only sue as representing M., and subject to all rights of set-off available against M., and that therefore L. and P. were entitled to a lien on the balance of the proceeds of the sold cargo, although it was not delivered or paid for in M.'s lifetime: —But held, that as regards the goods unsold at M.'s death, K. was entitled to them subject only to the payment of the sums for which they were respectively specifically pledged. *Kaltenbach* v. *Lewis*, 24 L. R., Ch. D., 54; 52 L. J., Ch., 881; 48 L. T. 844; 31 W. R. 731. Varying 45 L. T. 666; 30 W. R. 356.

L. and P. bought goods for M., not disclosing the fact that they bought as agents, and were, therefore, as between them and the vendors, personally liable to pay. On the day before the day of payment, M. asked L. and P. to make him an advance, on the security of one of K.'s cargoes, to enable him to pay for those goods. L. and P. did so, and the goods were thus paid for through L. and P. They knew that the cargo pledged did not belong to M., but nothing further; and they did not know whether the goods bought by M. were bought on his own account or not:—Held, that as M. was not at the time of the advance indebted to L. and P. in respect of the goods bought, though they were sureties for the payment, the pledge was not a pledge to secure an antecedent debt within the meaning of 5 & 6 Vict., c. 39, s. 3, and was valid, there being nothing in the circumstances to give them notice that M. was violating his duty to his principal. *Ib.*

1. *Semble*, where in order to save trouble delivery orders were not signed, but an arrangement was made that delivery should be made to persons producing cash receipts from the cashiers of the holders of the bill of lading, such receipts cannot be considered as a document of title within s. 5 of the Factors Act 1877 (40 & 41 Vict., c. 39). *Kemp* v. *Falk*, 7 L. R., App. Cas., 585; 52 L. J., Ch., 173; 47 L. T. 457; 31 W. R. 128.

3. Lien.

Of Factor.] 2. A factor has a lien on his principal's goods for the general balance due to him. *Godin* v. *London Assurance Co.*, 1 W. Black. 104.

3. Bills remitted to a factor or a banker, while unpaid, are in the nature of goods unsold, and, on failure of the factor, must be returned to the principal, subject to such lien as the factor may have thereon. *Zinck* v. *Walker*, 2 W. Black. 1154.

4. Factor gains a lien on goods consigned to him from his correspondent for the balance of his account, as well as for the duties, etc., and may retain for such balance; but if he parts with the possession of the goods to the owner, he loses the lien for the balance of accounts. *Kruger* v. *Wilcox*, Ambl. 252; Dick. 269.

5. Factor's lien both for his expenditure on the goods in his possession, and his general balance, lost by a special contract for a particular mode of payment. So in various trades. *Cowell* v. *Simpson*, 16 Ves. 280.

6. A. agreed to sell goods to B. to be accounted for in part of a debt to B.; C. with notice, agreeing to sell the goods as factor, not allowed to retain for a debt to him from A. *Weymouth* v. *Boyer*, 1 Ves. J. 416.

7. Under an agreement between a shipper of goods and a factor, through whom the goods were sold in a foreign country, the factor gave his acceptances to the shipper for a proportionate part of the value of the goods, for the payment of which acceptances, if not satisfied by the proceeds of the goods, the shipper was to provide:—Held, that on his failure to do so, and on the payment of the acceptances by the factor, the shipper of the goods became debtor in account to the factor for the amount paid by the latter; and that the remedy of the factor was not merely in damages. *Graham* v. *Ackroyd*, 10 Hare 192; 17 Jur. 657; 22 L. J., Ch., 1046; 1 W. R. 197.

Where a factor makes advances he has a personal remedy against the principal as well as a lien on the fund; and this is the same whether the factor has or has not a *del credere* commission, except that when the factor having a *del credere* commission has sold the goods, he cannot sue the principal for advances which are covered by the price of the goods, that price being warranted to the principal by the guarantee arising out of the commission. *Ib.*

Of Principal.] 8. A. employs B., as his factor, to sell; B. sells on credit, and, before the money is paid, dies indebted by specialty more than his assets will pay. This money shall be paid to A., and not to the administrator of B., as part of his assets, but thereout must be deducted what was due to B. for commission. A factor is in nature of a trustee only for his principal. *Burdett* v. *Willett*, 2 Vern. 638.

9. Where goods consigned to a factor continue in specie, and are found in his hands at the time of the bankruptcy, the principal is entitled to them and not the creditors at large. *Exp. Dumas*, 1 Atk. 234; 2 Ves. 582. *Godfrey* v. *Furzo*, 3 P. W. 186. *Mace* v. *Cadell*, Cowp. 233.

Also, if notes and not money be taken for the goods, they shall belong to the principal. *Ib.*

10. Merchant's goods in hand of factor are not liable to debts of a superior nature; otherwise of money. *Whitecomb* v. *Jacob*, 1 Salk. 160.

11. A factor makes an agreement with the master for the hire of a ship on his own account, for 48*l.* per month, and not on the part of the merchants, his principals; they are not liable, nor are their goods put on board, to satisfy the master's demand, but they are liable to pay the factor the freight for their cargo; and as he was bound by the charter-party, which gave the master a specific lien on the goods, the master has a right to be paid in the first place, before the assignees of a factor under a commission of bankruptcy, for the assignees only stand in the bankrupt's place. So, if a factor becomes bankrupt, and the merchant's goods are not mixed with his, the assignees shall not have them. Whoever lets a ship to hire, must take care that the hirer is substantial, for if he be not competent the

master must pay for his neglect; yet a factor may retain goods to pay custom for salvage. *Paul* v. *Birch*, 2 Atk. 621.

1. The plaintiffs, who were cotton spinners, employed a commission agent to sell their goods, and the course of business was for the agent to obtain the assent of the plaintiffs to each sale. The agent transmitted to the plaintiffs the particulars of certain sales, which he represented as having been made to specified purchasers, and afterwards rendered accounts, debiting himself with the purchase moneys, but not paying the balance. He afterwards executed an assignment for the benefit of his creditors, when it appeared that his representations as to his disposal of the goods were untrue, and that he had in fact consigned the goods for sale as and with goods of his own to factors in India, and that the accounts had been settled between him and the factors on the footing of debiting each cargo only with the advances and charges made in respect of that cargo, but that on the whole account there was a balance coming from the factors:—Held, first, that the plaintiffs were entitled to have the proceeds marshalled, and the advances and charges thrown entirely on the agent's own goods. *Broadbent* v. *Barlow*, 3 De G. F. & J. 570; 30 L. J., Ch., 569.

Held, secondly, that this right was not excluded by the settlement of accounts between the plaintiffs and the agent, or by the former having had upon the agent's books the means of discovering the fraud before a meeting took place of his creditors, at which the plaintiffs attended, and at which the deeds of assignment were agreed to, but at which neither the fraud, nor the claim founded on it, was brought forward; the principle being, that means of knowledge to affect a person with constructive notice must be such as a prudent man might be expected to avail himself of. *Ib.*

Held, thirdly, that the right was not excluded by the mode in which the factors had rendered their accounts to the agent, nor by their not having themselves set up any claim to marshal the proceeds of the consignment. *Ib.*

Held, fourthly, that the enforcement of this right did not preclude the plaintiffs from proving under the deed of assignment for the deficiency. *Ib.*

4. Accounts.

2. Infant cannot be made to account as factor. *Smally* v. *Smally*, 1 Eq. Abr. 6.

3. A surviving factor must account both for himself and his co-factor, though admitted that the executrix of the deceased factor was compellable, and that among merchants the *jus accrescendi* has no place. *Holtscomb* v. *Rivers*, 1 Ch. Ca. 127.

4. If a merchant employs his apprentice as a factor beyond sea, and he dies, his administrator shall account. *Lee* v. *Bowler*, Rep. *temp.* Finch 125.

5. A. sends B. as a factor abroad, and commissions him to draw on a foreign merchant, which he does, and so states in the account furnished. A. gives credit for the bills drawn as cash; but the bills are not accepted, by the contrivance of A. B. shall not be concluded by that account, but be paid. *Ward* v. *Praed*, Coles's P. C. 57.

6. Amongst the most important duties of a factor are those which require him to give to his principal the free and unbiassed use of his own discretion and judgment, to keep and render just and true accounts, and to keep the property of his principal unmixed with his own or the property of others. A factor having violated all these and other duties:—Held, that no credit was due to his accounts, and that the principal was not bound by them. *Clarke* v. *Tipping*, 9 Beav. 284.

7. Plaintiff, a factor abroad, having exceeded the price limited for the purchase of hemp, the defendant, who objected to the contract, but afterwards re-shipped and disposed of some of it on a risk, was ordered to account for the cost price. *Cornwall* v. *Wilson*, 1 Ves. 509.

Factor exceeds orders on one part, saves on another, the principal to take the whole. *Ib.*

8. Factor or correspondent pretending to insure as directed, charged as if he had insured. But such equity does not extend to an agent employed by him (ignorant of such deception). *Tickel* v. *Short*, 2 Ves. 239.

9. If a factor evades the custom of goods due to a foreign prince, and thereby incurs the punishment of a felon, and the forfeiture of the whole freight, he shall have the benefit, for he ran the risk. *Smith* v. *Oxenden*, 1 Ch. Ca. 25. S. P. *Knipe* v. *Jesson*, 1 Ch. Ca. 76.

10. *Secus*, if the factor evades the custom due to the King of England, for that is a fraud. *Borr* or *Borre* v. *Vandall* or *Vande*, 1 Ch. Ca. 30; Nel. 87.

11. Bill brought by principal to discover what goods defendant bought of his agent; he demurred, for that he was not obliged to set out what gain he had made by retail; demurrer overruled. *Lisset* v. *Reave*, 2 Atk. 394.

5. Set-off.

12. It being within the ordinary scope of a factor's authority to sell his principal's goods in his own name, a purchaser who has no knowledge of the agency is entitled to set off against the price of the goods a debt due to him from the factor personally. *Exp. Dixon, Re Henley*, 46 L. J., Bky., 20; 4 L. R., Ch. D., 133; 35 L. T., N. S., 644; 25 W. R. 105.

A principal had stipulated with his factor that bills of exchange for the price of goods sold should be made payable in such a manner as to show the factor's connexion with the principal, and they were, in fact, stamped "Agent for W. Dixon (Lim.), Calder and Govan Ironworks, Glasgow," in pale blue ink, but so that the stamp was concealed or obscured by the agent's signature:—Held, that the purchase being from a factor, and not a mere agent, the stipulation was immaterial as regarded the purchaser, unless he was affected with notice, and that the stamping of the bills was not sufficient evidence of notice against the purchaser's uncontradicted oath that he was unaware of any agency. *Ib.*

13. A. employs B. as his factor to sell cloth; B. sells cloth on credit, and before the money is paid dies, indebted by specialty more than his assets will pay; this money shall be paid to A., and not to the administrator of B. as part of his assets, but thereout must be deducted what was due to B. for commission; a factor is in

nature of a trustee only for his principal. *Burdett* v. *Willett*, 2 Vern. 638.

1. Administrator of a clothier brings an action against the factor for cloths sent by the clothier to the factor; the factor cannot in equity deduct, out of the value of the cloth, the money owing to him from the clothier. *Chapman* v. *Derby*, 2 Vern. 117.

2. A foreign merchant remitted bills to his factor in London for the purpose of being sold, with a view to enable the factor to meet bills which the foreign merchant had drawn or was about to draw upon him. The bills remitted were endorsed by the foreign merchant to the factor, and by the latter in his own name to the purchaser. Before the purchase money of the bills was paid the factor became bankrupt: —Held, that the proceeds of the bills belonged to the foreign merchant, and were not subject to a lien claimed by the purchaser in respect of a debt owing to him by the factor. *Exp. Pauli, Re Trye*, 3 Dea. 169 ; 2 Jur. 208.

3. Merchants in London, upon the instruction of shipping agents at Havannah, with respect to a cargo of tobacco to be consigned to the London merchants, and after receiving the shipping documents, effected policies of marine insurance in the ordinary form on behalf and for the benefit of all parties whom it might concern. The Havannah agents shipped and consigned the tobacco in their own names, but were in fact acting as commission agents for Havannah merchants to whom the tobacco belonged ; and the London merchants, before effecting the policies, had notice that the Havannah agents had an unnamed principal. A total loss having occurred, the London merchants received the policy moneys, but before receipt had notice that the moneys were claimed by the Havannah principals :—Held, that an action lay by the Havannah principals against the London merchants for the policy moneys ; that the London merchants were not entitled to a lien upon the moneys for the balance of their general account with the Havannah agents, and could not in that action set off their claim to that balance, or set off anything, except the premiums, stamps, and commission in respect of the insurance. *Mildred* v. *Maspons*, 8 L. R., App. Cas., 874 ; 53 L. J., Q. B., 33 ; 49 L. T. 685 ; 32 W. R. 125.

Held, also, by Lord Blackburn, that the case fell within the Factors Act (6 Geo. 4, c. 94), s. 1. *Sed quære*, by Lord Fitzgerald. *Ib.*

6. Suits by and against.

By Factor.] 4. A factor who sells goods for a principal may bring an action in the name of the principal against the vendee, and make himself a witness; or a vendor of goods to a factor for the use of his principal may maintain an action against the principal, and the factor may be a witness for the vendor. *Snee* v. *Prescot*, 1 Atk. 248.

Against Factor.] 5. Broker or factor not naming principal, may be examined on action in name of principal, but simply for benefit of trade ; if principal is declared, action must be against him. *Dixon* v. *Parker*, 2 Ves. 221.

But such broker or factor must act for another at the very time ; no subsequent consent or agreement will do. *Ib.*

6. Brokers and factors who act or agree for their principals are not liable in their own capacities. *Johnson* v. *Ogilby*, 3 P. Wms. 279.

XIV. ESTATE AGENTS.

7. When an owner of property employs an estate agent to procure a purchaser or tenant at a specified price, the agent has no implied authority to conclude a contract for sale ; his duty is simply to find a purchaser or tenant, and to communicate his offer to the owner. *Wilde* v. *Watson*, 1 Ir. L. R., Ch. D., 402.

8. An estate or a house agent, to whom instructions are given to procure a purchaser for property, has not, though the price is named in the instructions, authority to enter into a binding contract with a purchaser to sell such property. *Hamer* v. *Sharp*, 44 L. J., Ch., 53 ; 19 L. R., Eq., 108 ; 23 W. R. 158 ; 31 L. T. 643.

9. An agent to let lands is bound to let them to the best advantage ; but upon the mere ground of undervalue, a *bonâ fide* letting, which would be binding on the principal himself, will be equally binding on him when he acts through an agent, if the agent has acted fairly and honestly. *Dyas* v. *Cruise*, 2 J. & L. 460 ; 8 Ir. Eq. R. 407.

10. A power to a land agent to "manage and superintend estates" authorises him, on behalf of his principal, to enter into an agreement for the usual and customary leases, according to the nature and locality of the property. *Peers* v. *Sneyd*, 17 Beav. 151.

XV. GOVERNMENT AGENTS.

11. An agent who has received his instructions from a local subordinate government is not bound to recognise the authority of the supreme government, with respect to which his immediate principal is subordinate, in the subject matter of the agency. *Spain* (*Queen of*) v. *Parr*, 18 W. R. 110 ; 21 L. T., N. S., 555.

The London agent, who was also a member of a firm, who was commissioned to sell goods on behalf of the local government of a Spanish colony, was held to be justified in refusing to give them up to the Spanish consul-general in England till he had communicated, through his immediate principals, with the local government. S. C. 39 L. J., Ch., 73.

12. An act done by an agent of the government, though in excess of his authority, being ratified and adopted by the government, is equivalent to a previous authority. *Secretary of State for India* v. *Kamachee Boye Sahaba*, 7 Moo. Ind. App. 476 ; 13 Moo. P. C. 22.

See also FOREIGNER AND FOREIGN LAW, III.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PRINTER.

See also AUTHOR AND PUBLISHER.

1. Where a printer has been in the habit of printing and selling indiscriminately labels containing a copy, or colourable imitations, of the trade mark of the plaintiff, the celebrated manufacturer of eau de Cologne, and the plaintiff had filed his bill for an injunction to restrain such printing and selling, which was granted by the Vice-Chancellor, the Lord Chancellor dissolved the injunction on the ground that it appeared that there was a legitimate object for which these labels might be applied by retail dealers, viz., to replace soiled labels affixed to bottles containing the genuine eau de Cologne of the plaintiff. *Farina* v. *Silverlock*, 6 De G. M. & G. 214; 2 Jur., N. S., 1008; 26 L. J., Ch., 11.

Rights of Queen's Printer.] See COPYRIGHT, II. VI.

Printing Libellous Matter.] See DEFAMATION, III.

PRINTING PLEADINGS.

See PRACTICE (ANSWER)—PRACTICE (BILL).

PRINTS AND ENGRAVINGS.

See COPYRIGHT, V.

PRIORITY.

— *Of Charging Order.* See STOCK, V. IV.
— *Of Judgments.* See JUDGMENT, IX.
— *Of Legacy.* See EXECUTOR AND ADMINISTRATOR—LEGACY.
— *Of Liens and Mortgages.* See MORTGAGE, VII.—SOLICITOR, XIV. AND XV.
— *By Notice.* See EQUITABLE ASSIGNMENT—NOTICE—REGISTRATION.
— *Of Stop-Order.* See PRACTICE (STOP-ORDER).
— *Of Suit.* See PRACTICE (CROSS-BILL OR CAUSE)—EXECUTOR AND ADMINISTRATOR, XXXII. VIII. AND IX.

See also PRACTICE (STAY OF PROCEEDINGS).

PRISONER.

See BANKRUPTCY—DEBTORS ACT—PRACTICE (ATTACHMENT AND PROCESS OF CONTEMPT)—PRACTICE (HABEAS CORPUS)—PRACTICE (BILL PRO CONFESSO).

PRIVATE ACT.

See STATUTE.

PRIVATE BILL.

See PARLIAMENT.

PRIVATE HEARING OF ACTIONS.

See PRACTICE (TRIAL OR HEARING).

PRIVATE LETTERS.

— *Copyright in.* See COPYRIGHT, II. III. 3.
— *Letters Written without Prejudice.* See PRACTICE (EVIDENCE).

See also LETTERS—PRACTICE (DISCOVERY, PRODUCTION, AND INSPECTION).

PRIVILEGED COMMUNICATION.

See DEFAMATION—PRACTICE (DISCOVERY, PRODUCTION, AND INSPECTION).

PRIVILEGE FROM ARREST.

See BANKRUPTCY—PRACTICE (ARREST, PRIVILEGE FROM).

PRIVILEGE OF BANKRUPT.

See BANKRUPTCY.

PRIVILEGE OF PARLIAMENT.

See PARLIAMENT, I.—PEER AND PEERAGE, I.—BANKRUPTCY, VII. XXIV.

PRIVILEGE OF SOLICITORS.

See PRACTICE (ARREST, PRIVILEGE FROM)—SOLICITOR.

PRIVILEGE OF SUIT.

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I. JURISDICTION.

1. The Privy Council has no jurisdiction to direct the release of a party imprisoned for a contempt of the court below pending an appeal respecting the merits of the suit. *Hughes* v. *Porrel*, 4 Moo. P. C. 41.

2. *Semble*, a fine imposed by a court of record, for contempt of court, cannot be remitted by the Privy Council on appeal. *Smith* v. *Sierre Leone* (*Justices*), 3 Moo. P. C. 361.

3. The Judicial Committee of the Privy Council have no power under their general jurisdiction, as a court of error, to issue an order in the nature of a mandamus to the Court of Common Pleas to enter up judgment, though it was quite clear that judgment ought to have been entered up. *Re Muir*, 3 Moo. P. C. 150.

4. *Semble*, the Judicial Committe have no jurisdiction to determine matters litigated in an inferior court, but on appeal from the decision of that Court. *Re Gould*, 2 Moo. P. C. 188.

5. The Judicial Committee are bound to take notice of the law of the country from which the appeal comes, and to decide according to it, although it has not been noticed in the court below. When, therefore, a court below had decided upon the ground of evidence of which they had cognisance in another suit, but which was not legally before them in the suit in question, their decree was supported on the ground that the appellant, who was the plaintiff before them, had, according to the law of the country, no right to sue. *Chowdry* v. *Dibeh*, 3 Knapp 55.

6. The next of kin of an intestate filed their bill in equity, in the Supreme Court of Newfoundland, against A., the brother and deceased partner of the intestate, for an account of the estate of the father of A. and of the intestate, possessed by A., and an account of the partnership transactions, and the dealings of A. with the estate, since the death of the intestate. The bill was taken *pro confesso* against A., in the Colonial Court; and, on a reference, the Master reported that certain sums were due to the several next of kin on the account of the estate of the intestate's father possessed by A.; but that no account between A. and the intestate had been laid before him. The Supreme Court decreed that the sums, found by the Master to be due to the next of kin, and the costs, should be paid to them by A. The next of kin brought their actions in this country against A. upon the decree. A. then filed his bill in this court against the next of kin and personal representative of the intestate, stating that the intestate's estate was indebted to him on the partnership accounts and on private transactions, alleging various errors and irregularities in the proceedings in the Supreme Court, and that A. intended to appeal therefrom to the Privy Council; and praying that the estate of the intestate might be administered, the partnership accounts taken, the amount of the debt due to A. ascertained and paid, and the next of kin restrained by injunction from proceeding in their actions. Demurrer, for want of equity, allowed, on the ground that the whole of the matters were in question between

the parties, and might properly have been the subject of adjudication in the suit before the Supreme Court of Newfoundland. That inasmuch as the Privy Council is the court of appeal from the Colonial Court, and has jurisdiction to stay the execution of the decree pending the appeal, the Court will not interfere by injunction on the ground of error or irregularity in the decree of the Colonial Court. *Henderson* v. *Henderson*, 3 Hare 100.

Whether, in a case of error, shown in the judgment of the Court of a foreign country, from which there was no appeal to any of Her Majesty's Courts, the decision would be the same, *quære*. *Ib.*

1. The British North America Act 1867, s. 91, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer, and did confer, on it legislative power to interfere with property, civil rights, and procedure within the provinces, so far as these latter might be affected by a general law relating to these subjects. Consequently the Dominion enactment, 40 Vict., c. 41, s. 28, amending the Canadian Insolvent Act, and providing, that the judgment of the Court of Appeal in matters of insolvency should be final, and not subject to the appeal as of right to Her Majesty in Council allowed by the Civil Procedure Code, Art. 1178, is within the competence of the Canadian Parliament, and does not infringe the exclusive powers given to the provincial legislatures by s. 92 of the Imperial statute. Neither does it infringe the Queen's prerogative, for it only limits the right of appeal as given by the code. *Cushing* v. *Dupuy*, 5 L. R., App. Cas., 409; 49 L. J., P. C., 63; 42 L. T. 445.

The section, according to the true construction of the word "final" therein, excludes appeals to Her Majesty; but contains no words which purport to derogate from the prerogative of the Queen to allow such appeals as an act of grace. It, therefore, does not interfere with the prerogative of the Crown: and, *quære*, what powers may be possessed by the Parliament of Canada so to do. *Ib.*

II. ORDERS IN COUNCIL. CONSTRUCTION.

2. As to construction of orders in Council, see *Martyn* v. *Macullock*, 1 Moo. P. C. 308.

3. An ordinance passed in pursuance of an order in Council, and not altered or disapproved by Her Majesty in Council, though seemingly more extensive than contemplated by the order, is not void for the excess, but will be considered as duly authorised by the order, and taken in conjunction with it. *Inglis* v. *Barnard*, 3 Moo. P. C. 425.

Effect of on Subordinate Tribunals.] 4. When a decision of the Judicial Committee has been reported to Her Majesty, and has been sanctioned, it becomes the decree or order of the final Court of Appeal; and it is the duty of every subordinate tribunal to whom the order is addressed to carry it into execution. *Pitts* v. *La Fontaine*, 6 L. R., App. Cas., 482; 50 L. J., P. C., 8; 43 L. T. 519.

III. APPEAL, RIGHT TO, AND SPECIAL LEAVE.

1. *Right to*, 5961.
2. *Where no Intermediate Appeal*, 5962.
3. *Leave, when Granted*, 5963.
4. *Criminal Cases*, 5966.
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7. *Appealable Value*, 5968.
8. *Petition for Special Leave*, 5970.

1. Right to.

5. *Semble*, the Crown has no greater right than the subject to be let in to appeal in a general case in which its interests are concerned. *Laing* v. *Ingham*, 3 Moo. P. C. 26.

6. An appeal lies from a decree in the Isle of Man to the King in Court. *Christian* v. *Corren*, 1 P. W. 329.

7. *Semble*, that an appeal against the sentence of a colonial bishop, should now pray a reference to the Judicial Committee, and not to a commission of delegates. *Bowerbank* v. *Jamaica* (*Bishop*), 2 Moo. P. C. 449.

8. An appeal from decrees made in the plantations lies only to the King in Council. *Fryer* v. *Bernard*, 2 P. W. 262.

9. The right of appeal given by the charters of Bengal, Madras, and Bombay extends to interlocutory orders as well as to final decrees, but it does not extend to the finding of a jury upon an issue from the equity side of the court, no motion for a new trial having been made, nor exceptions taken to the Master's report founded on the verdict. *Ramdass* v. *Madowdass*, 3 Moo. P. C. 87.

10. A party is not bound to appeal from an interlocutory decree, though he might by so doing have raised the whole question at issue on the appeal from the definite sentence. *Jones* v. *Gough*, 3 Moo. P. C., N. S., 1.

11. An interlocutory order, referring matters of account to the sworn accountant of the Court of Civil Justice in Berbice, with instructions thereon, is not such a definite sentence as by the rules of the civil law requires a specific appeal, but may be questioned on a general appeal from the final sentence of the Court. *Cameron* v. *Fraser*, 4 Moo. P. C. 1.

12. No appeal lies from the Court of Common Pleas in Antigua except to the Court of Error in the island, from whose judgment an appeal lies to the Queen in Council; but the refusal of that Court to enter upon such appeal, under the mistaken notion that they were not properly constituted as a Court, was held not sufficient to let in an appeal to the Queen in Council. *Re Manning* (*Assignees*), 3 Moo. P. C. 154.

13. An appeal will lie to the Lords of the Committee of Council from a provisional order of the Royal Court of Jersey. *Re Belson*, 7 Moo. P. C. 114; 14 Jur. 631.

14. An order made by the judges of the Supreme Court of Madras, dismissing the Master of that court from his office for alleged official misconduct in the taxation of a bill of costs, reversed upon appeal by the Judicial Committee of the Privy Council. *Re Minchin*, 6 Moo. P. C. 43.

Such an order, being made by the Court a its own instance, is not an appealable griev

ance within the Madras Charter of Justice of December 1800. *Ib.*

1. By an order in Council of the 30th June 1860, provision is made for appeals from the Supreme Court in the colony of Queensland to Her Majesty in Council. *Australasia (Bank)* v. *Harris*, 8 Jur., N. S., 181; 10 W. R. 383; 15 Moo. P. C. 97.

2. The Judicial Committee has no jurisdiction to take into consideration the propriety of the dismissal of a public servant by a governor-general of a colony from an office held during his pleasure, unless the matter is expressly referred to them by the Crown. *Exp. Robertson*, 11 Moo. P. C. 288.

3. Where a party had repudiated the succession before the sheriff, and an Act founded on that repudiation had been in his presence recorded in the Royal Court, he was not allowed to appeal against that Act, though he alleged that he never meant to repudiate the succession, but only to avoid his share in certain unnecessary expenses, and though it appeared the record contained error on the face of it, that being a matter for the Court below to set right if required. *Le Feuvre* v. *Le Feuvre*, 2 Moo. P. C. 70.

4. An appeal lies to the Privy Council as a court of error, if there is error on the face of the record, such as might be moved in arrest of judgment in the court below. *Tronson* v. *Dent*, 8 Moo. P. C. 420.

5. It is the settled prerogative of the Crown to receive appeals in all colonial causes. *Re Natal (Bishop)*, 11 Jur., N. S., 353; 13 W. R. 549; 12 L. T., N. S., 188.

It is the undoubted prerogative of the Crown to receive appeals in all colonial causes; and by the 25 Hen. 8, c. 19 (by which the mode of appeal to the Crown in ecclesiastical causes was directed), it is by s. 4 enacted, that "for lack of justice at or in any of the courts of the archbishops of this realm, or in any of the King's dominions, it shall be lawful to the parties grieved to appeal to the King's Majesty in the King's Court of Chancery"—an enactment which gave rise to the commission of delegates, which was abolished by 2 & 3 Will. 4, c. 92, and for which the Judicial Committee of the Privy Council is by 3 & 4 Will. 4, c. 41, substituted. S. C. 3 Moo. P. C., N. S., 115.

In a dispute in a colony between two independent prelates, which, previously to the 25 Hen. 8, c. 29, would have been referred to the Pope, Her Majesty has appellate jurisdiction, and can exercise the same by referring the matter, under the 3 & 4 Will. 4, c. 41, for the advice of the Judicial Committee. *Ib.*

6. An information by way of bill of complaint was by consent amended by the introduction of the words, "That the rights, if any, of the several defendants may be ascertained and declared by decree of the Court, and that they may be ordered to pay each to the others and other of them their and his costs of this suit, and that the Court will give such further directions in the premises as shall be necessary." There was no stipulation that the right of appeal should be given up, and it appeared that the parties never contemplated that they were ceasing to keep the cause *in curiâ*, or that the judge was to hear it otherwise than as a judge, or that it was not to go on subject to all the incidents of a cause regularly heard in court:—Held, that the right to appeal had not being waived. *Pisani* v. *Att.-Gen. (Gibraltar)*, 5 L. R., P. C., 516; 22 W. R. 900; 30 L. T., N. S., 729.

7. A party to a suit, having an interest in the subject matter in his own right, and also as trustee for other parties, became insolvent, and his interest was vested in a trustee appointed to his sequestered estate:—Held, that he might, as such trustee, prosecute an appeal from an order made in the suit, notwithstanding the insolvency and the vesting of his estate and interest in the trustee of the sequestered estate. *Bute (Marchioness)* v. *Mason, Exp. Heard*, 7 Moo. P. C. 1.

8. The rule of English law that an appeal does not lie unless given by express legislative enactment does not prevail in French or Canadian law. *Montreal (Mayor, etc.)* v. *Brown*, 35 L. T., N. S., 870; 2 L. R., App. Cas., 168.

By a colonial statute, commissioners were appointed to fix the compensation to be paid for property taken for public improvements who were to make a report to be confirmed by the Superior Court, from which there was no appeal. The Act contained a further provision, that if the commissioners did not fulfil their duties in a diligent manner, they might be removed on petition to the Superior Court:—Held, that the Court of Queen's Bench had jurisdiction to entertain an appeal from the Superior Court upon a petition under the Act. *Ib.*

Upon a question of procedure, the Judicial Committee will be unwilling to reverse the decision of a colonial Court. *Ib.*

9. Express words are necessary to limit the prerogative of the Crown to entertain appeals; but the jurisdiction of Courts in election petitions, delegated to them by colonial legislative bodies, is special in its character, and does not involve as one of its incidents any right of appeal to the Crown. *Théberge* v. *Laudry*, 46 L. J., P. C., 1; 2 L. R., App. Cas., 102; 35 L. T., N. S., 640; 24 W. R. 216.

10. By Supreme Court Act 1875 (38 Vict. c. 11), s. 47, the judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any court of appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be ordered to be heard, saving any right which Her Majesty may be graciously pleased to exercise by virtue of her royal prerogative:—Held, that this section referred only to the hypothetical establishment in the future of a Court for hearing colonial appeals, not to any existing Court; and that in any case it left the Crown's prerogative entirely untouched. *St. Andrew's Church, Montreal* v. *Johnston*, 3 L. R., App. Cas., 159; 37 L. T., N. S., 556; 26 W. R. 359.

2. Where no Intermediate Appeal.

11. The Court, on special grounds, and upon terms, allowed an appeal, under 7 & 8 Vict., c. 69, direct from the Colonial Court, without bringing a previous writ of error in the Court of Error there. *Re Barnett*, 4 Moo. P. C. 453.

12. Where there are questions of law, raised

by the proceedings in the inferior courts in the colonies, the Judicial Committee of the Privy Council will favour an application for leave to appeal direct to the Queen in Council, under the 7 & 8 Vict., c. 69, without resorting to the intermediate court of appeal in the colony. *Harrison* v. *Scott*, 5 Moo. P. C. 357; 10 Jur. 443.

1. Under the statute 7 & 8 Vict., c. 69, an appeal allowed direct from the Assize Court, at Kingston, in Jamaica, to the Queen in Council, without an intermediate appeal to the Court of Error in the island. *Hitchins* v. *Hollingsworth*, 7 Moo. P. C. 228.

2. An appeal does not lie direct from the Supreme Court of New Zealand. *Re Bunny*, 8 W. R. 248.

3. The 15 Vict., No 10, gives an appeal to Her Majesty in Council from every judgment of the Supreme Court of Victoria. The 19 Vict., No. 13, gives one judge power to sit alone in the Supreme Court in equity, and gives an appeal to the whole court in banc, saving the appeal from the judgment of the full court to the Queen in Council:—Held, that the judgment of the single judge in equity is a judgment of the Supreme Court from which an appeal will lie direct to Her Majesty, and that the intermediate appeal is only permissive. *Garden Gully United Quartz Mining Co.* v. *M'Lister*, 1 L. R., App. Cas., 39; 24 W. R. 744; 33 L. T. 408.

3. Leave, when Granted.

4. By a Charter of Justice to a colonial Court, power was given to any party to appeal to the King in Council, against any final judgment, decree, or sentence of the Court, or any rule or order having the effect of a final or definitive sentence, and which appeal should be subject to the regulations therein mentioned. In a subsequent part of the charter there was a reservation to the King in Council, upon the petition of any person aggrieved by any judgment or determination of the Court to appeal therefrom, upon such other terms, and subject to such other regulations and restrictions, as to His Majesty should seem fit:—Held, upon a petition for leave to appeal, that no appeal could be allowed, except from a final judgment, decree, or sentence, or rule, or order, having the effect of a definitive sentence. *Re Mahon*, 2 Knapp 66.

5. *Semble*, where a matter has been referred by Her Majesty to the Judicial Committee, which is not strictly an appealable grievance, their lordships may, under the reservations contained in the 3 & 4 Will. 4, c. 41, advise Her Majesty to grant the petitioner leave to appeal. *Morgan* v. *Leech*, 3 Moo. P. C. 368.

6. Appeals from two orders of the Supreme Court of British Guiana, suspending from practice, for six months, two counsel, on special petition, allowed, and, under the circumstances, such orders reversed. *Re Downie*, 3 Moo. P. C. 414.

7. Appeal allowed (without prejudice to any objection to be taken by the Royal Court of Jersey at the hearing), from a provisional order of that Court, directing the infant children of the parties to be left provisionally in the custody of the mother, pending a suit for separation. *Belson* v. *Belson*, 7 Moo. P. C. 30.

8. The Charter of Justice of the Mauritius being silent as to appeals in cases of sentence of divorce, the Court there has not power to grant an appeal; but on a special application, in a fit case, the committee will advise the Crown to allow it on terms. *D'Orliac* v. *D'Orliac*, 4 Moo. P. C. 374.

9. The Charter of Justice of New South Wales of the 13th October 1823 (made in pursuance of the powers conferred by the 4 Geo. 4, c. 96), gave a right of appeal from the Court of Appeals in the colony to the King in Council, where the subject at issue involved the sum of 2,000*l.* sterling. The 4 Geo. 4, c. 96 being about to expire, the 9 Geo. 4, c. 83 was passed, in which no provision was made for the continuance of the Court of Appeals; but power was given to His Majesty by charter, orders in Council, or letters patent, to make rules for allowing appeals from the Supreme Court of the colony. No new charter, order in Council, or letters patent issued under this Act. In such circumstances, the judges in New South Wales held that they had no jurisdiction to allow an appeal from the Supreme Court to Her Majesty in Council; the Judicial Committee upon special petition, under their general jurisdiction, advised Her Majesty to admit such appeal. *Flint* v. *Walker*, 5. Moo. P. C. 180; 12 Jur. 1.

10. Under the Charter of Justice in the Mauritius, although there is no right of appeal in matrimonial causes, the Court will recommend the Crown to grant leave to appeal on a special application; in such cases, where the appeal is incompetent, the respondent ought to move, in the first instance, to dismiss the appeal, and not wait until the hearing to object. *Shire* v. *Shire*, 5 Moo. P. C. 81.

11. Although no power is given by the Charter of Justice, or the Act of Parliament creating the Supreme Court at New South Wales, to allow an appeal to the Queen in Council from that Court, yet, to prevent a failure of justice, this Court will, upon a petition for that purpose, grant leave to appeal from a judgment of that Court. *Australasia* (*Bank*) v. *Breillat*, 6 Moo. P. C. 152; S. C. *nom. Australasia* (*Bank*) v. *Anstralia* (*Bank*), 12 Jur. 189.

12. An appeal having been allowed by the Court below, and referred by Her Majesty to the Judicial Committee for adjudication in the ordinary way, their lordships, though of opinion that there existed no charter right of appeal, thought it a fit case for the allowance of a special appeal; and having heard the case upon the merits, directed a petition for special leave to appeal to be presented to Her Majesty; which, on being referred to them, they recommended the allowance thereof, and that the appeal be placed in the same plight and condition as that originally referred to them. *Re Minchin*, 6 Moo. P. C. 43.

13. Upon petition leave was given to appeal from an order of the Supreme Court at New South Wales, although no provision for appeal to the Queen in Council was made by the charter of justice, or Act of Parliament, creating that Court. *Bute* (*Marchioness*) v. *Mason*, *Exp. Heard*, 7 Moo. P. C. 1.

14. Appeal from an order of the Supreme Court at Calcutta, suspending from office the

master and accountant-general and examiner in equity of that court, upon special application, allowed. *Re Grant*, 7 Moo. P. C. 141.

1. Leave given to appeal, under circumstances, though the time limited by the Bombay charter had expired, and the decree of the Court below sanctioning the sale of real estate, the subject of the suit, had been partially acted on; the petitioner undertaking not to disturb the possession or title of the purchasers of any part of the property actually sold, to give security for costs, and to abide by any order which the Judicial Committee might think fit to make touching the matters in dispute. *Re Musadee Mahomed Cazum Sherazee*, 7 Moo. P. C. 391.

2. An Act of the Legislature of India, No. 18 of 1848, empowered the Governor in Council of Bombay to administer the private estate of the late Nawab of Surat, and it was by s. 2 enacted, "that no act of the Governor of Bombay in Council in respect of the administration to, and distribution of, such property, from the date of the death of the said Nawab, should be liable to be questioned in any court of law or equity." No provision was made for an appeal from the governor's decision. In pursuance of the power conferred by this Act, the Government agent at Surat, to whom the matter was referred, made an award, distributing the estate, in certain shares, among the heirs of the deceased, which award was confirmed by the Governor in Council. Upon application by a claimant dissatisfied with the award to the Judicial Committee, for leave to appeal from the Governor in Council's confirmation of the award:—Held, that the award was not such a judicial act as to come within the operation of s. 3 of 3 & 4 Will. 4, c. 41, or the 7 & 8 Vict., c. 69, and could not be entertained by the Committee without a special reference to them by the Crown, under s. 4 of the 3 and 4 Will. 4, c. 41. *Re Nawab of Surat*, 9 Moo. P. C. 88.

3. Appeal allowed from a sentence of the lieutenant-governor of the island of Heligoland; the sentence having been passed without hearing the appellant's case. *Siemens* v. *Bufe*, 11 Moo. P. C. 62.

4. No provision by statute or charter being made for appeal to Her Majesty in Council from judgments of the Court of the Judicial Commissioner of Oude, created on the annexation of that kingdom, in 1858, the Judicial Committee, to prevent a denial of justice, admitted an appeal under 3 & 4 Will. 4, c. 41. *Salik Ram* v. *Azim Ali Reg*, 14 Moo. P. C. 329.

5. Appeal to the Queen in Council allowed under 17 & 18 Vict., c. 117, s. 65, by the chief commissioner of the West Indian encumbered estates, upon prescribed terms. *Fraser* v. *Burgess*, 13 Moo. P. C. 314.

6. By an Order in Council, of the 10th of May 1860, provision is made for a direct appeal from judgments, decrees, or orders of the Supreme Court at New Zealand to the Queen. That Court refused to allow an appeal from an order made before the date of that Order in Council, on the ground that it was not retrospective in its operation. Upon petition, special leave to appeal was granted. *Re Bunny*, 15 Moo. P. C. 164; 8 W. R. 248.

7. The Crown, by letters patent of the 13th of May 1858, separated the district of Moreton Bay from New South Wales, and erected that district, under the name of Queensland, into a separate colony. The separation was proclaimed in New South Wales on the 1st of December 1859, and, on the 11th of that month in Moreton Bay, an appeal from the Supreme Court at Moreton Bay lay to the Supreme Court at New South Wales. On the 6th of December 1859 notice of an appeal was given from a judgment of the Court at Moreton Bay, and on the 22nd a special case was agreed on. The Supreme Court at New South Wales refused to entertain the appeal on the ground of want of jurisdiction. By an Order in Council on the 30th of June 1860, provision was made for appeals from the Supreme Court at Moreton Bay to the Queen in Council. Upon a special petition, leave was granted to appeal to the Queen in Council from the decision of the Supreme Court at Moreton Bay. *Australasia (Bank)* v. *Harris*, 15 Moo. P. C. 97.

8. By the Order in Council of the 30th of June 1860, provision is made for appeals from the Supreme Court at Queensland, formerly called Moreton Bay, direct to Her Majesty in Council. *Ib.*

9. Application for special leave to appeal from a judgment of the Court of Appeals for the Leeward Islands, on the grounds, first, that the Court being improperly constituted, no appeal could be legally asserted within the fourteen days from the judgment, the time limited for asserting an appeal; and, secondly, that the proceedings in the court below should have been at law and not in equity, refused, as the petitioner ought to have applied for leave to appeal within the time prescribed, which might have been done under protest; and that he was not entitled to the indulgence he asked for, his objection to the mode of proceeding being merely of a technical character and not affecting the merits. *Exp. Kensington*, 15 Moo. P. C. 209.

10. The Judicial Committee will not advise Her Majesty to grant leave to appeal to a party who resists a claim, not on the ground of the merits of his case, but on the ground of a mere formal defect in procedure on the part of the claimant. *Exp. Kennington*, 8 Jur., N. S., 1111; 10 W. R. 751.

On a petition for leave to appeal from a decision of a colonial court of appeal, on the ground that that court was not properly constituted at the time when the decision was given, it appeared that the petitioner was sued by a claimant in a court of equity in England, and was ordered by such Court to pay a sum of money to the claimant. The claimant proceeded to enforce this order by bill in the Equity Court of the Island of Antigua. The petitioner demurred, on the ground that the claim should have been enforced in a court of law in the colony, but judgment was given against the petitioner; whereupon he appealed to the Court of Appeal of the colony, which Court decided against him, on the ground that he had not served notice of appeal on the other side within the time required by a colonial statute. No application was made within fourteen days to the Court of Appeal, as required by the rules relating to appeals from the Leeward Islands, to grant leave to appeal, on the ground that the Court of Appeal was not properly constituted to entertain the appli-

cation:—Held, that either under protest or perhaps without protest, the petitioner might have applied to the Court of Appeal of the colony without damaging his case, and leave to appeal was refused. *Ib.*

1. The Judicial Committee will not grant special leave to appeal except when it appears clearly upon a statement of facts, verified by affidavit, that there is a point of general law proper to be determined on appeal, and a substantial case upon the merits. *Gour Monee Dossee* v. *Jogendro Narain Chowdury*, 12 Jur., N. S., 477; 14 W. R. 904.

2. Application for special leave to appeal from an order of the Supreme Court of Jamaica, refusing to quash a fiat, or certificate of insolvency, made under a local Act, refused, as the question at issue, namely, the validity of the fiat of insolvency, was not an appealable grievance within the Order in Council. *Re Abrahams*, 2 Moo. P. C., N. S., 241.

3. Special leave to appeal allowed from an order of the High Court of Judicature for the North-Western Provinces of India, by which order an infant was taken from the custody of her mother, a Mahomedan, on the ground that the minor's deceased father had been a professed Christian, and her mother, who was, as the Court held, living in adultery, was inducing her daughter to adopt the faith and habits of a Mahomedan. Liberty given, pending the hearing of the appeal, to the petitioner to apply to the High Court to have access at suitable times to her daughter. *Re Skinner*, 3 L. R., P. C., 451; 7 Moo. P. C., N. S., 296.

4. Special leave to appeal granted on the ground that the question raised was one of public interest, involving the constitutional rights of a colonial legislative assembly. *Speaker of the Legislative Assembly of Victoria* v. *Glass*, 3 L. R., P. C., 560; 40 L. J., P. C., 17; 24 L. T. 37; 20 W. R. 42; 7 Moo. P. C., N. S., 449.

5. The Supreme Court of the Straits Settlement having refused to grant leave to appeal to the Queen in Council, on the ground that it did not possess power to grant such leave, the Judicial Committee granted leave to appeal against the original decree, and also against the order refusing leave to appeal. *Neo* v. *Neo*, 5 L. R., P. C., 89.

6. The power of appeal to Her Majesty, and the authority of the Supreme Court of the Straits Settlement to grant leave to do so, contained in the letters patent of the Queen of the 10th of August 1855, were not abrogated by ordinance No. 5 of 1868, establishing the existing Supreme Court. All the provisions of the repealed letters patent applicable to the old court were virtually re-enacted by the ordinance, and made applicable to the new court which was put in its place. *Neo* v. *Neo*, 6 L. R., P. C., 381.

7. A bank, carried on by an unlimited and unincorporated partnership in Jersey, stopped payment, and, after certain proceedings in voluntary liquidation, the judge commissaire, to whom the Royal Court referred the ascertainment of claims under the Jersey Act, reported that the Crédit Foncier was a creditor (if at all) to the amount of 53,606*l.*, and, after a further reference by the same Court relating to another creditor's claim, reported that the requisite amount of assents had been obtained, and thereupon the Royal Court registered and confirmed a composition between the partnership and its creditors. The company petitioned for special leave to appeal, first, against the order of the Royal Court referring the matter to the judge commissaire; secondly, against the further reference by the same Court; and, thirdly, against the order confirming and registering the composition; alleging that they were entitled to claim 55,160*l.*, and that the claim of B. (who also petitioned), having been admitted at 3,800*l.*, was not mentioned in the schedule, and by reason of this and another error of computation the requisite assents had not been obtained. The Privy Council granted leave to appeal against the order confirming and registering the composition, limited to two questions; first as to the claim for 3,800*l.*; secondly, as to the alleged error of computation. The Council refused leave to proceed by a doléance, considering that by an ordinary appeal the petitioners could obtain relief. *Crédit Foncier* v. *Amy*, *Bailey* v. *Amy*, 6 L. R., P. C., 146.

8. The Dominion Controverted Elections Act of 1874 (Canadian Statute, 37 Vict., c. 10) does not contravene s. 92, subs. 14, of the British North America Act 1867. *Valin* v. *Langlois*, 5 L. R., App. Cas., 115; 49 L. J., P. C., 37; 41 L. T. 662.

9. The said sub-section does not relate to election petitions, while s. 41 of the same Act reserved to the Parliament of Canada the power of creating a jurisdiction to determine them. *Ib.*

The Parliament of Canada has power to commit such jurisdiction to existing provincial courts. *Ib.*

Special leave refused to appeal from two concurrent judgments of the Courts in Canada affirming the competency and validity of the said Act of 1874; it appearing that there was no substantial question requiring to be determined, nor any doubt of the soundness of the decisions, nor any reason to apprehend difficulty or disturbance from leaving the decisions untouched. *Ib.*

10. It is not competent to the Court of Queen's Bench for Lower Canada to grant leave to appeal to HerMajesty in Council from an interlocutory order, unless specially authorised so to do by the code of civil procedure. *Goldring* v. *La Banque d'Hochelaga*, 5 L. R., App. Cas., 371; 49 L. J., P. C., 82.

A judgment of the Court of Queen's Bench affirming a judgment of the Superior Court, which rejected the appellant's petition that a certain writ of *capias ad respondendum* issued against him under arts. 798 and 801 of the code of civil procedure might be set aside, is not a final judgment within the meaning of art. 1178. *Ib.*

11. Their lordships will not advise Her Majesty to admit an appeal from the Supreme Court of the Dominion save where the case is of gravity, involving matter of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character. Petition for special leave to appeal refused, the case depending on a disputed matter of fact whether there had been a gift or sale of certain goods of the value of 1,000*l.* *Prince* v. *Gagnon*, 8 L. R., App. Cas., 103.

1. Special leave to appeal will be granted on the ground of the importance of the question at issue. *Carter* v. *Molson*, 8 L. R., App. Cas., 530.

2. Petition for special leave to appeal in a case involving only an issue of fact refused. *Canada Central Railway Co.* v. *Murray*, 8 L. R., App. Cas., 574.

3. An order of Court directing a defendant to plead to an information (or other analogous proceeding) for libel, and directing that having pleaded he should be tried without a jury, is not a definitive sentence within the meaning of the Order in Council of 13th May 1572. Special leave to appeal therefrom refused. *Quære*, as to granting special leave to appeal in criminal cases in Jersey, or where there has been no definitive sentence. *Esnouf* v. *Jersey*, (*Att.-Gen.*), 8 L. R., App. Cas., 304; 52 L. J., P. C., 26; 48 L. T. 321.

See also Next Subdivisions.

4. Criminal Cases.

4. The Bombay charter of the 8th December 1823 (granted in pursuance of the powers conferred on the Crown by 4 Geo. 4, c. 71), after providing, "That in all indictments, informations, and criminal suits and causes whatsoever, the said Supreme Court of Judicature at Bombay shall have the full and absolute power and authority to allow or deny the appeal of the party pretending to be aggrieved," proceeds thus, "And we do hereby also reserve to ourself, our heirs and successors, in our or their Privy Council, full power and authority, upon the humble petition of any person or persons aggrieved by a judgment or determination of the Supreme Court of Judicature at Bombay, to refuse to admit his, her, or their appeal thereupon, upon such terms, and under such limitations, restrictions, and regulations, as we or they shall think fit, and to reform, direct, or vary such judgment or determination as to us or them shall seem meet." Upon a petition praying for leave to appeal from a conviction for felony:—Held, by the Judicial Committee of the Privy Council, that there was no power reserved to the Crown by the charter to allow appeals in criminal cases, such appeal being confined to civil cases only:—Held, also, that the charter having been granted by the Crown by force of an Act of Parliament must be construed with reference to the powers conferred by the Act, even though the prerogative of the Crown were limited by such construction; and that the Supreme Court alone has full and absolute power to allow or deny permission to appeal in criminal cases. *Semble*, no appeal lies in cases of felony to the Queen in Council from any of the dominions of the Crown of Great Britain which are governed by the law of England. *Reg.* v. *Eduljee Byramjee*, 5 Moo. P. C. 276.

5. The Crown had authority, by virtue of its prerogative, to review the decisions of all colonial courts, whether the proceedings are of a civil or criminal character, unless it has parted with such authority; but the inconvenience and inexpediency of entertaining appeals in criminal cases are so great, and the consequences so entirely destructive of the administration of criminal justice in the colonies, that the Judicial Committee is very reluctant to admit an application for such an appeal. *Falkland Island Co.* v. *Reg.*, 1 Moo., P. C. N. S., 299; 10 Jur., N. S., 807; 12 W. R. 220; 9 L. T., N. S., 103.

Where, however, the proceedings, though in form of a criminal, were in substance rather of a civil character, being an order in the nature of a summary conviction for penalties for killing animals *feræ naturæ*, and involved an important question of law and property, namely, the right of the Falkland Islands Company to hunt and take wild cattle upon grazing stations and the lands attached thereto, and the ordinance under which the conviction was made gave no appeal; the Judicial Committee, under the special circumstances of the case, and in analogy to the proceeding by *certiorari* in England, advised Her Majesty to admit an appeal from such order or conviction, on the understanding that the question of title and right would appear upon the face of the record, which was ordered to be brought up. *Ib.*

6. Appeal to the Queen in Council allowed from a judgment on a conviction of the Supreme Court of Calcutta in a case of murder. *Nga Hoong* v. *Reg.*, 7 Moo. Ind. App. 72.

7. A person having been convicted of a misdemeanour, and being in prison under sentence in the island of Jamaica, obtained leave to appeal to Her Majesty in Council, but without prejudice to any objection which might be taken at the hearing on behalf of the Crown to the jurisdiction of Her Majesty in Council in the matter. When the appeal came on to be heard, it appeared that the appellant had been discharged from prison on his own memorial:—Held, that as he had, since leave to appeal was granted, obtained all the substantial, if not technical, benefits of a pardon, no good purpose would be answered by entertaining the appeal, and their lordships dismissed the appeal, but made no order as to costs. *Levien* v. *Reg.*, 36 L. J., P. C., 62; 16 W. R. 159; 1 L. R., P. C., 536.

8. An indictment for libel was found at the assizes, held in the island of Jamaica. The prosecution was a private one. The indictment was afterwards removed by *certiorari* to the Supreme Court of the island, and tried on the civil side of that court, when a verdict of guilty was found. Upon motion for arrest of judgment, the Supreme Court suspended judgment, pending an application to the Queen in Council, upon certain grounds raised. Upon a petition for leave to appeal, the petition was dismissed, the Court declining to interfere, or give any opinion on the merits of the case. *Re Levien*, 10 Moo. P. C. 31.

Quære, whether upon a record so framed in the absence of a final judgment, an appeal will lie. *Ib.*

9. On a petition for leave to appeal from a conviction, judgment, and sentence of the Supreme Criminal Court of the Presidency of Bengal, on the ground of irregularities in the proceedings at the trial:—Held, first, that there exists, on behalf of the Crown, a prerogative right of appeal from all Her Majesty's dominions, even in matters of criminal jurisdiction. *Joykissen Moorkerjee* v. *Reg.*, 9 Jur., N. S., 4; 1 Moo. P. C., N. S., 172; 10 W. R. 832.

Held, secondly, that by granting an appeal is meant an examination of the whole proceedings which have taken place, not simply the investigation of a question of law. *Ib.*

Held, thirdly, that it is inexpedient to grant leave to appeal in criminal cases; and admitting that the present was *primâ facie* a case of great grievance, and admitting the prerogative of the Crown to grant an appeal in criminal cases, the Privy Council refused to grant leave to appeal. *Ib.*

1. It is the inherent prerogative right, and on all proper occasions the duty, of the Queen in Council to exercise an appellate jurisdiction in all cases, criminal as well as civil, arising in the colonies, from which an appeal lies, and where, either by the terms of a charter or a statute, the power of the Crown has not been parted with, with a view not only to ensure, as far as may be, the due administration of justice in an individual case, but also to preserve generally the due course of procedure. *Reg.* v. *Bertrand*, 1 L. R., P. C., 520; 36 L. J., P. C., 51; 16 W. R. 9; 16 L. T., N. S., 752.

The exercise of this branch of the prerogative in criminal cases is to be cautiously admitted, and is regulated by a consideration of circumstances and consequences. *Ib.*

Leave to appeal will only be granted in special circumstances, such as where a case raises questions of great and general importance in the administration of justice, when it will be proper for the Judicial Committee to advise the allowance of such an appeal. *Ib.*

2. On a petition by the attorney-general of New South Wales for special leave to appeal from an order of the Supreme Court of that colony, it appeared that the respondent was charged, on a criminal information by the attorney-general of the colony, with murder; that he pleaded not guilty, and was tried and found guilty by the jury. The Supreme Court afterwards, on an application by the respondent, made an order that a *venire de novo* should issue, on the ground that the jury was allowed access to certain newspapers pending their verdict, special leave to appeal was granted. *Reg.* v. *Murphy*, 37 L. J., P. C., 21; 2 L. R., P. C., 35.

3. On a petition by the attorney-general of the province of Quebec, special leave to appeal was granted from a judgment of the Queen's Bench. Quebec, on a case reserved in a trial for felony. *Reg.* v. *Coote*, 4 L. R., P. C., 599; 42 L, J.' P. C., 45; 9 Moo. P. C., N. S., 463.

5. Contempts.

4. The Judicial Committee have no jurisdiction to entertain an appeal from orders by a court of record in the colonies inflicting fines upon a practitioner for contempts of court, such court being the sole judge of what constituted the contempts. *Rainy* v. *Sierra Leone* (*Justices*), 8 Moo. P. C. 47.

Upon a reference by the Colonial Office to the Judicial Committee, referring the whole matter of complaint against the judge, concerning the contempts and the infliction of the fines, for their advice and opinion, the Committee advised the Crown to remit part of the fines, which by an Order in Council was directed. *Ib.*

5. Leave to appeal given from an order of the Supreme Court of Civil Justice of British Guiana, committing the publisher of a local journal to prison for six months for an alleged contempt of court, in publishing in such journal comments on the administration of justice by that Court, with liberty to the judges of the Supreme Court to object to the competency of such appeal at the hearing. *Re M'Dermott*, 1 L. R., P. C., 260; 17 W. R. 352.

6. The Judicial Committee will not entertain an appeal from an order of a court of record inflicting punishment by fine or imprisonment for contempt, if it appears upon the face of the order that the party has committed a contempt, that he has been duly summoned, and that the punishment awarded was of an appropriate kind. *M'Dermott* v. *British Guiana* (*Judges*), 38 L. J., P. C., 1; 2 L. R., P. C., 341; 20 L. T., N. S., 47; 5 Moo. P. C., N. S., 466.

An order of a colonial court of record committing for contempt being discretionary, is not the subject of an appeal. *Ib.*

7. Reference by the Crown to the Judicial Committee, under 3 & 4 Will. 4, c. 41, s. 4, in the matter of a fine imposed for contempt by a colonial court. *Re Pollard*, 2 L. R., P. C., 106; 3 Moo. P. C., N. S., 111.

6. For Costs.

8. The Judicial Committee will not entertain an appeal solely on the ground of the refusal of the Court below to allow a defendant costs on the dismissal of a suit for subtraction of a church rate, if care and discretion have been *bonâ fide* exercised by the judge. *Richards* v. *Birley*, 2 Moo. P. C., N. S., 96.

9. Where costs are in the discretion of the Court below, an appeal will not lie in respect of costs alone, unless the Court below has proceeded upon a mistake or misapprehension. *Attenborough* v. *Kemp*, 14 Moo. P. C. 351; 7 Jur., N. S., 665; 9 W. R. 771; 5 L. T., N. S., 67.

Where there has been *bonâ fide* care exercised by the judge who refused costs, no appeal will be permitted which involves a question of costs only. *Ib.*

10. Although an appeal will not be allowed in respect of costs only, yet where there has been a mistake upon some matter of law which governs or affects the costs, the party prejudiced is entitled to have the benefit of correction by appeal. *Yeo* v. *Tatem*, *The Orient*, 3 L. R., P. C., 696; 40 L. J., Adm., 29; 24 L. T. 918; 20 W. R. 6.

11. Appeals merely for the sake of costs will not be allowed, even if the costs amount to the appealable value. *Crédit Foncier of Mauritius* v. *Paturau*, 35 L. T. 869.

12. An appeal from a decree of the Vice-Admiralty Court of Sierra Leone, restoring property seized for breach of the custom laws, but without damages or costs, the judge below being of opinion that there was probable cause for the seizure, was dismissed by the Judicial Committee with costs, on the grounds that as regarded one of the appellants, who proved

not to be the owner of the goods, though so proceeded against, the appeal was for costs alone, and therefore could not be entertained; and that it appearing from the evidence that there was probable cause for the seizure, the judge of the Admiralty Court was justified in refusing to decree damages and costs to the other appellants, the owners of the goods seized. *Wilson* v. *Reg.*, 1 L. R., P. C., 405.

7. Appealable Value.

1. Application for leave to appeal from an order of the Supreme Court of Van Diemen's Land, refusing a fourth new trial of an action of trover, the subject matter of which amounted to 970*l.*, refused, the Charter of Justice limiting the right of appeal to 1,000*l.*, and the Judicial Committee being of opinion, upon the merits, that it was a mere question for a jury, who had already found four times against the plaintiff. *Re Sherwin*, 4 Moo. P. C. 311.

2. Leave given to appeal, though the subject matter of the suit was below 200*l.*, the sum required by the Order in Council of 13th May 1823, and the appeal refused by the Royal Court. *Jersey* (*Att.-Gen.*) v. *Capelain*, 4 Moo. P. C. 37.

3. An Act of the Parliament of Great Britain declared that all laws passed by the legislature of a colony should be valid and binding within the colony, and directed that the Colonial Court of Appeal should be subjected to such appeal as it was previously to the passing of the Act, and also to such further and other provisions as might be made in that behalf by any Act of the colonial legislature: —Held, that an Act having been passed by the colonal legislature, limiting the right of appeal to causes where the sum in dispute was not less than 500*l.* sterling, a petition for leave to appeal, in a cause where the sum was of less amount, could not be reviewed by the King in Council, although there was a special saving in the colonial Act of the rights and prerogatives of the Crown. *Cuvillier* v. *Aylwin*, 2 Knapp 72.

4. Leave to appeal from a sentence of the Supreme Court of Jamaica, affirming a decision of the local magistrates, inflicting penalties for harbouring apprenticed labourers, refused, the penalties being under 200*l.*, the amount limited by the "Act in aid" as that under which no appeal should be allowed, and there being nothing in the case to make the appeal proper under the general jurisdiction. *Re Harvey*, 3 Moo. P. C. 148.

5. There is no appeal from the Supreme Court in Prince Edward Island except to the governor and Council; but where the sum in question was below the amount at which an appeal was allowed, by the royal instructions, to the governor and Council, and the case was one of hardship, the Committee advised Her Majesty to allow the appeal to the governor and Council. *Re Cambridge*, 3 Moo. P. C. 175.

6. An appeal to the King in Council, from Malta, being given only where the matter involved civil rights to the extent of 1,000*l.*; but, on leave to appeal, granted against decrees of the courts of the first and second instance, directing the removal of children from the guardianship of the mother. *Camilleri* v. *Fleri*, 5 Moo. P. C. 161.

7. The Order in Council of the 14th of April 1851 restricts the right of appeal to the Queen in Council, to matters where the property, or civil rights, amount to 300*l.* *Re Abrahams*, 2 Moo P. C., N. S., 241.

Application for special leave to appeal from an Order of the Supreme Court of Jamaica, refusing to quash a *fiat*, or certificate of insolvency, made under a Jamaica local Act, refused, as the question at issue, namely, the validity of the *fiat* of insolvency, was not an appealable grievance within the Order in Council. *Ib.*

8. Leave to appeal granted from an order of the Governor and Council at Sierra Leone, refusing a new trial, although the amount of the matter at issue was under 400*l.*, the appealable value limited by the Charter of Justice, that Court having refused to hear counsel in support of the rule on the merits of the case or the questions of law raised. *Patnelli* v. *Heddle*, 8 Moo. P. C. 41.

9. Although the subject in dispute was under the appealable value prescribed by the royal instructions, regulating appeals from Jamaica, yet the Judicial Committee, from the fact of the public importance of the question at issue, allowed an appeal. *Lindo* v. *Barrett*, 9 Moo. P. C. 456.

10. The Royal Instructions regulating appeals from Barbadoes to the Queen in Council, limit the right of appeal to cases in which the subject matter involved amounts to 3,000*l.* The Court at Barbadoes held, that certain accounts and documents sought to be recovered in an action of detinue, were of no value in themselves, and refused leave to appeal against a judgment of nonsuit in the action. Upon a petition for leave to appeal, founded upon an allegation that the value of the accounts and securities exceeded the appealable value, the Judicial Committee granted special leave to appeal. *Wilson* v. *Callender*, 9 Moo. P. C. 100.

When the appeal came on for hearing, it appeared that the allegation as to the value of the accounts and documents was unfounded in fact, and unsupported by evidence, upon which the Committee stopped the case, and dismissed the appeal with costs. *Ib.*

11. Under circumstances, special leave to appeal allowed, although the subject matter of the appeal was under the appealable value stipulated by the Order in Council, dated the 18th December 1834. *Castrique* v. *Buttigieg*, 10 Moo. P. C. 94.

12. In estimating the appealable value, restricted by the Order in Council of the 10th of April 1838, for regulating appeals from the Supreme and Sudder Dewanny Courts, in the East Indies, to 10,000 rupees as the amount in dispute, regard should be had to the whole matter involved in the suit, and not to the value of a fractional part of the property sought to be recovered. *Musumat Ameena Khatoor* v. *Radhahenod Misser*, 12 Moo. P. C. 470.

A suit was brought to recover a zemindary in the possession of different persons under deeds of sale in execution of a decree. The value of the property sued for was stated in the plaint to be 14,325 rupees. The Sudder Court upheld the sales, so far as related to the claims of some of the defendants. The other

defendants applied for leave to appeal to England, which the Sudder Court refused, on the ground that, as the value of their portion was only 8,215 rupees, it was not within the appealable value prescribed by the Order in Council of the 10th of April 1838. Such construction overruled, and leave to appeal granted. *Ib.*

1. Under circumstances showing a question of importance, and the sum involved uncertain in value, leave was given to appeal from an Order of the Supreme Court of Jamaica refusing such appeal, although the amount of the verdict was under 300*l.*, the appealable value limited by the Order in Council of the 14th of April 1851. *St. George, Jamaica (Churchwardens)* v. *May*, 12 Moo. P. C. 282.

Security for respondent's costs directed to be lodged in the Council Office within three months from the date of the Order giving leave to appeal. *Ib.*

2. Where, in an action, the Court at Calcutta gave damages, the amount of which was under the appealable value prescribed by the Calcutta charter. As an important point of law was involved, special leave to appeal was, upon petition, granted. *Rogers* v. *Rajendro Dutt*, 13 Moo. P. C. 209.

3. By an Act of the Legislative Council of Lower Canada, passed in the 34 Geo. 3, c. 6, called "The Judicature Act," an appeal lies from the Court of Appeals in Canada to the Queen in Council, when the matter in dispute exceeds 500*l.*, and this provision was continued upon the substitution of the Court of Queen's Bench for the Court of Appeals, by an Act of the Legislative Council of Canada, subsequently passed. In an action for non-performance of a contract, a verdict was given for 600*l.* currency (under 500*l.* sterling), and the Court of Queen's Bench in Canada refused leave to appeal to England, on the ground that the sum was under the appealable value. Upon a special petition to Her Majesty in Council for leave to appeal, such leave was granted, first, because by the law of Canada interest ran with the judgment, which would bring the subject matter within the appealable value; and, secondly, because important questions of mercantile law were raised, and an action of a similar nature was pending, the transaction being a continuing contract. *Boswell* v. *Kilborn*, 12 Moo. P. C. 467.

4. Mode of estimating the appealable value. Interest given by decree to be added to the principal. *Gooroopersad Khoond* v. *Juggutchunder*, 13 Moo. P. C. 472.

Where interest subsequent to the date of the decree can be added is a question for the discretion of the Judicial Committee. *Ib.*

5. Special leave to appeal granted, notwithstanding that no application had been made for such leave to the Court below. Upon the allegation, that though the amount decreed was much under the appealable value, the original demand being necessarily limited by the jurisdiction of the Court in which the suit was originally instituted, yet the subject matter at issue exceeded in value the appealable amount. *Mutusawmy Jagavera Yettapa Naiker* v. *Vencataswara Yettia*, 1 L. R., P. C., 1; 35 L. J., P. C. C., 37.

6. By 34 Geo. 3, c. 6, s. 30 (Act of Lower Canada), the judgment of the Court of Appeals of that province shall be final in all cases where the matter in dispute shall not exceed the sum or value of 500*l.* sterling; but in cases exceeding that sum or value, as well as in all cases where the matter in question shall relate to matters or things where rights in future may be bound, an appeal shall lie to His Majesty in his Privy Council, though the immediate sum or value be less than 500*l.* sterling, provided security be first duly given by the appellant that he will effectually prosecute his appeal. On a petition for leave to appeal, the subject matter in dispute not being of the value of 500*l.*, on the ground that other actions were pending against the petitioner, to which, if the judgment appealed against were suffered to stand, he had no defence:—Held, that the subject matter of appeal did not fall within the words of the section, "matters or things where rights in future may be bound," but leave to appeal on the petitioner depositing with the registrar security for the costs of the respondent was granted. *Re Marois*, 8 Jur., N. S., 268; 10 W. R. 326.

7. By 34 Geo. 3, c. 6, s. 30 (Act of Lower Canada), the judgment of the Court of Appeals of that province shall be final in all cases where the matter in dispute shall not exceed the sum or value of 500*l.* sterling. An action was brought by A. in the Superior Court of Montreal against B., to recover the amount of certain promissory notes, with interest, amounting to a sum less than 500*l.* A., in his declaration, claimed a writ of *saisie arrêt*, or attachment against goods of B., of the value of 1,642*l.*, alleged to be in the possession of C. B. suffered judgment by default. A. obtained judgment on his writ of *saisie arrêt*, by which the goods in the hands of C. were declared liable to the claims of A. Leave to appeal was given to C. by the Court of Queen's Bench of Lower Canada. On a petition to rescind the leave to appeal so given:—Held, first, that Her Majesty in Council is not precluded from entertaining a petition to rescind leave to appeal, by the fact that leave to appeal was granted by a colonial Court under the authority of a colonial statute. *Macfarlane* v. *Leclaire*, 8 Jur., N. S., 267; 10 W. R. 324.

Held, secondly, in determining the question of the value of the matter in dispute, upon which the right of appeal depends, the correct course is to look at the judgment as it affects the interest of the party who is prejudiced by it, and who seeks to relieve himself from it by an appeal. *Ib.*

Held, thirdly, that the matter in dispute upon which this appeal was founded exceeded in value the sum of 500*l.* *Ib.*

8. Where the subject matter of an appeal was under the appealable value, and the questions raised for decision turning on the particular facts, and not one involving special circumstances, an application for leave to appeal was refused. *Spearman* v. *East India Railway Co.*, 20 L. T., N. S., 501.

9. Special leave to appeal granted, although the subject matter of the suit was under the appealable value, as the decision was to govern other suits. *Ko Khine* v. *Snadden*, 2 L. R., P. C., 50; 5 Moo. P. C., N. S., 67; 37 L. J., P. C., 119.

10. Special leave to appeal (the sum involved being below the appealable amount) allowed, on the ground that the question involved the

construction of a Colonial Act which affected the interests of a large class in the colony for which the Act was passed, and in granting the leave the Committee limited the appeal to the construction of the Colonial Act. *Brown* v. *M'Laughan*, 3 L. R., P. C., 458; 7 Moo. P. C., N. S., 306.

1. Under the Code of Civil Procedure for Lower Canada, the appealable amount is 500*l*., but an appeal is also permitted in cases of less value, if they are cases concerning titles to lands or tenements, annual rents, or other matters in which the rights in future of parties may be affected. An annual rent of $11·28c. had been sold for $456, payable in ten equal yearly instalments, and the land was hypothecated to secure the amount. In a suit to enforce payment of certain instalments, the Court of Queen's Bench in Lower Canada granted leave to appeal to Her Majesty in Council:—Held, that this case did not fall within the above description, and was not appealable. *Sauvageau* v. *Gauthier*, 5 L. R., P. C., 494; 22 W. R. 667; 30 L. T., N. S., 510.

2. It is too late for a respondent at the hearing to take an objection to the competency of the appeal, on the ground that the subject matter of the suit did not involve the prescribed appealable value; such objection not having been taken in his case. The proper course would have been for the respondent to move, in the first instance, to dismiss the appeal on that ground. *Aldridge* v. *Cato*, 4 L. R., P. C., 313; 20 W. R. 977.

3. Although Her Majesty's prerogative to allow an appeal is preserved by Canadian Act, 38 Vict., c. 11, s. 47, the Judicial Committee declined to advise its exercise in a case where the amount at issue was only $300, and where the issue between the parties related simply to the legal construction and effect of a particular contract, and where no general principle was involved, and no other cases were necessarily affected by the decision complained of. *Johnston* v. *St. Andrew's Church (Ministers and Trustees)*, *Montreal*, 3 L. R., App. Cas., 159; 26 W. R. 359; 37 L. T., N. S., 556.

Consolidation of Appeals.] 4. Five suits involving the same question may be consolidated for the purpose of bringing the amount up to the minimum required for appeal. *Exp. Gopal Lall Thakoor*, 8 W. R. 224.

In such case, with consent of parties, the Privy Council will dispense with the transmission of the records in every case. *Ib.*

8. Petition for Special Leave.

Form and Contents.] 5. When the petition of special leave to appeal stated correctly two valid grounds for granting the same; but contained misstatements of fact which affected the third ground relied upon by the petitioner:—Held, that any such petition is liable at any time to be rescinded with costs if it contains any misstatement or any concealment of facts which ought to be disclosed. It appearing, however, that there was in this case no intention to mislead, the appeal was heard and allowed, but without costs. *Ram Sabuk Bose* v. *Monomohini Dossee* (2 L. R., Ind. App., 81) approved. *Mussoorie Bank* v. *Raynor*, 7 L. R., App. Cas., 321; 51 L. J., P. C., 72; 46 L. T. 633; 31 W. R. 17.

6. The petition for leave to appeal must state fully but succinctly the grounds upon which it is based; the record not being before their lordships until forwarded by the proper authorities. *Canada Central Railway Co.* v. *Murray*, 8 L. R., App. Cas., 574.

7. Upon a petition for leave to appeal, it is the duty of the petitioner to state in the fullest and frankest manner all the circumstances of the case. *Lyall* v. *Jardine*, 3 L. R., P. C., 318; 39 L. J., P. C., 43; 22 L. T. 882; 18 W. R. 1050.

8. An order granting leave to appeal, obtained upon an *ex parte* application, founded on an allegation that the interest added to the principal recovered in an action on a fire policy exceeded the appealable value, upon petition of the respondents, showing that the calculation as to value was erroneous, was discharged. *Quebec Fire Assurance Co.* v. *Anderson*, 13 Moo. P. C. 477.

9. Special leave to appeal having been given on an *ex parte* application, and upon an erroneous statement contained in the petition for leave: the order allowing such leave discharged with costs. *Bulkeley* v. *Scutz*, 3 L. R., P. C., 196; 6 Moo. P. C., N. S., 481.

Objections and Practice thereon.] 10. If leave to appeal is obtained *ex parte*, the respondent may, as a matter of course, present a counter petition to dismiss. *Sibsurain Ghose* v. *Hullodhur Doss*, 9 Moo. P. C. 354.

Where an appeal had been granted *ex parte* upon an allegation unfounded in fact, the Judicial Committee refused to hear the case, and dismissed the appeal with costs. *Ib.*

11. Special leave to appeal granted *ex parte* from an order of the Supreme Court at Jamaica issuing a peremptory mandamus, directing justices of the peace to restore a party to the office of surgeon, subject to the right of the respondent to move upon a counter petition to quash the leave given. *Hill* v. *Reg.*, 8 Moo. P. C. 138.

12. Practice where an appeal is allowed after notice, and the respondent applies to rescind the leave given. *Cremidi* v. *Parker*, 11 Moo. P. C. 79.

13. Where there is a fatal objection to the right of appeal, the respondent ought to apply to quash the appeal, and not to wait till the hearing to urge such objection to its competency. *Tronson* v. *Dent*, 8 Moo. P. C. 420.

14. Her Majesty in Council is not precluded from entertaining a petition to rescind leave to appeal on the ground of want of jurisdiction, by the fact that leave to appeal was granted by a colonial court under the authority of a colonial statute, as the construction put by the colonial court upon the Act can be reviewed by the committee. *Macfarlane* v. *Leclaire*, 15 Moo. P. C. 181; 8 Jur., N. S., 267; 10 W. R. 324.

15. Order for leave to appeal granted upon the report of the committee without prejudice to the right of the respondent's showing cause against such order. *Exp. Robertson*, 11 Moo. P. C. 288.

Cause being shown upon a counter petition, such order rescinded. *Ib.*

16. Where it is alleged that the bringing an

appeal is contrary to agreement, the objection ought to be made when leave to appeal is applied for, or to be taken by a petition to the Queen before the appeal comes on for hearing. *Pisani* v. *Att.-Gen.* (*Gibraltar*), 5 L. R., P. C., 517; 22 W. R. 900; 30 L. T., N. S., 729.

1. When leave to appeal has been unduly given, the proper course is to come to the Privy Council before any expense has been incurred, and to apply for the dismissal of the appeal. *Sauvageau* v. *Gauthier*, 5 L. R., P. C., 494; 22 W. R. 667; 30 L. T., N. S., 510.

Such an application, if delayed till the hearing, will only be granted without costs, and if there are special circumstances in favour of granting special leave to appeal, an application for such leave will be entertained; but if it is granted, fresh security for costs must be given. *Ib.*

2. It is too late for a respondent at the hearing to take an objection to the competency of the appeal, on the ground that the subject matter of the suit did not involve the prescribed appealable value; such objection not having been taken in his case. The proper course would have been for the respondent to move, in the first instance, to dismiss the appeal on that ground. *Aldridge* v. *Cato*, 4 L. R., P. C., 313; 20 W. R. 977.

3. A sentence of the Prerogative Court of York, in a testamentary case, was pronounced in August 1856; this sentence decreed probate of the will in question, costs being given out of the testator's estate to both parties. These costs were taxed and paid in November of that year, the proctor of the opposing party attending. In June 1857 application was made by the parties originally opposing the will for leave to appeal; such application refused, on the ground that the taxation and receipt of the costs was an acquiescence in the sentence and prompted the appeal. *Brown* v. *Davenport*, 11 Moo. P. C. 297.

IV. PRACTICE ON APPEALS.

1. *Time and Extension thereof*, 5971.
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1. Time and Extension thereof.

4. A petition to appeal need not be presented to the King in Council within a year after an appeal has been refused by the Colonial Court. *Orphan Board* (*President*) v. *Van Reenen*, 1 Knapp 83.

5. Application to dismiss an appeal, on the ground of delay in prosecution, and no certificate being filed pursuant to the 31st section of the Canada Judicature Act, refused, the rule allowing a year and a day for prosecuting an appeal, though usually adhered to, not being imperative upon the King in Council, and the respondents having no claim to complain of delay, after laying themselves eight months without making any application. *St. Louis* v. *St. Louis*, 1 Moo. P. C. 143. And see *Wilson* v. *Arnold*, *id.* 14 n.

6. The provisions of the 5 Geo. 4, c. 113, s. 29, are conclusive, and the Judicial Committee have no power to extend the time limited for appealing. *Muter* v. *Chipohase*, 1 Moo. P. C. 1.

7. After a delay of six years, the Judicial Committee refused leave to prosecute an appeal, though the delay arose from circumstances over which it was sworn the appellant had no control. *Lindo* v. *Rex*, 1 Moo. P. C. 3.

8. Leave to appeal against a decision pronounced in 1819, and in which no step had been taken for two years previous to the application, refused. *Laing* v. *Ingham*, 3 Moo. P. C. 26.

9. The 5 Geo. 4, c. 113, s. 29, enacts that no appeals shall be prosecuted from any sentence of any court of admiralty or vice-admiralty, with the exception of the Cape of Good Hope, and eastward thereof, unless an inhibition be applied for and decreed within twelve months from the time of the decree or sentence being pronounced. By the 3 & 4 Will. 4, c. 41, the appellate jurisdiction given by the previous statute to the High Court of Admiralty was vested in the Judicial Committee of the Privy Council, but which court from its constitution had no jurisdiction over the appeal until the petition of appeal was referred to them by the Crown. The appellant presented on the 16th of July 1841 a petition of appeal from a decree of condemnation pronounced on the 12th August 1840, by the Vice-Admiralty Court of Sierra Leone, against a vessel engaged in the slave trade, contrary to the provisions of the 6 Geo. 4, c. 113. The appeal was not referred by Her Majesty to the Judicial Committee until the 11th August 1841, one day before the year expired, and notice of such reference was not given by the clerk in Council until the 13th of the same month, one day after the twelve months had expired, when the appellant applied for and obtained an inhibition. On protest against the appeal:—Held, that the 5 Geo. 4, c. 113 was incorporated in the 3 & 4 Will. 4, c. 113; 2nd, that the appellant, having failed to procure, in compliance with the 29th section of the 5 Geo. 4, c. 113, an inhibition to issue within twelve months from the sentence, was barred his appeal, the provisions of that section being imperative and leaving no discretion in the Court to relax the operation of the Act. *Logan* v. *Burslem*, 4 Moo. P. C. 204; 7 Jur. 1.

The 5 Geo. 4, c. 113 (The Slave Abolition Act), s. 29, enacts that no appeals shall be prosecuted from any sentence of any court of admiralty or vice-admiralty, except in any vice-admiralty court at the Cape of Good Hope, or to the eastward thereof, unless an inhibition be applied for and decreed within twelve months from the time of the decree or sentence being pronounced:—Held, to apply to foreigners

as well as British subjects. S. C. 4 Moo. P. C. 300.

The British Parliament has no power to legislate for foreigners out of the dominions and beyond the jurisdiction of the Crown; yet it can by statute fix the time within which application must be made for redress to the tribunals of the empire. This being matter of procedure, becomes the law of the forum by which all mankind are bound. *Ib.*

The Act 6 & 7 Vict., c. 38, which was, in this case, for the first time brought into operation, is only applicable to matters of inferior importance. *Ib.*

1. Upon a petition stating that a party against whom a decree had been pronounced by the Supreme Court of Newfoundland was at the time resident in England, and had no representative within the island, or notice of proceedings against him; the Judicial Committee gave leave to appeal upon terms, notwithstanding that he had not asserted an appeal within fourteen days from the final decree, as required by the Charter of Justice of Newfoundland. *Henderson* v. *Henderson*, 4 Moo. P. C. 259.

2. Whether the rules of the Ecclesiastical Courts in Doctors' Commons relating to the doctrine of pre-emption of appeal, apply to an ecclesiastical cause in the Supreme Court at Calcutta, so as to deprive a party of the charter right to appeal within six months from the decree, etc., *quære*. *Casement* v. *Fulton*, 5 Moo. P. C. 130.

3. Where the petitioner, after a decision in his favour, that certain seizures for alleged breaches of the revenue laws by the attorney-general of Jersey were illegal, filed his petition and remonstrance in the Royal Court there, to recover damages suffered thereby; and the attorney-general alleging, that, having acted under the advice of the bailiff, jurats, lieutenant-governor, and treasurer of the island, they ought to have been made parties, and they were accordingly joined in the suit, whereupon the attorney pleaded, that the bailiff and jurats constituted the Royal Court, whereupon the Court declared itself incompetent to adjudicate in the cause: after two years the petitioner presented a doleance and petition to the Queen in Council, and obtained a summons for the attorney-general to appear:—Held, that the lapse of time, and the uniting a doleance with a petition of appeal, being the one a complaint against the judge, and the other a prosecution of a suit between the parties, and, lastly, the suit being between other parties, who were not included in the petition, were fatal objections, and the summons was dismissed. *Re Whitfield*, 5 Moo. P. C. 157.

4. Where the time for appealing from a Vice-Admiralty Court has expired, owing to a delay by counsel in advising on the success or failure of such appeal, such delay being caused by counsel's waiting for the decision of another appeal pending before the Privy Council, which decision it is reasonably possible may throw light on the appeal to be advised upon, such apology may, in the absence of circumstances to destroy its effect, induce the Judicial Committee to allow the prosecution of the appeal under 26 Vict., c. 24, s. 23. *Cassanova* v. *Reg.*, 1 L. R., P. C., 115; 12 Jur., N. S., 127; 14 W. R. 617.

5. The Judicial Committee has no jurisdiction to entertain an application for extension of time to appeal until the petition of appeal is lodged. *Gungadhur Seal* v. *Sreemutty Raddamoney Dossee*, 9 Moo. P. C. 411.

Where it appeared that an inquiry was pending before the Master in the court below, arising out of the decree which was the subject of the appeal, the result of which might render the prosecution of the appeal unnecessary, the Judicial Committee enlarged the time prescribed by Rule 5 of the Order in Council of the 13th June 1853, for prosecution thereof, until further order. *Ib.*

6. The petitioners, being the respondents in a suit in the High Court of Bengal, against whom a divisional bench pronounced judgment, applied for a review of such judgments which was admitted for argument, but dismissed on the hearing. The petitioners applied for leave to appeal to Her Majesty in Council; but the High Court refused the application, on the ground that the time had expired within which such appeal could be granted. It appeared that the practice in respect of the time from which the limitation as to appeals ran had been changed pending the proceedings on review. Under these circumstances special leave to appeal was granted. *Nogender Chunder Ghose* v. *Mahomed Ensuff*, 37 L. J., P. C., 16.

2. Abatement and Revivor.

7. The executors of B., parties to the suit below, had not been served with the appeal; the Court, before giving judgment, directed the appeal to stand over for six months, with liberty for them to attend and be heard on the appeal. *Gordon* v. *Horsfall*, 5 Moo. P. C. 393; 11 Jur. 569.

8. Appeal abated by death of respondent, whose heirs renounced the succession; and a curator having been appointed by the Court below to the vacant succession, the appeal was revived against such curator. *Ermatinger* v. *Gugy*, 5 Moo. P. C. 1.

9. Appeal abated by the death of the Dean of Jersey, pending the appeal, revived in the name of his successor, though not prosecuted within the time required by the 57th canon. *Jersey* (*Dean*) v. —— (*Rector of the Parish of*), 3 Moo. P. C. 229.

10. Some of the plaintiffs to a suit had died pending an appeal, and the suit had not been revived against their representatives. In such circumstances the appeal was allowed to be prosecuted in the name of the surviving plaintiffs, as this Court is not disposed to give effect to technical rules in pleading, which would prevent justice being done. *Bute* (*Marchioness*) v. *Mason, Exp. Heard*, 7 Moo. P. C. 1.

A party to a suit, having an interest in the subject matter in his own right, and also as trustee for other parties, became insolvent, and his interest was vested in a trustee appointed to his sequestered estate:—Held, that he might, as such trustee, prosecute an appeal from an order made in the suit, notwithstanding the insolvency and the vesting of his estate and interest in the trustee of the sequestered estate. *Ib.*

11. After an appeal to England before any

petition of appeal was lodged, the appeal abated by the death of the appellant; appeal revived by the appellant's special administratrix. *Troup* v. *East India Co.*, 7 Moo. Ind. App. 104.

1. An appeal abated by the death of the respondent, revived by the appellant, by making the deceased's heir respondent in his stead. *Ahier* v. *Westaway*, 9 Moo. P. C. 395.

2. An appeal abated by the death of the respondent. Administration with the will annexed was granted to the administrator-general of Bengal. On the application of the appellant the appeal was revived against the administrator-general, as the personal representative of the respondent. *Gobind Chunder Sein* v. *Ryan*, 15 Moo. P. C. 230.

3. Dismissal for want of Prosecution.

3. The petitioner's summons to the attorney-general discharged for non-prosecution of his appeal in the limited time, and for other reasons. *Re Whitfield*, 5 Moo. P. C. 157. And see 2 Moo. P. C. 269, 273.

4. Appeal dismissed for want of prosecution. *Semble*, it is not necessary for the respondent to lodge a printed case and appendix before moving to dismiss the appeal for non-prosecution. *Jackson* v. *Prothero*, 3 Moo. P. C. 490.

5. Application to dismiss an appeal on the ground of delay in prosecution and no certificate, being pursuant to the 31st section of the Canada Judicature Act, refused, the rule allowing a year and a day for prosecuting an appeal, though usually adhered to, not being imperative upon the King in Council, and the respondents having no claim to complain of delay, after laying themselves eight months without making any application. *St. Louis* v. *St. Louis*, 1 Moo. P. C. 143. And see *Wilson* v. *Arnold*, *id.* 147. n.

6. After an appeal had been set down for hearing the appellant was adjudged an insolvent. The Court postponed the appeal for six months to enable the official assignee to intervene. No steps having been taken by the assignee, the Judicial Committee refused a further extension of time and dismissed the appeal for want of prosecution. *Gooroochurn Sein* v. *Radanauth Sein*, 11 Moo. P. C. 76.

7. An appeal was allowed by the Supreme Court in New South Wales in July 1855. No step was taken in England by the appellant to prosecute the appeal, either by entering an appearance or lodging a petition of appeal. The transcript was transmitted by the Colonial Court to the Council Office. Motion by respondent, in November 1856, to dismiss the appeal from prosecution. The Judicial Committee declined to make any order upon the motion. *Walker* v. *Kirohner*, 11 Moo. P. C. 21.

Quære, if the Judicial Committee has any jurisdiction over an appeal before the petition of appeal is lodged and referred to them. *Ib.*

4. Restoring.

8. Leave given to restore an appeal, dismissed for want of prosecution, the Court below having consolidated it with another appeal in the same cause, which was still pending. *Chowdry* v. *Mullick*, 1 Moo. P. C. 404.

9. Leave given to restore an appeal dismissed for want of prosecution by the appellants, the appellants' agent, who was instructed to prevent the dismissal of the appeal, not having received the transcript until after the expiration of a year and a day from the time of the allowance of the appeal, and the respondent having in consequence thereof obtained an order of dismissal. *Dabee* v. *Roy*, 3 Moo. P.C. 11.

10. Appeal restored after being dismissed for want of effectual prosecution within the time limited by the 5th rule of the Order in Council of the 13th of June 1853; the new rules having been only recently adopted by the Sudder Court at Calcutta, and the appellant, in ignorance of their existence, being engaged in taking steps to prosecute the appeal within the time and according to the practice previously existing. *Tewarree* v. *Maree*, 9 Moo. P. C. 86.

11. Circumstances under which the time limited for prosecuting an appeal before Her Majesty in Council, by the 5th order of the Orders in Council of June 1853, was extended, and a certificate dismissing the appeal set aside. *Duthie* v. *Butler*, 14 W. R. 617.

12. Appeal from the Sudder Court in India, which stood dismissed under Rule 5 of the Order in Council of the 13th June 1553, for want of effectual prosecution restored, as the appellant was in ignorance of the existence of the new rules, the Sudder Court having served the appellant (after the interposition of appeal) with notice that two years was allowed after the arrival of the transcript in England for prosecuting the appeal. *Seto Luchmeechund* v. *Seto Zorawur Mull*, 9 Moo. P. C. 351.

Where Government securities for the due prosecution of an appeal and costs were deposited in the registry of the Sudder Court, the Judicial Committee, in restoring the appeal, dispensed with the usual recognisance in England. *Ib.*

13. Restoration of an appeal allowed, upon condition of the appellant lodging in England security for costs of the appeal. Six months having elapsed without the appellant having lodged the required security, the respondent applied to dismiss the appeal by reason of the non-performance of that condition. As it appeared that the appellant's agent was in daily expectation of funds from India, the case was, upon the appellant paying the costs of the day, ordered to stand over for three months for the appellant to perform that condition; in failure thereof, the appeal to stand dismissed. *Rance Hurrosoondree Dibiah* v. *Rajah Pran Kishen Sing*, 11 Moo. P. C. 304.

14. Under circumstances, showing conflicting and opposite decisions by the Sudder Court upon the same question at issue between the same parties, an appeal treated under the 8 & 9 Vict., c. 30, s. 2, as abandoned for non-prosecution, was restored upon terms of payment of costs, and undertaking to lodge cases forthwith, and security or a bond in England to the amount of 500*l.* *Debiah* v. *Sing*, 11 Moo. P. C. 152.

Where an appeal has been treated as abandoned by the 8 & 9 Vict., c. 30, s. 2, the Judicial Committee has no power to grant leave to institute a new appeal; only a discre-

tion to allow the original appeal to be restored. *Ib.*

1. Appeal dismissed for want of prosecution, under Rule V. of the Order in Council of the 13th June 1853, restored under circumstances showing that the interest of infants was materially affected, but upon condition that the appeal should be prosecuted within a given time. *Rance Birjobuttee* v. *Pertaub Sing*, 13 Moo. P. C. 465.

5. Transcript Record.

2. The prerogative of the Crown with regard to aliens must be determined by the laws of the particular colonies in which the questions arise, and not by the law of England, which is only to be looked at in order to determine who are, and who are not, aliens. The Droit d'Aubaine became the law of Lower Canada with regard to aliens, on the ancient French law being established there, by the 14 Geo. 3, c. 83. The Judicial Committee will not notice any alteration of rights that may have taken place between the parties in consequence of an Act of the provincial legislature, but which do not appear on the record. *Donegani* v. *Donegani*, 3 Knapp 63.

3. The letters of preference of escheated properties in a colony, not forming part of the transcript, the hearing of the appeal respecting it was postponed, and an order made for a certified copy to be transmitted by the clerk of the patents in Jamaica to the Privy Council office. *Mason* v. *Jamaica* (*Att.-Gen.*), 4 Moo. P. C. 228; 7 Jur. 1071.

4. Respondents appeared by counsel at the hearing to argue an appeal, without having lodged a printed case. The Council refused to hear the appeal until a printed case was lodged. *Bengal Government* v. *Mussumat Shurrufutoonnissa*, 8 Moo. Ind. App. 225.

5. Two of the judges in the court below dissented from the other judges, but did not express their reasons in court for disagreeing with the other judges. After an appeal was interposed to England, those judges prepared written judgments, which were transmitted to England, and first known at the hearing, as forming part of the printed record before the Judicial Committee. Such course observed upon and condemned, as the judges' opinions should have been stated publicly at the hearing in the court below, and not have been reserved to influence the decision of the Court of Appeal. *Brown* v. *Gugy*, 2 Moo. P. C., N. S., 341.

6. Reasons given by a judge of a court from which an appeal lies to the Privy Council ought to be stated publicly at the hearing, and communicated to the registrar of the Privy Council. *Richer* v. *Voyer*, 5 L. R., P. C., 461; 22 W. R. 849; 30 L. T., N. S., 506.

The Privy Council will not look at notes merely communicated to one of the parties. *Ib.*

7. An appellant had obtained leave to appeal, but took no steps to procure a transcript of the record to be sent and lodged at the Privy Council office for three years, or any other step. The appeal was dismissed, with costs. *Smith* v. *Cresswell*, 10 L. T., N. S., 672.

8. Two sets of defendants severed in defence (their interests involving an alternative as to which was responsible to the plaintiff), and the Court below fixed one set of the defendants with the liability. Upon an appeal, in which the plaintiff was made sole respondent, the other defendants were held entitled to appear, and to lodge a separate case. *East India Co.* v. *Robertson*, 12 Moo. P. C. 400.

9. The Courts in Canada examined witnesses and compared the handwriting of a promissory note sued upon, and which was alleged to be a forgery, with the handwriting of two other documents put in evidence, and admitted to be genuine. In such circumstances the Judicial Committee, upon petition for that purpose, ordered the Court in Canada to transmit the originals for the purpose of inspection and comparison at the hearing of the appeal from the judgment of the Court of Lower Canada. *McCarthy* v. *Judah*, 12 Moo. P. C. 47.

10. The Court can only look to the record of proceedings transmitted by the Court below. It will not receive shorthand writers' notes to impeach the accuracy of the judges' notes taken at the trial, to show that the evidence set forth in the transcript record was not exhibited, or that evidence had been given which had been omitted in the transcript. *Stanford* v. *Brunette*, 14 Moo. P. C. 60.

A petition by an appellant impugning the correctness of the transcript record transmitted by the registrar, under the seal of a colonial Court, praying for the transmission of the original documents adduced in evidence, the shorthand writers' notes of the evidence, judgments and observations of the judges, and for a fuller and more correct account of the oral evidence given at trial, before the hearing of the appeal, refused. *Ib.*

11. It is no part of the duty of the registrar of the Judicial Committee to give notice to the parties to an appeal of the arrival of the record of the proceedings in the court below. The parties must examine for themselves at the Council Office. *Moyee* v. *Roy*, 38 L. J., P. C., 21; 20 L. T., N. S., 333; 2 L. R., P. C., 274; 5 Moo. P. C., N. S., 373.

6. Pleadings.

12. Some of the plaintiffs had died in the course of the appeal, and the suit had not been revived against their representatives. In such circumstances, the appeal was allowed to be prosecuted in the name of the surviving plaintiffs, as this court is not disposed to give effect to technical rules in pleading, which would prevent justice being done. *Bute* (*Marchioness*) v. *Mason, Exp. Head*, 7 Moo. P. C. 1.

13. The Order in Council establishing the Judicial Committee, directs that the rules of procedure shall be so framed as to secure, as far as may be, that cases shall be decided on their merits, according to substantial justice, without excessive regard to technicalities of pleading. *Black* v. *Ottoman Bank*, 8 Jur., N. S., 801.

14. An objection to an agreement as being void by the Statute of Frauds, 29 Car. 2, c. 3, by reason of its not being in writing, should be pleaded by the answer, and cannot be entertained at the hearing of an appeal. *Daniel* v. *Trotman*, 1 Moo. P. C., N. S., 123.

1. The Privy Council, though not holding parties strictly to their pleadings, will not allow defences to be set up on appeal which have not been suggested in the pleadings, or called to the attention of the Courts below. *Garden Gully Mining Co.* v. *McLister*, 33 L. T., N. S., 408; 24 W. R. 744; 1 L. R., App. Cas., 39.

2. The Privy Council will exercise its discretion in deciding a case on its merits, without regarding strictly the precise terms of the pleadings. *M'Lean* v. *M'Kay*, 5 L. R., P. C., 327.

3. When the rules of pleading in a court in a foreign country having jurisdiction over British subjects, are by petition and answer, the several paragraphs of the answer can be read together, and not as in English pleadings treated as separate pleas. *Hart* v. *Gumpach*, 4 L. R., P. C., 439; 42 L. J., P. C., 25; 21 W. R. 365; 9 Moo. P. C., N. S., 241.

7. Admissibility of New Evidence.

4. A medical certificate of the competency of the party, in a suit *impotentiæ causâ*, not in evidence in the court below, refused to be admitted on appeal. *Harrison* v. *Harrison*, 4 Moo. P. C. 96; 6 Jur. 899.

5. Evidence not adduced in the court below, nor forming part of the transcript, admitted on motion to be used at the hearing of the appeal, subject to all just exceptions. *Hughes* v. *Parral*, 4 Moo. P. C. 41.

6. *Quære*, whether an appellant who wishes to avail himself of evidence not produced before the Court below, must not, either in his petition of appeal, or by a special petition for that purpose, pray that it may be received before the Judicial Committee. *Jephson* v. *Riera*, 3 Knapp 130.

7. *Semble*, on an appeal in a proceeding under the Church Discipline Act, the Court will not permit the examination *vivâ voce* of witnesses examined in the court below, on the ground of their having been tampered with previously to their examination there, unless upon direct proof of such tampering having taken place; nor under a general charge of adultery, etc., will it admit additional articles, bringing forward acts of adultery alleged to have occurred subsequently to the close of the case in the court below. *Craig* v. *Farnall*, 13 Jur. 217.

8. On a motion for leave to adduce fresh evidence before the hearing of an appeal, it appeared that the evidence might have been adduced at the hearing in the court below, if application had been made to postpone the hearing for that purpose, but that no such application was made. The Committee, therefore, refused to admit further evidence, and dismissed the motion, with costs. *The Alicia Annie and Aminta* v. *The Scindia*, 35 L. J., P. C. C., 53. S. C. *nom. Kirby* v. *The Scindia*, 12 Jur., N. S., 534.

9. A special libel of appeal, and an allegation by the appellants, and responsive allegation by the Crown, pleading new matters, admitted by the Court of Appeal, and fresh evidence taken thereon. *Hocquard* v. *Reg.*, 11 Moo. P. C. C. 155.

10. The Royal Court of Jersey having refused to hear witnesses tendered by a defendant, in support of one of his pleas, and great delay having occurred from the course pursued, the Judicial Committee, under 3 & 4 Will. 4, c. 41, s. 7, appointed a special examiner to take further evidence in the island, confining his inquiry to certain facts, and directing him to report the same within a limited time; the appeal to stand over for the production of his report, and to be argued with reference only to the effect produced upon the entire case by such additional evidence. *Falle* v. *Le Sueur*, 12 Moo. P. C. 501.

8. Objections not taken in Court below.

11. *Semble*, objections cannot be made to a decree at the hearing before the Privy Council, that have not been made in the court below. *Frankland* v. *M'Gusty*, 1 Knapp 274.

12. The Lords of the Privy Council are less strict in matters of form than other Courts; and where, after a confirmation of a report made in the court below, a further inquiry as to the matter of the report had been directed by such Court, the Lords of the Privy Council refused to disturb such order, notwithstanding its manifest irregularity, and though it was admitted that if the objection had been taken in the court below, it would have been fatal. The party interested in opposing the report, which was re-opened, was not before the Court when it was confirmed. *Lyons* (*Mayor*) v. *East India Co.*, 1 Moo. P. C. 175.

13. An objection not raised in the court below cannot be taken in the Appellate Court, unless it is patent upon the face of the proceedings, so that the Appellate Court can take a judicial notice of the objection. *Devine* v. *Holloway*, 14 Moo. P. C. C. 290.

14. An objection for want of parties to a bill ought to be made in the court below. A court of appeal will not treat the suit as defective when no such objection was taken in the Colonial Court. *Bowes* v. *Toronto* (*City of*), 11 Moo. P. C. 463.

15. Parties having separate and distinct interests were joined together as co-plaintiffs: —Held, that as no objection, for misjoinder or multifariousness, had been raised by the answer, or at the hearing in the court below, to the frame of the bill, it could not be taken upon appeal. *Bute* (*Marchioness*) v. *Mason*, *Exp. Heard*, 7 Moo. P. C. 1.

16. The Judicial Committee will not entertain technical objections not taken in the court below, when they are merely of form, and do not affect the substance of the matter in controversy. *Orphans* (*Board of*) v. *Kraegelius*, 9 Moo. P. C. 438.

17. The Court will not entertain a purely technical objection to a party's right of action which has not been made in the court below. *Bengal* (*Bank of*) v. *Macleod*, 7 Moo. P. C. 35; 13 Jur. 945. See also *Bengal* (*Bank of*) v. *Fagan*, 7 Moo. P. C. 61.

Upon the reversal of the judgment of the Supreme Court at Calcutta finding for the plaintiff, this Court, in the circumstances of the constitution of the Supreme Court, directed a verdict to be entered for the defendants, instead of awarding a *venire de novo*. *Ib.*

1. The Judicial Committee will not entertain an appeal upon facts which were known to the appellant at the time of hearing in the court below, but which were not brought to the notice of the court below. *Lyall* v. *Jardine*, 39 L. J., P. C., 43; 18 W. R. 1050; 22 L. T., N. S., 882; 3 L. R., P. C., 318.

2. The Judicial Committee is unwilling to send a case for re-trial, or to decide it, upon points which have been raised for the first time at their bar, and which possibly may have been treated as agreed upon, or too clear for argument in the court below. *Mackay* v. *Commercial Bank of New Brunswick*, 5 L. R., P. C., 394; 43 L. J., P. C., 31; 30 L. T. 180; 22 W. R. 473.

3. The Privy Council, though not holding parties strictly to their pleadings, will not allow defences to be set up on appeal which have not been suggested in the pleadings, or called to the attention of the Courts below. *Garden Gully Mining Co.* v. *McLister*, 1 L. R., App. Cas., 39; 33 L. T. 408; 24 W. R. 744.

4. In a case in which the government of a colony appeared in the name of the nominal defendant, and obtained judgment:—Held, that the right of the plaintiff to appeal against such judgment could not be prejudiced by the objection that the action had not been brought against the right party, such objection not having been taken in the court below. *Webb* v. *Wright*, 8 L. R., App. Cas., 318; 52 L. J., P. C., 40; 49 L. T. 145.

9. Judgment on Questions of Fact.

5. No appeal will lie from the judgment of a Court below, on the sole ground that it discredited the testimony of the witnesses improperly. *Santacana* v. *Ardevol*, 1 Knapp 269.

6. The objection to allow a witness to be re-examined, after a release of a prior interest going to his competency, is a purely technical one; and where there was no suspicion of previous cognisance, or lying by until the objection was discovered, the appeal was dismissed with costs, affirming the decision below. *Clark* v. *Carter*, 4 Moo. P. C. 207; 7 Jur. 161.

7. Where, on an objection taken at the hearing of the cause to the competency of a witness, the Court rejected his entire deposition, against which the appellant interposing an appeal, and withdrawing from the case, a sentence was given:—Held, that the hearing being a continuous act, the receiving or refusing evidence was not an appealable grievance; but after sentence, an appeal being competent, or to any part thereof, that such withdrawal was not a contempt of Court, nor to preclude the right of appeal. *Handley* v. *Edwards*, 4 Moo. P. C. 407; 8 Jur. 677.

8. Where books and papers were fairly presumable to be in the power of the plaintiff, the Judicial Committee, on appeal, in reviewing the items of an account, proceeded on the principle of acting on much less amount of evidence, in defect of proof occasioned by such absence of books, etc. *Retemeyer* v. *Obermüller*, 2 Moo. P. C. 93.

9. When the question is one of fact only, and has been tried by a jury in the court below, this Court will not reverse a judgment upon such finding, unless they are satisfied that the judgment is clearly wrong. Although there is not so much strictness required in pleadings in the courts in the Isle of Man as in England, yet where a declaration in an action for deceit contains specific averments of fraud, such averments must be established by proof, to entitle the plaintiff to recover. *Moore* v. *Clucas*, 7 Moo. P. C. 352.

10. The Judicial Committee will not reverse the finding of a jury or of a Court that sits as a jury upon a question of fact, unless perfectly satisfied that they were wrong, as, from their knowledge of the local circumstances and the character and appearance of the witnesses, they are better able to form a correct opinion than the appellate tribunal. *Mullick* v. *Radakissen*, 9 Moo. P. C. 46.

11. *Semble*, the Court will not disturb a judgment of a Court in India upon the question of the credibility of witnesses, unless it is manifestly clear, from the probabilities attached to certain circumstances in the case, that the Court below was wrong in the conclusion drawn from such evidence. *Musadee Mahomed Cazum Sherazee* v. *Meerza Ally Mahomed Khan*, 8 Moo. P. C. 90.

12. It is not the practice of the Committee to disturb the finding of the Court below upon mere issues of fact, unless clearly satisfied that there has been some miscarriage, either in the reception, or in the application of evidence. *Re Ghoolam Moortoozah Khan Bahadoor*, 9 Moo. Ind. App. 456.

13. On an issue involving a question of fact, tried by a jury, the Privy Council will not reverse the finding of the jury unless (1) anything material has been admitted as evidence which was not legal evidence, (2) anything material has been tendered as evidence and rejected which ought to have been received, or (3) misconduct on the part of the jury. *Cowin* v. *Moore*, 14 Moo. P. C. 354.

14. Where evidence is conflicting, the Appellate Court, in order to advise a reversal of the judgment appealed from, must not merely doubt whether the judgment appealed from is correct, but must be satisfied that it is wrong. *North German Lloyd Steamship Co.* v. *Elder*, 14 Moo. P. C. 241.

15. As a general rule, the Judicial Committee will not reverse the concurrent findings of two Courts on a question of fact. *Hay* v. *Gordon*, 4 L. R., P. C., 337; 21 W. R. 11.

Semble, that in cases where the decision of a Court below is only operative upon confirmation by a superior Court, they will not be considered as two separate judgments. *Ib.*

16. As a general rule the Appellate Court will not reverse a decision of the Court below on a mere question of fact; but where there is no conflict of testimony, and the only question of fact is as to the effect of the facts proved in raising further inferences of fact, that rule does not apply. *Thurburn* v. *Steward*, 3 L. R., P. C., 478; 40 L. J., P. C., 5; 19 W. R. 678.

17. The Committee will not recommend Her Majesty to reverse the judgment of an inferior court in a suit in which nominal damages alone are to be recovered. *Giraud* v. *Paterson*, 38 L. J., P. C., 65; 21 L. T., N. S., 200.

A suit having been brought in Her Majesty's Consular Court at Smyrna to recover damages, and not to try a right, and judgment having been given for the defendant:—Held,

that if the plaintiff had a nominal interest which might be the subject of an action in one of the courts of common law, that species of nominal interest for the mere nominal claim for damages would be no ground before the Judicial Committee to recommend that the judgment of the Court below should be reversed. S. C. 18 W. R. 359.

1. In a question of fact the Judicial Committee is reluctant to reverse or disturb the decision of the Court below. *The Alice and The Princess Alice*, 2 L. R., P. C., 245; 38 L. J., Adm., 5; 19 L. T., N. S., 678; 5 Moo. P. C., N. S., 333.

2. The Judicial Committee will not, unless there is manifest error in a judgment under appeal, overrule decisions pronounced in a country in which the law of France prevails, must be known and continually acted upon by courts of law, and in which also the witnesses on both sides reside and may have been more or less known to and seen when under examination by the judges or some of them, who likewise are familiar with the usages and customs of the place in which all the circumstances which formed the subject of the evidence occurred. *Scott* v. *Paquet*, 36 L. J., P. C., 65; 4 Moo. P. C., N. S., 505.

3. Material mistakes in respect to certain facts in evidence occurred in the summing up of the judge. The Committee, though it sustained the decree appealed from, under the circumstances affirmed the judgment without costs. *General Iron Screw Co.* v. *Moss*, 15 Moo. P. C. 122.

The Court must be satisfied that the decree is founded on some substantial mistake, either in law or fact. *Ib.*

4. The Judicial Committee is always reluctant to interfere with a matter of discretion exercised by the Court in India, unless it can be shown that the Court has acted upon an erroneous principle. *Hindustan, China, and Japan (Bank of)* v. *Eastern Financial Association*, 2 L. R., P. C., 489; 20 L. T., N. S., 889; 17 W. R. 554; 6 Moo. P. C., N. S., 114.

10. New Trial, when Directed.

5. Where, at a trial in Bengal, the judge received certain documentary evidence, the Supreme Court, on an application for a new trial on the ground of such evidence being improperly received, should consider the importance of the evidence so received. *East India Co.* v. *Paul*, 14 Jur. 253; 7 Moo. P. C. 85.

6. At the trial, certain documents contained in the schedule to the answer of the defendants to a bill of discovery filed in equity were read as evidence for the plaintiff, but the Court refused to allow the defendants to read the answer to which the schedule was annexed:—Held, that as the Supreme Court at Calcutta, being jurymen as well as judges, had refused to allow the answer to be read, on the ground that such answer contained nothing material to the issue which could influence their verdict, a new trial on the ground of such refusal would not be granted. *Ib.*

7. Upon the reversal of the judgment of the Supreme Court at Calcutta, finding for the plaintiff, this Court, in the circumstances of the constitution of the Supreme Court, directed a verdict to be entered for the defendants, instead of awarding a *venire de novo*. *Bengal (Bank of)* v. *Macleod*, 7 Moo. P. C. 35; 13 Jur. 945. S. P. *Bengal (Bank of)* v. *Fagan*, 7 Moo. P. C. 61.

8. Where a judgment of the Queen's Bench in Lower Canada (affirming the judgment of a superior Court) was reversed by the Privy Council on the ground of misdirection on the part of the judge who tried the cause, the Committee, on the petition of the appellant, who was unable to enforce his decree, directed a *venire de novo*. *Montreal Assurance Co.* v. *M'Gillivray*, 13 Moo. P. C. 125; 9 W. R. 370.

9. In reversing the judgment of the Court below, liberty was given to amend the pleadings, and a new trial directed. *Williams* v. *Byrnes*, 1 Moo. P. C., N. S., 154.

10. The principles which govern the Appellate Court in granting a new trial when the verdict of the jury is against the opinion of the presiding judge, explained. *Humphrey* v. *Nowland*, 15 Moo. P. C. 343.

11. Although the Privy Council have the right, if they think fit, to order a new trial on any ground, that power will not be exercised merely where the verdict is not altogether satisfactory, but only where the evidence so strongly preponderates against it as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it. *Connecticut Mutual Life Insurance Co. of Hertford* v. *Moore*, 6 L. R., App. Cas., 644.

12. When a defendant did not apply to the Colonial Court for a new trial in an action for a libel, but, upon special application for leave, the Judicial Committee, after hearing counsel on both sides, allowed the appeal on the ground of the judge's misdirection:—Held, that it was too late at the hearing to object, that the appellant ought to have applied to the Court below for a new trial. *Stace* v. *Griffith*, 2 L. R., P. C., 420; 6 Moo., P. C., N. S., 18; 20 L. T., N. S., 197.

13. By the ordinances constituting the Supreme Court at Hong Kong, it is enacted, that all matters relating to the practice and proceedings of that court are to be the same as the courts in England. The Supreme Court is composed of a single judge, and there is no court of error or appeal in the colony. An appeal to England lies against any final decree, judgment, or sentence, or against any rule or order made in a civil suit or action having the effect of a final and definitive sentence. In an action on promises, the jury found a verdict for the respondents. Before judgment was signed, the appellant applied to the Court for leave to appeal from such verdict to England, which the judge, in the circumstances of the constitution of the Court, granted:—Held, that as the English practice prevailed at Hong Kong, the allowance of such appeal was irregular, being in effect an appeal against the verdict of a jury, and that the proper course would have been to have moved the Court below for a new trial, and to have appealed against the judgment refusing such motion. *Tronson* v. *Dent*, 8 Moo. P. C. 420.

14. The appellants brought an action of ejectment in the Island of Ceylon, for lands then in the possession of the respondent, and

for mesne profits. The respondent had filed a bill in the Court of Chancery, in England, to establish a contract of sale of the same lands. From the insufficiency of the pleadings in the action, at Ceylon, the real question between the parties, namely, whether an absolute contract had been executed according to the law of Ceylon, was not put in issue, or brought before that Court. This omission arose principally, if not entirely, from the conduct of the respondent. A decree was made by the district Court of Kandy in favour of the appellants; but upon application to the Supreme Court, by the respondent, stating the omission of the facts necessary to enable the Court to have decided the question at issue, and for leave to amend the pleadings, the Court set aside the decree of the district Court, and granted a new trial, with leave to amend the pleadings, and to enter into further evidence. Upon appeal from this order, the Judicial Committee considered that the conduct of the respondent had been such that a new trial ought not to have been granted, and that the same point ought not to be litigated in England and Ceylon; and, considering also the difficulty of the parties obtaining effectual relief in England, put the respondent upon terms of consenting to the dismissal of his bill in England, with costs, and to pay the costs incurred in the court below, when they would sustain the order appealed from; or, in the alternative, that their lordships would reverse the order granting the new trial, and put the appellants in the possession of the lands, leaving the Supreme Court in Ceylon to ascertain the amount of the mesne profits. *Anstruther* v. *Arabin*, 6 Moo. P. C. 286; 12 Jur. 883.

11. Remitting Cause.

1. A party having presented a doleance and petition against an order of the Royal Court of Jersey, made *ex parte* in a proceeding against him for breach of the revenue laws, their lordships, considering that such order might properly, according to the practice of the Court, be made *ex parte*, dismissed the petition and doleance; but considering the hardships of the case, and particularly that the petitioner had neglected to defend himself in ignorance of what the law allowed to be done against him in his absence, remitted the case to the Court below, with liberty to petition to defend himself. *Re Whitfield*, 2 Moo. P. C. 269.

2. Cause remitted to the Court below to calculate interest upon the debt according to the Dutch Roman law in force at the Cape of Good Hope. *Maxwell* v. *Deare*, 8 Moo. P. C. 364.

3. Petition to dismiss an appeal from the Sudder Court in India, and for an order directing that Court to carry into execution the terms of a deed of compromise upon which the withdrawal of the appeal was founded; refused. *Ghosal* v. *Indoo*, 7 Moo. P. C. 140.

All this Court will do in such circumstances is to make an order of dismissal, reserving to the parties leave to apply to the Court in India to take further proceedings, in pursuance of such agreement. *Ib.*

12. Re-hearing Appeal.

4. Petition for a re-hearing of an appeal, on the ground that the judgment of the Judicial Committee had been formed upon documents, which were improperly included by the clerk of the appeals in Lower Canada in the transcript of documents, having been excluded from the pleadings by an act of the Court below, refused, as it appeared that the petitioner had not objected to the documents forming part of the transcript, and had sought to take advantage of such documents as evidence at the hearing of the appeal. *Motz* v. *Moreau*, 13 Moo. P. C. 376; 9 W. R. 421.

5. The re-hearing of an appeal heard *ex parte*, on which an Order in Council has been made, refused, the default in not appearing and contesting the appeal being occasioned by the agents of the respondent, who sought to have the appeal re-heard. *Exp. Kisto Nauth Roy*, 2 L. R., P. C., 274; 38 L. J., P. C., 21; 20 L. T., N. S., 333; 17 W. R. 521; 5 Moo. P. C., N. S., 373.

A re-hearing will not be allowed except under very special circumstances. *Ib.*

6. A petition having been presented for a re-hearing of the appeal, before the report of the Judicial Committee had been confirmed by Her Majesty in Council, which stated that evidence had been received at the hearing of the appeal which was not called for or produced in the court below, and which the petitioner alleged contradicted the case made by the pleadings on both sides, was dismissed, the Judicial Committee, without deciding that they were not competent to grant a rehearing, being of opinion that the grounds relied on in the petition did not bring the case within any principle on which such an application could be supported. *The Singapore and The Hebe*, 1 L. R., P. C., 378; 4 Moo. P. C., N. S., 271.

13. Stay of Proceedings.

7. A mandamus of penal interdict ought not to be granted to restrain the execution of a sentence upon grounds that might have been brought forward at the hearing of the cause. In an appeal against the execution of a sentence, the appellant cannot enter into its merits. By such an appeal, the justice of the original sentence is admitted. *Nieuwerkerk* v. *Reynolds*, 1 Knapp 151.

8. Appeal allowed from a sentence of the Lieutenant-Governor of the island of Heligoland; the sentence having been passed without hearing the appellant's case. *Siemens* v. *Bufe*, 11 Moo. P. C. 62.

Execution of sentence, ordering a distribution of the property in dispute, ordered to be stayed pending the appeal.

9. On petition to stay the trial of the issues of fact pending an appeal to the Judicial Committee from the Supreme Court:—Held, that a petition for a stay of proceedings will only be granted when an irreparable injury will result to the party applying, unless delay is granted, and when the party applies promptly. *Ally Khan* v. *Ajoadhyaram Khan*, 1 L. R., P. C., 8; 12 Jur., N. S., 59; 35 L. J., P. C., 21; 14 W. R. 250.

14. Appeal in Formâ Pauperis.

1. Appeal *in formâ pauperis* allowed, the appellant, by his petition and affidavit, alleging that he was not worth 5*l.* besides wearing apparel, etc. *Brouard* v. *Dumaresque*, 3 Moo. P. C. 457.

2. Leave to appeal *in formâ pauperis* allowed, and sureties for prosecuting appeal dispensed with. *Brouard* v. *Dumaresq*, 6 Moo. P. C. 412.

3. Before a party can be admitted to appeal *in formâ pauperis* to the Judicial Committee of the Privy Council from the courts in Doctors' Commons, he must have a certificate of an advocate of the bar of those courts that he has a just and probable cause of appeal. Upon such certificate, and taking the usual oath as a pauper, the surrogate may admit an appeal *in formâ pauperis*. *Lait* v. *Bailey*, 7 Moo. P. C. 436.

4. An appellant who had not sued as a pauper in the court below admitted by the Judicial Committee to appeal *in formâ pauperis*, upon the usual certificate, without giving security for the costs already incurred, and in which she had been condemned by the decree of the Court below. *Watts* v. *Beaman*, 9 Moo. P. C. 81.

5. An appellant admitted to appeal *in formâ pauperis*. *Re Lempriere*, 11 Moo. P. C. 398.

6. In consequence of the poverty of a plaintiff, the Supreme Court of New Zealand allowed an appeal to the Queen in Council without requiring security for costs. *Bunny* v. *Hart*, 11 Moo. P. C. 189.

7. Permission is given to appeal *in formâ pauperis* in a case in which the appellant was not heard in the Court below, and refused leave to appeal to Her Majesty in Council, the decision being in fact *ex parte*. *George* v. *Reg.*, 1 L. R., P. C., 389; 4 Moo. P. C., N. S., 287.

15. Security for Damages and Costs.

8. The Court below at the Mauritius is the sole judge of the sufficiency of the security to be given for the due prosecution of an appeal. Where that Court has refused to allow an appeal on account of the insufficiency of the security tendered, the Privy Council will not allow one to be instituted. *Cambernon* v. *Egroignard*, 1 Knapp 251.

9. Appeal allowed, though the security for prosecuting the same had not been perfected in due time, such omission being occasioned by the suspension and removal of the judges in the colony, and the imperfect constitution of the Court in consequence thereof. *Inglis* v. *De Barnard*, 3 Moo. P. C. 425.

10. The Supreme Court at the Mauritius refused to allow an appeal to the Queen in Council from a definitive sentence in a suit for a divorce *à vinculo*, except upon terms of giving security in the aggregate sum of 1,200*l.* sterling for performance of the Order in Council to be made on appeal, and the costs incurred thereby. On petition the Judicial Committee allowed the appeal, fixing the security at 300*l.* *Hulm* v. *Hulm*, 4 Moo. P. C. 262.

11. An Order of Council having been made altering the mode of appealing from the colony, and having been directed by a proclamation of the governor, dated the 14th of May, to take effect from the 18th:—Held, that an appeal which had been noted on the 2nd of that month, from a judgment made on the 1st, and on which the petition to appeal had been presented on the 15th, ought to be prosecuted according to the previous practice, and not according to the order. *Semble*, the Privy Council will not direct a greater security to be entered into by an appellant on granting him leave to appeal, than it had been the practice to require in the colony, although the instructions to the governor empowered him to require greater. *Craig* v. *Shand*, 1 Knapp 253.

12. The "proper security" used in the Canada Act, 34 Geo. 3, c. 2, s. 35, as to the security to be given by an appellant party, means security with proper sureties; but an objection in respect thereof, not having been taken by the respondent in the court below, and an order reviving the appeal having been obtained by the representative of the appellant, was overruled as too late. *Powell* v. *Washburn*, 2 Moo. P. C. 199.

13. Decree of Court below carried into effect pending an appeal, upon the respondent's giving security to abide the event of the appeal. *Gore* v. *Bethel*, 12 Moo. P. C. 189.

14. The terms of the Order in Council are prohibitory, and give the Court no discretion to admit an appeal, unless the security be completed within three months from the date of the petition; but under circumstances, the Court advised the Crown to admit it on petition. *Retemeyer* v. *Obermüller*, 2 Moo. P. C. 93. S. P. *Starkey* v. *Lapslie*, 2 Moo. P. C. 96. n.

15. Leave to appeal on an *ex parte* application was, under special circumstances, granted upon terms of the appellant prosecuting the appeal, and giving security for 500*l.* No step was, however, taken by the appellant to perfect the security or prosecute the appeal. The respondents, on being served with the order admitting the appeal, filed a counter petition, to revoke the leave granted to appeal. The Judicial Committee, under the circumstances, there having been great delay, made an order putting the appellant upon terms of lodging his petition of appeal within six weeks, or the appeal to stand dismissed, and enlarged the amount of the recognisance to 1,000*l.*, to cover the expenses occasioned by the proceedings in the Master's office, reserving the costs of the application to revoke the leave to appeal to the hearing. *M'Kellar* v. *Wallace*, 8 Moo. P. C. 378; 5 Moo. Ind. App. 372.

16. Recognisance entered into to abide the determination of an appeal vacated upon petition of the appellant upon the abandonment of the appeal. *Reed* v. *Dabee*, 11 Moo. P. C. 151.

17. Security ordered to be given in the island of Heligoland by the petitioner for the respondent's costs, and also in the Privy Council Office for costs of copying transcript and printing appendix to the appellant's case. *Siemens* v. *Bufe*, 11 Moo. P. C. 62.

18. Where the Judicial Committee grants leave to appeal under the general jurisdiction of the Queen in Council, it will impose such

terms upon the party applying as the special circumstances of the case require. *Re Sibnarain Ghose*, 8 Moo. P. C. 276.

Appeal admitted from an order confirming the report of commissioners in a partition suit, although the appealable value was under 1,000 rupees, the amount prescribed by the Order in Council of the 10th of April 1838. The petitioner (the plaintiff) had offered to compensate the defendant if the report of the commissioners was varied. The Judicial Committee, in granting leave to appeal, put the petitioner upon terms of lodging in the Council Office, within four months, a certificate of recognisance to the Queen, and the sum of 1,500*l.* for such compensation and costs as might be awarded. *Ib.*

1. In granting special leave to appeal from a judgment in an action in which damages were awarded, the Judicial Committee imposed terms on the petitioner, in addition to giving security for costs, to find security for the amount of the damages awarded by the jury, and upon the compliance of such terms ordered execution of the judgment of the Colonial Court to be stayed. *Stace* v. *Griffith*, 2 L. R., P. C., 420; 6 Moo. P. C., N. S., 18; 20 L. T., N. S., 197.

2. Decree of the Vice-Admiralty Court of Sierra Leone in a proceeding *in rem* for breach of the revenue laws of the colony, condemning the goods seized, and the owners in penalties, reversed by the Judicial Committee, so far as the penalties were concerned, with costs, it appearing that though the claim of the owner of the goods was rightly rejected, because he failed to comply with the rule of the Vice-Admiralty Court requiring security for costs, yet that such rule did not apply, so far as regarded the penalties, against which he was entitled to be heard in the court below without giving any such security. *George* v. *Reg.*, 1 L. R., P. C., 389; 4 Moo. P. C., N. S., 287.

3. Where, in a proceeding *in rem*, a bail-bond given in the court below only covered the costs in that court, the appellants, who were foreigners, were called upon to give security for the costs of the appeal. The Court of Appeal will not, however, entertain any question as to uncovered costs in the court below. *The Hélène*, 35 L. J., Adm., 1.

4. Appeal allowed by a Government officer, the nominal defendant under a local colonial Act, without giving security for costs of appeal. *Robertson* v. *Dumaresq*, 2 Moo. P. C., N. S., 66.

5. By an order of the Supreme Court of Victoria, leave to appeal to Her Majesty in Council, pursuant to a colonial Act, was allowed on condition of the appellant giving security within three months for costs of appeal. The appellant at first offered to deposit money to the amount of the security required, but afterwards a security bond was approved by the Master of the Court, and, without objections by the defendant, filed as a record; but in consequence of objections afterwards taken by the defendant's solicitors to the competency of the proposed sureties, the bond was not filed within three months. Upon a motion by the defendant to set aside the leave to appeal upon that ground, the Supreme Court made an order revoking the leave given. The Privy Council upon petition gave special leave to appeal, on security being given for costs in England, with liberty for the petitioners to apply to the Court at Victoria to cancel the security bond. *Webster* v. *Power*, 1 L. R., P. C., 150.

6. The attorney-general of the Isle of Man, as the chief law officer of the Crown there, bringing an appeal, is not required to enter into a recognisance to answer the costs of appeal. *Man, Isle of (Att.-Gen.)* v. *Cowley*, 12 Moo. P. C. 27; 7 W. R. 713.

7. A sum ordered to be deposited for security of respondent's costs, on allowance of an appeal, granted *ex parte* upon petition of the respondent, increased, on account of the length of the transcript of the proceedings. *Boswell* v. *Kilborn*, 13 Moo. P. C. 476.

8. The security entered into in the Sudder Court for the costs of appeal to England is vacated by the dismissal consequent upon non-prosecution of the appeal within the prescribed time. *Ranee Birjobutteo* v. *Pertaub Sing*, 13 Moo. P. C. 465.

When an appeal is restored, fresh security will be required to be deposited in England. *Ib.*

16. Costs of Appeal.

9. Although the general rule in the Privy Council is not to condemn the appellant to pay the respondent's costs, where the judgment of the Court below is altered on appeal, yet where the appellant might have obtained the alteration in the Court below without appeal, which was made on appeal, and the general principle of the judgment was affirmed, he was ordered to pay the respondent's costs. *Bertram* v. *Godfray*, 1 Knapp 381.

10. Costs given to appellants from the judgment of a colonial court of error, confirming, upon a bill of exceptions, the judgments of a court of common law, on the ground that the points of law involved in the appeal had previously been determined, in two previous appeals against the same respondents, and that they, by not consenting to an amicable compromise, had put the appellants to unnecessary expense. *Needham* v. *Simpson*, 2 Knapp 1.

11. Decree affirmed with costs, though varied in minor points improperly made the subject of appeal, and which might have been set right by the Court below, if applied to. *Stratton* v. *Symon*, 2 Moo. P. C. 125.

12. Appeal from the High Court of Admiralty not prosecuted; cause remitted with costs. *Brownlow* v. *Garson*, 4 Moo. P. C. 272.

13. Where the Court below had pronounced in favour of a will, impeached as obtained by conspiracy and want of testamentary capacity, and condemned the opposing party in costs, the Judicial Committee affirmed the judgment below as to the will; but there being circumstances to require and justify the inquiry, the costs below ordered to come out of the estate, and no order as to costs of appeal. *Armstrong* v. *Huddleston*, 1 Moo. P. C. 478.

14. In reversing the judgment of the Court below, liberty was given to amend the pleadings, and a new trial directed. Costs of the amendment of the pleadings directed to abide the event of the new trial. *Williams* v. *Byrnes*, 1 Moo. P. C., N. S., 154.

15. When an appeal is dismissed, a verbal

modification of the decree of the Court below, such modification being consistent with the intention of that Court, ought not to relieve the appellant from paying the costs of the appeal. *Van Breda* v. *Silverbauer*, 3 L. R., P. C., 84; 39 L. J., P. C., 8; 22 L. T. 667; 18 W. R. 553; 6 Moo. P. C., N. S., 319.

1. On reversal of an order of the Court below no costs were given, as special leave to appeal was only allowed to decide an abstract question of constitutional law. *Speaker of the Legislative Assembly of Victoria* v. *Glass*, 3 L. R., P. C., 560; 40 L. J., P. C., 17; 24 L. T. 37; 20 W. R. 42; 7 Moo. P. C., N. S., 499.

2. When a printed case has been lodged by a respondent, but he does not appear on the hearing, he will, if successful, be allowed his costs down to the lodging of the case, inclusively. *O'Shanassy* v. *Joachim*, 34 L. T., N. S., 265; 1 L. R., App. Cas., 82.

3. Upon a remit to the Court below, the Judicial Committee directed that the costs of the appeal should abide the ultimate result of the proceedings consequent upon the remit. *Jones* v. *M'Kenzie*, 13 Moo. P. C. 1.

4. Where an appeal was affirmed upon wholly different grounds from those relied upon by the Court below, the dismissal was ordered to be without costs. *Fischer* v. *Kamala Naicker*, 8 Moo. Ind. App. 170.

5. In reversing a judgment, the Judicial Committee, under the circumstances, gave the appellant the costs incurred in the Court below, but not of appeal. *Smith* v. *Deighton*, 8 Moo. P. C. 179.

6. The defendant did not appeal from the interlocutory decree, but proceeded in the Master's office in respect of the matters included in the accounts; but before the general report was made by the Master, he appealed from such interlocutory decree to England. In reversing such a decree, the Judicial Committee ordered him to pay the costs of the proceedings in the Master's office, and remitted the cause to the Court below, with directions that the costs payable to the defendant upon the dismissal of the bill, and the costs payable by him consequent upon his proceedings in the Master's office, should be set off, the one against the other, and the balance paid to the party entitled to the same. *M'Kellar* v. *Wallace*, 8 Moo. P. C. 378.

7. Rule 1 of the Order in Council of the 13th of June 1853, allowing an appellant costs upon a successful appeal, is discretionary with the Court, and only to be allowed in special circumstances. *Lindo* v. *Barrett*, 9 Moo. P. C. 456.

Upon a reversal, the Order in Council contained no direction as to costs. Upon petition by the appellant for a supplemental order allowing costs, the Judicial Committee refused to interfere. *Ib.*

To entitle an appellant to costs, application ought to be made at the hearing. *Ib.*

8. Costs of appeal, including those incurred before the Commissioners of the West Indian Encumbered Estates, allowed to a successful appellant, and directed to be added to the amount of his claim for principal and interest. *Fraser* v. *Burgess*, 13 Moo. P. C. 314.

9. The practice in the House of Lords and in the Exchequer Chamber is never to give a successful appellant his costs. In the Privy Council the rule is the opposite way. In appeals from sessions the costs are given, because in such small matters, unless the successful appellant could get his costs, his right of appeal would practically be taken away. The principle, however, upon which costs are not awarded, is that a suitor ought not to pay for the errors of a judge. *Denny* v. *Hancock*, 40 L. J., Ch., 193, 194.

17. Other Matters.

10. When the Privy Council has sent a reference to a Court below for them to certify, as to a point of their practice, their certificate cannot be disputed, unless a petition praying for a fresh reference is presented, and supported by affidavits disputing the accuracy of the certificate. *Le Quesne* v. *Nicolle*, 1 Knapp 257.

11. Order of reference to take accounts, etc., was made pursuant to the powers contained in the 3 & 4 Will. 4, c. 41, s. 17, notwithstanding the dissent of the respondent's counsel to the Court referring the same. *Hutchinson* v. *Gillespie*, 2 Moo. P. C. 243.

12. Parties to an appeal agreed to compromise the same, and that the appellant should have paid over to him a certain sum of money, the amount for compensation in respect to slaves attached to an estate, the subject of the appeal. Upon petition to dismiss the appeal, an order of dismissal made, containing also an order for the accountant-general of the Court of Chancery to pay the appellant the compensation money in question. *M'Turk* v. *Douglas*, 6 Moo. P. C. 500.

13. On a petition praying that a receiver might be appointed of certain estates pending an appeal, it appeared that a district Court decreed in favour of the petitioner, but that the High Court of Bengal reversed the decree. It also appeared that the property was of great extent, paying a large revenue to the Government. The Privy Council refused to appoint a receiver. *Burmono* v. *Thakoor*, 37 L. J., P. C., 7.

14. Two orders of the Supreme Court at New Zealand, the first suspending and the second striking an attorney off the Rolls of that Court, sustained. *Bunny* v. *New Zealand* (*Judges*), 15 Moo. P. C. 164.

15. An Order of Council having been made altering the mode of appealing from the colony, and having been directed by a proclamation of the governor, dated the 14th of May, to take effect from the 18th:—Held, that an appeal which had been noted on the 2nd of that month, from a judgment made on the 1st, and on which the petition to appeal had been presented on the 15th, ought to be prosecuted according to the previous practice, and not according to the order. *Craig* v. *Shand*, 1 Knapp 253.

Allowance of Interest.] 16. By an Order in Council, the judgment of the Supreme Court at Hong Kong, in an action, was reversed and a nonsuit directed to be entered. On the receipt of this order in the colony, the successful appellant, to carry the order into execution, applied to the Supreme Court for an order for repayment of the amount of the judgment, with interest upon the whole sum paid by way of principal and interest by the

appellant. The Supreme Court was of opinion, that as there were no express directions in the Order in Council for payment of interest on the judgment, it had no power to allow interest, and refused to make any order thereon:—Held, that although by the terms of the Order in Council the judgment of the Supreme Court was only reversed, and a non-suit directed to be entered, yet, (1) that interest upon the judgment was to be implied under the general words there used; and (2) that inasmuch as under the general regulations of 1845, applicable to appeals from Hong Kong to the Queen in Council, the Supreme Court is to execute and carry into effect the judgments and orders of the Queen in Council, that Court had power, without more, to have ordered payment of interest; as otherwise the successful appellant would not be restored to all he had lost by reason of the judgment being reversed. *Rodger* v. *Comptoir D'Escompte de Paris*, 3 L. R., P. C., 465; 24 L. T., N. S., 111; 40 L. J., P. C., 1; 19 W. R. 449; 7 Moo. P. C., N. S., 314.

1. As to jurisdiction to give subsequent interest upon a judgment debt established on appeal. *Australasia (Bank)* v. *Breillat*, 6 Moo. P. C. 152. S. C. *nom. Australasia (Bank)* v. *Australia (Bank)*, 12 Jur. 189.

Hearing of Counsel.] 2. Practice as to number of counsel entitled to be heard where there are two distinct appeals against the same respondent, whose defence to each appeal is in substance the same. *Re Downie*, 3 Moo. P. C. 414.

3. A reply on the hearing of the appeal allowed, though not allowed by the practice of the Court below on the original hearing of the Act on petition. *Henfrey* v. *Henfrey*, 4 Moo. P. C. 29; 6 Jur. 355.

4. The appearance of counsel, who had been previously engaged at the hearing of a cause, on the cause coming on again upon the reserved question of costs, the proctor who originally instructed him being present, and not objecting to his taking part in the proceedings, and the opposite party being thereby led to suppose he was properly instructed to agree to a final decree:—Held, binding on the party for whom he originally appeared, so as to perempt an appeal previously lodged against the former decree. *Kelly* v. *Bushby*, 3 Knapp 375.

V. ECCLESIASTICAL AND PROBATE.

5. No appeal from a sentence of the delegates to the lords in Parliament. *Kennedy* v. *Cassilis (Earl)*, 2 Swan. 326.

6. The sentence of the Ecclesiastical Court cannot be reversed in a summary way, but by appeal only to proper judges; nor can a prohibition to that Court be granted upon a petition; but by motion and proper suggestion it may. *Hill* v. *Turner*, 1 Atk. 516.

7. A person aggrieved by, or interested in, a sentence in the Ecclesiastical Court, may have a commission of delegates, though he was no party to the original suit. *Jones* v. *Bougett*, 1 Atk. 298.

8. *Semble*, that the Privy Council will not adjudicate upon a will, not established in a court of probate, though registered in the colony, and not questioned in the court below. *Moss* v. *Leatham*, 2 Moo. P. C. 73.

9. On reversing the decision of the Prerogative Court, rejecting an allegation pleading circumstances to entitle a paper to probate, the Judicial Committee retained the cause, and ultimately granted probate of the instrument. *Bateman* v. *Pennington*, 3 Moo. P. C. 223.

10. A party in contempt for not obeying a monition, whose contempt has been signified under 53 Geo. 3, c. 127, and a writ *de contumace capiendo* extracted against him, is not precluded from appealing from the principal sentence, though pronounced *in pœnam:* protest against permission to appeal under such circumstances overruled. *Harrison* v. *Harrison*, 4 Moo. P. C. 96; 6 Jur. 899.

11. A., being a stipendiary curate within a diocese, the bishop, after due notice and inquiry, revoked his licence. He appealed to the archbishop of the province under 1 & 2 Vict., c. 106, s. 98, and the archbishop confirmed the revocation:—Held, that neither the 2 & 3 Will. 4, c. 92, and 3 & 4 Will. 4, c. 41, nor the 1 & 2 Vict., c. 106, authorise the Privy Council to receive appeals, except in the cases mentioned in 1 & 2 Vict., c. 106, s. 6, from the decisions given by the archbishops under 1 & 2 Vict., c. 106. *Poole* v. *London (Bishop)*, 7 Jur., N. S., 347; 14 Moo. P. C. C. 262; 9 W. R. 485; 4 L. T., N. S., 224.

12. No appeal is given by 3 & 4 Vict., c. 86, either to the Arches Court, or thence to Her Majesty in Council, from the decision of the commissioners, on the regularity or irregularity of the proceedings before them. *Simpson* v. *Flamank*, 1 L. R., P. C., 463; 4 Moo. P. C., N. S., 385; 16 W. R. 8; 16 L. T., N. S., 724.

13. The Court will not allow an appeal from its decision as to the admission of articles, unless some important principle of law is involved in such decision. *Martin* v. *Mackonochie*, 36 L. J., Ecc. Cas., 25.

14. Although the judgment in the court below may be on all points reversed, a bishop, as respondent, will not be condemned in the costs of the proceedings either in the Court of Arches or in the Court of Appeal, if in instituting them he has acted simply in accordance with his duty to the public. *Berney* v. *Norwich (Bishop)*, 36 L. J., Ecc., 10.

15. No appeal was interposed from an interlocutory judgment of the Arches Court admitting articles of charge against a clergyman proceeded against under 3 & 4 Vict., c. 86:—Held, that the appellant was not concluded by the admission of the articles, and that it was competent to him upon appeal from the final sentence to open the finding of the interlocutory judgment upon the articles. *Williams* v. *Salisbury (Bishop)*, 2 Moo. P. C., N. S., 375.

Secus, with respect to the respondent who had adhered to the appeal. *Ib.*

PRIZE AND PRIZE MONEY.

16. The question of prize or no prize, or by whom taken, cannot be tried at common law, but must be decided by the judge of the Court of Admiralty; and the jurisdiction depends not upon the locality, or upon the parties, but upon the nature of the question, which is such

as cannot be tried by any rules of common law, but by the general law of nations, which is there administered by forms best adapted to the subject of its jurisdiction, and the interests of the parties. *Mitchell* v. *Rodney*, 2 Bro. P. C. 423.

1. The prize courts and courts of Lords Commissioners of Appeals have the sole and exclusive jurisdiction over the question of prize or no prize, and who are the captors, notwithstanding any of the prize Acts; and if they pronounce a sentence of condemnation, adjudging also who are the captors, the courts of common law cannot examine the justice or propriety of it. *Camden* (*Lord*) v. *Home*, 6 Bro. P. C. 243; 2 H. Bl. 533; 4 T. R. 382.

2. Whether the Court of Chancery has jurisdiction to determine whether a ship of war was or was not at the time of the capture one of the squadron under the command of a particular officer, *quære*. *Parker* v. *Toulmin*, 1 Cox 265.

3. Prohibition to enjoin judge of Prize Court from proceeding in a question of prize or no prize, refused. *Exp. Lynch*, 1 Madd. 15.

4. A court of equity has jurisdiction upon a bill by officers of the army and the East India Company, on behalf of themselves and all others, etc., for an account of prize money received beyond the due proportion, and for a distribution according to the King's grant and usage, considering the defendants as trustees; but upon the construction of the grant, as not creating a trust, a demurrer was allowed. *Brown* v. *Harris*, 13 Ves. 552.

5. The Court of Chancery has admiralty jurisdiction. Letters of marque and reprisal may be repealed in Chancery after a peace, though there is a clause in the letters patent that no treaty of peace shall prejudice them. *Rex* v. *Carew*, 1 Vern. 54; 3 Swan. 669.

6. Where privateer had taken a prize without having letters of marque, and the Court of Admiralty had sentenced her as a droit to the Crown, the Court of Chancery refused, with costs, to restrain the parties from receiving, or the register of the Admiralty from paying, the proceeds under a treasury warrant. *Nicol* v. *Goodall*, 10 Ves. 155.

Privateer sailing and taking prize without letters of marque, the prize belongs to the King as a droit of the Crown. *Ib.*

7. Bill by one of the officers and crew of a privateer against the owner, for an account of captures according to the articles. Leave given to amend, by stating that the bill was on behalf of the plaintiff and all others; upon that amendment the account was decreed. *Good* v. *Blewitt*, 13 Ves. 397.

8. Two captains of ships of war enter into an agreement that all prizes taken by either of them, whether in the ships they then had, or in any other ship which they might thereafter command, should be equally divided between them. One of them changed his ship, which, meeting with an accident, was ordered to be laid up, and it was some time before he got another. The other captain continued cruising all the time, but objected to account for the prizes which he took during the interval of his partner's being unemployed:—Held, that he was accountable for all the prizes taken from the date of the agreement. *Ogle* v. *Sansom*, 1 Bro. P. C. 149.

9. Bill for an account and share of prize-money dismissed, the sum being certain, and the remedy at law against the prize agents. *Ogle* v. *Haddock* (*Representatives of Admiral*), 1 Ves. 161.

10. If any doubt exists as to the character of a ship claimed to be the property of a neutral, being still enemy's property, the rule of the Prize Court is, that the claimant shall be put to strict proof of ownership, and any circumstance of fraud, or contrivance, or attempt at imposition on the Court, in making out his title, is fatal to the claimant; condemnation of the ship as enemy's property necessarily follows. *Batten* v. *Reg*, 11 Moo., P. C., 271.

11. Military prize, when captured, is capable of being effectually assigned by the captor, before any interest in it has been vested in him by a grant from the Crown. A warrant of the Crown, conveying military prize to trustees upon trust, to collect, recover, and receive the same, and directing the trustees, as soon as the case would permit, to prepare a scheme for the distribution thereof, conformably to certain principles therein stated, and to submit such scheme to the Lords of the Treasury, for the signification of the royal pleasure thereon, is not an absolute or final grant: it creates no vested interest in any particular individuals, as objects of the bounty; nor can persons claiming to be *cestuis que trustent* compel a distribution under it by a suit in equity against the trustees. *Semble*, the Crown may at any time before distribution alter or revoke a grant of military prize. *Alexander* v. *Wellington* (*Duke*), 2 Russ. & M. 35; 9 L. J., Ch., 36.

12. The Crown, by royal warrant, "granted to the Secretary of State for India in Council for the time being" certain booty taken in war "in trust for the use of" certain persons, who had been adjudged entitled to it upon a reference to the Court of Admiralty, to be distributed among them, with a further provision that in case any doubts should arise in the course of the distribution the decision of the Secretary of State should be final, unless the Crown should otherwise order:—Held, (1) That the Secretary of State for India in Council could only sue or be sued as a corporation under 21 & 22 Vict., c. 106, s. 65, in proceedings which might have been taken by or against the late East India Company; (2) That the royal warrant constituted the Secretary of State for India in Council an agent of the Crown for the purpose of the distribution of the fund under the control of the Crown, but did not constitute him a trustee for the persons interested subject to the control of a court of equity. *Alexander* v. *Wellington* (*Duke*) (2 Russ. & M. 35) discussed. *Brown* v. *Harris* (13 Ves. 552) distinguished. *Kinloch* v. *Secretary of State for India in Council*, 7 L. R., App. Cas., 619; 51 L. J., Ch., 885; 47 L. T. 133; 30 W. R. 845. Affirming 15 L. R., Ch. D., 1; 49 L. J., Ch., 571; 42 L. T. 667; 28 W. R. 619.

13. Assignment of sailor's share of prize money at great undervalue, set aside for fraud, but still to stand as security for what really advanced. The same equity as to an under-assignment. *How* v. *Weldon*, 2 Ves. 516.

14. Sale of a seaman's prize money, and

subsequent agreement in confirmation, set aside. *Taylour* v. *Rochfort*, 2 Ves. 281.

1. The property in a prize of war may pass to the captors without the prize being taken into a port belonging to the country of the captors, or being condemned by a prize court. *The Gauntlet*, 25 L. T., N. S., 69. Reversed *sub nom.*, *Reg. or Dyke* v. *Elliott*, 4 L. R., P. C., 184; 41 L. J., Adm., 65; 26 L. T. 45; 20 W. R. 45.

A prize of war (a merchantman) with a prize crew on board is not a ship of war. *Ib.*

2. A British ship was taken by the Americans, and afterwards retaken by one of the British crew, brought into port, and condemned. A writ of prohibition to enjoin the judge of the Prize Court from proceeding after the termination of the war, at the suit of the American owners, to try the question of the recapture, was refused; it being a case clearly within the jurisdiction of a court of prize, and such jurisdiction not being determined by the cessation of the hostilities. *Harmony* (*Case of the ship*), Coop. 325. And see *Exp. Lynch*, 1 Madd. 15.

3. Charter-party of affreightment between the owners of the ship M. and the commissioners of transports for and on behalf of his Majesty; during its continuance in the transport service the ship makes a capture, which is condemned, and upon petition to the treasury, two-thirds of a moiety of the proceeds arising from the capture, were ordered by warrant from the Crown to be paid to the owners. These proceeds are entirely at the discretion of the Crown; and upon motion for payment into court of a sum, admitted by the commissioners of transports to be due for freight under the charter-party, which motion was resisted on the ground that the commissioners were entitled to set off the amount of the proceeds received by the owners under the warrant, payment was ordered accordingly, without prejudice to the question of ownership. *Thurgar* v. *Morley*, 2 Meriv. 20.

4. No interest complete vested in prizes before condemnation; but upon condemnation it is considered the property of the captor from the time of the capture. The Crown in prize grants puts what is strictly bounty upon the footing of right, considering the claim as transmissible to the legal representatives of the claimant, deceased before the grant, subject to his will, etc., as his other property. *Stevens* v. *Bagwell*, 15 Ves. 139.

5. Where satisfaction is made to shipowners under a royal proclamation, for a distribution of prizes, such of the underwriters as have paid are entitled to a restitution of the insurance money; but those who have compounded and renounced salvage are not; and the underwriters who are foreigners are entitled to the benefit of the proclamation equally with British subjects. *Blauwpot* v. *Da Costa*, 1 Eden 130.

PROBATE.

— *Of Wills.* See EXECUTOR AND ADMINISTRATOR, I.
— *Duty.* See REVENUE, IV.

PROCEDENDO.

See BANKRUPTCY, XV. xi.—PRACTICE (PROHIBITION).

PROCEEDINGS AT LAW.

— *Injunction to Stay.* See INJUNCTION, III.
— *When Directed.* See PRACTICE (ISSUES AND TRIAL BY JURY).

PROCESS.

See PRACTICE (ATTACHMENT AND PROCESS OF CONTEMPT) — PRACTICE (HABEAS CORPUS)—PRACTICE (SERVICE).

PROCHEIN AMI.

See PRACTICE (NEXT FRIEND).

PROCLAMATION.

See CROWN—FINES AND RECOVERIES.

PRO CONFESSO.

See PRACTICE (BILL PRO CONFESSO).

PRODUCTION AND CONCEALMENT OF INFANTS AND WARDS OF COURT.

See INFANT, II. iii.

PRODUCTION OF CESTUI QUE VIE.

See LIFE, ESTATE FOR, I. ii. 2.

PRODUCTION OF DEEDS AND DOCUMENTS.

See PRACTICE (DISCOVERY, PRODUCTION, AND INSPECTION)—MORTGAGE, XI. iii.—VENDOR AND PURCHASER.

PROFESSIONAL CONFIDENCE.

See FRAUD, II. VIII. TO X.—PRACTICE (DISCOVERY, PRODUCTION, AND INSPECTION)—BARRISTER—SOLICITOR.

PROFIT A PRENDRE.

See COMMON—EASEMENT.

PROFITS.

See RENTS AND PROFITS.

PROHIBITION.

See PRACTICE (PROHIBITION).

PRO INTERESSE SUO, EXAMINATION.

See PRACTICE (EVIDENCE).

PROLIXITY.

See PRACTICE (SCANDAL, PROLIXITY, AND IMPERTINENCE).

PROMISES.

See SETTLEMENT — TRUSTS — SPECIFIC PERFORMANCE.

PROMISSORY NOTE.

See BILLS OF EXCHANGE.

PROOF.

— *Of Debts before Master.* See COMPANY — EXECUTOR AND ADMINISTRATOR — PRACTICE (INQUIRIES AND ACCOUNTS).
— *Generally.* See PRACTICE (EVIDENCE).
— *Of Deeds.* See PRACTICE (EVIDENCE).
— *Of Wills.* See PRACTICE (EVIDENCE)—WILL.
— *Of Handwriting.* See PRACTICE (EVIDENCE).
— *Of Marriage.* See PRACTICE (EVIDENCE).
— *In Bankruptcy generally.* See BANKRUPTCY.

PROPERTY-TAX.

— *Deduction of.* See ANNUITY, XII. 2—LANDLORD AND TENANT—LEGACY—VENDOR AND PURCHASER.

See also REVENUE.

PROSECUTION OF DECREE.

See PRACTICE (JUDGMENTS, DECREES, AND ORDERS).

PROTECTOR.

See FEE TAIL, V. v.

PROVIDENT SOCIETY.

See BUILDING SOCIETY—FRIENDLY SOCIETY.

PROVISIONAL ASSIGNMENT.

See BANKRUPTCY, XVI. xi.

PUBLIC ACCOUNTS.

See ACCOUNTANT TO CROWN.

PUBLICATION.

— *Of Evidence.* See PRACTICE (EVIDENCE).
— *Of Will.* See WILL.
— *Restraining.* See COPYRIGHT — INJUNCTION, II. IX.—LETTERS, III. 1—TRADE, III.

PUBLIC CALAMITY.

See also ACT OF GOD.

1. By the term of French contract, *rentes viagères* for two lives in succession were, after the death of first life, payable with all arrears to survivor. Representative of first life relieved against loss of arrears occasioned by the French revolution. *Hachett* v. *Pattle*, 6 Madd. 4.

2. It has been the constant rule of courts of equity in Ireland, that when, by a general and national calamity, nothing is made out of lands which are a fund for the payment of interest, no interest ought to run during the continuance of such public calamity. *Basil* v. *Atcheson*, 4 Bro. P. C. 503.

3. It seems that arrears of an annuity or jointure, which accrued due during the time of a public rebellion, cannot be recovered under a bill in equity. The decree in this cause does not appear. *Kirkby* v. *Ormsby*, Colles's P. C. 134.

PUBLIC COMPANY.

See COMPANY — GAS COMPANY — LANDS CLAUSES ACT—MINES AND MINERALS—RAILWAY—WATER COMPANY.

PUBLIC HEALTH.

See LOCAL GOVERNMENT.

PUBLIC HOUSE.

See ALE AND BEER HOUSE—LANDLORD AND TENANT — MORTGAGE — VENDOR AND PURCHASER.

PUBLIC LIBRARY.

See CHARITY, IV. v. 7.

PUBLIC OFFICER.

See AMBASSADOR—BANKRUPTCY—COMPANY, VII.—CONSUL—OFFICE.

PUBLIC PENSION.

See PENSIONS AND PAY.

PUBLIC POLICY.

See CONTRACT, VI. 2—WILL.

PUFFER.

See VENDOR AND PURCHASER.

PURCHASE.

— *Heir taking by Purchase.* See WILL.
— *In Name of Child.* See ADVANCEMENT.
— *Plea of.* See VENDOR AND PURCHASER.
— *By Parties in Fiduciary Situation.* See FRAUD, II.—TRUSTS.

1. Lands are acquired in two ways, by descent or by purchase. The first is by right of blood and act of law; the second is by one's own act, and in its most comprehensive signification the word "purchase" includes every other mode of coming to an estate but that by inheritance. In its more confined, it means such acquisitions as are made by bargain and sale for valuable consideration. The word, in its comprehensive signification, includes these five methods of acquiring estates, viz., Escheat, Occupancy, Prescription, Forfeiture, and Alienation, and these only. As to acquisition by execution, which Lord Coke considers under the head of elegit, it is not considered by any writer as an acquisition by purchase. The acquiring profits out of real assets is not an acquisition by purchase; it is only a right to be paid by the heir out of the assets in his hands. *Aylmer* v. *Bellew*, Vern. & Scriv. 23.

PURCHASER.

— *Generally.* See VENDOR AND PURCHASER.
— *Payment into Court by.* See VENDOR AND PURCHASER.
— *Bonâ fide Purchaser for Value without Notice.* See NOTICE and Cross References there—VENDOR AND PURCHASER.

PURCHASE MONEY.

— *Apportionment on Sales under Power.* See POWER.

See also LANDS CLAUSES ACT, XIII.—SETTLED ESTATES ACTS, IX. AND XI. IV.—VENDOR AND PURCHASER.

QUAKERS.

— *Answer of.* See PRACTICE (ANSWER).

2. Devise to A., on condition "that if he shall marry, or form any connection resembling or in imitation of marriage, contrary to the order and established rules of the people called Quakers, such devise should, as to him and his issue, cease and be void," established; and A., having broken the condition, held to have forfeited. There is no doubt of the legality of Quaker marriages. They were meant to be included in the remedy of the stat. 21 & 22 Geo. 3, c. 25, though the words of that Act may seem not to apply to them. *Haughton* v. *Haughton*, 1 Moll. 611.

3. If one puts in his answer as being a Quaker, the Court will not inquire whether he is such. *Marsh* v. *Robinson*, 2 Anstr. 479.

4. A Quaker cannot be admitted to exhibit articles of the peace against her husband upon her affirmation, as it is in nature of a criminal prosecution. *Exp. Gumbleton*, 2 Atk. 70; 9 Mod. 232.

5. The Court allowed a Quaker to put in his answer without oath or affirmation, where the bill appeared frivolous. *Wood* v. *Story*, 1 P. W. 781.

6. A bill being preferred against a Quaker for tithes, who refused to answer upon oath, the defendant was brought to the bar, and, having been brought three times before, the bill was taken *pro confesso*, and it was referred to a Master to examine what was due, and not to be armed with a commission for that purpose. *Anon.*, 2 Ch. Ca. 237; 2 Freem. 27.

QUARE IMPEDIT.

See ECCLESIASTICAL PERSONS AND PROPERTY, II. 7.

QUEEN.

See CROWN.

QUEENSLAND.

See COLONIES AND COLONIAL LAW, X. xxx.

QUIA TIMET BILL.

— *As to Cancellation and Delivery up to Documents.* See RECTIFICATION AND CANCELLATION.

See also INJUNCTION—PRACTICE (RECEIVER) —PRACTICE (PAYMENT INTO COURT).

1. To sustain a *quia timet* bill there must be not only title, but danger to the property: where both concur the Court will require the defendant to give security. *Fisher* v. *Hughes*, 1 Coop. C. C. 329.

2. A. covenants that a specific sum should be paid to B., if B. survived; A. having aliened part of it, on a bill by B., A. decreed to give security that it should be forthcoming. *Flight* v. *Cook*, 2 Ves. 619.

3. The statutes providing for the relief of subject, accountants who have equities against the Crown, held not to be confined to cases where the subject be actually sued or impleaded, but he may proceed by bill in equity in the first instance, and as it were *quia timet*, and that during the passing his accounts before the commissioners of audit. *Colebrooke* v. *Att.-Gen.*, 7 Price 146.

4. A. is bound for B., and has a counter-bond; equity will compel B. to pay the debt, though A. is not sued. *Ranelaugh* v. *Hayes*, 1 Vern. 190.

5. A trustee held shares in a company on trust for an adult *cestui que trust*. He had applied for them at the request of the *cestui que trust*, who paid the money due to the company on the application and allotment. The trustee executed a transfer of the shares to the *cestui que trust*, and the latter sent it to the company for registration, but the directors refused to register it, and when an order was made to wind up the company the name of the trustee remained on the company's register as the holder of the shares. The trustee brought an action against the *cestui que trust*, claiming an indemnity against liability on the shares. There was no evidence to show whether calls were likely to be made in the winding-up:—Held, that the action was a mere *quia timet* one, and that it was premature and could not be maintained. *Ranelaugh* (*Lord*) v. *Hayes* (1 Vern. 189) not followed. *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.*, 22 L. R., Ch. D., 561; 52 L. J., Ch., 418; 48 L. T. 107; 31 W. R. 285.

6. Colonel of a regiment having taken a bond of indemnity from his agents, with another as surety, in respect of all charges, etc., to which he may become liable by their default, the agent shaving afterwards become bankrupt, and Government having given notice to the representatives of the colonel (deceased) of a demand upon the colonel's estate, by virtue of an unliquidated account, a bill by the representatives of the colonel, against the representatives of the surety, to pay the balance due to Government, and also to set aside a sufficient sum out of their testator's estate to answer future contingent demands, though attempted to be supported upon the principle of a bill *quia timet*, dismissed with costs. *Antrobus* v. *Davidson*, 3 Meriv. 569.

7. Where the object of a bill *quia timet* is to prevent the assignees of a bankrupt, purchaser of estate, from bringing an action to recover back part of consideration money remaining due to vendor, which had been paid to him subsequent to act of bankruptcy, on the ground of his having waived his equitable lien, by taking a bond for the purchase money, if the bill charge, as a fact, that the bond was given as a further additional or collateral security, the question of law cannot be raised on a general demurrer. *Braband* v. *Hoskins*, 3 Price 31.

8. A party who had granted an annuity to a trustee for his wife, filed a bill against the trustee, his wife, and an assignee of the annuity, from her stating that such assignee had filed a bill against him and his wife, and that the trustee threatened to distrain, and praying to be at liberty to pay the arrears of the annuity into court, and to be indemnified against the costs of the assignee's suit:—Held, that the suit was not sustainable as an interpleader or *quia timet*, because, on account of the trustee not being a party to the assignee's suit, no decree could be made in it against the plaintiff. *Palmer* v. *Fraser*, 3 Y. & Coll. 491; 3 Jur. 890.

9. The Court will not interfere, *quia timet*, in a case of alleged nuisance, but the actual existence of the nuisance must be proved. *Att.-Gen.* v. *Kingston-upon-Thames* (*Mayor*), 11 Jur., N. S., 596; 13 W. R. 888; 12 L. T., N. S., 665.

Therefore, where an information was filed to restrain the pollution of a navigable river by an increased discharge of sewage into it, but the evidence failed to show that a nuisance had actually arisen, the Court dismissed the information, without prejudice to any further proceedings being taken, if a nuisance should ultimately be occasioned. *Ib.*

10. Principles on which courts of equity proceed, in ordering the delivery up of instruments on which actions may be brought. *Cooper* v *Joel*, 27 Beav. 313; 1 De G. F. & J. 240.

A written guarantee was given for moneys payable by instalments; though invalid, there was no invalidity on the face of it. In an action for the first instalment the plaintiff was non-prossed:—Held, that, although there was a legal defence, the instrument ought to be cancelled, on the ground that future actions were contemplated, and that the future defence might fail from the loss of evidence. *Ib.*

QUIET ENJOYMENT.

See COVENANT—LANDLORD AND TENANT, I. VII. 5—XII. VI.—MORTGAGE, I. III. 3—SETTLEMENT, X. XVI.—VENDOR AND PURCHASER.

QUIETING POSSESSION.

See INJUNCTION, II. X.—PEACE, BILL OF.

QUIT RENTS AND CHIEF RENTS.

See also IRELAND, V. 1 & 6.

1. Quit rents, being incidents of tenure, are proper subjects of compensation. *Esdaile* v. *Stephenson*, 1 Sim. & S. 122.

2. Quit rent shall not be apportioned as between the tenant for life and remainderman, the stat. 11 Geo. 2, c. 19, s. 4, having no application in this case. *Sutton* v. *Chaplin*, 10 Ves. 66.

3. Bill does not lie against several tenants of a manor for quit rents, the plaintiff's remedy being at law, and the suit also multifarious as to the different tenants. *Bouverie* v. *Prentice*, 1 Bro. C. C. 200.

4. Though a bill in equity lies to recover a small quit rent, yet it ought to appear that plaintiff has no remedy for the same at law. *Holder* v. *Chambury*, 3 P. W. 256.

5. Bill by the lord against his tenant for a quit rent; the bill alleged, that the land out of which it issued, by reason of the unity of possession of the lands out of which the rent was supposed to issue, with other lands, was not known. Defendant answered as to discovery but demurred as to relief. *Sed quære*, whether a demurrer to all relief be good. *North* v. *Strafford* (*Earl*), 3 P. W. 149.

6. An owner of a quit rent shall pay taxes only in proportion to what the land pays; but if the matter has been examined by the commissioners of the land tax, the Court will not re-examine it. *Brockman* v. *Honeywood*, 1 P. W. 328.

7. Bill in equity lies for recovering ancient quit rents, though very small, as 2*s.* or 3*s.* per annum; and if proved to be constantly paid, the Court will decree payment, or will direct an issue to try whether any and what rent is issuing out of all or any of the lands in the bill. *Cooks* v. *Fbley*, 1 Vern. 359.

8. Where by great length of time it is become impossible to know out of what particular lands ancient quit rents are issuable, courts of equity have exercised a jurisdiction, and have constantly, on proof of payment within a reasonable time, decreed a satisfaction for all arrears of such rents, and payment of same in future. *Bridgewater* (*Duke*) v. *Edwards*, 6 Bro. P. C. 368.

9. The receipt granted by the collector of quit rent is evidence of the apportionment of rent. *Bowles* v. *Waller*, Hayes 439.

10. The Court of Judicature for re-building houses burnt down by the great fire of London, having settled the rent which the tenant was to pay for a house at 5*l.* per annum, and there being an ancient rent of 25*s.* per annum issuing out of the same house to a charitable use, now twenty years in arrear, a question arose, whether the landlord or tenant should pay this rent? Upon reading the Act of Parliament, Lord Keeper was satisfied the tenant was in no case to be charged with more than the rent of 5*l.* per annum in the whole, and directed plaintiff to bring Lady D., who had the reversion expectant on the lease, before the Court, and ordered the tenant not to pay any more of his rent in the meantime, and declared that the growing payments, and the arrears of the 25*s.* per annum, should be deducted out of the rent. *Grice* v. *Banke*, 1 Vern. 309.

11. A. seised in fee of premises subject to a quit rent, agreed with B. (his attorney and tenant of part of the premises), to sell him the reversion of that part, B. covenanting to pay the whole quit rent. A. accordingly conveyed the reversion, and B. covenanted to pay the whole quit rent, and to indemnify A., his heirs, and assigns, and their real and personal estate. A. sold the residue of the premises discharged of quit rent to C., which devolving on the plaintiff he was obliged to pay the entire quit rent, and filed his bill against D. (the heir, devisee, and administrator of B.), praying that the sums he paid for quit rent might be declared a charge on D.'s portion, or that they might be paid out of B.'s real and personal estate come to E., or that the quit rent might be apportioned, and D. decreed to pay his portion of it:—Held, on demurrer:—First, that the plaintiff was entitled to the benefit of the agreement of B. charging the premises. Second, that D. was answerable to the extent of the real and personal estate of B. Third, that the suit was maintainable for the apportionment of the quit rent. *Hatton* v. *Haddy*, 2 Jones 541.

12. By the Charter of Justice of the 23rd December 1823, establishing the Supreme Court at Bombay, that Court was prohibited (in like manner as the Supreme Court at Calcutta, under the 21 Geo. 3, c. 70, s. 8) from entertaining any jurisdiction in any matter concerning the revenue, under the management of the Governor and Council, or any act done in the collection thereof. *Spooner* v. *Juddow*, 4 Moo. Ind. App. 353; 6 Moo. P. C. 257.

In an action of trespass brought against the collector of revenue at Bombay, for distraining for arrears of Government "quit-rent," the defendant pleaded "not guilty" only. The Supreme Court at Bombay held, that the "quit rent" was not "revenue" within the meaning of the charter, and that the act complained of was not warranted by the usage of the country and the company's regulations, and that the Court had jurisdiction to entertain the action, and found for the plaintiffs:—Held, reversing such finding and judgment, first, that the "quit-rent" was part of the "revenue" of the East India Company at Bombay; and, secondly, that it being a matter concerning the revenue and the collection thereof, the Supreme Court had no jurisdiction; and that, the Court being excluded by the charter from any matter concerning the

revenue, the plea of "not guilty" was sufficient; and that the judge ought, at the trial, to have directed a nonsuit, or a verdict to be entered for the defendants. *Ib.*

A plea in abatement to the jurisdiction of the Court must point out another Court before which the matter is cognizable. A plea in bar, if well founded, is sufficient, without pointing out the court in which the suit ought to have been brought. *Ib.*

1. Quit-rents and crown-rents are charges and incumbrances on lands. *Massy* v. *O'Dell*, 9 Ir. Ch. R. 441.

2. By letters patent of 31 Car. 2, the lands of H. were granted to Sir G. A. in tail male, and a rent of 3*d.* per acre, the amount of quit-rent prescribed by the Act of Settlement, was reserved. In 1681 Sir G. A. conveyed the lands to S. and his heirs, saving the estate and right of the Crown. In 1776 the estate tail determined by failure of issue male of Sir G. A. The representatives of S. remained in possession of the lands down to the filing of the bill in 1841, and dealt with the estate as an absolute estate in fee. The rent reserved by the letters patent was regularly paid to the proper officer, and the usual receipt given for it as quit-rent:—Held, that the right of the Crown to the land on the determination of the estate tail, was barred and transferred to the vendor by the 48 Geo. 3, c. 47, the case not coming within any of the exceptions in the first section of that Act, and the exception of the purchaser to the title was overruled. *Tuthill* v. *Rogers*, 6 Ir. Eq. R. 429; 1 J. & L. 36.

3. A bill for a chief rent is sustainable in this court, where, in consequence of the acts of the party liable to pay such chief rent, all the difficulty in the way of plaintiff's proceeding at law has been occasioned. *Dublin (Archbishop)* v. *Trimleston (Lord)*, 2 Dr. & War. 535.

4. Land on which an improved chief rent, which was purchased by the plaintiff's testator in 1853, had been reserved by a former vendor of the land, was ordered to be sold to pay the arrears of the chief rent which had accrued due since that date. *Horton* v. *Hall*, 17 L. R., Eq., 437; 22 W. R. 391.

RABBITS.

See GAME.

RACES.

See GAMING AND WAGERING.

RAILWAY.

— *Bills in Parliament respecting.* See PARLIAMENT, III.
— *Contracts for Construction of.* See ARCHITECT AND ENGINEER — WORK AND LABOUR.
— *Purchase of, and Interference with, Canals.* See CANAL AND CANAL COMPANY.
— *As Carriers.* See CARRIER.
— *Compulsory Purchase of Lands for.* See LANDS CLAUSES ACT.
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2. *Deviation and Plans*, 5991.
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IX. RAILWAY COMMISSIONERS, ARBITRATION BY, 6040.

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1. *Of Part of Undertaking*, 5990.
2. *Deviation and Plans*, 5991.
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4. *Private Branch Lines*, 5993.
5. *Bridges*, 5995.
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7. *Roads and Streets, Interference with*, 6000.
8. *Stations*, 6004.
9. *Streams, User and Diversion of*, 6006.
10. *Tunnels*, 6007.
11. *Injuries by Exercise of Powers*, 6007.
12. *Other Matters*, 6009.

1. Of Part of Undertaking.

1. Where a railway company has undertaken to complete a line, or any series of lines, it is bound to complete the whole line or series of lines, and is not, without parliamentary authority, at liberty to abandon any portion of its undertaking. *Graham* v. *Birkenhead, Lancashire, & Cheshire Junction Railway Co.*, 12 Beav. 460.

But on an application by an individual shareholder, on behalf of himself and the other shareholders, for an injunction to restrain the construction of part only of the line, the Court refused to interfere, on the ground of the acquiescence of the plaintiff, and also that the other shareholders, had for eighteen months previously to filing the bill known, or had the means of knowing, the acts complained of. S. C. 2 Macn. & G. 147; 2 H. & Tw. 450; 20 L. J., N. S., Ch., 445; 14 Jur. 494. Reversing on this point 12 Beav. 460.

Existing contracts for making part of the line are no answer to an application to prevent a railway company from making a portion of the line with an intention of completing less than the whole. S. C. 12 Beav. 460.

On an application for an injunction to prevent a railway company from making a portion only of its line, abandoning the rest, the Court would not be disposed to act in a severe and strict manner, if by a small expenditure a great benefit might result to the shareholders, and a considerable advantage to the public. *Ib.*

Observations as to the discretion of the Court in such a case. *Ib.*

2. A railway company authorized to make a line of fifty-six miles, resolved on making only four miles of it, and to abandon the rest:—Held, that such a resolution was illegal, both as against the landowners on the line and the shareholders in the company. *Cohen* v. *Wilkinson*, 12 Beav. 125; 5 Rail. Ca. 741; 18 L. J., N. S., Ch., 378; 13 Jur. 641. Affirmed 1 Macn. & G. 481; 1 H. & Tw. 554; 5 Rail. Ca. 758; 19 L. J., N. S., Ch., 477; 14 Jur. 535.

The powers contained in railway Acts are given only in contemplation of the supposed public good by completion of the whole work, and the Court will interfere when it sees that the whole undertaking cannot be completed. *Ib.*

A railway is not like a partnership for general trading purposes, in which one portion of the business may be abandoned, but it is a partnership for a public purpose for effecting a work which it is a duty to complete. The obligation to complete the work is co-extensive with the authority to make it. *Ib.*

3. A bill was filed by a shareholder on behalf, etc., to prevent the directors making a part only of the railway, abandoning the rest, and for an indemnity. There were several classes of shareholders:—Held, that it was not necessary that the several classes should be severally and separately represented on the record. *Dunvile* v. *Birkenhead, Lancashire, & Cheshire Junction Railway Co.*, 12 Beav. 444.

4. A shareholder in a line of railway projected by A., filed a bill on behalf of himself, etc., against the members of the provisional committee, alleging that they had abandoned the line in favour of one projected by B., and alleging misconduct, etc., and praying an account, a receiver, and an injunction. Demurrer for want of equity and for want of parties, overruled without prejudice, and costs, with consent of all, reserved. *Wilson* v. *Stanhope*, 4 Rail. Ca. 251.

5. Where a railway company has formed a portion of the line, but is unable to complete the whole, the Court exercises a discretion in granting an injunction, the effect of which will be to prevent that portion being made effective and beneficial to the public and profitable to the shareholders. *Hodgson* v. *Powis (Earl)*, 12 Beav. 529; 19 L. J., N. S., Ch., 356; 14 Jur. 906.

Quære, whether railways, forming a cluster, differ from a continuous line with respect to the propriety of granting an injunction against the construction of part only of an undertaking authorized by the Legislature. *Ib.*

A series of Acts had in the same year been obtained by the same parties for the construction of three different railways, all forming part of one system, but not joining each other at any point, and with different amounts of capital stock specifically allotted to each undertaking. Two years afterwards the whole of the undertakings were leased to another company, under an Act of Parliament, the management being intrusted to a joint committee. Only one of the three lines was completed, the others being abandoned:—Held, overruling the decison of the Rolls, that no injunction ought to be granted on an interlocutory application to restrain the amalgamated companies from making calls, or extending the works which they had already completed, and an injunction which had been granted was dissolved. S. C. 1 De G. M. & G. 6; 21 L. J., N. S., Ch., 17; 15 Jur. 1022. Reversing 12 Beav. 392, 529; 19 L. J., N. S., Ch., 356, 418; 14 Jur. 906, 965.

6. It appeared very probable that at the time of filing the bill, a company, which were authorized to make 150 miles of railway, intended to complete 23 miles only, and then abandon the rest. Upon a motion to restrain them, it appeared that the company had since abandoned the whole. The Court was of opinion that if the case had remained as it was at the time of the filing of the bill, the plaintiff would have been entitled to the injunction; but refused it, on the ground of the alteration in the existing circumstances, and gave no costs. *Logan* v. *Courtown (Earl)*, 3 Beav. 22; 20 L. J., N. S., Ch., 347.

See also II. *post.*

2. Deviation and Plans.

1. A vertical deviation of the level of a railway not exceeding five feet, calculated with reference to the datum line shown on the plans and sections deposited in pursuance of the Standing Orders of the Houses of Parliament, is within the powers of deviation conferred by the Railway Clauses Consolidation Act for Scotland (8 & 9 Vict., c. 33, s. 11), although the deviation may exceed five feet, calculated with reference to the surface line shown on the said plans and sections. *North British Railway Co.* v. *Tod*, 12 Cl. & F. 722; 4 Rail. Ca. 449; 10 Jur. 975.

In putting a construction upon a railway company's Act, no regard will be paid to the plans and sections deposited, in pursuance of the Standing Orders of the Houses of Parliament, previous to the application for that Act, unless they are incorporated therewith. *Ib.*

2. Held, following *North British Railway Co.* v. *Tod* (12 Cl. & F. 722), that the plans and sections of an intended railway company, deposited in pursuance of the Standing Orders of the Houses of Parliament, cannot be referred to for the purpose of construing the special Act, except so far as they may have been incorporated within its provisions. *Beardmer* v. *London & North Western Railway Co.*, 1 Macn. & G. 112; 1 H. & Tw. 161; 5 Rail. Ca. 728; 18 L. J., N. S., Ch., 432; 13 Jur. 327.

The fourteenth section of the Railway Clauses Consolidation Act (8 & 9 Vict., c. 20) is to be construed as referable to the line of railway alone, whereas s. 16 comprehends all collateral works, therein called accommodation works, which may become necessary in consequence of the formation of the railway itself. *Ib.*

3. Time for making deviations from the adopted line being extended for another two years from the 4th July 1838, an injunction was refused. *Dublin Navigation Co.* v. *North Midland Railway Co.*, 2 Jur. 1076.

4. No proprietor, through whose lands a railway is to pass, is entitled to object that the line prescribed by the Act of Parliament has been deviated from, before it has reached his land, unless he can show that the deviation is prejudical to himself, or is likely to defeat the objects of the Act; and in a case where there had been a deviation by the undertakers of the Aire and Calder navigation, and an injunction had been obtained, on that and upon other grounds, to restrain them from prosecuting their works, that injunction was dissolved. *Lee* v. *Milner*, 2 Y. & Coll. 611.

5. There is no jurisdiction in equity to order a legal instrument to be delivered up, on the ground of illegality, which appears upon the face of the instrument itself. During the progress of a railroad bill through Parliament, the promoters of the bill agree, with an owner of land on the intended line, that if the bill shall pass they will endeavour in the next session to obtain the sanction of Parliament to a deviation of the line. *Quære*, whether such an agreement is legal. *Simpson* v. *Howden (Lord)*, 3 Myl. & C. 97; 1 Rail. Ca. 326. And see 3 Rail. Ca. 294.

6. A railway company having entered on land which they had purchased, and having proceeded to make their line in a manner exceeding their powers of vertical deviation, on a motion for an injunction, the Lord Chancellor, varying the order of the Vice-Chancellor, directed an action to be brought immediately, and the motion to stand over. *Holyoake* v. *Shrewsbury & Birmingham Railway Co.*, 5 Rail. Ca. 421.

The plaintiff must satisfy the Court that he has sustained substantial damage from the violation of a legal right to entitle him to an injunction. *Ib.*

7. A railway company was building an embankment more than five feet above the level, according to ss. 11 and 12 of the Railway Clauses Consolidation Act. It had not given the notice required by s. 12, but had obtained the consent required by s. 11. The Court put it on terms to take the opinion of the Board of Trade, submitting to such order as this Court should thereafter make, otherwise an injunction would go to restrain the company from proceeding with the embankment. *Pearce* v. *Wycombe Railway Co.*, 1 Drew. 244.

Where a railway was constructed on a deviation beyond the authorized limits, but it had been decided that such deviation was proper, having regard to the interests of P., a landowner:—Held, that P. was not entitled to the costs of moving for an injunction to restrain the railway company from so constructing the railway. S. C. 17 Jur. 660.

8. The lines and works of a railway are sufficiently shown on the plans deposited by a black line, with dotted lines on each side, to mark the limits of deviation. *Weld* v. *London & South Western Railway Co.*, 9 Jur., N. S., 510; 11 W. R. 448; 8 L. T., N. S., 13.

9. Where the deposited plans and sections specify the span and height of a bridge by which a railway is to be carried over a turnpike road, the company will not, in the construction of the bridge, be allowed to deviate from the plans and sections. *Att.-Gen.* v. *Tewkesbury & Great Malvern Railway Co.*, 9 Jur., N. S., 951; 8 L. T., N. S., 682.

10. There is a presumption of intention that the plans and sections referred to in an Act conferring powers over the property of individuals should be adhered to. *Ware* v. *Regent's Canal Co.*, 3 De G. & J. 212; 5 Jur., N. S., 25; 28 L. J., Ch., 153.

A canal company, being desirous to enlarge one of their reservoirs, in order to obtain an Act of Parliament for that purpose, gave the usual parliamentary notices, and deposited with the clerk of the peace certain plans and sections. The plans showed the lines, and where the enlargement was to take place, and also the proposed limits of lateral deviation, and the sections referring to the plans showed the levels. The company completed the reservoir, but deviated from the deposited plans and sections. On a bill filed by W., alleging that his lands were flooded in consequence of such deviation, to restrain the company from using the reservoir as constructed:—Held, that the sections and plans deposited with the clerk of the peace were incorporated in and formed part of the Act of Parliament of the company, and, therefore, if any actual damage had resulted to W., he would have been entitled to an injunction. *Ib.*

11. Where a company has a project extending into two adjacent counties, a landholder in

one county is not bound to examine the plans or works of the company to be executed out of the county, or any plans or sections except those deposited with the clerk of the peace of his own county. *Bentinck* v. *Norfolk Estuary Co.*, 3 Jur., N. S., 204.

1. Where a special railway Act provided that the line should be made according to the levels shown on the deposited plans, and that it should be lawful for the company to carry the line across a specified street on the level of the street:—Held, that the latter provision was not obligatory, and did not prevent the company from carrying its line across the street according to the provisions of the general Act. *Dover (Harbour Wardens)* v. *London, Chatham, & Dover Railway Co.*, 3 De G. F. & J. 559.

2. Where a railway company, keeping within its powers of deviation, deviates from the deposited plans in such a way as to arouse an apprehension, which was not aroused by the deposited plans, that great inconvenience and risk will be caused to the public, yet it will not be restrained by injunction if the information or bill against them does not charge them with capriciously using its powers of deviation, and if no evidence is given to show that, granting the deviation, the line could be constructed in such a way as to allow the aroused apprehension. *Att.-Gen.* v. *Great Western Railway Co.*, 14 W. R. 726.

As to taking Lands within Limits of Deviation.] See LANDS CLAUSES ACT, V. II. AND III.

3. Gauge.

3. A railway Act enacted that the railway should be constructed in all respects to the satisfaction of the engineer of the Great Western (a broad gauge railway), and that it should be formed of such gauge, and according to such mode of construction, as to admit of its being worked continuously with the Great Western. The Court was of opinion that the railway might be constructed on the narrow gauge, as well as the broad. *Beaman* v. *Rufford*, 1 Sim., N. S., 550; 20 L. J., N. S., Ch., 537; 15 Jur. 914.

4. The Act of Parliament, constituting a railway company, directed that the railway, branch railways, and works should be completed to the satisfaction of the engineer of a broad gauge railway company, and should be of such gauge and construction as would admit of the railway to be constructed being worked continuously with the broad gauge railway; and after reciting that the railway to be constructed was intended to be connected with two narrow gauge railways at specified junctions, the Act directed, that, along the portions of the railway north of the specified point on their line, additional rails should be laid down, so as to adapt the line as well to the narrow as to the broad gauge there. The company proceeded to form a line on the narrow gauge for the whole length on the north of the specified point on its line, as also on a part of the line south of that point, with earth-work and timber-work so as to admit of the broad gauge rails being added, and of the railway being a mixed gauge line throughout, with double rails to the north of the specified point. The broad gauge company was entitled to shares in the mixed gauge railway company. And in a suit by the broad gauge company, suing on behalf of themselves and the other shareholders, against the directors of the mixed gauge company, it asked for an injunction to restrain the construction of the railway otherwise than upon the broad gauge throughout its entire length, or otherwise to restrain the laying down the narrow gauge at all south of the specified point; also to restrain the laying down the narrow gauge north of the specified point, until the rails on the broad gauge had been laid down throughout the line; and also to restrain the opening the railway on any part till the rails on the broad gauge had been laid down on the whole line. But held, that the Court could not grant an injunction for any such objects. *Great Western Railway Co.* v. *Oxford, Worcester, & Wolverhampton Railway Co.*, 5 De G. & Sm. 437; 16 Jur. 443.

A broad gauge railway company were shareholders in a mixed gauge railway company, who, by its Act, were bound to construct their line throughout on the broad gauge, and as to part on the narrow gauge also. In March 1852 it filed a bill, stating that the mixed gauge railway company were about to construct the line throughout on the narrow gauge, although its funds were insufficient to enable them to do so, and also to comply with their Act as to laying down the broad gauge. The bill sought an injunction to restrain the opening of any part of the narrow gauge line, and the further construction upon that gauge until the broad gauge was complete. In April 1852 the injunction was refused. From that time contests were carried on in Parliament between the two companies, ending in the rejection of certain bills solicited by the mixed gauge company. From August 1852 to January 1853 correspondence was carried on between them as to traffic arrangements. In January 1853 the broad gauge company filed a new bill, and sought an injunction to restrain the opening by the mixed gauge railway of any portion of the line upon the narrow gauge before the broad gauge was completed. In the same month they moved for an injunction in the new suit, and also appealed from the refusal of the injunction in April 1852:—Held, that both motions were too late. Principles on which the Court acts in refusing applications, either original or by way of appeal, on the ground of laches. Effect of objection in excluding laches. S. C. 3 De G. M. & G. 341.

5. A railway company, in accordance with the provisions of an Act of Parliament, altered the gauge of its line, "on the terms of being paid an equitable portion of the expense thereof, such expense and proportions to be borne by the companies whose interest would be advanced by such alteration": and it was enacted that the plaintiffs should pay to the defendants such proportion of the expense as should be agreed upon between the parties; or, in case of their differing, as might be determined by the award of the railway commissioners. The several companies not being able to agree, the question was referred to the commissioners, and an inquiry was by them instituted, at which no person on behalf of the plaintiffs attended, and at which it appeared from the evidence

that no notice was formally given them to attend, but at which expenses of the alteration were divided and apportioned among the companies. Notice of the award by the commissioners was sent to the plaintiffs, and their portion of the expenses demanded, but not being paid, an action was commenced. The plaintiffs impugned the fairness of the award inasmuch as the sum demanded was the proportion of the expense for seventy-one miles, instead of for four only. On a bill by the plaintiffs to set aside the award and to restrain the action:—Held, that the authority of the commissioners to make the award having been conferred upon them by Act of Parliament the Court had no jurisdiction by way of appeal to set it aside; and as the plaintiffs had subsequently had recourse to, and had memorialised, the commissioners, the bill must be dismissed, with costs. *Newry & Enniskillen Railway Co.* v. *Ulster Railway Co.*, 2 Jur., N. S., 60. Affirmed 2 Jur., N. S., 936.

4. Private Branch Lines.

1. The plaintiff was a lessee for a term of twenty-one years of prebendal lands, there being reserved to the lessors the woods, underwoods, mines, quarries, seams of clay, with full and free authority and power to enter and cut down, and to dig, win, work, get, and carry away the same, with free ingress, egress, wayleave, and passage to and from the same, or to or from any other mines, quarries, and seams of clay, on foot and on horseback, and with carts and all manner of carriages, and also all necessary and convenient ways, passages, conveniences, privileges, and powers whatsoever for the purposes aforesaid, and particularly of laying, making, and granting waggon-ways in and over the demised premises, paying reasonable damages. The Vice-Chancellor, inclining to the opinion that the reservation did not enable the lessors to grant to a public company a licence to make a railway for the purpose of conveying passengers and general merchandise, but was only intended to enable the lessors or their grantees to convey mineral produce and wood from the demised lands to and from adjacent lands, granted an injunction restraining the lessors and their licencees from proceeding to make a railway for the former purpose, previous to the precise extent of the reservation being ascertained by the decision of a court of law. *Farrow* v. *Vansittart*, 1 Rail. Ca. 602.

2. Where, by a clause in an Act of Parliament, it was enacted, "that nothing herein contained shall be construed to prevent any owner or occupier of any ground through which the said railway may pass, from carrying at his or their own expense any railway or other road, or any cut or canal which such owner or occupier is authorized to make in his or her lands or grounds across the said main railway within the respective lands or grounds of such owner or occupier":—Held, that the right given by this clause was not confined to the state of the land at the time the Act passed, but was intended for the convenience of the occupiers from time to time of the land partly on one side and partly on the other of the principal railway, and that without reference to the title under which it was held. *Monkland & Kirkintilloch Railway Co.*, 3 Rail. Ca. 273.

Semble, no interdict will be granted to prevent a party having the right to cross a railway from prolonging and extending it for the use of any persons with whom he might make an agreement for that purpose. *Ib.*

3. A neighbouring landowner proposed to construct a railway on his own land, and to carry it under the company's railway, and to use it as a public railway for general traffic:—Held, that he was entitled so to do, and that the clause in the Act did not restrict the use of the cross railway to purposes connected with the more convenient enjoyment of the neighbouring lands. *Hughes* v. *Chester & Holyhead Railway Co.*, 3 De G. F. & J. 352; 8 Jur., N. S., 221; 31 L. J., Ch., 97; 10 W. R. 219; 7 L. T., N. S., 197. Reversing 1 Dr. & Sm. 524; 9 W. R. 760.

By a clause in a railway Act, after reciting to the effect that the proposed line skirted the sea, and would obstruct the traffic between the sea and the lands on its shore, and so deprive the lands of their natural advantages of position as respected the sea, and that the lands abounded with minerals, which in some cases belonged to persons not owners of the surface, and were well situated for manufactories and other purposes of commerce, and that it was desirable to give facilities of access between the lands and the sea, and from the sea and the lands on the seaward side of the line to parts inland: it was enacted to the effect that owners or occupiers of any lands, manufactories, or mines, lying near or adjoining the railway, and at parts adjacent, might at any time make any railways across the railway (not crossing it on a level), and use them "for the benefit of themselves and of all and every other person and persons to whom they or any of them may from time to time give leave, and in such way and for such purposes as they or any of them may require; and the company should not be entitled to demand tonnage or compensation for making such railway, or for passing goods, persons, horses, carts, etc., along such railway. *Ib.*

4. A canal Act, passed in 1789, empowered the proprietors of lands and their lessees to make railways or roads across lands of other persons to convey their coal and ironstone to the canal. Fifty-four years after the Act the lessees of some coal mines gave a notice to an adjoining landowner of their intention to avail themselves of the powers of the Act, to enable them to make a road over his land. This resulted in an agreement, which authorized the lessees to make the road, paying annually 5*l.* 15*s.* This sum was paid irregularly. At intervals the ownership of the lands was changed, and the lessees afterwards abandoned the tramroad, and apparently without any consent, except that of the tenant, made a railroad across the estate in a different direction. They also erected an engine-house, partly on the old tramroad and partly on adjoining land, and for this they subsequently agreed to pay an additional 1*l.* 15*s.* The agreement contained no limit for the continuance of the road, but six months' notice of its discontinuance was to be given by the lessees, who were to restore it to agricultural purposes. Upon the defendant becoming owner of the

lands, he complained of the carriage of goods not mentioned in the Act, and gave the lessees notice that he should require an annual payment of 35*l.*, and, upon their refusing to pay that sum, he gave them notice to cease the use of the railway, and subsequently he took up the rails. Upon a bill by the lessees:—Held, that the landowner was bound by the agreement of his predecessor; that the abandonment of one way for another had not affected the agreement; that the alteration as well as the erection of the engine-house had been acquiesced in by the landowners; that the payment was fixed for the railway, but not for the engine-house; that the defendant was not justified in taking up the rails, and that he must answer in damages for the loss sustained by the lessees; that they might restore the rails, and that the defendant must be restrained from interfering with them or with their use and enjoyment of the railway for all purposes. *Mold* v. *Wheatcroft*, 29 L. J., Ch., 11.

1. By a clause in an Act (similar to s. 76 of the Railway Clauses Act), owners or occupiers of land adjoining or near the railway might lay down or extend on their own lands or on lands on the sides thereof, belonging to the company, any collateral or continuous branch from such lands to communicate with the railway for bringing carriages upon or across the same; but all the openings and communications for that purpose were to be made at such places as might, so far as practicable, be most convenient to all the parties interested, and so as not to endanger the safety of persons travelling on the railway, and in case of difference as to the proper places for the openings, they were to be determined by two justices of the peace; provided always, that the company should not be bound to make any such opening where they should have erected any building, station, or yard:—Held, that the assent of the company to an opening being made at a station was not in the nature of a licence, and could not be revoked. *Bell* v. *Midland Railway Co.*, 3 De G. & J. 673.

2. An iron company, owners of a private railway, being desirous of connecting its line with other railways by means of a branch line, applied to various landowners, and to O. and his mortgagees, for way leaves through their lands, and an offer in writing was made to them in March 1843 by O. and his mortgagees of a way leave through their lands, by a lease for sixty years, by the payment of triple damages yearly. There was no express acceptance by the company of the offer. The iron company assigned all its interest to a railway company, which was to construct the line. In October 1843 the proposed line was staked out over the lands of O., and in July 1844 (all the other landholders being settled with) the works were commenced; and in 1845 the line was opened for traffic. In June 1844 the mortgagees of O., under their power of sale, sold and conveyed the property, including the land on which part of the line was formed, to B., who sold to S. From 1844 to 1847 unsuccessful negotiations had been pending between the parties for settling the quantum of the yearly rent; and in 1847 S. brought ejectment against the company. The company then filed a bill to stay proceedings at law, and for specific performance, alleging acceptance of the offer of March 1843 by the acts of the company, in staking out and making its line in accordance with the offer, and praying that the Court would determine the quantum of rent to be paid:—Held, that the acts of the company did not amount to an acceptance of the offer so as to make it a contract binding the land, and the bill was dismissed. *Moynell* v. *Surtees*, 1 Jur., N. S., 737; 25 L. J., Ch., 257; 3 W. R. 535. Affirming 1 Jur., N. S., 80; 3 W. R. 36; 3 Sm. & G. 301.

After a suit was instituted by a railway company for specific performance, the company obtained legislative powers to retain possession of the land in question:—Held, that the cause must be decided as if the Act had not passed. *Ib.*

An offer to sell land, to be binding upon the person making it, must be accepted within a reasonable time. *Ib.*

If the person making the offer die, become bankrupt, or sell, before acceptance of the offer, the land is not bound. *Ib.*

Semble, an agreement to grant a way leave for the purpose of a mineral railway simply will not justify the construction of a railway for the purposes of general traffic. *Ib.*

The scope of the bill being for specific performance of an alleged contract:—Held, that the plaintiffs were not entitled to relief on the principle of quieting possession. *Ib.*

3. Where an incorporated company stands by and permits expensive works to be executed at the spot where its premises are situated and its operations carried on, the effect, for all purposes of knowledge and acquiescence, will be the same as in the case of an individual. *Laird* v. *Birkenhead Railway Co.*, 1 Johns. 500; 6 Jur., N. S., 140; 29 L. J., Ch., 218.

4. The plaintiff in 1855 submitted to the directors of a railway company a project for a private branch line, to be constructed at his cost and for his accommodation, to which the directors expressed their assent and agreement generally, but the terms and details were left for future arrangement. In 1856 he, at considerable cost, constructed the branch, and the company prohibited the user until a definite understanding should be come to. *Semble*, that at this time the company was bound to assent to reasonable terms, and the Court, if possible, would have decreed specific performance. *Ib.*

After some discussion, terms as to tolls and other matters were proposed by the plaintiff, and the traffic was continued on the basis of the plaintiff's memorandum of terms, and payment made by the plaintiff for the carriage of goods during two-and-a-half years; but no agreement was ever signed by two directors. The directors ultimately insisted on terms originally suggested by them before the user commenced, and then objected to by the plaintiff, and at variance with the terms on which the user had been enjoyed; on the plaintiff declining to make an agreement the company proceeded to obstruct the traffic:—Held, that there was an indefinite agreement in 1855 for a user on reasonable terms; that the actual user had removed all difficulty about what terms were reasonable, and that the plaintiff was entitled to specific performance, on the basis of the unsigned memorandum, on the terms of which the user had been permitted. *Ib.*

1. The defendants agreed with the plaintiffs to undertake to execute a branch railway according to the terms of a specification to be prepared by the plaintiff's engineer for the time being, and to give a bond to secure the performance of their contract. The plaintiffs had at the date of the agreement a bill pending to enable them to make the branch, and holding them to complete within a specified time, on pain of a suspension of dividends on the capital of their entire line. The specification was prepared by the company's engineer, but prices having risen, the defendants repudiated their agreement. The plaintiffs then filed their bill for a specific performance of the agreement according to the terms of the specification, and to have the bond executed, charging that they would have withdrawn the bill before parliament, by reason of the liabilities incurred on the passing thereof, had not the defendants (to whom, as owners of a large estate adjacent to the proposed branch, it was of great importance that the plaintiffs should be bound to make the branch) assented to the terms of the agreement, and the plaintiffs believed that they would *bonâ fide* carry out the same; that the defendants, by their agreement, induced the plaintiffs to come under the obligation to make and complete the lines, and the Act was passed upon the faith of the agreement; and charging that the not carrying out the agreement was a fraud on the plaintiffs, there having been a part performance on their part. On demurrer, it was held (assuming the agreement to be valid within the Statute of Frauds, and in other respects one upon which the plaintiffs could recover), first, that the agreement could not be enforced as regards the construction of the railway, because from the nature of the works, the subject of the agreement, it was an agreement the execution of which the Court could not superintend consistently with public convenience, inasmuch as the motions would be incessant for committal or otherwise for non-performance of orders with regard to the making of particular works, besides the difficulty, on the ground of reciprocity, in enforcing that part of the agreement by which the plaintiffs were to provide the land, and because the plaintiffs having by their act power to acquire the land, could make the railway for themselves; and having so ascertained the expense the defendants had put them to, would have an adequate and the better remedy in damages, and that the circumstances of fraud alleged in the bill did not prevent the application of the foregoing reasons. Secondly, that as the Court could not superintend the general execution of the whole works or enable the defendants to earn the whole of the money to which they would be entitled for the works when made, the execution of the bond would be a piecemeal performance of the agreement, which the Court would not direct, and the demurrer was allowed. *South Wales Railway Co.* v. *Wythes*, 1 Kay & J. 186; 24 L. J., Ch., 1; 3 W. R. 3; 3 Eq. Rep. 70. Affirmed 24 L. J., Ch., 87; 3 W. R. 133; 3 Eq. Rep. 153.

5 Bridges.

2. A company was empowered to do all works necessary and convenient for constructing a railway, and among others to cross canals and make embankments in the line; and in particular to cross a canal of which the defendants were the proprietors, and to make an embankment over a valley near the same place. Subsequent clauses in the Act restricted the company from doing anything which should obstruct the navigation of the canal, or any part thereof, and specified the height and dimensions of any bridge to be made and maintained for carrying the railway over the canal. The company, for the purpose of transporting earth from the higher lands on the south to the lower land on the north side of the canal for constructing an embankment, erected a temporary bridge over the canal, supported partly on piles driven into the bed of the canal:—Held, that the clause empowering the railway company to cross canals in the progress of their works was not restricted by the subsequent clauses which applied to permanent bridges. *London & Birmingham Railway Co.* v. *Grand Junction Canal Co.*, 1 Rail. Ca. 224.

Although a railway company is not to act capriciously in regard to carrying out the powers of an Act of Parliament, the Act constitutes it the judge of the most convenient mode of conducting the works. *Ib.*

3. A railway company, in exercise of the powers conferred on it by an Act of Parliament, which gave compensation to persons whose property might sustain damage from their operation, was proceeding to erect an arch over a mill race, for the purpose of sustaining an embankment, on which the railway was to be constructed; and it appeared that injury would be done to the mill if the arch were of the proposed dimensions, but that the injury would be avoided if the arch were of certain larger dimensions; an injunction was granted to restrain the company from making over the mill race an arch of less than certain specified dimensions. *Coates* v. *Clarence Railway Co.*, 1 Russ. & M. 181; 8 L. J., N. S., Ch, 72.

4. Sections 70 and 71 of a railway Act provide for the crossing by the railway of roads, not being turnpike roads. Section 72 provides that a turnpike road which shall be crossed by the railway, shall be raised or sunk so as to pass over or under the tramway. The railway being proposed to cross the Northam Bridge Road in the mode provided for by ss. 70 and 71, the plaintiffs, the proprietors of the road, filed their bill, insisting that the road was a turnpike road, and praying to restrain the railway company from crossing over or using the same, until it should have complied with s. 72. On a motion for an injunction, the Vice-Chancellor, being of opinion that the road was not a turnpike road, and therefore not within s. 72, refused the motion, but gave leave to the plaintiffs to take the opinion of a court of law upon the question, as being one of legal construction. A case was accordingly made for the opinion of the Court of Exchequer, and a certificate returned by the judges of that Court, stating that the Northam Bridge Road was a turnpike road. The Vice-Chancellor, on an application by the railway company, refused to send the legal question for the opinion of another court of law. Upon a motion for the injunction, as consequent upon the above certificate:—Held,

that, as the object of the plaintiffs must be to procure for the public using the road a compliance with s. 72 of the Act, upon the railway company entering into an undertaking to proceed with and complete a bridge over the road with all possible dispatch, an injunction ought not to be granted during the time which must necessarily elapse in building the bridge. *Northam Bridge & Roads (Proprietors of)* v. *Southampton Railway Co.*, 1 Rail. Ca. 653; 9 L. J., N. S., Ch., 277. And see S. C. at law, 6 M. & W. 428.

1. A railway company, in the progress of its works, proposed to cross a mill-stream, by a bridge to be supported in the centre of the mill-stream by two piles, placed sixteen feet apart. The bridge was to be six feet in height above the level of the water. The plaintiff, the owner of the mill, asserted that that height was insufficient to allow barges to pass under; and also, that placing piles in the stream would impede the flow of the water, and thereby stop the working of the mill. The company adduced affidavits of engineers to show that the level of the railway, and the nature of the ground upon which the embankments were founded, prevented them from making the bridge of a greater height: and they also showed, that, over a public navigable river which was connected with the mill-stream, there were some bridges only six feet high; and moreover, that, at the time of the passing of their Act, there was over this mill-stream a bridge of that height, though such bridge had since been pulled down by the plaintiff and re-erected of a greater height; and that the flow of water would be in no way impeded by the piles. The plaintiff adduced affidavits of engineers to show, that, although some of the bridges over the navigable river were of the height of six feet only, yet that the water under them could be lowered by waste gates; and that, to obtain a perfect level on the line of the railway, the embankments, and consequently the bridge over the mill-stream, ought to be raised two feet:—Held, by the Vice-Chancellor, that the Act authorising the company to conduct their works, doing as little damage as possible, the plaintiff, under the circumstances stated, was not entitled to require the company to build the bridge at the height of more than six feet:—Held, by the Lord Chancellor, that nothing but necessity could justify the company in carrying on their works in such a manner, or on such a level, as would cause serious damage to the owner of the land. In a case where the affidavits on engineering points are conflicting, the Court will seek for the professional assistance of some impartial engineer, to form a decision upon them. *Manser* v. *Northern & Eastern Counties Railway Co.*, 2 Rail. Ca. 380; 5 Jur. 988.

2. Where, in consequence of a company raising the level of its railway within the limits of vertical deviation, it became necessary to raise the height of a bridge over which a road was to be carried:—Held, that there was no restriction as to the powers of the company to alter the levels of the approaches to the bridge, provided the land to be affected was included in the plans and sections deposited, or mentioned in the books of reference, and that full satisfaction was made to all parties interested for the damage sustained. *Beardmer* v. *London & North Western Railway Co.*, 1 Macn. & G. 112; 1 H. & Tw. 161; 5 Rail. Ca. 728; 18 L. J., N. S., Ch., 432; 13 Jur. 327.

3. An information was filed, at the relation of one of the commissioners appointed under 12 Geo. 3, and 57 Geo. 3, against the Eastern Counties Railway Company and the Northern and Eastern Railway Company, for the purpose of restraining it by injunction from constructing or making any covering or building over certain streets and courts within the jurisdiction of the said Acts. The defendants were desirous of building a station, and for that purpose proceeded under the powers of its Act to arch over certain streets within the jurisdiction of the said paving commissioners:—Held, by the Lord Chancellor on appeal, that an injunction should issue to restrain the defendants from constructing or making any covering or building over the streets in question, further or otherwise than might be necessary for the purpose of constructing the railway; but at the same time directed a case for the opinion of the Barons of the Court of Exchequer, as to the right of the company to cover in or build over such streets for the purposes of a station. Their lordships having certified that they were of opinion that the defendants were entitled (if it was necessary or reasonably convenient for the construction of a station and proper warehouses) to construct such coverings or buildings, by arches or otherwise, over the streets within the jurisdiction of the paving commissioners:—Held, that the injunction should be dissolved, the fact of the commencement of the works by the defendants being sufficient proof of the necessity for and the convenience of such buildings. *Att.-Gen.* v. *Eastern Counties Railway Co. & Northern & Eastern Counties Railway Co.*, 2 Rail. Ca. 823.

4. The Act of Parliament authorized the railway company to carry its railway over any road by means of an arch sixteen feet above the surface of the road. This was done by the company, who, at the same time, lowered the road to meet the required height, and thereby the road became flooded. Before the Act was passed, the consent of the trustees of the road was obtained, on condition that the road should not be prejudiced; but no special proviso was inserted in the Act:—Held, that the trustees of the road were precluded from obtaining relief, there being no express clause restricting the usual powers given to railway companies. *Aldred* v. *North Midland Railway Co.*, 1 Rail. Ca. 404; 3 Jur. 244.

5. Section 9 of the London and Southampton Railway Act empowered the company to make in, upon, across, under, or over any land, streets, hills, valleys, and roads, such inclined planes, tunnels, embankments, bridges, arches, and piers as the company should think proper, according to the provisions, and subject to the restrictions of the Act. Section 74 provided, that where any bridge should be erected by the company for the purpose of carrying the railway over or across any turnpike road, or other public highway, the span of the arch thereof should be of such width as to leave a clear and open space under every such arch of not less than fifteen feet. Section 77 provided, that where any part of any carriage or horse-road

should be found necessary to be cut through, diverted, sunk, etc., the company should previously thereto cause a sufficient road to be made instead thereof, as convenient for passengers and carriages as the road to be cut through. The company erected a bridge over a turnpike road at a place where the width of the then existing road was forty feet, but the bridge crossing obliquely, and the piers being built on the road, the passage under the arch was only twenty-four feet for the length of one hundred and sixty feet:—Held, that the restrictions of s. 77 applied only to a case where a road might be either temporarily or permanently diverted, and that under s. 9, the company might build any piers or necessary buildings for a bridge, provided they left a width under such bridge of fifteen feet, as provided by s. 74. *Att.-Gen.* v. *London & Southampton Railway Co.*, 1 Rail. Ca. 302; 9 Sim. 78; 7 L. J., N. S., Ch., 15.

1. The Manchester and Leeds Railway Act enables the company to make the railway in a prescribed course. Section 34 reciting that the railway is to be carried across the Aire and Calder navigation, at three specified places, requires the company to erect bridges at such three crossings, and prescribes the dimensions of such bridges. Section 38 provides that the company shall, during the progress of construction of such bridges, leave an open uninterrupted navigable water-way, of a specified height and extent, and imposes penalties on non-compliance with its provisions. Sections 42 and 44 provide, that the railway company shall not make any bridge over the navigation, and generally shall not interfere therewith, otherwise than as provided by the Act. Section 94 empowers the company, subject to the restrictions imposed by the Act, to make and maintain the railway, and to construct in, under, upon, across, or over, any hills, valleys, roads, rivers, canals, brooks, or streams, or other waters, such embankments, bridges, aqueducts, and conduits, either temporary or permanent; and to erect and construct such buildings, engines, machinery, apparatus, and other works and conveniences for the purposes of the Act, as the company shall think proper. By an agreement made between the navigation and railway companies, and afterwards embodied in an Act of Parliament, the line of the railway was changed, by which change the navigation was crossed only once by the railway, and only one bridge required. The railway company had introduced into the above agreement a clause enabling them to erect temporary bridges across the navigation, but which was struck out by the navigation company. The railway company having commenced the building of the permanent bridge, erected a temporary bridge, adjoining to the permanent bridge, which was used partly for building that bridge, and partly for conveying earth and materials across the river. On the application of the navigation company, an injunction was granted *ex parte*, restraining the erecting of a temporary bridge across the navigation, or of anything impeding the navigation in a manner not authorized by the Act. Affidavits were filed on both sides; and upon motion to dissolve the injunction:—Held, by Alderson, B., that, subject to the restrictions of the Act, s. 94 ought to be literally carried into effect. That the railway company had the power of erecting such a temporary bridge, the power being exercised reasonably and *bonâ fide*. That, in construing such power with a view to its reasonable and *bonâ fide* exercise, regard must be had to the peculiar purpose for which the permanent bridge was designed. That the temporary bridge being of the dimensions specified in s. 34, and a navigable water-way being left as required by s. 38, the same was lawfully erected under s. 94, for the *bonâ fide* purpose of building the permanent bridge. That the temporary bridge being erected and used for a lawful purpose might also be used for other purposes, for which alone it could not have been erected. That, subject to the restrictions of the Act, the company acting *bonâ fide*, was constituted the judge of the mode of executing its works. Circumstances upon which the Court was of opinion, that the temporary bridge was reasonably and *bonâ fide* erected, and was unaffected by any circumstances connected with the above-mentioned agreement. As between the two companies no costs were given, although an *ex parte* injunction was dissolved. *Priestly* v. *Manchester & Leeds Railway Co.*, 2 Rail. Ca. 134; 4 Y. & Coll. 62. See also 1 Rail. Ca. 576.

Acts of Parliament, giving railway companies power to build bridges, must be expounded with reference to the peculiar mode of construction of bridges in railways. *Ib.*

2. A railway company bought land from the plaintiff, and in the purchase deed covenanted with him not to erect any building upon it to a greater height than eighteen feet within the distance of eighty feet from certain other property of his. At the time of the conveyance the railway had been carried through the purchased land with two lines of rails on a viaduct thirty-three feet high, part of which was within eighty feet from the protected property. The company afterwards determined to widen its railway, so as to have four lines of rails, and commenced building on the purchased land, for the purpose of widening the viaduct, piers more than eighteen feet high, and standing within eighty feet of the protected property, and between it and the old viaduct:—Held, that the company ought to be restrained from so doing. *Lloyd* v. *London, Chatham, & Dover Railway Co.*, 2 De G. J. & S. 568.

3. A railway company had power by its Act to cross a river, the property of certain persons, by the erection of a viaduct. By a clause to protect the proprietors of the river, it was enacted that between certain points the works incident to the construction of the railway should be made under the direction of the proprietors, and according to plans to be submitted and approved by their engineer before commencement of the work. The company required the viaduct to be built on piles driven into the river; the proprietors objected that it should be done by a viaduct of one span or arch:—Held, that the company was not restricted to that mode of construction, but might carry the viaduct according to the terms of its Act, without doing any permanent damage to the proprietors of the river. *Birmingham Waterworks Co.* v. *London & North Western Railway Co.*, 4 L. T., N. S., 398.

4. In a contract between a railway company and a proprietor of land to be crossed by the

line of railway, the Railways Clauses Act (8 & 9 Vict., c. 20) should be expressly referred to, if the company intends to claim the benefit of its provision. *Clarke* v. *Manchester, Sheffield, & Lincolnshire Railway Co.*, 1 John & H. 631.

Therefore, where a company contracted "to provide and erect a suitable bridge over a street (marked in a plan referred to in the deed) as then planned and intended"; and the plan showed that the street was intended to be forty-two feet wide:—Held, in the absence of any reference in the deed to the Act, that the company was not at liberty to narrow the street to the dimensions specified in s. 49 (twenty-five feet), but must make a bridge with an arch of the full width of the street (forty-two feet). *Ib.*

1. By the plans and sections deposited by a company, it appeared that they intended to carry the railway across a public road by means of a skew bridge. Instead of doing so, the company diverted the road for some distance, and afterwards restored it to its former course by a bridge which crossed the railway at right angles, thus causing two abrupt and dangerous curves. A dispute having arisen between the trustees of the road and the company, the Court granted an injunction until further order, restraining the company from proceeding with the works, and directed that in the meanwhile, a competent person should inquire and report whether any deviation was necessary, and if so, how it could most conveniently be effected. *Att.-Gen.* v, *Dorset Railway Co.*, 9 W. R. 189; 3 L. T., N. S., 608.

2. A railway company having formed its line, obtained an Act for an extension for three years of their compulsory powers to take land, the preamable stating that it was for the convenience and safety of the public. The company was owner of the soil on both sides of a lane crossed by a bridge, and therefore, like any other owner, owner of the soil of the land, but by a subsequent Act the soil of all roads was vested in the district board of works in whose district such roads were situate. After the expiration of the three years the company found it necessary to widen the bridge over the lane, and claimed power to do so notwithstanding that the board of works for the district denied such power, and proceeded to widen the bridge, but only in the same line of abutment, the road itself not being narrowed, but the soil necessarily disturbed to form such addition. The board moved for an injunction to restrain such widening:—Held, that the soil of the road was only vested in the board to promote the public convenience and prevent the incursion of strangers. That the public convenience required the widening of the bridge, and as the only obstruction would occur whilst the works were in progress, and the road would not be ultimately narrowed, it was not a case for the extraordinary interference of the court. *Wandsworth Board of Works* v. *London & South Western Railway Co.*, 8 Jur., N. S., 691; 10 W. R. 814.

3. A railway company, with whose Act the Railways Clauses Act 1845 was incorporated, by its deposited plans and sections proposed to build over a turnpike road an arch, of a span of forty-five feet. The company afterwards proposed to the trustees of the road to vary its plans, and to build a bridge of a span of thirty-five feet; but the proposal was rejected. Subsequently the company's agents commenced the erection of a bridge of the lesser span; and thereupon one of the trustees filed an information for an injunction:—Held, that the word "accordingly," in s. 13 of the Railways Clauses Act 1845, meant, according to the deposited plans and sections; and that the company was bound to erect the bridge according to the plans which had been deposited. *Att.-Gen.* v. *Tewkesbury & Malvern Railway Co.*, 9 Jur., N. S., 618; 8 L. T., N. S., 196; 4 Giff. 333. Affirmed 9 Jur., N. S., 951; 32 L. J., Ch., 482; 8 L. T., N. S., 682; 1 De G. J. & S. 423.

A bridge, forming part of the line of railway itself, is an engineering work within s. 14, and the company is by that section debarred from making it otherwise than according to the description in the plan. *Ib.*

4. A railway company obtained a conveyance, for the purposes of the railway, of land from C.; and in the conveyance the company bound itself to erect and maintain a bridge over the road leading to C.'s property, which was to be, according to the plans, thirty-five feet wide, and leaving a road under it of fifteen feet wide. Afterwards this bridge was made, but the company, some years later, amalgamated with the H. company, and the latter company's Act authorized a junction with the former railway, at a point near this bridge. The two companies then agreed as to the mode of effecting the junction; and part of the plan was to widen the arch or bridge over C.'s road, so as to extend the bridge from thirty-five feet to fifty-five feet wide, thereby darkening the road beneath. C. applied for an injunction to restrain the companies from carrying out this plan:—Held, that the first company having, in the first instance, obtained the conveyance from C., on certain conditions as to the width of the bridge, was bound not to depart from those conditions; and the H. company was equally bound, as claiming under the first company; for it was part of the consideration to maintain the bridge of the height and width originally fixed. *Edinburgh & Glasgow Railway Co.* v. *Campbell*, 9 L. T., N. S., 157.

5. By its special Act, passed in 1872, a railway company whose line was made in 1857, was authorized to divert a road crossing its line on the level, and to carry it under the line by a bridge, and the soil of the diverted road was to belong to the company. The new road and bridge were to be in accordance with the deposited plans and sections, which showed a total height from the road to the rails on the bridge of sixteen feet three inches, but did not mention the height of headway. The special Act incorporated the Lands Clauses Act 1845, and the Railways Clauses Act 1845 (s. 49 of which provides that all bridges shall have a headway of fifteen feet), and it provided that nothing in the special Act should exempt the company from the provisions of the general Acts. It also gave the company power to deviate from the deposited sections to the extent of five feet. The company, without altering the levels of the line (no such alteration being shown on the deposited plans), made the bridge of the prescribed height of sixteen feet three inches, but with a headway of only fourteen feet, and that

partly gained by carrying the road below the level of the adjoining land, so that at times it was flooded from an open ditch near the line, and became impassable. If the surface of the road was raised one or two feet, all serious inconvenience from flooding would be removed, and a headway of twelve or thirteen feet would be sufficient for the traffic of the district. On an information at the relation of the road surveyors:—Held, that the attorney-general was entitled to an injunction, restraining the company from making or maintaining the bridge with less headway than fifteen feet, or any bridge which, by reason of the road thereunder being of too low a level, might cause the road to be flooded. *Att.-Gen.* v. *Furness Railway Co.*, 47 L. J., Ch., 776; 38 L. T., N. S., 555; 26 W. R. 650.

1. A local board of health withdrew its opposition to a railway bill upon the insertion in the Act of a clause providing that no bridge carrying a road over the railway within their district should have an approach with a slope of more than one in thirty. The making a slope of one in thirty required an encroachment on the land of a person who obtained an injunction to prevent such encroachment, and the company thereupon made a bridge with a slope of one in twenty:—Held, that the company must not have a bridge with a slope of more than one in thirty, and that it was no answer to say that this requisition could not be complied with without stopping the railway. *Att.-Gen.* v. *Mid-Kent Railway Co. & South Eastern Railway Co.*, 3 L. R., Ch., 100; 16 W. R. 258.

6. Level Crossings.

2. Damages are not recoverable for stoppages and other mere inconveniences incident to the crossing of a public road by a railway on the level, under the sanction of Parliament. *Caledonian Railway Co.* v. *Ogilvy*, 2 Macq. H. L. Ca. 229.

A level crossing in such a case is a grievance to be endured without complaint by private persons, from a consideration of the benefit gained by the public. *Ib.*

Hence where a railway passed within some few yards of a gentleman's lodge, across a public road, forming the chief access to his residence; although he was liable to constant stoppages by the closing of the gates on the level crossing; although the passing of trains frightened his horses and terrified his visitors, "particularly ladies":— Held, that these annoyances did not ground a claim of damages against the company. *Ib.*

Held, also, that the inconvenience felt in such a case is one to which all the Queen's subjects are exposed, and for which no particular or individual remedy exists. *Ib.*

3. By a railway Act it was provided that it should be lawful for the company, in constructing its railway, to carry the same on a level across a road at a particular point, provided the company should erect and maintain a good and sufficient public foot bridge, for the use of foot passengers over such road at or near the point of level crossing:—Held, that such a provision was permissive, and not mandatory. *Dover* (*Harbour Wardens*) v. *London, Chatham, & Dover Railway Co.*, 7 Jur., N. S., 453; 30 L. J., Ch., 474; 9 W. R. 523; 4 L. T., N. S., 387.

4. Where a person has made a special agreement as to crossings on a line of railway running through his land, if, from particular circumstances, that agreement is not carried into effect, he cannot, on the ground of any general rights, under the railway Acts, claim to have any other crossings made according to the discretion of the Court, for that would be to get the Court to substitute a new agreement, and not to enforce the performance of the original. *Darnley* (*Earl*) v. *London, Chatham, & Dover Railway Co.*, 2 L. R., H. L., 43; 36 L. J., Ch., 404; 15 W. R. 817; 16 L. T., N. S., 217.

A railway company which was promoting a bill for a new line agreed with a landowner that if the Act passed it would pay him a fixed sum for so much of his land as it should want, and would make for the convenience of his estate such crossings as his surveyor should, within a month from their taking possession of the land, notify to it or its engineer:—Held, that this could not be construed as an agreement to make the necessary and proper crossings, with a superadded direction as to the mode of ascertaining them, so as to enable the Court to ascertain them, if not ascertained in that particular mode; but that no notification having been made within the time, there was no contract which the Court could enforce. S. C. 1 De G. J. & S. 24; 11 Jur., N. S., 520; 13 W. R. 824; 12 L. T., N. S., 593.

A landowner agreed to sell land to a railway company, and the company agreed to make such crossings as the landowner's surveyor should, within one month after the company took possession, direct in writing. No award was made by the surveyor until about two months after possession had been taken. The company having refused to make some crossings directed by the award the landowner filed a bill, alleging conduct on the part of the company amounting to a waiver of the limitation of the time for making the award, insisting on the direction of the surveyor as binding, and praying that the company might be decreed to make the works directed by it, but not distinctly putting forward any case for specific performance of the agreement independently of the award. The Court being of opinion that the award was not binding upon the company, and that the title to relief independently of the award was not put forward with sufficient distinctness to make it right to give relief on that footing, gave the landowner leave to withdraw replication and amend his bill by putting in issue any claim founded on the original agreement. S. C. 1 De G. J. & S. 204.

In June 1858 an agreement was entered into between D. and a railway company, by which the company should make and maintain for the convenience of D.'s estate, as many crossings, and of such kinds, as his agent, C., should, within one month after obtaining possession of the land, direct and notify in writing to the company. The company obtained possession of the land in December 1858, but C. did not send in his notification till the 5th of March 1859. It was alleged that by agree-

ment the time for making the notification had been extended. The company, however, alleged that it had been sent too late, and that it was not bound to perform the works required by C. :—Held, that, although time was originally made of the essence of the contract, the stipulation in regard to it had been waived by the conduct of the agents of the company. S. C. 9 Jur., N. S., 148; 7 L. T., N. S., 590. Affirmed 33 L. J., Ch., 9; 11 W. R. 388; 8 L. T., N. S., 94.

1. A railway company was empowered for the purposes of its undertaking to take marsh lands at Harwich belonging to the Crown, and which had been acquired by the Crown for the purposes of defence, but it was required by its Act to construct and maintain across, over, or under its railway such communications as the Commissioners of Woods and Forests should adjudge to be necessary for the convenient use and occupation of the Crown lands. Accordingly the company took lands which lay between the railway and an estuary, and agreed with the Commissioners to make four level crossings over its line as communications with these lands. At this time the land was used for grazing purposes only. Subsequently it was purchased by a land company and laid out for building. Thereupon the railway company disputed the right of the owners or occupiers of houses on the land to use the level crossings, on the ground that the right of way was restricted to the purposes for which communication with the several lands was necessary at the time the railway was made :—Held, that the grant of the right of way was not so restricted, but gave the landowners a right of way over the level crossings for all purposes which would not interfere with the proper working of the railway. *United Land Co.* v. *Great Eastern Railway Co.*, 33 L. T., N. S., 292; 44 L. J., Ch., 685; 10 L. R., Ch., 586; 23 W. R. 896. Affirming 17 L. R., Eq., 158; 22 W. R. 126; 29 L. T., N. S., 498; 43 L. J., Ch., 363.

A right of way acquired by prescription is restricted to the purposes for which it was acquired. But where such a right is acquired by grant, the limit to the right of user is a question depending on the construction of the instrument of grant. *Ib.*

A right of way over, under, or across a railway is *primâ facie* general, and not restricted to purposes to which the land was applicable at the time the right arose. *Ib.*

The authorities, establishing the principles that a right of way cannot be increased by imposing an additional burden on the servient tenement, do not apply to lands taken by a railway company. *Ib.*

2. A private railway Act contained a recital that it was expedient that certain footways which were crossed by the railway on the level should be dealt with as by the Act provided, namely, "that as regards five of such footways the rights of way in respect thereof should be extinguished, and the other footway should be carried by a bridge over the railway." One of the five footways to be extinguished was the subject of a previous agreement between the owners and the company, under which the owners, their heirs, tenants, and assigns were to have a free way of passage with horses, carts, waggons, and carriages over the said footway. The Act provided no compensation for the extinguishment. The company erected a fence across the level crossing without any notice to the owners, who brought their action to restrain the company from so doing :—Held, that their private rights were not taken away by the Act, which only dealt with public rights of way. *Wells* v. *London, Tilbury, & Southend Railway Co.*, 37 L. T., N. S., 302; 25 W. R. 325; 5 L. R., Ch. D., 126.

3. The provisions of the Highways Act (5 & 6 Will. 4, c. 50, s. 71), as amended by 2 & 3 Vict., c. 45, s. 1, and 5 & 6 Vict., c. 55 (for the better regulation of railways), s. 9, by which the proprietors of a railroad which crosses a highway at a level crossing are compelled to put up gates at such crossing, do not apply to a private line of railway, on private property used by the proprietors exclusively for their private purposes. *Matson* v. *Baird*, 39 L. T., N. S., 304; 26 W. R. 835; 3 L. R., App. Cas. (Sc.), 1082.

A horse escaped from a field without any negligence on the part of its owner, and strayed for two miles along a public highway to a point where the road was crossed on a level by a private railway. The horse then strayed along the railway for about half a mile further till it reached the place of junction between the private line and the line of the North British Railway Company, where it was killed by a passing train. The private railway was not constructed under parliamentary powers, nor used for the conveyance of passengers, and there were no gates either at the level crossing or at the junction :—Held, that the owners of the private railway were under no obligation to erect gates at the level crossing, and were not liable at the suit of the owner of the horse. *Ib.*

7. Roads and Streets, Interference with.

4. An agreement was entered into between a landowner and a railway company, that the former should not oppose a projected railway, on condition that there should be a reference to arbitration, for, among other purposes, defining the line of approach to his premises from a turnpike road which it was proposed to divert. After the award indicating such approach had been made, it became expedient for the company further to divert the turnpike road, but within the limits of deviation, and consequently necessary to alter the line of the approach to the landowner's premises :—Held, that the company were not precluded from making such alteration. *Wood* v. *North Staffordshire Railway Co.*, 1 Macn. & G. 278; 1 H. & Tw. 611. Reversing 13 Jur 466.

5. In the month of February 1847 P. entered into a contract with a railway company to sell certain land to the company; and the agreement contained certain stipulations as to the construction, by the company, of two bridges, and also the following words, "and a road upon the level as at present where the said P. now passes to and fro from his brick-kilns." In May 1847 P. conveyed the land to the company, but in the conveyance no mention was made of the bridges or road. P. died, leaving the plaintiff his heir-at-law who

entered into possession of the land. The company having lately commenced their works on the lands in question, and making the road several feet lower than the original level, the plaintiff applied for an injunction to restrain the company from proceeding to construct the road at a lower level than the road referred to in the agreement, and from stopping up the present road, except for the purpose of carrying a new road across the land at what was the level at the date of the agreement:—Held, that although the conveyance was silent as to the bridges and road, the plaintiff was entitled to his injunction; and that, it being a case of specific performance of an agreement, the Court would not compel the plaintiff to try his rights in an action. *Foster* v. *Birmingham, Wolverhampton, & Dudley Railway Co., and Birmingham & Oxford Junction Railway Co.*, 2 W. R. 378.

1. Motion for an injunction to restrain a railway company from stopping up a road, until it should have made another, as convenient as the old road, according to the Act of Parliament:—Held, that it did not appear to be the intention of the defendants to break up the old road, until a new one (about to be formed) was completed. The injunction could not be granted, but the motion should stand over, till it was ascertained whether the company would, after making the new road, proceed in an illegal course; and whether the new road was really as inconvenient, and contrary to the clauses of the Act, as the plaintiff alleged. *Kemp* v. *London & Brighton Railway Co.*, 1 Rail. Ca. 495; 3 Jur. 403.

2. By an Act by which a railway company was incorporated, the usual power was given to it, to construct, according to the provisions and restrictions of the Act, the said railway upon, across, or over any roads, etc., doing as little damage as might be. By a subsequent section it was enacted, "that where the railway should cross any turnpike road, or other public highway, by means of an arch," such arch should be "of such width as to leave a clear and open space under such arch of not less than fifteen feet":—Held, that, under these clauses, the company was empowered to diminish the width of any turnpike road which was crossed by the railway, provided it left an open space of fifteen feet; and an application by the trustees of a turnpike road for an injunction to restrain a railway company from constructing a bridge over the road of less than the usual width of that road, on the ground that an inconvenience to the public would be thereby occasioned, was refused; but leave was given to the trustees to proceed against the company in a court of law. *Att.-Gen.* v. *London & Southampton Railway Co.*, 9 Sim. 78; 1 Rail. Ca. 283; 7 L. J., N. S., Ch., 15.

3. By s. 59 of the London and Brighton Railway Act, after reciting that it is intended to carry the railway across certain public roads or highways in the parish of C., and to alter the levels or present surface of such roads, it is enacted, that all alterations, whether temporary, permanent, of, in, or to any of the said public roads or highways, and all works connected therewith of any kind or description whatsoever, and all bridges to be erected by the company, and all future repairs of such altered roads, or any temporary roads, and the quality of the materials to be used and applied in or to such altered or temporary roads, and all future damage to such altered or temporary roads, shall be made, formed, completed, and finished under the superintendence, from time to time, and to the entire satisfaction of the board of surveyors of roads from the parish of C. By s. 60 it is enacted, that if the company shall in the doing, making, forming, completing, and finishing of all, or any, or either of such alterations or works, in, to, or belonging to the said public roads or highways in the parish of C., do or cause any injury or damage to any or either of the said road or roads, or to any part thereof, and shall not forthwith proceed to repair and make good such injury or damage to the satisfaction of the board of surveyors of the parish of C.; or if the roads so to be altered shall not be properly made and completed, and kept in repair, it shall be lawful for the said board of surveyors to cause such repairs to be done. The company made a diverted temporary road, leading from one of the said roads; which diverted temporary road was crossed by the railway. The railway did not cross the old road, neither did the company alter the level or surface of the old road. The company also made and tendered to the surveyors a permanent diverted road, which the surveyors refused to approve of or accept; the company having, in the execution of its works, crossed the temporary diverted road with locomotive engines, the surveyors put up fences on either side, so as to obstruct the passage across it:—Held, that, even if the surveyors had, under ss. 59 and 60, a jurisdiction to determine in what manner the diverted permanent road should be made, they were not justified in putting up the fences across the temporary road, but ought to have applied to this court for an injunction, or to a court of law for a mandamus; that the right of the surveyors was a private right; and that they were in no way interested in the question of public safety. *London & Brighton Railway Co.* v. *Blake*, 2 Rail. Ca. 322.

Quære, whether, upon the true construction of the Act, such diverted temporary road was an alteration of a road, within the meaning of ss. 59 and 60. *Ib.*

4. The preamble of the London and Brighton Act, after reciting that a railway between London and Brighton would be of great public advantage, by s. 3 enacts that it shall be lawful for the company to make and maintain a main line of railway and branches, with all proper warehouses, wharves, and all other suitable and proper works, communications, etc. By s. 12 the usual powers are conferred on the company for making and maintaining the railway, and, among others, to make and construct upon, across, or over, any roads, etc., such roads, ways, cuttings, etc., as the company shall think proper. The company having purchased a private wharf, separated from one of their terminus stations by a turnpike-road, laid down on the road stone blocks, so as to form two runs or stoneways level with the road, for the purpose of facilitating the passage of goods from the wharf across the road to the station:—Held, that the company was not authorized by its Act to interfere with the road in such a manner. An injunction, which had been granted to restrain the trustees of the road

from removing the stone blocks, was dissolved, although, in the opinion of the Court, no damage could result from the stone blocks either to the road or the passengers upon it. *London & Brighton Railway Co.* v. *Cooper*, 2 Rail. Ca. 312.

1. By the Railway Clauses Consolidation Act, if a railway crosses any turnpike road, then, except where otherwise provided for by the special Act, the road is to be carried over the railway or the railway over the road. By its special Act a company was authorized to make the railway "in the line and upon the lands delineated in the plans deposited"; and it was authorized to pass a certain turnpike road on a level, and the deposited plans so represented. The plaintiff agreed to sell to the company a portion of his land adjoining the road, and the agreement recited that it was purchased for the purpose of constructing a railway "according to a certain plan and section thereof deposited," etc.:—Held, that the company, under the Acts, had power to make the turnpike road pass under the railway instead of on a level, and that this right had not been destroyed by the agreement with the plaintiff. Whether a public company can contract itself out of powers given it by the legislature for the public protection, *quære*. *Semble*, not. *Breynton* v. *London & North Western Railway Co.*, 10 Beav. 238; 4 Rail. Ca. 553; 2 Coop. C. C. 198; 11 Jur. 28.

2. A railway company having begun to divert a turnpike road, by a crossing on a bridge over its railway, with a sharp curve, an information at the relation of two of the trustees of the road was filed, praying for an injunction to restrain the company from interfering with the road, until it should have provided another as convenient as the former, or as near thereto as circumstances allowed, as required by the Railways Clauses Consolidation Act 1845, s. 56. The Court, holding that the company were not doing as little damage as could be, granted the injunction; but without prejudice to any application either party might make to the Board of Trade, under s. 66 of the above Act. In granting such an injunction, the Court cannot point out to the company what it ought to do, except by stating the reasons which induce the Court to come to its conclusion, or the manner in which it appears to the Court that that which seems an evil can be remedied. *Att.-Gen.* v. *London & South Western Railway Co.*, 3 De G. & Sm. 439; 13 Jur. 467.

3. In 1850 a meeting of landowners was held for the construction of a private road from A. to join a turnpike road at point C. In 1854 the road was constructed as far as D., which was within 250 yards of the proposed point of junction, when the works were suspended. The proprietors of the new road, however, entered upon the remaining land, cut down the trees, and marked out the proposed line of road. In 1853 a railway company was projected and the plans deposited, showing that at the proposed point of junction of the new road with the turnpike road the turnpike road would be raised several feet. The new road was not referred to in the deposited plans, and in 1854 the Act passed without making any provision in respect of it. The new road was afterwards completed throughout, and opened for traffic in 1855. From point D. to the point of junction with the turnpike road the gradient of the new road was very steep; and assuming the company to have constructed its line by raising the turnpike road, according to the deposited plans, the junction at point D. would have been impracticable. The company subsequently constructed its line, but, instead of raising the turnpike road according to its deposited plans, it turned it, and interposed the railway between the turnpike road and the new road. Upon a bill filed by the proprietors of the new road:—Held, that the fact of the new road being projected and completed to within 250 yards of the proposed point of junction before the railway was authorized or planned did not establish in the proprietors of the new road the right to join the turnpike road in the same way as they would have been entitled to if the company's Act had not passed; and that the proprietors of the new road were not entitled to have an archway formed under the railway, or to have the road united on either side, at the expense of the company. *Ganthern* v. *Stockport, Disley, & Whaley Bridge Railway Co.*, 3 Jur., N. S., 573.

4. C. was possessed of a fire-clay field, to which he had made a private railway, communicating with the M. & K. railway, belonging to the appellants. The appellants, in 1845, obtained an Act for constructing a branch from their railway, in making which they interfered with the private railway. By the Railways Clauses Act the appellants were bound, within a certain period, under penalties, to cause a substituted railway to be made instead of the one interfered with. C. entered into an agreement for a lease with M. of the fire-clay field, by which it was stipulated that the lessee should have the use of the private railway. The agreement also provided, that in case the appellants should fail to make the substituted railway, C. would do so at his own expense. The company not having made the substituted railway, M. brought an action against C., and recovered damages. C. then sued the appellants for the amount on an implied indemnity, and for special damage:—Held, that C. could have maintained an action *ex delicto* against the company for neglecting to restore the substituted railway, and that the provision contained in s. 47, as to penalties, did not extinguish such right of action, the remedy under such section being only cumulative. Nor was C. confined for a remedy to the statutory tribunal which the Legislature has provided where losses are sustained in the formation of railways. That tribunal is only established to give compensation for losses sustained in consequence of what a railway company may do lawfully under the powers of the Act by which it is constituted. For anything done in excess of those powers, or contrary to the provisions of the Act, the proper remedy is in the ordinary tribunals of the country. *Caledonian Railway Co.* v. *Colt*, 3 Macq. H. L. Ca. 833; 7 Jur., N. S., 475.

Held, also, that C. was not entitled to recover the money paid by him to M., as the action brought by the latter was *ex contractu* on an agreement to which the appellants were not privy; whereas the cause of action by C.

against the appellants was *ex delicto*. C. should have himself made the substituted railway, and then sued the company for the cost and any other special damage. *Ib.*

1. Upon one of the sections of a railway, deposited with the clerk of the peace, and referred to by an Act (afterwards passed) authorising the formation of the line, there was a note to the effect that a particular road, therein delineated, was to be stopped up, and another, therein also delineated, was to be a substituted road for it :—Held, that the public and the landowners were not thereby affected with notice, so as, upon the ground of acquiescence, to be precluded from obtaining an injunction, upwards of four years afterwards, on the company's proceeding to stop up the road. *Att.-Gen.* v. *Great Northern Railway Co.*, 4 De G. & Sm. 75 ; 14 Jur. 684 ; 15 Jur. 387.

The works for stopping up the above-mentioned road were commenced in October 1849, but it was not rendered entirely impassable till February 1850 :—Held, that an application for an injunction in February 1850 was not too late. *Ib.*

The provisions of the Railways Clauses Consolidation Act 1845, requiring a substituted road to be made in certain cases :—Held, not to be satisfied by an existing road, which was alleged to be as convenient as any new substituted road could be. *Ib.*

A bill stated that a railway company was interfering with a public road, by digging a trench and lowering the level of it, and causing a permanent and complete obstruction. The bill prayed for an injunction restraining the company from obstructing the road or rendering the same less convenient for the passage of carriages, etc., than it had previously been, until it had made a proper substituted road. An injunction to that effect was granted. The company then changed its plan, and, instead of lowering the road, carried the railway across it on a level, with posts and gates which were closed only during a few short and ascertained periods in the day, when trains crossed :—Held, that the general terms of the injunction were not restricted by reference to the particular nature of the injury complained of, but that it had in spirit, as well as terms, been violated. A sequestration was ordered to issue for the contempt, and was only stayed upon appeal, upon the defendants paying all the costs, and undertaking to construct a road in conformity with the provisions of the Railways Clauses Consolidation Act, and in the meantime to provide and maintain a free passage at all times. *Ib.*

Where an injunction was granted in May against a railway company, and a sequestration was directed to issue in November for a breach of it, the Court refused to suspend the latter order pending an appeal from both orders, although the result of the sequestration would be to compel the defendants to construct a bridge (which would become unnecessary if the order should be reversed), and to stop the traffic on the line in the meantime. *Ib.*

2. Section 16 of the 8 & 9 Vict., c. 20, authorizes the permanent diversion of public roads, and not only a temporary diversion for the purpose of constructing a railway. *Phillipps* v. *London, Brighton, & South Coast Railway Co.*, 4 Giff. 46 ; 9 Jur., N. S., 348 ; 7 L. T., N. S., 663.

3. Where a railway company had obstructed an alleged public right of way, and the evidence showed that the public right had been so dealt with that it had been lost, and did not establish a private right of way, the Court refused an injunction against the company, and left the plaintiff to pursue his remedy by action on the case, under the provisions of the Railways Clauses Act, 8 & 9 Vict., c. 20. *Freeman* v. *Tottenham & Hampstead Junction Railway Co.*, 11 Jur., N. S., 107 ; 13 W. R. 335 ; 11 L. T., N. S., 702.

4. The Court will, by mandatory injunction, restrain a trespass the continuance of which will inflict irreparable damage upon persons in possession. Damage which it is impossible to measure will be deemed irreparable. *London & North Western Railway Co.* v. *Lancashire & Yorkshire Railway Co.*, 36 L. J., Ch. ; 4 L. R., Eq., 174 ; 17 L. T., N. S., 43 ; 15 W. R. 810.

A bill was filed to restrain a railway company from placing an obstruction, partly on a public footway and partly on land belonging to the plaintiffs and a rival railway company, so as to block up the access to a station of the plaintiffs, and alleged that the injury to the traffic by allowing the obstruction to remain would be irreparable, and that the Act was done without any colour of title by the defendants :—Held, that this was one of the exceptional cases in which the Court would interfere to restrain a trespass by a stranger. *Ib.*

5. A railway company was empowered, for the convenience of the public, to widen a bridge over a lane, but the time for the compulsory purchase of land had expired ; the soil of the lane was vested in a board which had the powers of surveyors :—Held, that as the soil was vested in the board for the convenience of the public, the Court would not interfere by injunction, as the inconvenience to the public passing along the lane would be none, or very small. *Wandsworth Board of Works* v. *London & South Western Railway Co.*, 8 Jur., N. S., 691 ; 10 W. R. 814.

Held, also, that the inconvenience to the public whilst the works of the bridge were going on was not enough to induce the Court to interfere. *Ib.*

6. A railway company while constructing a railway laid down sleepers and rails for some distance over one side of a highroad, and ran locomotives and trucks over it. No fence had been put up between these rails and the portion of the road left for the ordinary traffic, which was in places narrow :—Held, that although the evidence did not show that the public had been greatly inconvenienced by this proceeding, the highroad had thereby been rendered "dangerous and extraordinarily inconvenient," and that the railway company must be restrained by a perpetual injunction from using the highway till it had made a substituted road. *Att-Gen.* v. *Widnes Railway Co., Widnes Railway Co.* v. *Widnes Local Board*, 30 L. T., N. S., 449 ; 22 W. R. 607.

7. When a railway company has diverted a road *ultrà vires*, but with a *bonâ fide* view to the convenience of the public, a court of equity will not compel it to replace the road so as to make its work *intrà vires*, if the result will be to cause greater inconvenience to the public, or the complaining section of the public

Att-Gen. v. *Ely, Haddenham, & Sutton Railway Co.*, 6 L. R., Eq., 106 ; 37 L. J., Ch., 822 ; 16 W. R. 834.

In such a case an information was dismissed without costs, and without prejudice to the attorney-general proceeding against the company at law. *Ib.*

If a railway crosses a highway without diverting it, a bridge must be made for the highway over or under the railway, according to the Railways Clauses Consolidation Act, 1845, s. 40, but the highway may be diverted, under ss. 16, 53, and 56, to a place where there is a level crossing, if the road so diverted will be more convenient than a bridge. S. C. 4 L. R., Ch., 194 ; 38 L. J., Ch., 258 ; 17 W. R. 356 ; 20 L. T., N. S., 1.

1. A railway company was by its special Act empowered to stop up, certain streets and passages in the metropolis, including L. C., and to appropriate and use such streets and passages, or parts so stopped up, for the purpose of the railway and works, and it was authorized to grant leases of superfluous lands. The company erected a station at the north end of L. C., and thereby completely stopped it up as a thoroughfare, and it purchased all the houses along each side of the street, but did not expressly purchase or pay for, or take any conveyance of the soil of the street itself ; nevertheless it treated the whole of the space formerly occupied by the street as well as by the houses on each side of it (which they had pulled down) as vested in it, and it surrounded it with hoarding, stopping up the south end of the street, and leased a plot of land comprising the ground at the south end of the street to the defendants for building purposes. Builders occupying premises in the street running at right angles to L. C., claimed a special right of access to them over the end of L. C. for the purpose of conveying long ladders and poles to their premises, beyond the right of the public in the street as a highway. They filed a bill to restrain the railway company from building so as to interfere with this alleged right, and moved for an injunction :—Held, that the railway company having stopped up the one end of the street which it required for the purposes of its station, and having purchased all the houses in the street, had a right to stop up and appropriate the rest of the street, and accordingly the motion was refused. *Temple* v. *Flower*, 41 L. J., Ch., 604 ; 20 W. R. 587 ; 26 L. T., N. S., 657.

The railway company and the attorney-general ought to be parties to such suit. *Ib.*

2. A railway Act obtained by the Great Eastern Railway Company for extending its line into the city of London, and making a station, incorporated the Railway Clauses Act 1845, and declared that plans and sections had been deposited, and then gave a general power to stop up streets within a given area. Sun Street was within the area, but the plans and sections had described it as crossed by an arch, and in a subsequent Act, where many of the levels were altered, it was spoken of as crossed underground by a tunnel. The railway company proposed to build a station on the soil of Sun Street :—Held, that the company might do so ; for that the street being within the area described, there was nothing inconsistent in the provisions of the Acts, the power to cross the street by an arch or a tunnel not affecting the right to use the surface of the soil for a station to be built within the area described in the Act. *Att-Gen.* v. *Great Eastern Railway Co.*, 6 L. R., H. L., 367. Affirming 22 W. R. 281.

Held, also, that ss. 13 and 14 of the Railway Clauses Act, 8 & 9 Vict., c. 20, were controlled by the section in the special Act which gave power to stop up the streets within the defined area. S. C. 7 L. R., Ch., 475 ; 41 L. J., Ch., 505 ; 20 W. R. 599 ; 26 L. T., N. S., 749.

Upon a motion for an injunction, the Court had granted an injunction restraining the company from permanently stopping up the street until the hearing of the cause. S. C. 25 L. T., N. S., 867.

In matters of great importance which can only be properly determined at the hearing, the Court is in favour of restraining destructive operations until the hearing. *Ib.*

8. Stations.

3. The intention of Eton College to exclude the Great Western Railway Company from having a station within three miles of Eton being admitted or apparent, and they having procured to be introduced into the Act clauses prohibiting the company from forming, making, or laying down a railway or tram or other road to the south of the line, approaching within three miles of the college, and for making or constructing a depôt, station, or yard, etc., within three miles of the college, without the consent of the college, and the company having set down and taken up passengers without such consent within the prohibited space :—Held, that the words did not restrain it from so doing, the company being entitled to do all the Act does not upon a strict construction restrain it from. Injunction refused. *Eton College* (*Provost*) v. *Great Western Railway Co.*, 1 Rail. Ca. 200 ; 3 Jur. 163.

4. Under a compulsory power in a railway Act to take land for the "railway and works" :—Held, the company might do so for the purpose of building a station. *Cother* v. *Midland Railway Co.*, 2 Ph. 469 ; 5 Rail. Ca. 187 ; 17 L. J., N. S., Ch., 235.

5. Where by a clause in a railway Act it was provided that "it should not be lawful for the railway company to make or establish any public station, yards, wharves, waiting, loading, or unloading places, warehouses, or other buildings and conveniences for the depositing, receiving, loading, or keeping any passengers or cattle, or any goods, articles, matters, or things, upon the estate of R. G. without his consent" :—Held, upon demurrer, that the word public did not necessarily apply to every building, and that if it did, every convenience connected with the railway must, upon the question of demurrer, be considered as public, and therefore within the restriction of the clause. *Gordon* v. *Cheltenham Railway Co.*, 5 Beav. 229 ; 2 Rail. Ca. 800.

The Court also granted the injunction, the case of acquiescence having failed, and the evidence of inconvenience to the public being scanty. The Lord Chancellor, on appeal, directed the opinion of a court of law to be taken

as to the construction of the Act. S. C. 2 Rail. Ca. 872.

1. Where the Legislature has vested special powers in a particular body for special purposes, a general Act subsequently passed will not override those special powers. By a clause in a railway Act, after reciting that plans and sections of the widenings, enlargements, and other works proposed to be made, describing the lands intended to be taken or used for the purposes of such widenings and enlargements, and for the stations, works, and conveniences to be connected therewith, and also books of reference, had been deposited with the clerks of the peace, the company was empowered to "widen, alter, enlarge, and complete its railway, and other works, in, upon, or over the lands delineated on the plans and described in the books of reference, and to enter upon, take, and use such of the lands described upon the plans, and in the books of reference, as might be necessary for such purposes, and to purchase and acquire any easement, right, or limited interest upon, over, through, or in any of the lands";—Held, that this authorized the building of a station upon part of the lands described, and not only such works as were necessary for the mere widening of the railway, the station being necessary for the public convenience. *London & Blackwall Railway Co.* v. *Limehouse District Board of Works*, 3 Kay & J. 123; 26 L. J., Ch., 164; 5 W. R. 64.

2. The Court refused to restrain one railway company from using the station of another, under an agreement which was made between the two companies before a connection had been established between the company using the station and a third company, which brought such third company into competition with the company to whom the station belonged, it not being clear that the right of the defendants to use the station was not intended to be given by their special Act, the agreement being open to the construction that the extent and terms of the station accommodation were from time to time to form the subject of reference to arbitration, and there being no award specifying the time at which it should determine; the rival or competing company having also been in existence at the time the agreement was made, and the plaintiffs being therefore at that time aware of the possibility of the competition afterwards arising; and, supposing the question to be doubtful, the balance of convenience preponderating against granting the injunction. *Midland Railway Co.* v. *Ambergate, Nottingham, & Boston & Eastern Junction Railway Co.*, 10 Hare 359; 1 W. R. 162.

3. A first-class station means a station at which all trains other than express, mail, or special trains are in the habit of stopping. *Flood* v. *North Eastern Railway Co.*, 21 L. T., N. S., 258.

Where, therefore, a railway company had taken land with respect to which there was a covenant existing "that the land should for ever thereafter be used as a goods depôt, and as a first-class station for taking up and setting down passengers travelling along the company's line of railway"; and the company had only allowed third-class or merely local trains to be advertised to stop at the station built on the land, and there was no goods depôt provided:—Held, that the company was bound by the covenant; and an injunction was granted to restrain it from allowing the ordinary fast trains to pass the station. *Ib.*

4. On the purchase of land by a railway company in 1838, the company covenanted with the landowners that a piece of the land purchased should "for ever thereafter be used and employed as and for a first-class station or place for the purpose of taking up and setting down passengers travelling along the railway." The station was built and the railway was completed in 1842; the railway company was afterwards made part of a company with a much greater length of railway. In 1869 the landowner filed a bill to compel the company to build a larger station and to stop all trains at that station:—Held, that as the existing station had not been objected to, and had remained for many years, and as the passengers were not numerous, the Court would not compel a larger station to be built; but that as many trains as stopped at any other station between the termini of the original railway, excepting mail, express, and special trains, must stop at this station. *Hood* v. *North Eastern Railway Co.*, 5 L. R., Ch., 525; 18 W. R. 473; 23 L. T., N. S., 206. Affirming 8 L. R., Eq., 666; 20 L. T., N. S., 970; 17 W. R. 1085.

5. A contract entered into by a railway company with a landowner to build a railway station at a particular spot, nothing being said as to the user of the station, or the degree of convenience and accommodation to be afforded by it, is too vague and indefinite to be enforced by decree for specific performance; but the Court will give damages for the breach of such contract, and in assessing those damages will give the landowner the benefit of all such presumptions as, according to the rules of law, are made against wrongdoers. *Wilson* v. *Northampton & Banbury Junction Railway Co.*, 43 L. J., Ch., 503; 9 L. R., Ch., 279; 22 W. R. 380; 30 L. T., N. S., 147.

6. A railway company purchased lands from C., and agreed to erect a station at A., and that the trains should stop there for passengers and luggage. It entered into possession of the lands before the conveyance was executed, but did not erect a station, and C. served a writ of ejectment upon it. The company then filed their bill against C. praying for the specific performance of the contract. A decree was made ordering specific performance, and that C. should execute a proper conveyance of the lands, and that such conveyance should contain a covenant by the company to erect the station, and that trains should stop there for passengers and luggage. This conveyance was duly executed. Under Acts of Parliament of 1867 and 1873, confirming agreements between the company and the L. S. W. Company, the latter company was empowered to take a lease for 1,000 years of the S. railway, and to work it, and was, during such lease, to be liable to all duties and obligations to which the S. Company, if the Acts had not been passed, would be subject and liable. No station was erected. On bill filed by C. against both companies:—Held, that though the L. S. W. Company was a necessary party to the suit, no case whatever had been made out against them, inasmuch as it was not bound either

in law or in equity by the covenant entered into by the S. Company with C. to erect a station, but that it would be bound, when the station was made, to stop its trains there. *Churchill* v. *Salisbury & Dorset Railway Co.*, 23 W. R. 894. Varying 23 W. R. 534; 33 L. T., N. S., 216.

1. Three railway companies, under an Act of Parliament, being entitled to the joint use of a station, one of them, as it was alleged by one of the others, unfairly used the station to the detriment of such other company, which filed a bill to restrain the use of the station by such other company, except in accordance with the Act. A general demurrer was put in to the bill, on the ground chiefly that a committee of the three companies was, under the Act, the proper tribunal, and it was overruled. *Mid-Wales Railway Co.* v. *Cambrian Railways Co.* 21 L. T., N. S., 16.

9. Streams, User and Diversion of.

2. A railway company, in exercise of the powers conferred on it by an Act of Parliament, which gave compensation to persons whose property might sustain damage from its operations, was proceeding to erect an arch above a mill race, for the purpose of sustaining an embankment on which the railway was to be constructed, and it appearing that injury would be done to the mill, if the arch were of the proposed dimensions, but that the injury would be avoided if the arch were of certain larger dimensions, an injunction was granted to restrain the company from making over the mill race an arch of less than certain specified dimensions. *Coats* v. *Clarence Railway Co.*, 1 Russ. & M. 181; 8 L. J., Ch., 72.

3. A railway company made excavations upon its own land, the purpose of which was the partial diversion of the stream of water of a navigable river; and the works so prosecuted necessarily occasioned the obstruction of a private road. The plaintiffs, who were the owners of a fulling mill, which was supplied with water from the river, alleged that the proposed diversion of the stream was illegal under the powers of the Act. The plaintiffs, who had a right of way over the private road, also alleged that the company was interfering with the road without the performance of the conditions imposed by the railway Act, as preliminary to interfering with the road:—Held, that although the company were working on their own land, the plaintiffs must be held to have had notice of the intended works of the company; and had by an acquiescence for eighteen months, during which the company had expended a large sum of money on the works, precluded itself from asking for the interposition of this Court by injunction. *Semble*, the plaintiffs, although interested, by the situation of their property or the nature of their business, in preserving open the navigation of the river Calder, but not otherwise interested in the navigation, were not entitled to sustain a suit to enforce clauses in the railway Acts protecting the Calder navigation from injury by the railway works. *Illingworth* v. *Manchester & Leeds Railway Co.*, 2 Rail. Ca. 187.

4. A railway company is only justified in diverting streams and roads as authorized by the 16th section of the Railways Clauses Act 1845, when such diversions are strictly necessary to enable the company to carry out the undertaking, and therefore the right to make such a diversion cannot be insisted on where it is only convenient or economical for the company to do so. A railway company, in order to avoid the expense of making two bridges within a very short distance of each other, diverted a stream and carried it along the east side of their line, so that it no longer entered the plaintiff's land, which lay on the west side of the line. The plaintiff only used the stream for the purposes of watering cattle; and although the company provided (by means of culverts) for a sufficient flow of water for this purpose in the old bed of the stream:—Held, that the diversion of the stream being only convenient and economical, and not strictly necessary, was not justified by the Act, and that the plaintiff was therefore entitled to an injunction to restrain the company from interfering with the flow of the stream, as formerly enjoyed. *Pugh* v. *Golden Valley Railway Co.*, 15 L. R., Ch. D., 330; 49 L. J., Ch., 721; 42 L. T. 863; 28 W. R. 863. Affirming 12 L. R., Ch. D., 27; 48 L. J., Ch., 666; 4 L. T. 30.

The power conferred on a railway by the 16th section of the Railways Clauses Act 1845, to divert the course of a river or road, "in order the more conveniently to carry the same over or under, or by the side of the railway, as it may think proper," is to be taken as cut down and qualified by the proviso that it be an act necessary for making, maintaining, altering, or repairing, and using the railway. *Ib.*

5. By an Act of Parliament authorizing the construction of a railway, it was provided that nothing in the Act should authorize or empower the railway company "to obstruct the navigation of a river, or any part thereof, or to divert any of the waters therein or which now supply the river":—Held, that this clause applied only to the time of construction of the railway, and did not take away the rights of the company as a riparian proprietor. *Att-Gen.* v. *Great Eastern Railway Co.*, 23 L. T. 344; 18 W. R. 1187. Affirmed 6 L. R., Ch., 572; 19 W. R. 788.

The ordinary right of the riparian proprietor is to take so much water as he requires for domestic or similar purposes:—Held, that the fact that the railway company did not require water for such purposes did not entitle it to take it for other purposes, such as supplying their locomotives. *Ib.*

6. A railway company whose line crossed a stream in the immediate neighbourhood of one of their stations, took water for supplying its engines and for the general purposes of the station. On a bill filed by a millowner lower down the stream, it appeared that the abstraction of water did no damage in wet weather, and never shortened the working of the mill for more than a few minutes a day:—Held, that the company, as riparian owner, was entitled to take a reasonable quantity of water for its purposes, and that in this case the quantity taken was reasonable. *Sandwich (Earl)* v. *Great Northern Railway Co.*, 10 L. R., Ch. D., 707; 49 L. J., Ch., 225; 27 W. R. 616.

1. The owner of land not abutting on a river, with the licence of a riparian owner, took water from the river, and after using it for cooling certain apparatus returned it to the river undiminished and unpolluted :— Held, that a lower riparian owner could not obtain an injunction against the landowner so taking the water, or against the riparian owner through whose land it was taken. *Northam* v. *Hurley* (1 E. & B. 665), and *Sampson* v. *Hoddinot* (1 C. B., N. S., 590) distinguished. *Kensit* v. *Great Eastern Railway Co.*, 23 L. R., Ch. D., 566 ; 52 L. J., Q. B., 608 ; 48 L. T. 784 ; 31 W. R. 603.

10. Tunnels.

2. *Semble*, that under the Railway and Lands Clauses Acts companies are entitled permanently to use the land for the purposes of tunnels without doing more than paying for the permanent user and occupation of the land. *Pinchin* v. *London & Blackwall Railway Co.*, 2 W. R. 696 ; 2 Eq. Rep. 1172; 1 Jur., N. S., 241 ; 24 L. J., Ch., 417.

3. A railway company, having constructed a tunnel, proceeded to dispose of the ground under which the tunnel ran, and contracted on the 5th June to sell a portion to B., subject to the condition that he was to erect no buildings nor make any excavations, etc., but according to a specification approved in writing by the principal engineer. B. entered immediately, and sent in plans in August to the resident engineer, for the approval of the principal engineer. The resident engineer never submitted them to the principal, but told B. verbally that he might proceed. B. thereupon proceeded till the 26th October, when the conveyance was completed, and the company's solicitor, finding him carrying on building operations, asked if he had the approval in writing of the principal engineer, and told him he must procure it. The principal engineer then for the first time saw the plans of the proposed buildings, and immediately condemned them as dangerous to the tunnel, and therefore, of course, also dangerous to the proposed houses. B. insisting on proceeding, the company caused an information to be filed to restrain him, on the ground of danger to the public. A counter information was thereupon filed against the company to restrain it from running its trains, on the same ground of danger to the public. The fact of danger to the public by the continuation of B.'s plans was fully made out. An injunction had been obtained on the first information, and refused on the second:—Held, at the hearing, first, that the approval of the company's resident engineer was not binding on the company ; and, secondly, that the defendant B. having been allowed to continue his works from August to the 26th October was, under the circumstances, not such an acquiescence on the part of the company as to exempt B. from being restrained from further prosecuting his building. *Att.-Gen.* v. *Briggs*, 1 Jur., N. S., 1084.

4. A railway company acquired land under special Acts, which contained no provision as to sale of superfluous lands, but incorporated the Lands Clauses Consolidation Act 1845. It made its line in a cutting, which it covered over with an arch forming a tunnel :— Held, that the company had no right to grant building rights over the crown of the tunnel. *Re Metropolitan District Railway Co. and Cosh*, 40 L. T. 482.

5. In 1871 the plaintiff became the purchaser in fee simple of hereditaments, described in the deed of conveyance as "all that piece of ground with the sixteen messuages thereon." The houses were divided into two blocks by a cul-de-sac or passage open at one end only, which had been dedicated to the use of the public for twenty years, but the soil of which the plaintiff claimed as his private property by virtue of his conveyance. A railway company, being about to tunnel under this cul-de-sac, gave the plaintiff a notice to treat in respect of three houses on each side of it, but not in respect of that part of the cul-de-sac between them, the company contending it was a public way or street :—Held, that the cul-de-sac was a public way or street, and that the company was entitled to tunnel under it without paying the plaintiff any compensation. *Souch* v. *East London Railway Co.*, 42 L. J., Ch., 477 ; 16 L. R., Eq., 108.

6. Circumstances of acquiescence and part performance, under which a railway company was held bound by an agreement for making a tunnel running into and upon their land, although no contract had been executed pursuant to the 8 & 9 Vict., c. 16, s. 97, and although the terms of such agreement were not ascertained without some difficulty. *Laird* v. *Birkenhead Railway Co.*, 1 Johns. 500 ; 6 Jur., N. S., 140; 29 L. J., Ch., 218.

See also V. 2 *post.*

11. Injuries by Exercise of Powers.

7. Where a public company is exceeding its powers, a court of equity cannot refuse to interfere by injunction, notwithstanding that irreparable mischief is not shown to result from the proceedings of the company. *River Dun Navigation Co.* v. *North Midland Railway Co.*, 1 Rail. Ca. 135.

8. Parties injured by the conduct of a railway company, in exceeding the powers conferred upon it by Act of Parliament, are entitled to the most effectual remedy within the power of a court of equity ; and where it appeared that the injury complained of would be remedied by suspending an injunction, an injunction which had been granted was suspended for three weeks. *Spencer* v. *London & Birmingham Railway Co.*, 1 Rail. Ca. 159.

9. The sixty-ninth section of a railway Act enacts that, in all cases in which, in the exercise of any of the powers thereby granted, any part of any quay, wharf, or other communication shall be found necessary to be cut through, taken, or so much injured as to be impassable, or inconvenient for the transporting, conveying, landing, shipping, or depositing of any goods or merchandise, the company shall, at its own expense, before any such quay, wharf, etc., shall be cut through, taken, or injured as aforesaid, cause another equally convenient quay, etc., to be set out and made instead thereof. The railway was made to pass

injunction to restrain the obstruction of the works, has not jurisdiction to award and secure to it possession of such temporary easement. *Ib.*

1. Specific performance will not be decreed of an act which the defendant cannot lawfully carry into execution, and which would be useless to the plaintiff if it were carried into execution. A railway company ordered to make a drain contracted for. *Powell* v. *South Wales Railway Co.*, 1 Jur., N. S., 773.

II. OPENING LINE.

2. An information was filed praying a declaration that a railway company, constituted for making a principal and a diverging line of railway, was bound to construct the diverging line as well as the principal, and to open the whole for public traffic simultaneously, and for an injunction to prevent it from making one line until another was made, or until the notices to treat were given to the landowners preliminarily to making such other line. A general demurrer to this bill was allowed, the Vice-Chancellor guarding himself from expressing any opinion as to what he should have done if this had been a bill by a shareholder, or an information and bill, instead of an information only. *Att.-Gen.* v. *Birmingham & Oxford Junction Railway Co.*, 3 Macn. & G. 453; 16 Jur. 113. Affirming 15 Jur. 1024; 4 De G. & Sm. 490.

If the public interests represented by the attorney-general were entitled to have the second line of railway made, they should proceed by mandamus. *Ib.*

The fact that the writ of mandamus could not be obtained till after the Long Vacation did not give any equity that could support the information. *Ib.*

Whether the Court would have granted the relief asked if the proceeding had been by bill by a shareholder or an aggrieved landowner, *quære*. *Ib.*

Whether, at the hearing, an injunction can be granted which the bill or information did not seek, *quære*. *Ib.*

3. The defendants were, by Act of Parliament, authorized to make a short line, uniting their main line with the plaintiffs' line; but the defendants were prohibited from opening their main line until the junction should be completed. In default of the defendants making the junction within a specified time, the plaintiffs were authorized to make it. The defendants proposed opening their main line before the completion of the junction:—Held, that the plaintiffs had a sufficient interest to entitle them to an injunction to prevent this proceeding, and that it was not necessary to resort to an information for that purpose, and an injunction was granted, although the delay in opening the main line might be prejudicial to the public. *Cromford & High Peak Railway Co.* v. *Stockport, Disley, & Whaley Bridge Railway Co.*, 24 Beav. 74; 3 Jur., N. S., 628; 5 W. R. 636.

Held, on appeal, that it is not imperative on the Court to enforce by interlocutory injunction a statutory prohibition, and where a railway company was about to violate a clause in its Act expressly prohibiting the opening of a main line until a junction line was opened, but which appeared to have been introduced merely for the purpose of obliging the company to complete speedily the junction line, the Court, on an undertaking being given to complete the junction line, with all practicable diligence, suspended an interlocutory injunction granted by the Court below to restrain the opening of the main line. S. C. 1 De G. & J. 326.

4. When an inspector of the Board of Trade reports to the Board of Trade that the opening of a railway will be attended with danger to the public by reason of the incompleteness of the works, and gives the grounds of his opinion, the requisitions of the 5 & 6 Vict., c. 55, s. 6, are satisfied. The Board of Trade has exclusive jurisdiction in the matter, and the Court will not enter into the question whether the reasons given by the inspector do not show on the face of the report that he has come to a wrong conclusion. *Att.-Gen.* v. *Great Western Railway Co.*, 4 L. R., Ch. D., 735; 46 L. J., Ch., 192; 25 W. R. 330; 35 L. T., N. S., 921. Affirming 35 L. T., N. S., 302; 24 W. R. 1015.

The term "incompleteness" in that section includes defectiveness or imperfection generally, and such incompleteness may arise from the state of the works upon a neighbouring line with which the railway in question is connected. *Ib.*

5. Under statutory powers junctions were made between the main line of a railway company and two branch lines of railway on opposite sides of the main line, so that trains coming from one of the branch lines ran for some distance along the main line, and then passed on to the other branch line. Some years afterwards the company laid down a line of railway parallel to its main line for about a mile, and substituted for one of the original junctions a new junction, nearly opposite to the other original junction, so as to form between the two branch lines a level crossing over the main line. The company also made two new stations on this new line:—Held, that the new line was a railway or a portion of a railway which, under 5 & 6 Vict., c. 55, s. 4, could not be opened without previous notice to the Board of Trade. *Att.-Gen.* v. *Great Western Railway Co.*, 7 L. R., Ch., 767.

6. When a petition was presented by a judgment creditor, for the appointment of a receiver of the tolls of a railway company, and it appeared that the line had not been used by the company, although a portion of it had been occupied, and maintained by another company, without payment of compensation:—Held, that the railway had not been opened for public traffic within the meaning of its Act. *Re Beddgelert Railway Co.*, 19 W. R. 427.

7. A railway company, being empowered by their Act to make a double line of mixed gauge lines, opened the down line of rails on the mixed gauge with the sanction of the Board of Trade. Afterwards they gave notice to the Board of Trade that the up line was ready to be opened, and the Board of Trade appointed an inspector, who reported that the up line was not safe by reason of the incompleteness of the permanent way. The Board accordingly gave notice to the company, under the 5 & 6 Vict., c. 55, to postpone the opening of the line

for a month. The company disregarded the notice and opened the line. The attorney-general filed an information to restrain the company from using the up line without the sanction of the Board of Trade :—Held, on a motion for an injunction, first, that the Board of Trade were not *functi officio* by reason of having sanctioned the opening of the down line. Secondly, that the Court of Chancery will interfere at the instance of the attorney-general to restrain an act which has been declared by a competent authority to be illegal, without considering the grounds on which the act has been declared illegal. Thirdly, that in the present case the Court would grant an injunction without looking at the grounds on which the inspector had given his certificate. *Att.-Gen.* v. *Oxford, Worcester, & Wolverhampton Railway Co.*, 2 W. R. 330.

III. ACCOMMODATION WORKS.

See also I. *ante*—PARLIAMENT.

1. *Jurisdiction of Court of Chancery*, 6011.
2. *Private Ways*, 6011.
3. *Sidings*, 6013.
4. *Water Supply*, 6014.

1. Jurisdiction of Court of Chancery.

1. A railway company was, by its special Act, required to construct and maintain such culverts, drains, etc., under the railway as two justices should, upon the application of any landowner in case of dispute, judge to be necessary for his accommodation. In 1841 the company constructed an embankment for the railway across lands belonging to the plaintiff's predecessors, and made a culvert under the embankment for the purpose of draining the lands. Twenty years afterwards the plaintiff came into possession of the lands, and found that, owing to the height of the bottom of the culvert, the water could not be properly drained off. Upon a suit by him to compel the company to provide a proper drain: —Held, that the Court of Chancery, independently of the question whether it had jurisdiction or not, would not interfere in questions of accommodation works, but that such questions ought to be referred to two justices, as provided by the Act. The Court will refuse to exercise a concurrent jurisdiction as well after the completion of the railway as during its construction. *Hood* v. *North Eastern Railway Co.*, 11 L. R., Eq., 116; 19 W. R. 266; 23 L. T., N. S., 433.

The Court of Chancery will not entertain a suit to enforce the making or repairing railway accommodation works unless recourse has been had in the first instance to justices, where by Act of Parliament they have jurisdiction in the matter. S. C. 40 L. J., Ch., 17.

2. Where land is taken by a railway company, not under its compulsory powers, but by private contract, the jurisdiction of the Court of Chancery to secure to the vendor the easements he contracted for is not ousted by the provisions of the railway Acts. *Sanderson* v. *Cockermouth & Workington Railway Co.*, 2 H. & Tw. 327; 19 L. J., N. S., Ch., 503. Affirming 11 Beav. 497.

2. Private Ways.

3. A railway company, about to sever the plaintiff's land by its railroad, agreed to purchase the necessary portion of land, "subject to the making such roads, ways, and slips for cattle as might be necessary" :—Held, that, although it was very difficult to execute an agreement thus expressed, yet that the plaintiff was entitled to a specific performance; that the word "necessary" must receive a reasonable interpretation. The expression was held to mean "such roads, ways, and slips for cattle as might be necessary and proper for convenient communication between the severed portions of the plaintiff's land"; and a reference was therefore directed to ascertain what was necessary and proper. *Sanderson* v. *Cockermouth & Workington Railway Co.*, 2 H. & Tw. 327; 19 L. J., N. S., Ch., 503. Affirming 11 Beav. 497.

Where land is taken by a railway company, not under its compulsory powers but by private contract, the jurisdiction of the Court of Chancery, to secure to the vendor the easements he contracted for, is not ousted by the provisions of the railway Acts. *Ib.*

4. The Metropolitan Board of Works, under the powers conferred on them by the Thames Embankment Act 1862, cut off from its river frontage a piece of land belonging to the defendant. The question of compensation was referred to an umpire, who made his award in the belief that the land had been made inaccessible to carriages by the embankment works. By s. 62, the Board of Works was bound to provide means of access to the land. The defendant filed a bill to compel them to make the land accessible to carriages, and at the same time commenced an action for the whole amount awarded. The Board of Works filed a bill for an injunction against the action: —Held, that the action must be restrained until the hearing of the cause. *Metropolitan Board of Works* v. *Salisbury* (*Marquis*), 20 W. R. 507; 26 L. T., N. S., 390.

S. was entitled to houses in Cecil and Salisbury Streets, and to a piece of low level ground at the south ends of these streets. The low level communicated by means of two lanes at the banks of the streets with the Strand on the north side, and by means of wharves, with the river Thames on the south side. In 1862 the Thames Embankment Act authorized the construction of the embankment road and of the ornamental gardens alongside of the river. These improvements were completed in 1870; their effect was to deprive the low level ground in question, and also the two streets, of all communication with the river or with the embankment on the south side. S., as the owner of the depreciated property, had obtained 10,000*l.* as compensation assessed by an umpire; but under s. 62 of the Act of 1862, S. was entitled besides to full and free communication to the embankment road and the river, and he claimed that such right belonged to him in respect as well of the houses in Cecil and Salisbury Streets as of the low level ground, and that the right in dispute was to a wheel or a cartway, and not to a footway merely. The makers of the improvements had offered to construct a convenient footway across the gardens to the embankment road, but such

4. Water Supply.

1. A clause in an agreement by a railway company to purchase land, binding the company to procure a supply of water as good as the supply of water cut off by the construction of the line from the severed lands of the vendor, only binds the company to do once for all that which may reasonably be expected to insure a sufficient supply of water, and does not bind them to do whatever may be necessary from time to time to secure that result. *Re Gray and the Metropolitan Railway Co.*, 44 L. T., 567.

IV. WORKING AND MANAGEMENT.

1. *Unauthorized Application of Funds*, 6014.
2. *Unauthorized Trading*, 6015.
3. *User of Land, Extent of*, 6015.
4. *Lease of Line and Working Agreements*, 6016.
5. *Running Powers*, 6018.
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2. Although the Court will not interfere with a company merely because a particular act has been done in an informal way, which may afterwards be legally set right by it, the rule does not apply to cases of misapplication of funds which could not under any circumstances be rendered legal. *Bagshaw* v. *Eastern Union Railway Co.*, 2 H. & Tw. 201; 2 Macn. & G. 389; 6 Rail. Ca. 169; 19 L. J., N. S., Ch., 410; 14 Jur. 491. Affirming 7 Hare 114; 6 Rail. Ca. 152; 18 L. J., N. S., Ch., 193; 13 Jur. 602.

Demurrer for want of equity to a bill charging the misapplication by a railway company of moneys raised to purchase an authorized line in the purchase of an unauthorized line, and seeking to restrain it, overruled. *Ib.*

Quære, whether a railway company may so apply moneys. *Ib.*

3. A railway company is bound to apply all its moneys and property for the purposes directed and provided for by the Act of Parliament, and not for any other purposes whatever. Any application of or dealing with the capital funds, or money, in any manner not distinctly authorized by the Act is illegal; and where directors, for purposes not authorized by the Act, are proceeding to involve the company or shareholders in liabilities to which they never consented, relief may and ought to be given in this court. In such a case, one shareholder may sue on behalf, etc. *Salomons* v. *Laing*, 12 Beav. 339; 6 Rail Ca. 289, 303; 19 L. J., N. S., Ch., 225; 14 Jur. 279, 471.

4. A railway communicated with a river, upon the banks of which the company was empowered to erect wharves, etc., and take tolls. The navigation of the river having become deteriorated, the company was about to support a bill for improving it. An injunction was granted to restrain the application of the funds of the company towards that object. *Munt* v. *Shrewsbury & Chester Railway Co.*, 13 Beav. 1; 20 L. J., N. S., Ch., 169; 15 Jur. 26.

5. Although it is competent to directors of every railway company, on complying with the Wharncliffe Order, to apply to Parliament for an extended line, or for any other extension of their powers, they will be restrained from defraying the expenses of such application out of the assets of the company, and from issuing new shares, purporting to be shares in the company, except for the purposes and under the powers of existing Acts. *Vance* v. *East Lancashire Railway Co.*, 3 Kay & J. 50.

6. It is improper and wrong for railway companies to embark their funds in other railway undertakings; and they have no right to engage or pledge their funds, or entangle their affairs, in unauthorized transactions, upon the speculation that they may obtain parliamentary authority for doing acts which are beyond their powers at the time when they are done. *Logan* v. *Courtown* (*Earl*), 13 Beav. 22; 23 L. J., N. S., Ch., 347.

Motion to restrain a company from declaring a forfeiture of shares, by reason of the non-payment of calls, alleged to be made for illegal purposes, refused; although it appeared that the directors had conducted the proceedings, in many particulars, in a very improper manner, it being sworn that money was wanted to satisfy existing legal obligations of the company, and it being denied that the company sought to enforce the calls for illegal purposes. *Ib.*

7. An incorporated railway company having powers within a fixed time to complete a branch line, commenced, but afterwards, by a vote of the proprietary, suspended for a time the works. Before its powers expired, the works, on a resolution of the shareholders, were resumed, and actively prosecuted. After a lapse of nearly a year, the powers having then expired, and the branch railway still being unfinished, two shareholders, on behalf of themselves and the other shareholders, filed a bill to restrain the further prosecution of the works. On a motion for an injunction:—Held, that the plaintiffs having been aware of the intention to construct the line, and not having applied with diligence, the Court would not grant the injunction. *Ffooks* v. *South Western Railway Co.*, 1 Sm. & G. 142; 17 Jur. 365; 1 W. R. 175.

A shareholder who had acquiesced in the recommencement of the works, afterwards sold his shares to a purchaser, who objected to the further prosecution of the works:—Held, that the purchaser was bound by the acquiescence of his vendor. *Ib.*

Semble, where it is established that, on pretence of serving the interests of one company, a member of a rival company procures shares in order to oppose the company into which he has intruded, the Court, at the instance of such shareholder, will not ordinarily interfere. *Ib.*

Semble, the mere expiration of the parliamentary period for the completion of a railway begun before the powers expired is not enough to stamp with illegality the proceeding to complete such railway. *Ib.*

1. The majority of shareholders in a company incorporated by Act of Parliament, approved at a meeting of a contract to sell the concern to F., who was one of the committee of management, and passed a resolution that the contract should be confirmed by a special Act, and that if the Act should not be passed the expenses of promoting the bill and of the agreement should be partly borne by the company. At a Wharncliffe meeting subsequently held, a resolution was passed by a majority of more than thirty to one, authorizing the presenting by the company of a bill in Parliament to enable it to dispose of the concern. One of the dissentients at the Wharncliffe meeting moved to restrain the company from carrying out the agreement, and from presenting the proposed bill in Parliament, and from applying any part of its funds towards its promotion. On the company undertaking not to apply any of its funds towards promoting the bill, the Court refused the motion. *Mathias* v. *Wilts & Berks Canal Navigation Co.*, 34 L. T., N. S., 346.

2. It is not lawful to apply the funds of a company in an application to Parliament for powers to extend the business of the company beyond the objects for which it was constituted, and the Court will interfere, by injunction, at the suit of a shareholder, to restrain any such application. *Simpson* v. *Denison*, 10 Hare 51; 16 Jur. 828,

The same principles which regulate the rights of parties in ordinary partnerships are applicable in determining the duties of the managing bodies in joint stock companies, as between them and members of such companies. *Ib.*

See also COMPANY, VI. III.

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3. A railway company will be restrained, at the information of a relator, from carrying on a trade not authorized by the Act constituting the company. *Att-Gen.* v. *Great Northern Railway Co.*, 6 Jur., N. S., 1006; 20 L. J., Ch., 794; 8 W. R. 556.

The information may be filed without the certificate of the Board of Trade, mentioned in 7 & 8 Vict., c. 85. *Ib.*

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4. Where purchases of land are made under the compulsory powers of an Act of Parliament, the purchasers on the one hand, and the vendors on the other, have a right to confine the exercise of the ownership to the specified purpose. *Bostock* v. *North Staffordshire Railway Co.*, 2 Jur., N. S., 248; 25 L. J., Ch., 325; 3 Sm. & G. 283; 5 De G. & Sm. 584.

By an Act of Parliament a company was formed for constructing a canal, and the lands to be taken for that purpose were to be vested in the company "to and for the use of the navigation, but to or for no other use or purpose whatever." By a subsequent Act, the company was authorized to purchase lands for the purpose of making a reservoir for supplying the canal with water, but under the powers and restrictions contained in the former Act. By subsequent Acts the canal, and all powers and obligations, became vested in a railway company. The canal company took land from B., and thereon form the Rudyard lake or reservoir, adjoining which B. was possessed of a mansion-house, etc., and was entitled to a right of fishing in part of the lake, but the railway company was possessed of the land covered with the water of the lake. In 1851 the company issued a programme for the celebration of a "grand *fête* or regatta" on the lake, against which the solicitors of B. remonstrated; but the company persisted in holding the *fête*, which resulted in injury to B. and her property. On the issuing of a programme for another *fête*, B. filed this bill, praying that the company might be restrained from holding the *fête*, and on an undertaking being given by the railway company, the motion stood over. Subsequently an action was brought by B. against the company, but the jury could not agree on a verdict. In December 1851 the motion for an injunction was again made, when the Court continued the order previously made until after the next assizes. At the new trial a verdict was returned for B., with nominal damages. An injunction was again moved for, and granted; but the Court directed a case for the opinion of the Queen's Bench. On the questions submitted to the judges, a majority of them certified in favour of B. The legal right of B., to protect which the suit was instituted, having by a court of law been affirmed:—Held, that that legal right ought to be protected, and accordingly a perpetual injunction was granted to restrain the railway company from using the reservoir to the injury of B., or for any other purposes than those mentioned in and authorized by the Acts of Parliament. *Ib.*

The rights of ownership in fee conferred on public companies by Act of Parliament are, by the settled doctrine of the Court, restricted and qualified by the terms of the legislative contract; and therefore where in an Act of Parliament it was said in express words that the fee-simple and inheritance of property were to vest in a company "to and for the use of the navigation, but to or for no other use or purpose whatever":—Held, that the words were inserted for the benefit of the vendors of the land, and the company was restrained from using the land for any purpose not authorized by the Act. *Ib.*

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be erected upon the land; that "buildings connected therewith" did not mean buildings only connected locally with the railway, but meant buildings especially applicable to the uses of that particular railway, and that the construction of the clause was not to be governed by considerations of what would or would not be connected with other and different railways; that the building erected by the company being used as a custom-house for the examination of the luggage of passengers landing from the Continent, many of whom travelled by the railway, such user was for the purpose connected with the railway, and that the use, being to some extent for such purpose, it did not cease to be so, within the meaning of the provision, merely because all the purposes for which the building was used were not purposes connected with the railway. *Dover (Harbour Wardens)* v. *South Eastern Railway Co.*, 9 Hare 489; 21 L. J., N. S., Ch., 886.

Where there is a parliamentary power to sell in fee, but with a restriction of the rights of ownership in the purchaser, and a conveyance to an owner in fee is made under such power, sound construction requires that the restriction imposed upon the purchaser, who becomes the owner in fee, shall not be extended beyond its necessary limits. *Ib.*

1. A railway company purchasing land for the railway acquires an absolute fee simple, but such fee simple is acquired solely for the purposes of constructing and using the railway. *Norton* v. *London & North Western Railway Co.*, 9 L. R., Ch. D., 623; 47 L. J., Ch., 859; 39 L. T., N. S., 25. Affirmed 13 L. R., Ch. D., 268; 41 L. T. 429; 28 W. R. 173.

A railway company has no right to erect hoardings to prevent prescriptive rights being acquired for windows looking across the line of railway. *Ib.*

A railway company is liable to an action for nuisance for using its rights so as to injure the neighbouring landowner where it might use them without such injury. *Ib.*

A railway company may by its conduct abandon land outside its fence which was formerly its own, so as to permit the adjoining owner to acquire such land by adverse possession. *Ib.*

2. A railway company, having the usual powers under its special Act to take and use land for the purpose of the railway and works, cannot, whether for valuable consideration or otherwise, alienate for any purpose except the purposes of the Act any portion of its land, not being "superfluous land" within s. 127 of the Lands Clauses Act 1845, and not being land taken for extraordinary purposes within s. 45 of the Railways Clauses Act 1845, nor any easement over the same. *Mulliner* v. *Midland Railway Co.*, 11 L. R., Ch. D., 611; 48 L. J., Ch., 258; 27 W. R. 330; 40 L. T. 121.

Where a railway station is erected on arches on land thus taken, the part of the land under the arches is not "superfluous land" within s. 127 of the Lands Clauses Act 1845. *Ib.*

The B. railway company, having, under its Act, acquired land, constructed its railway, and erected a station which was partly built on arches, sold to its contractors its superfluous land, and also purported to convey to them without consideration a right of way under one of the arches leading to part of the land so sold though not being a way of necessity thereto. The contractors sold the land and alleged right of way to the plaintiff. The M. railway company had, under the said Act, entered into a working agreement with the B. railway company, whereby, after the line was opened, the M. railway company was "to manage, work, and use" the railway and works, and to develop the traffic. The M. railway company now required the arch in question as a closed yard for loading and unloading goods. In an action by the plaintiff to restrain the M. railway company from interfering with his right of way:—Held, that the alienation of the right of way under the arch was *ultrà vires*: that the M. railway company was entitled to use the land under the arch in the way proposed; and that, its title being prior to that of the plaintiff, who must be taken to have notice of the company's rights, his action could not be sustained. *Ib.*

See also I. 10 *ante*.

4. Lease of Line and Working Agreements.

3. An agreement between two railway companies, made without the authority of the Legislature, whereby one company delegates to another all the powers which have been conferred upon it by Parliament, is an unlawful attempt to effect that which parliament alone can authorize, and is against public policy, and in such a case the Court will not interfere to assist either of the parties in obtaining a collateral benefit which the agreement would give, or aid them in any manner which would promote the object of the agreement. *Great Northern Railway Co.* v. *Eastern Counties Railway Co.*, 9 Hare, 306.

4. A railway company entered into an agreement to lease its line to another company. The agreement contained provisions which were legal, and others which were *ultrà vires*, but an application was to be made to Parliament for power to carry out such provisions as should be *ultrà vires*:—Held, that as the agreement provided for a number of things to be done, which were all for the purpose of accomplishing an object that was *ultrà vires*, the parties had no right, by virtue of that agreement, until they had obtained the authority of Parliament to do even those acts which, independently of the agreement, they did not require the authority of Parliament to do. The Court, in granting an injunction to this extent, refused to restrain two directors, appointed under the agreement, from acting, on the ground that the shareholders had power to remove them, and that their removal might be detrimental to the business of the company. *Hattersley* v. *Shelburne (Earl)*, 10 W. R. 881; 31 L. J., Ch., 873.

5. The Brighton Railway Company and the South Western Railway Company jointly became purchasers, under an Act obtained in 1847, of a line of railway called the Portsmouth Extension Railway, including the station known as the Landport station. The 13th section enacted, "that each of the two companies might at all times thereafter use the joint line for the purposes of conveying passengers, animals, and things upon the same, and for all

such other purposes as should be necessary for the traffic or business thereon of the respective companies." There were provisions for the tolls to be demanded, and for enabling the companies to enter into a contract between themselves for the purpose of ascertaining the profits of the joint line, and the division of such profits. The South Western and the Portsmouth Companies entered into an agreement in 1858, by which they agreed to apply to Parliament in the then ensuing session for an Act to enable the latter company to lease its line to the former company for the term of 999 years, at a rental of 18,000*l.* a year; and, if unsuccessful in obtaining the Act, that they should repeat their efforts in 1860, and that in the meantime the South Western Company should work the Portsmouth line and pay the rent. By this arrangement the traffic on the South Western Company was greatly increased. On a bill filed by the Brighton Company to restrain the other companies from using the joint station for the traffic coming from the Portsmouth line, and for an account:—Held, that the Act of 1847 did not create a joint tenancy carrying with it the right of using for every kind of traffic a station appurtenant to the joint line, and that the South Western had no right to use it except for what was properly traffic of that company. *London, Brighton, & South Coast Railway Co.* v. *London & South Western Railway Co.*, 4 De G. & J. 362; 5 Jur., N. S., 801; 28 L. J., Ch., 321.

Held, also, that the agreement between the South Western Company and the Portsmouth Company was *ultrà vires* and illegal, and that the conveyance of passengers and goods under it did not constitute traffic which could be considered traffic of the South Western Company within the meaning of the Act of 1847. *Ib.*

Held, therefore, that the Brighton Company was entitled to an injunction restraining the South Western Company from using the joint station for the purposes of any traffic destined for or coming from the Portsmouth Railway, or any part thereof. *Ib.*

1. An Act of Parliament empowered one railway company to grant, and another company to accept, a lease of a railway upon such terms as should be agreed upon, provided that the power to lease should not arise till the Board of Trade had certified that it had been proved to their satisfaction that half the capital of the leasing company had been raised, and applied for the purposes of its Acts; and it was also provided that no lease should be of any effect unless previously sanctioned by three-fifths of the shareholders of each company voting at a special meeting:—Held, that no lease, or binding agreement for a lease, could be made before the certificate had been obtained. *Kent Coast Railway Co.* v. *London, Chatham, & Dover Railway Co.*, 3 L. R., Ch., 656; 19 L. T., N. S., 174; 16 W. R. 1027.

Heads of agreement for a lease were sanctioned by majorities of three-fifths at meetings of the two companies without any certificate of the Board of Trade being obtained, and were acted upon for several years, but no formal lease, or agreement for a lease, was ever executed. The heads of agreement were also invalid as providing for payment of the rent out of profits not so applicable:—Held, that the arrangement was not ratified by references to it in subsequent local and personal Acts of Parliament not expressing any direct intention to confirm it. *Ib.*

2. Where a contract between two companies proves to be one by which one of the contracting parties will gain considerable advantages, at the expense of the other, while the other will receive no corresponding benefit, whether such contract is or is not legally valid, equity will not aid in enforcing it by a decree for specific performance. *Shrewsbury & Birmingham Railway Co.* v. *North Western Railway Co.*, 6 H. L. Ca. 113; 3 Jur., N. S., 775; 26 L. J., Ch., 482.

A private Act of Parliament authorized one railway company to accept a lease of another railway; the directors of the first company then entered into an agreement with the directors of a third company, the stipulations of which were to be performed during the continuance of such lease. No lease within the provisions of the Act was ever granted. The agreement appeared to be, if legally valid, at least unfair to the shareholders of one of the companies:—Held, that equity could not enforce it by a decree for specific performance. *Ib.*

An Act of Parliament recited three other Acts, one only of which had relation to an agreement entered into between the plaintiffs and defendants. By the first section, on the completion of the works of the three lines of railways, by the recited Acts authorised to be made, so as to be opened for public traffic, or at such other period as might be agreed upon, the S. U. R. Co. were empowered to grant to the L. & N. W. R. Co. a lease in perpetuity of the undertaking. By the eleventh section of the same Act, it was enacted, that as each of the lines of railway should be completed, the same should be worked and used by the L. & N. W. R. Co., and for the purposes of such working, the L. & N. W. R. Co. were to exercise the powers before given by the Act to the S. U. R. Co. in relation to every such completed railway. Other sections of the Act spoke of the "lease of the said railways," and the "making of such lease":—Held, that, according to the true construction of the Act, there was no postponement of the rights of the parties to the benefits of the provisions of the lease, until the whole of the three lines had been completed. S. C. 2 Macn. & G. 324; 2 H. & Tw. 257; 20 L. J., N. S., Ch., 90; 14 Jur. 921, 1125.

3. The S. railway company was authorized by its Act to "make and maintain" a railway, with all proper stations, approaches, and works, and was empowered to transfer or sell the railway before or after completion, and all the powers of the company, to the D. railway company. By a working agreement, the terms of which were incorporated in the Act, it was provided that the S. company was to complete the line, and that, when completed, it should be maintained and worked by the D. company in perpetuity, and that it was to pay an annual sum to the D. company. On the completion of the line the D. company took possession of and worked the same under the agreement, but no sale to it of the railway had been effected. While the D. com-

pany was thus in possession the S. company, acting under the alleged powers in the Act, in order to provide a better access to a station on the line, erected some stone steps in the station yard, which the D. company removed. In an action for a mandatory injunction to compel the D. company to restore the steps :—Held, that, on the true construction of the Act and working agreement incorporated therewith, the D. company was entitled to the exclusive possession and right of maintenance of the railway and works ; and that the erection of the steps was a work of maintenance, and was a wrongful act on the part of the S. company. *Sevenoaks, Maidstone, & Tunbridge Railway Co.* v. *London, Chatham, & Dover Railway Co.*, 11 L. R., Ch. D., 625 ; 48 L. J., Ch., 513 ; 27 W. R. 672 ; 40 L. T. 545.

Under power to "maintain" a railway and works, reasonable improvements, consistent with the purpose of the undertaking, are included. *Ib.*

1. The Caledonian Railway Company, for thirteen years up to July 1879, had been proprietor of the D. and A. railway, and had incurred certain liabilities in respect of payment of dividends to preference and ordinary shareholders of the D. and A. line. The preamble of the North British Railway (D. and A. Joint Line), passed July 1879 (42 & 43 Vict., c. 155), set forth that it was expedient that the Caledonian and North British Companies should have equal rights and powers, and be subject to equal liabilities over and with respect to the D. and A. line. Section 3 provided that on and after the 1st of February 1880, called the "vesting period," all interest which the Caledonian possessed should be transferred to the Caledonian and North British jointly and in equal proportions in manner hereinafter provided by the Act. Section 6 provided that the consideration for the transfer of the joint line shall be as follows: "(1), From and after the vesting period the company (the North British) shall pay to the Caledonian Railway Company half-yearly, on the 1st of March and 1st of September in each year, a sum equal to one-half of the aggregate of the following half-yearly payments, for which the Caledonian Railway Company is now liable in respect of its acquisition of the D. and A. railway." The Caledonian Railway Company claimed that under this section there was a half-yearly payment amounting to 5,903*l.* 15*s.* due on the 1st of March 1880 :—Held, that the liability to make payment in 1880 did not arise till September, the time of payment applicable to the first six months following the 1st of February 1880. *Caledonian Railway Co.* v. *North British Railway Co.*, 6 L. R., App. Cas. (Sc.), 114 ; 29 W. R. 685.

2. A railway company having agreed to let its line to another, which had taken possession under the agreement, filed a specific performance bill against the other, which thereupon gave notice that it would pay the rent into court. The plaintiffs then gave the defendants notice, that unless the rent were paid to the plaintiffs, interest would be claimed on it under the 3 & 4 Will. 4, c. 42, s. 28. The defendants obtained *ex parte* an order that they might be at liberty to pay the rent into court, and paid it in accordingly :—Held, that they thereby obstructed the recovery of interest at law, and that the Court had jurisdiction to order payment of interest. *Hull & Selby Railway Co.* v. *North Eastern Railway Co., and the Lancashire & Yorkshire Railway Co.*, 5 De G. M. & G. 872.

3. By a contract under seal between a railway company and J. it was agreed that the rolling stock of the company should be valued and handed over to J., who was to work the railway at certain mileage rates, to be paid monthly, subject to a deduction by way of remuneration for the use of the stock, and also to a deduction on the value of the stock, as a "depreciation fund." Valuations of the stock were made at the commencement, and during the continuance of the contract, on the assumption that the "depreciation fund" was merely a "guarantee fund" in the hands of the company, and was not to belong to them eventually, save so far as it was necessary to meet actual depreciation. On the faith of the depreciation fund being a guarantee fund only, J. made considerable expenditure, which diminished or prevented the depreciation of the rolling stock. Upon the determination of the contract, J. brought an action at law against the company, in which it was determined that the depreciation fund was not a guarantee fund, but belonged to the company in all events. It was held by the Lord Chancellor of Ireland, but overruled on appeal, that an equity had arisen from the dealings between the parties subsequently to the contract, and that J. was not precluded by the result of the action from obtaining relief in equity. The Lord Chancellor was of a different opinion as to the rule of equity, and Lord Wensleydale as to the facts assumed by the Lord Chancellor of Ireland, as the ground of the equity on which he decided. Per the Lord Chancellor.—The fact that a person has acted upon a mistaken view of his right under a contract, does not entitle him to relief in equity or at law. *Midland Great Western Railway of Ireland Co.* v. *Kinder*, 6 W. R. 510 ; 4 Jur., N. S., 643.

5. Running Powers.

4. In 1848 the East Lincolnshire Railway Company agreed with the defendants that a station on the defendants' line should be used equally by both companies, but should be subject to the by-laws of the defendants, and that a committee of three from each board should be appointed to arrange the working of the traffic, etc ; that the cost and maintenance of the station and the working should be borne by the two companies equally ; that the defendants should afford to the East Lincolnshire Railway Company facilities for access to the Great Grimsby Docks ; and that the East Lincolnshire Railway Company should give up a piece of land to the defendants ; that the defendants should have the right of running with their engines, etc., on the East Lincolnshire line between Great Grimsby and Louth ; and that the East Lincolnshire Railway Company should have the same right over the defendants' line between Great Grimsby and New Holland, paying in either case 66 per cent. of the gross receipts to the company whose line was used ; and that each company should provide station accommodation for the

other at New Holland and Louth respectively for three years, as therein mentioned. The said East Lincolnshire line of railway became vested in the plaintiffs, as lessees thereof, for 999 years. Disputes arose between the companies, which ended in the defendants preventing the plaintiffs from running their engines, etc., on the line between Great Grimsby and New Holland, and giving them a formal notice to determine the agreement. On motion, an injunction was granted to restrain the defendants from obstructing the plaintiffs running their engines, etc., over that part of the defendant's line mentioned in the agreement: Held, that the agreement was permanent, and could not be determined without the consent of both parties, and was not a mere licence revocable at the will of either. An agreement to grant an easement of this nature to a corporate body need not be by deed, and might be permanent, although it was to the company only, and not to the company and its successors. *Great Northern Railway Co.* v. *Manchester, Sheffield, & Lincolnshire Railway Co.*, 5 De G. & Sm. 138; 16 Jur. 146.

Held, also, that the terms of the contract were not too vague, but that the user conceded was one consistent with the proper engagement of the railway, the subject matter of the contract, and with the rights of the granting party; held, also, that this Court will grant an injunction, restraining the defendants from acting contrary to a negative agreement, although it cannot specifically enforce the performance of the whole of the agreement. *Ib.*

1. The object of the eighty-seventh section of the Railways Clauses Consolidation Act (8 Vict., c. 20) is to enable one railway company to contract for the passing of its trains to the limits of the railway of another company, with the incidents which ordinarily attach to such power of passing, including that of stopping at the stations on the line, and carrying passengers and goods to and from such stations. But it does not enable one railway company, under colour of passing over the line of another company, to carry the whole of the traffic of the other railway over which it may agree to pass. *Simpson* v. *Denison*, 10 Hare 51; 16 Jur. 828.

An agreement by one railway company for the payment to another of such an amount as will, after answering all expenses and liabilities, furnish a certain dividend on the paid-up capital of such other capital, is not an agreement for the payment of a toll within the meaning of the eighty-seventh section of the Railways Clauses Consolidation Act. *Ib.*

By an agreement between the G. N. Railway Company and the A. Company, the G. N. Company was, first, to bear harmless the A. Company against all its guarantees to canals or otherwise; secondly, the G. N. Company was, until an Act of Parliament could be obtained, to work the traffic of the A. Company, and to pay it such toll as should, after answering the expenses and liabilities of the A. Company, pay a dividend of 4 per cent. on the paid-up capital of the A. Company; and after obtaining the Act of Parliament, the G. N. Company was to guarantee 4 per cent. to the A. shareholders; and thirdly, the G. N. Company was, in the next session of Parliament, to apply at its own costs for an Act of Parliament to ratify this agreement, and to keep on renewing such application, if unsuccessful, always at its own expense. The Railways Clauses Consolidation Act 1845 was embodied in the Acts of the G. N. and A. Companies. On a bill by two shareholders of the G. N. Company to restrain their directors from carrying out this agreement, or from defraying out of the fund of the company the costs of such applications:—Held, that the arrangement was not within the purview of the Railways Clauses Consolidation Act 1845, s. 87; and that payments mentioned in the agreement were not tolls within the meaning of the section. *Ib.*

Quære, what is a toll, and how ought tolls to be reserved within that section. *Ib.*

Semble, a toll is a payment for the right of passing along a highway, public or private; it is a payment connected with the passing over, and should probably be reserved with reference to the number of carriages passing over the line. *Ib.*

2. Whether s. 92 of the Railways Clauses Consolidation Act does or does not convert railways into public highways, and whether that section be or be not controlled by s. 87 of the same Act, giving powers to companies to enter into agreements as to passing over or along each other's lines, yet when an agreement as to the terms of passing over or along each other's lines has been entered into between railway companies, their rights in respect of such passing depend upon the terms of the agreement, and are no longer governed by the provisions of the Railways Clauses Consolidation Act. *Great Northern Railway Co.* v. *Eastern Counties Railway Co.*, 9 Hare 306; 21 L. J., Ch., 837.

Construction of an agreement between two railway companies, enabling one to pass over and use the railway stations, watering places, and sidings upon and appertaining to the other, and giving the right of access to such parts of the stations and appurtenances as were necessary to the traffic on and over the other, with a covenant to give the same facilities and assistance as its own traffic of the like character should receive. *Ib.*

One railway company having granted to another the use of its lines and of all conveniences upon the lines, cannot object to its grantees using the rights so granted for any purposes to which it may be able to apply them, even if the grantors were not entitled to use them for such purposes, *semble*. *Ib.*

An agreement between two railway companies, made without the authority of the legislature, whereby one company delegates to another all the powers which have been conferred upon it by Parliament, is an unlawful attempt to effect that which Parliament alone can authorise, and is against public policy; and in such a case, the Court will not interfere to assist either of the parties in obtaining a collateral benefit, which the agreement would give, or aid them in any manner which would promote the object of the agreement. *Ib.*

3. Where an agreement was entered into by two railway companies giving mutual rights of running trains on each other's lines, and company A. had possessed and enjoyed for several years the rights granted to them, while company B. took no steps to enforce the stipu-

lation in their favour, and allowed the time to expire within which it should have been performed, an injunction was granted to restrain company B. from disturbing the enjoyment of the rights of company A. *Great Northern Railway Co.* v. *Lancashire & Yorkshire Railway Co.*, 1 Sm. & G. 81.

1. Where a railway company, over whose line another railway company has running powers, is empowered to make regulations as to the construction of the carriages to be used on the railway, the onus lies upon the company having the running powers to show that the regulations are unreasonable and unnecessary. *Rhymney Railway Co.* v. *Taff Vale Railway Co.*, 29 Beav. 153; 7 Jur., N. S., 202; 30 L. J., Ch., 482; 9 W. R. 222; 4 L. T., N. S., 227. Affirmed 4 L. T., N. S., 534.

The fact of the regulations having been wholly or in part relaxed in the past is no reason for the Court to interfere to restrain them from being strictly enforced in the future. *Ib.*

2. A railway, associating, allying, and connecting itself with another, does not thereby become equitably "amalgamated" with it; and an agreement to amalgamate as from a time past may possibly in equity amount to amalgamation, but an agreement to do so at a future period will not until that period arrives. *Shrewsbury & Birmingham Railway Co.* v. *Stour Valley Railway Co.*, 2 De G. M. & G. 866.

Pending the progress of a bill through Parliament, authorizing the S. V. Company to lease its line to the N. W. Company, the bill was opposed by the S. B. Company, and, upon a compromise, a clause was inserted, securing to the S. B. Company the use of part of the land and the joint use of a station, subject to the cesser of these rights in the event of the S. B. Railway Company being leased to or amalgamated with a fourth company, viz., the G. W., who were rivals to the N. W. Company. At this time the S. B. Company was under no engagements to the G. W. Company. Subsequently, however, those two companies entered into agreements, giving facilities and preference to each other's traffic, and agreed to amalgamate at a future time, if the sanction of Parliament could be obtained:—Held, that this was not such a change of circumstances produced by the conduct of the S. B. company as to exclude it from equitable relief by injunction for the enforcement of the right of user conferred on it by the Act. *Ib.*

The Court may interfere between two railway companies entitled to the joint use of a station by prescribing regulations for its management; but such interference is not to take place without grave occasion. The Court may also direct a partition of the station, and appoint a receiver, if necessary. But where provisions exist for the settlement of disputes on the above subjects by arbitration, the Court will withhold its interposition until the remedy thus provided has been resorted to. *Ib.*

3. A railway company contracted with another for the use of the line of the latter for a term, at graduated tolls, according to the tonnage carried, which were to be a charge on the tolls and dues of the former company. The former company had no express parliamentary power thus to charge its tolls:—Held, that the charge was of too doubtful legality to be enforced by an injunction to restrain the former company from paying a dividend to its shareholders until the sums due upon the agreement were provided for, no case being made out showing a probability of there being no fund forthcoming to answer the demand at the hearing. *South Yorkshire Railway & River Dun Co.* v. *Great Northern Railway Co.*, 3 De G. M. & G. 576; 22 L. J., Ch., 761; 1 W. R. 203.

Semble, that a railway company cannot legally or equitably mortgage its undertaking without the authority of Parliament. *Ib.*

Semble, that such an agreement is not a contract for the use of a line, nor for an apportionment of tolls within the 87th section of the Railway Clauses Consolidation Act, 8 Vict., c. 20. *Ib.*

4. Heads of a proposed agreement were arranged between the directors of two railway companies, by which one company was to allow the other company, for ninety-nine years, to work the lines, and use the property and plant of the granting company, except certain specified lands and buildings, upon certain terms of allowance for working expenses and charges, and the maintenance for works and ways, the property and plant to be restored on the termination of the agreement, on terms of profitable return to the granting company; and provision was made for application to Parliament for powers, if needful. On a bill by a shareholder in the granting company, on behalf of himself and all other the shareholders in that company except the directors, against that company and the other company:—Held, first, that the proposed agreement was a delegation of some of the statutory powers of one of the companies to the other, which was contrary to the policy of their Acts, and could neither be granted nor accepted without further powers from Parliament; that it was a contract savouring of illegality, which, at the suit of any shareholder, this Court would restrain; and the Court, on motion, restrained the company from perfecting the agreement. Secondly, that such an agreement is not distinguishable on principle from a lease, to grant which is clearly not within the statutory powers of the granting company. Thirdly, that s. 87 of the Railways Clauses Consolidation Act merely gives to one company a limited power to run a portion of its traffic only, when it is necessary for the purposes of its own traffic, over the line of another railway company. Fourthly, that an agreement for an application to Parliament for powers necessary to enter into the above terms, and upon a stipulation that they should not be acted upon until the necessary powers should have been obtained, would be lawful, and would not be restrained. Fifthly, that the suit being by one shareholder, on behalf of himself and the other shareholders in the granting company, against that company, and the other company proposing to enter into an illegal agreement, without making any directors or other persons parties, seeking an injunction against the granting company to restrain them from perfecting the agreement was properly framed. *Winch* v. *Birkenhead, Lancashire, & Cheshire Junction Railway Co.*, 5 De G. & Sm. 562; 16 Jur. 1035.

5. When two railway companies gave mutual

running powers to one another over parts of their respective lines, with a stipulation that local traffic should be respected:—Held, that by local traffic was meant the traffic between two stations, both being on one of the lines over which the running powers extended. *Midland Railway Co.* v. *Manchester, Sheffield, & Lincolnshire Railway Co.*, 22 L. T., N. S., 601.

1. A. company, being owner of a station, entered into agreement with B. company to make a new junction between their respective lines, so that B. company may use such station. C. company, having running powers over A. company's line, subsequently entered into an agreement with B. company for use of B. company's line. An attempt of C. company to go from B. company's line to A. company's line over the junction was resisted on the ground that C.'s agreement with B. did not give a right to use such injunction, and even if it did, such agreement was *ultrà vires* and invalid, as being a delegation of statutory powers, and as such against public policy:—Held, that the effect in law of the right to make the junction was to make the two lines one continuous line, which the public had a right to use, and therefore also a company working under arrangements with companies owning the two lines. That the agreement as stated did not amount to a delegation of statutory powers, nor was it *ultrà vires*. *Midland Railway Co.* v. *Great Western Railway Co.*, 42 L. J., Ch., 438; 8 L. R., Ch., 841; 21 W. R. 657; 28 L. T., N. S., 718.

2. By an agreement between the directors of two railway companies, the North Western Company was to have running powers over the Llanelly Railway Company's lines, subject to its by-laws; was to be at liberty to have its own staff at its stations, and be allowed a reasonable sum for cartage, clerkage, etc.; the latter company was to be at liberty to call on the North Western Company to carry passengers and goods for the Llanelly Company upon its local lines, and both sets of directors bound themselves to send by each other's lines all traffic not otherwise consigned. A chief consideration for this agreement was an advance of money by the North Western directors to the Llanelly Company's directors; but no mention of this consideration was made in the agreement. Though there were in the agreement provisions for referring to arbitration any differences that might arise as to the agreement, there was not any mention of any time for which it was to endure, or how it might be terminated:—Held, that all the provisions of the agreement showed that it was a permanent and not a terminable agreement; and that, consequently, a notice to terminate it at the end of six months from a given time was invalid. *Llanelly Railway & Dock Co.* v. *London & North Western Railway Co.*, 7 L. R., H. L., 550; 23 W. R. 927; 32 L. T., N. S., 575; 45 L. J., Ch., 539. Affirming 42 L. J., Ch., 884; 8 L. R., Ch., 942; 21 W. R. 889; 29 L. T., N. S., 357.

Such an agreement appeared to be authorized by the Railways Clauses Act 1845 (8 & 9 Vict., c. 20, s. 87); and any differences arising between the two companies occasioned by any hardship felt in the working of the agreement, on either side, might be made the subject of arbitration under 22 & 23 Vict., c. 59. *Ib.*

The usages and rules of law applicable to the determination of contracts for hiring, service, or partnership, have no application to contracts between railway companies. An agreement between railway companies not *ultrà vires*, and by its terms unlimited in duration of time, can only be determined, failing mutual consent, by an Act of Parliament. *Ib.*

The agreement provided that the London and North Western Company, in the event of its exercising its running powers, should be at liberty to have its own staff of clerks at the stations on the company's line, and should carry the local traffic of the Llanelly Company if required to do so:—Held, that this was not a handing over of the management of the one company to the other such as would be contrary to the spirit of the railway Acts if done without express parliamentary sanction. *Ib.*

6. Rolling Stock.

3. The doctrine of *ultrà vires* as explained in *Ashbury Railway Co.* v. *Riche* (7 L. R., H. L., 63) is to be maintained, but is to be applied reasonably, so that whatever is fairly incidental to those things which the Legislature has authorized by an Act of Parliament ought not (unless expressly prohibited) to be held as *ultrà vires*. *Att.-Gen.* v. *Great Eastern Railway Co.*, 5 L. R., App. Cas., 473; 49 L. J., Ch., 545; 42 L. T. 810; 28 W. R. 769. Affirming 11 L. R., Ch. D., 449; 48 L. J., Ch., 428; 27 W. R. 759; 40 L. T. 265.

In an Act of this kind granting special powers, what is not permitted is prohibited. *Ib.*

Semble, the test applied in *Ashbury Railway Co.* v. *Riche* to the powers of a joint stock company (limited) registered under the Companies Act 1862 applies with equal force to the case of a railway company incorporated by Act of Parliament. *Ib.*

An Act of Parliament authorized a company to make a railway to T. and S. There were two other railway companies which were afterwards combined into one called the Great Eastern Railway Company. This latter company entered into a contract with the T. and S. Company, with which it was in connection in several respects, to supply it with rolling stock upon receiving a certain annual payment, and having certain other advantages. The contract was adopted by the shareholders of both companies. An action was brought against the Great Eastern Company, and an injunction asked for to restrain it from executing this contract. One of the Acts relating to the two companies contained (clause 14) the following provision: "The two companies may enter into agreements with respect to the working, maintenance, and management of the extension railway [this was the T. and S. Railway], or any part thereof, and of the railways of the two companies connected therewith [these were the two companies which had been incorporated under the name of the Great Eastern], and with respect to the apportionment of the traffic, and of the tolls, fares, and charges for traffic on the extension railway, and the railways of the two companies, the appointment of a joint committee, or any other

matters incident to the carrying out the purposes of this Act." The 15th clause of the Act was in these words: "The directors of the T. and S. Company, and the directors of the two companies respectively, may (subject to the sanction of the shareholders) enter into any contracts or agreements for effecting all or any of the purposes of this Act, or any objects incidental to the execution thereof, and every such contract or agreement may contain such covenants, clauses, powers, provisions, and conditions as may be mutually agreed upon between the parties thereto": —Held, that the contract of the Great Eastern Company to supply the T. and S. Company with rolling stock was not *ultrà vires*, but was warranted by the words of these sections of the Act. *Ib.*

1. A railway company being in want of money, and being advised that it had no power to borrow, sold part of its rolling stock to a waggon company for 30,000*l.*, at the same time making a contract with the waggon company for the hire of this rolling stock at a rent which would repay the 30,000*l.* and interest in five years. At the same time three of the directors of the railway company guaranteed to the waggon company the payment of the rent. The waggon company brought an action against the sureties and the railway company for rent due:—Held, that the transaction being *bonâ fide*, and what it purported to be, was not an illegal and void transaction under 7 & 8 Vict., c. 85, s. 19, and 30 & 31 Vict., c. 127, s. 4, by being a cloak for borrowing money. *Yorkshire Railway Waggon Co.* v. *Maclure*, 21 L. R., Ch. D., 309; 51 L. J., Ch., 857; 47 L. T. 290; 30 W. R. 761. Reversing 19 L. R., Ch. D., 478; 51 L. J., Ch., 253; 45 L. T. 747; 30 W. R. 288.

Held, also, that if the transaction had been a mere device for borrowing money, it would have been illegal. *Ib.*

Semble, although the fact of the railway company having a debenture debt could not affect the liability of the railway company on the contract, debenture holders have some sort of security on the rolling stock for the time being, subject to the right of the railway company to use and otherwise deal with it in the ordinary course of business, but the railway company cannot sell the whole of the rolling stock to pay debts which are subsequent in priority to the debentures. *Ib.*

2. A railway company sold its rolling stock to a waggon company for a sum of money, and the waggon company let the rolling stock back to the railway company at a rent, on payment of which for a term the railway company was to become repossessed of the rolling stock, the rent being equal to the purchase money and interest. The Court of Appeal decided that the transaction was a *bonâ fide* sale and re-hiring, and not a sham transaction as a cloak for borrowing. (See *Yorkshire Waggon Co.* v. *Maclure*, 21 L. R., Ch. D., 309.) A receiver of the railway company's undertaking having been appointed under s. 4 of the Railway Companies Act, certain moneys which represented rent of some of the rolling stock let by the railway company to another company, and proceeds of sale of other rolling stock, were paid to the receiver. Debenture holders, who had become such after the date of the above-mentioned agreement of sale and re-hiring, and also the waggon company, claimed the money:—Held, that, although by s. 23 of the Act "all money borrowed . . . by a company on . . . debenture stock . . . shall have priority . . . debenture stock . . . shall have priority . . . over all claims on account of any debts . . . or engagements" (except as in the section specified), that section was subject to s. 4, by which moneys received by a receiver under the Act were not payable to creditors until after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking; and that the rent of the rolling stock was a "working expense," and a "proper outgoing," and entitled to priority over the claim of the debenture holders. *Re Cornwall Minerals Railway Co.*, 48 L. T. 41.

Distress.] 3. By 30 & 31 Vict., c. 127, s. 4, the rolling stock of a railway company is protected from distress. *Eyton* v. *Denbigh, Ruthin, & Corwen Railway Co.*, *Rickman* v. *Johns*, 38 L. J., Ch., 74.

7. Traffic Arrangements.

Of Railways inter se.] 4. By an agreement between two railway companies, which was to last for fifty years, the Great Northern Company should book and invoice, and cause or permit to be conveyed or despatched by and along the lines of the Sheffield Company, all traffic originating upon any of the lines of the Great Northern Company, for which the railways of the two companies formed a convenient route, "not otherwise specially consigned or addressed," or the subject of agreements (if any) subsisting with other companies. The Sheffield Company in like manner contracted to carry on its lines (*mutatis mutandis*). By an agreement between the Sheffield Company and the Midland Company, by which running powers and access to Manchester over the Sheffield lines were conceded to the Midland Company, the effect was to give the latter company a through route to Manchester wholly independent of the Great Northern Company. On application for an injunction to restrain the Sheffield company from carrying out this latter agreement:—Held, that the Sheffield Company had not been guilty of fraud or breach of that agreement, and the injunction refused. *Great Northern Railway Co.* v. *Manchester, Sheffield, & Lincolnshire Railway Co.*, 5 L. T., N. S., 667.

5. The managing body of a railway company has no power to enter into a contract fixing and regulating the future traffic which may be carried upon a line of railway which the company may thereafter be empowered to construct, so as to give to another railway company an interest in such traffic and profits. *Midland Railway Co.* v. *London & North Western Railway Co.*, 2 L. R., Eq., 524; 15 W. R. 34; 35 L. J., Ch., 831; 15, L. T., N. S., 264.

Certain railway companies, including the plaintiffs, entered into an agreement by which, having provided that it should relate to and include all traffic of whatever description despatched or carried from either of two specified routes from or to the several places therein mentioned, they stipulated that all through traffic from or to any of those places should be carried and sent by them along and over the said two routes, and the gross profits

divided between them in certain proportions; a special clause in the agreement provided that none of the companies, parties thereto, should, by any of the devices there particularized, or by any other means or inducement whatsoever, cause or promote the said traffic to go or pass, so that the same should not be treated as part of the traffic to which the agreement related, and the profits derived therefrom be apportioned accordingly. The plaintiffs subsequently acquired and opened a new route to and from the termini specified in the agreement. Upon the question whether the traffic proceeds of this new route were within the terms of the agreement:—Held, that the agreement only embraced the traffic on the then existing lines, that there was nothing to prevent the formation of a new line by the plaintiffs, and that it was not compulsory upon them to bring into the common fund the proceeds of their new route. *Ib.*

Semble, that the agreement would have been illegal and *ultrà vires* if it had contained an express or implied condition prohibiting any of the companies from making or being party to the making of any new line, except on the terms of the agreement. *Ib.*

1. An agreement between two railway companies, that the one company will not carry traffic over a particular portion of its line:—Held, *obiter*, not illegal. *Lancaster & Carlisle Railway Co.* v. *North Western Railway Co.*, 2 Kay & J. 293.

Quære, whether an agreement by the directors of one railway, that in return for being entitled to carry traffic over their line on the line of another railway company, the directors of the first company will, out of the assets of their own company, make certain payments to the latter, is or is not void, as being beyond the powers of the directors. *Ib.*

2. There is no principle of public policy which renders void a traffic agreement between two lines of railway for the purpose of avoiding competition. Though a public company constituted for a particular purpose will not be allowed to apply its funds in a manner not sanctioned by the constitution of the company, the Court will not interfere with a traffic agreement between two lines of railway to divide the net earnings in certain definite proportions. *Hare* v. *London & North Western Railway Co.*, 2 John & H. 80; 7 Jur., N. S., 1145; 30 L. J., Ch., 817.

Two groups of railway companies, being respectively the owners of independent conterminous routes, agreed to divide the profits of the whole traffic in certain fixed proportions, calculated on the experience of the past course of traffic:—Held, that such an agreement, being *bonâ fide*, was not *ultrà vires*. *Ib.*

3. Alienation by an incorporated railway company of the tolls to arise from any portion of its line of railway is contrary to public policy as well as *ultrà vires* of the directors of the company. Therefore, where a Bill before Parliament, for the purpose of enabling one railway company to grant to another railway company a lease of its contemplated lines of railway, was opposed in Parliament by a third railway company, and the third company eventually withdrew its opposition to the Bill in consideration of an agreement, by way of arrangement as to traffic, entered into between the first and second companies and the third company, whereby it was stipulated that the third company should receive a certain proportion of the tolls to arise from the traffic along a specified portion of the line of the first and second companies, and that the first and second companies should, on the other hand, receive a specified proportion of the tolls to arise from the traffic along a particular portion of the line of the third company, such agreement to be determinable at the option of the third company only, but otherwise to be permanent between the parties thereto, the Court refused to decree a specific performance of such agreement at the instance of the third company, notwithstanding that the other parties thereto had obtained the consideration therefor by the withdrawal by the third company of its opposition to the Bill in Parliament. *Shrewsbury & Birmingham Railway Co.* v. *London & North Western Railway Co.*, 17 Jur. 845; 22 L. J., Ch., 682; 1 W. R. 172.

4. An agreement was made between A. Railway Company and B. Railway Company, that A. should have the use of B.'s station at S., paying such charge for additional accommodation, arising from the traffic of A., as arbitrators should determine; and that the traffic of A. (that is, traffic using both lines, or any portion thereof) between S. and R., or any points intermediate to these, should be carried on, as respects engine power, etc., at the costs of A., who should pay to B., for the use of its railway and in respect to the traffic specified, a *pro ratâ* proportion (according to the distance passed over the two lines respectively) of the tolls arising from such traffic; with this proviso, that nothing therein contained should authorise B. to receive for the use of its railway between its point of junction with A.'s line for a greater distance than half the length between such point of junction and the terminus of B. at S.; nevertheless B. should be entitled to charge for the use of such portion of its railway for a length of two miles at the least. A special verdict found that the length of B.'s line from S. at its point of junction with A. was four miles and no more:—Held, that the right of A. to use B.'s line was extended to all traffic passing over the original line of the former to or from the points named on whatever of the line its transit commenced or ended; but that the *pro ratâ* proportion of toll payable was according to the distance over the two lines referred to in the agreement. *Lancashire & Yorkshire Railway Co.* v. *East Lancashire Railway Co.*, 4 W. R. 780; 5 H. L. Ca. 792; 2 Jur., N. S., 767; 25 L. J., Exch., 278.

With Public.] 5. A contract was made between the agents of a railway company and the owners of a coal mine, to carry the coals at a stated tonnage for twenty-one years; and it was agreed that the contract should be reduced into a more formal instrument, and should contain all the terms stated in the "correspondence," which was one that had taken place between the parties and their agents respecting the same. The coals were so carried, and after a time the company's business passed to, and the company was con-

solidated with, a new company, formed under an Act of Parliament, which continued the carriage of the coals at the same rate. It then alleged, that the agents for the old company had exceeded their authority in making the contract for twenty-one years, and demanded an increased rate of tonnage, which was paid, under protest, by the owners of the coal mine. On a bill filed against the company for specific performance of the agreement, and for the execution of a formal instrument:—Held, that, whether at the date of the agreement there was authority in the agents to accede to such a term as twenty-one years or not, looking at the acts of the parties, the company was bound for that time while it subsisted as a company, and before the Act of Parliament passed, even if it was not bound by it at the date of the agreement. *Sowerby* v. *Pontop Railway Co.*, 10 Jur. 942.

The Act of Parliament contained a clause binding the company by all contracts of the old company, and a clause precluding it from taking less rates of charges from any persons than it required from the public generally. The charges made under the contract, and the increased rate of charges to the plaintiffs, were both less than the rate charged to the public. *Quære*, whether, according to the true construction of the Act, the agreement having existed before the Act of Parliament, the company might not be bound to regulate their charges to the public in general by their particular contract. *Ib.*

1. A merchant residing at B., and carrying on business in the towns and throughout the district traversed by a railway, in 1846 entered into an agreement with the railway company that he would, in consideration of the company granting him yearly, during so long a time as he should carry on business at B., a free pass over its line, between the towns of B. and C., have, for so long a time as the scale of charges of the company, and of a canal company, should bear the same proportion to each other as they then bore, all his goods carried by the railway company, in preference to the canal company. That arrangement continued to 1849, when the merchant, at the request of the company, to prevent the annoyance to them of constant applications for free passes, consented to pay 5*l.* as a nominal consideration for such free pass. This arrangement continued to 1857, when after a correspondence on the subject, arising out of his application for a renewal of the pass, the company refused to renew it. The agreement of 1845 was not executed by or on behalf of the company. A bill was filed by him for specific performance of the agreement:—Held, that the agreement, being uncertain in its terms, could not be specifically enforced. *Sturge* v. *Midland Railway Co.*, 4 Jur., N. S., 273; 6 W. R. 233.

2. The Court will not interfere by injunction to restrain a railway company from determining even upon a notice which may be irregular and insufficient, an agreement with contractors for the performance of certain duties in reference to the goods traffic of the line; the agreement involving personal service, and as such being one of which the Court would not grant specific performance. *Horne* v. *London & North Western Railway Co.*, 10 W. R. 170.

3. A ship belonging to a railway company was held to blame for a collision. A person took a through ticket for the journey by rail and by the ship, and brought an action against the company on the contract for delay and loss of luggage caused by the collision:—Held, that the company was within s. 514 of the Merchant Shipping Act 1854, which limited their liability to 15*l.* per ton of the registered tonnage of the ship. *London & South Western Railway Co.* v. *James*, 21 W. R. 151; 8 L. R., Ch., 241; 42 L. J., Ch., 337; 28 L. T., N. S., 48.

An injunction was granted to restrain further proceedings in actions for damage to goods, for damage to the ship which was run into, and for damage for loss of life. *Ib.*

4. A trader opened a credit account with a railway company for freight. An account of what was due was to be delivered once a month, and payment was to be made within seven days after delivery; and the company was to have a general lien, for all the moneys due upon any account, upon all goods in the hands of the company. The trader filed a petition for liquidation; and a receiver and manager of his estate and business was appointed, who, in order to carry on the business, bought goods with his own money and sent them to the railway company consigned to the trader. The company refused to deliver the goods until it was paid what was owing to it by the trader for freight due when the petition was filed. The receiver paid the money under protest, and the goods were delivered. The Court of Bankruptcy, on the receiver's application, ordered the money to be repaid:—Held, on appeal, that the company would have no defence to an action by the receiver for the money paid to it, but that the Court of Bankruptcy had no jurisdiction to order repayment. *Exp. Great Western Railway Co., Re Bushell*, 22 L. R., Ch. D., 470; 52 L. J., Ch., 734; 48 L. T. 196; 31 W. R. 419.

8. User by Public.

5. Upon the construction of a contract between an individual and a railway company:—Held, that nothing had taken place which could give him a right to use horses, as the moving power, against the will and consent of the company. *Thorne* v. *Taw Vale Railway & Dock Co.*, 13 Beav. 10.

A plaintiff sued as one of the public to restrain a railway company from closing it:—Held, that such a suit could not be maintained. *Ib.*

6. The Court will enforce, by injunction, the provision of s. 115 of the Railways Clauses Consolidation Act (8 & 9 Vict., c. 20), that no engine or other description of moving power shall be brought or used upon a railway, unless the same shall have been approved by the railway company as therein mentioned, notwithstanding the practice of railway companies has been to rely on each other with respect to the fitness of their respective engines, and not to enforce the provision of the Act; and notwithstanding also, that, to enforce such right of inspection, would occasion great inconvenience to the public traffic, and although it may appear that the provision is sought to be enforced, not from any apprehension of the use of improper engines, but for the purpose

of impeding the traffic over its line of a competing company. *Midland Railway Co.* v. *Ambergate, Nottingham, & Boston & Eastern Junction Railway Co.*, 10 Hare 359; 1 W. R. 162.

Although the expression "the railway" is, by the interpretation clause of the Railways Clauses Consolidation Act (s. 3), defined to mean "the railway and the works by the special Act authorized to be constructed," and these have been construed to include a station, yet it is very doubtful whether the power reserved to the public by the Railways Clauses Consolidation Act (s. 92), to use "the railway" with engines and carriages, upon payment of tolls which are calculated at a certain rate per mile, includes the power of using also the stations of the company. *Ib.*

1. A colliery company having railways from its collieries, with junctions with the line of a railway company, claimed the right, under the Railways Clauses Act 1845, s. 92, to use the railway. After some correspondence as to the engines to be used for that purpose, the railway company protested against the colliery company using the railway with engines belonging to another railway company, and also without an examination of them under s. 115. The coal company then attempted to run a train on to the line, but found the gates at the junction locked. They were likewise told that the signals and points would not be worked for them. A bill was then filed, alleging that the engines had been approved for another purpose in 1857, and praying for an injunction to restrain the railway company from obstructing the coal company in the use of their line:—Held, that though the word "railway," in the interpretation clause, includes "signals" as "works," still that there was no obligation under that or the 92nd clause upon the railway company to work the signals for the persons using the railway. *Powell Duffryn Steam Coal Co.* v. *Taff Vale Railway Co.*, 9 L. R., Ch., 331; 43 L. J., Ch., 575; 30 L. T., N. S., 208. Affirming 22 W. R. 182; 29 L. T., N. S., 575. And see S. C. 26 L. T., N. S., 357; 20 W. R. 460.

Held also, that, inasmuch as the colliery company could not run over the line unless the points and signals on the line were properly worked by the railway company, the Court could not grant relief, as it does not order the performance of a continuous act like working signals, the doing of which requires continuous attention, and cannot be seen to by the Court. The absence of a proper method of enforcing the provisions of s. 92, is no reason for extending the jurisdiction of the Court. *Ib.*

Approval, under s. 115, of the engines to be used, is a condition precedent to the user of the line under s. 92. *Ib.*

9. Tolls and Charges.

2. A party interested in the subject matter of a private Act of Parliament, will have his rights affected by its provisions, though it may have been introduced and passed without notice duly given to him. *Edinburgh Railway Co.* v. *Wauchope*, 8 Cl. & F. 710; 3 Rail. Ca. 233.

A private Act of Parliament, made for the construction of a railway, gave to W., a landed proprietor, through whose land the railway was to pass, "the sum of one halfpenny per ton upon all goods and articles upon which a tonnage duty is charged or chargeable in virtue of this Act." The section which empowered the railway company to levy a tonnage duty contained this clause: "For every carriage conveying passengers, or goods or parcels not exceeding 5 cwt.," a sum named. There were other clauses fixing the duty payable for goods, but there was no other which referred to passengers:—Held, that the company was empowered to levy a tonnage duty on carriages according to their weight, when containing passengers; and that the sum to be paid to W. must be calculated on the tonnage so levied. *Ib.*

W. had for some years received money on the tonnage levied on goods and parcels alone:—Held, that this did not prevent him from afterwards claiming payment on the tonnage duty on passengers. *Ib.*

3. Where an option is given to a party sending packages, containing small parcels, to pay according to an average, or to pay for the parcels separately, if the principle of an average be legal, and the amount of it reasonable, although the alternative requiring the party to pay for the separate parcels may be *per se* illegal, that will not render the demand to pay according to average illegal, and the Court will not grant an injunction until the illegality be established at law. *Pickford* v. *Grand Junction Railway Co.*, 3 Rail. Ca. 538.

Quære, whether the defendants, being carriers only to Birmingham, can legally make the same charge to A. for delivery of goods at Birmingham, as they make to B. for delivery of goods at Worcester, B. agreeing to give the company his whole custom, and agreeing to pay on certain articles an increased price. *Ib.*

4. Tolls within the meaning of the Railways Clauses Consolidation Act should be fixed with reference to the number of carriages of one railway company which pass over the line of another railway company, under the terms of the agreement between the two railway companies. *Semble.* *Simpson* v. *Denison*, 10 Hare 60; 16 Jur. 828.

An agreement by one railway company for the payment to another of such an amount as will, after answering all expenses and liabilities, furnish a certain dividend on the paid-up capital of such other capital, is not an agreement for the payment of a toll within the meaning of the 87th section of the Railways Clauses Consolidation Act. *Ib.*

Quære, what is a toll, and how ought tolls to be reserved within the 87th section of the Railways Clauses Consolidation Act 1845. *Ib.*

Semble, a toll is a payment for the right of passing along a highway, public or private; it is a payment connected with the passing over, and should probably be reserved with reference to the number of carriages passing over the line. *Ib.*

5. Alienation by an incorporated railway company of the tolls to arise from any portion of their line of railway is contrary to public policy as well as *ultrà vires* of the directors of the company. *Shrewsbury & Birmingham Railway Co.* v. *London & North Western Railway Co.*, 17 Jur. 845; 22 L. J., Ch., 682.

6. *Semble*, that a railway company cannot legally or equitably mortgage its undertaking

without the authority of Parliament. *South Yorkshire Railway and River Don Co.* v. *Great Northern Railway Co.*, 22 L. J., Ch., 761; 1 W. R. 203; 3 De G. M. & G. 576.

Semble, that such an agreement is not a contract for the use of a line, nor for an apportionment of tolls within section 87 of the Railways Clauses Consolidation Act, 8 Vict., c. 20. *Ib.*

1. A railway company, incorporated by statute, was empowered to make a line between certain termini, and to impose certain tolls and charges for carriage of goods on that line. The company afterwards obtained several other Acts, and, among them, one passed for making a junction and branch railway, and incorporating the Lands and Railways Clauses Acts, and including a number of enactments, in which the words "the railway" were used in some places so as to be applicable only to the junction and branch lines, but, in others, also introducing, as to "the railway," a fresh system of tolls and charges:—Held, that the term "the railway" must be considered to mean the whole system of railway belonging to the company, and that it was over it that the tolls and charges imposed were intended to extend, and not over the junction and branch lines only, and that the old and higher rates on the main line were impliedly repealed. *Bristol & Exeter Railway Co.* v. *Garton*, 8 H. L. Ca. 477; 7 Jur., N. S., 173; 30 L. J., Exch., 241; 3 L. T., N. S., 251.

2. A company obtained an Act (8 & 9 Vict., c. 169) authorizing it to construct a railway and to demand tolls for the conveyance of passengers and goods thereon. The charge for the conveyance of goods was generally thus expressed, "per ton per mile not exceeding," etc. One clause provided that "for articles or persons conveyed on the railway for a less distance than four miles" there might be, "in addition to the prescribed tolls for conveyance, a reasonable charge for the expense of stopping, loading, and unloading." No publication of this charge in the form of a "toll" had been made upon the toll-board:—Held, that this "charge" for stopping was not properly a "toll," and that the non-publication of it on the toll-board in the form required by the Railways Clauses Consolidation Act 1845, ss. 93 and 95, did not prevent the company from demanding it. The judgment of the Court below was on this point affirmed. *Pryce* v. *Monmouthshire Canal & Railway Co.*, 4 L. R., App. Cas., 197; 49 L. J., Exch., 130; 40 L. T. 630; 27 W. R. 666.

The 105th clause of the Act granted tolls for "a fraction of a mile beyond four miles," etc.; the company claimed such tolls when the whole distance traversed was less than four miles. The House was divided: two judges were of opinion that the charge was, on the whole, warranted by the words of the Act; the other two judges, applying the principle that no charge could be imposed on the public but by the clearly-expressed intention of the Legislature, held, that in this case the Legislature had not clearly expressed an intention, nor had intended, to authorize such a charge. The judgment of the Court below stood affirmed. No costs were given. *Ib.*

3. The Monmouthshire Canal Act provided that, upon auxiliary railroads made by private individuals under the authority of the Act, the tolls should not exceed the rate charged by the canal company, which for the articles of limestone and iron-stone was restricted to 2½*d.* a ton per mile; and it also empowered the canal company, by agreement with the landowners, itself to construct auxiliary railroads, on which tolls not exceeding 5*d.* a ton per mile might be charged. Certain landowners and owners of iron works, and, among others, the assignees of the Beaufort works, formed a joint company, and under the powers given by the Act, constructed a railroad, connecting a lime quarry, called the Trevil quarry, with the several iron works, and with the railroads of the canal company. In the partnership deed of the railroad company, the lessees of the Beaufort works covenanted for themselves, their heirs, executors, administrators, and assigns, so long as the covenantors, their executors, administrators, or assigns should occupy the Beaufort works, to procure all the limestone used in the said works from the Trevil quarry, and to convey all such limestone, and also all the iron-stone, from the mines to the said works, along the Trevil railroad, and to pay a toll of 5*d.* a ton per mile for the same:—Held, that the covenant, securing a toll of 5*d.* a ton per mile to the shareholders of the Trevil railroad, was a fraud upon the canal company and the Legislature, and, therefore, ought not to be specifically enforced by injunction. *Keppell* v. *Bailey*, 2 Myl. & K. 517. Coop. *temp.* Brougham, 298.

4. The Birmingham and Derby Junction Railway, commencing at Derby, communicates with the London and Birmingham Railway at Hampton-in-Arden. The Midland Counties Railway forms a communication between Derby and the London and Birmingham Railway at Rugby. The Birmingham and Derby Railway Act empowers that company to receive from passengers conveyed by the company's carriages tolls not exceeding a specified amount. A subsequent Act, for authorizing an alteration in the line of railway, provides, that the charges by the first Act, authorized to be made for the carriage of passengers, goods, or other matters or things, shall be at all times charged equally and after the same rate per ton, or per mile, in respect of all passengers and goods of a like description, and conveyed or propelled by a like carriage or engine, passing on the same portion of the line only, and under the same circumstances; and that no reduction or advance in any charge for conveyance by the company, or for the use of any locomotive power to be supplied by them, shall be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the same portion of the railway, under the same circumstances. After the opening of the Midland Counties Railway, the Birmingham and Derby Junction Railway Company charged passengers, conveyed by its carriages from Derby to Hampton-in-Arden, 8*s.*, while it charged other passengers proceeding from Derby to Hampton-in-Arden, and thence to London, only after the rate of 2*s.* between Derby and Hampton-in-Arden. An information was filed praying an injunction to restrain the imposition of an unequal charge between the termini at Derby and Hampton: it was admitted that the charge of 8*s.* did not exceed the rate allowed by the Act:—Held,

on motion for an injunction, that the clause above set forth was only meant to prevent the exercise of a monopoly, to the prejudice of one passenger or carrier in favour of another. That, even if this Court had jurisdiction in such a case, it would not interfere, unless it were clear that the public interest required it; and that in this case, it being admitted that the higher charge was not more than the Act permitted, it did not appear that the public were prejudiced by the arrangement. The motion was refused with costs. *Att.-Gen.* v. *Birmingham & Derby Junction Railway Co.*, 2 Rail. Ca. 124.

1. Section 90 of the 8 & 9 Vict., c. 20 (Railways Clauses Act 1845), requires equality of tolls for similar services rendered by railway companies to all persons; and s. 2 of the 17 & 18 Vict., c. 31 (Railway and Canal Traffic Act 1854), forbids the giving of any undue or unreasonable preference or advantage to any particular person or company. A charge made by a railway against A. for services rendered by that company to him must not, therefore, be greater than the charge made by the same company against B. for rendering him services of the like nature. *London & North Western Railway Co.* v. *Evershed*, 3 L. R., App. Cas., 1029; 39 L. T., N. S., 306. Affirming 3 L. R., Q. B. D., 134; 47 L. J., Q. B., 284; 37 L. T., N. S., 623; 26 W. R. 863.

E. was a brewer at the town of Burton, where three railways had their stations. With one of these railways (Midland) certain brewers in the town had direct communication by sidings, which enabled goods to be sent to the trains, and taken from the trains of the Midland with greater ease and less loss of time than by the way of ordinary cartage. The Midland charged them nothing for cartage, and made a rebate in the charge for station to station conveyance. These brewers had no such communications with the North Western, but it was often convenient for them to send by that railway; and the directors of that railway, in order to compete with the Midland, allowed these particular brewers the same advantages as to cartage and rebate as the Midland did. As to all others in the same trade (E. amongst the rest), the directors of the North Western made the ordinary charge for cartage, and allowed no rebate on the charge for conveyance on the line:—Held, that this was an inequality and an undue preference within the meaning of the statutes. *Ib.*

Where E., one of the persons thus paying the higher rate, had for some time paid it in ignorance of the facts, but afterwards, on finding that he was subjected to this higher charge, paid it under protest:—Held, that he was entitled to recover back, in an action for money had and received, the difference he had so paid under protest. *Ib.*

2. Money paid in excess, in disregard of the equality clauses in railway Acts, can be recovered back in an action for money had and received. *Great Western Railway Co.* v. *Sutton*, 4 L. R., H. L., 226; 38 L. J., Exch., 177; 18 W. R. 92.

3. A special Act, relating to the company, provided that where goods were carried on the company's railway, or partly on its railway and partly on some other railway of which it was a joint owner, or which it had a right to use, for a less distance than six miles, the company should be entitled to take tolls as for six miles. The Act also provided that the tolls for goods carried over the company's line and over portions of other lines of which it was a part owner, or which it had a right to use, should be computed as if the company's line and the portions of the other lines formed one railway. Goods were passed over the line of which the company was sole owner for a distance of less than six miles: the same goods on their transit to their ultimate destination passed over another line of which the company was a part owner for a distance of more than six miles. This latter line was under the sole management of another company. The goods were accompanied by two declaration notes, one made out in the name of the first company and the other in the name of the other company, but the station of ultimate destination mentioned in both notes was the same:—Held, that the company was not entitled to split the contract, that the two lines must be treated as one, and that the six-mile clause was not applicable. *Lancashire & Yorkshire Railway Co.* v. *Gidlow* (No. 1), 42 L. J., Exch., 129; 21 W. R. 649.

The same Act of Parliament, while providing the maximum rate of tolls to be charged, made an exception in respect of special services to be rendered by the company for loading, unloading, collection, and delivery of goods:—Held, that the company was not entitled to charge for special services, though found by a jury to have been actually rendered by it; the customer charged for such services not having had the offer and option first distinctly given him of either availing himself of such services at the company's rate of charge or of doing them himself, such services being incidental to the ordinary business of a carrier, and such as the customer, without notice, might have supposed were covered by the company's charges for toll. *Ib.*

4. A railway Act gave the directors of the company power to charge a sum for the conveyance of coal along the line, "including the tolls for the use of the railways and waggons, or trucks and locomotive power, and every expense incidental to such conveyance," which sum was to be a maximum sum, except in certain cases, the exception being thus expressed: "Except a reasonable sum for loading, covering, and unloading of goods, and delivery and collection, and any other services incidental to the business of a carrier, where such services, or any or them, are or is to be performed by the company." The services in respect of which the excepted charges were claimed to be made were those of taking the waggons of a colliery owner from his own sidings and attaching them to the trains or returning them from the line of the railway to the sidings of the colliery owner; and whatever particular difficulty arose in this work was occasioned by the position of the points effecting the junction of the line with the sidings:—Held, that these were not services which came within the meaning of the exception. *Lancashire & Yorkshire Railway Co.* v. *Gidlow* (No. 2), 7 L. R., H. L., 517; 32 L., T., N. S., 573; 24 W. R. 144.

At some of the stations the colliery owner had been allowed to leave his coals on the

ground adjoining the lines:—Held, that this might have been made the subject of an agreement for payment for any advantage thus obtained by him, but did not come within the description of a service contained in the exception. *Ib.*

Another clause in the same Act required that the company should at all times "provide sufficient locomotive power, when and as the same shall be required, and as soon as an adequate and sufficient load shall be in readiness, to convey all merchandize." The directors required the colliery owner to furnish a declaration of his having ready fifteen waggons with a minimum load of four tons in each waggon, and gave orders not to forward his coals in a smaller number of waggons containing coals. While this restriction existed the coals of other owners were carried in smaller quantities. The regulation requiring fifteen waggons was an unreasonable requirement:—Held, that this restriction was not warranted by the words of the section, and that the colliery owner, having suffered in his business from such restriction, was entitled to damages on that account. *Ib.*

The colliery owner had paid several of these sums, which in his action he sought to recover as overcharges, but he had paid them under protest and for the purpose of obtaining possession of his goods:—Held, that his payment of them under such circumstances was not a fact which would disqualify him from recovering them in an action for money had and received. *Ib.*

1. As to the reasonableness of charges, the principle is not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. *Canada Southern Railway Co.* v. *International Bridge Co.*, 8 L. R., App. Cas., 723.

Receiver.] 2. Where there were several judgments against a railway company, the tolls of which were wholly inadequate to meet the debts of the company, the judgment creditors held entitled to a charge on the tolls, and one of the judgment creditors was appointed receiver. A sale of the lands was refused, but inquiries were directed as to the best means of making the railway profitable. *Furness* v. *Caterham Railway Co.*, 4 Jur., N. S., 1213; 27 L. J., Ch., 771.

3. A receiver was appointed over the tolls, etc., of a railway company, and certain parties recovered damages in an action against the company for injuries suffered by a collision. On an application in the suit, in which the receiver was appointed, an order was made that he should pay such damages as part of the working expenses, etc., of the half year in which the accident occurred. *Exp. Thurgood*, 18 L. T., N. S., 18.

4. Statutory bondholders of a railway company are not entitled to an equitable charge on the tolls and traffic receipts of the company, or to have a receiver appointed over such tolls and receipts for the purpose of paying their demands. *Imperial Mercantile Credit Association* v. *Newry & Armagh Railway Co.*, 2 Ir. R., Eq., 524; 16 W. R. 1070. Reversing 2 Ir. R., Eq., 1; 16 W. R. 335.

5. When a receiver is appointed over a railway, the Court has jurisdiction to control expenditure in the management and repairs of the railway, though the directors individually are not parties to the suit. *Belfast & County Down Railway Co.* v. *Belfast, Holywood, & Bangor Railway Co.*, 3 Ir. R., Eq., 581.

The remuneration of directors is a proper expenditure, and should be allowed, though the company is insolvent. *Ib.*

Repairs and improvements of the line and stations, wire fencing, gas fittings, and the like, are expenses properly paid out of revenue, if there is no capital immediately available for such purposes. *Ib.*

6. When a petition was presented by a judgment creditor, for the appointment of a receiver of the tolls of a railway company, and it appeared that the line had not been used by the company, although a portion of it had been occupied and maintained by another company, without payment of compensation; that the contract on which the judgment was recovered had been entered into previously to the passing of the Act; and that the service of the petition had been effected at a house which had formerly been, but was no longer, the office of the company, and on a person who had acted as, but who was not properly constituted, the secretary:—Held, that service of the petition was insufficient. *Re Beddgelert Railway Co.*, 19 W. R. 427.

Held, also, that the railway had not been opened for public traffic within the meaning of the Act; and that as the judgment had been recovered upon a contract entered into before the passing of the Act it could have no effect. *Ib.*

10. Trains.

Express.] 7. The trains called "express trains," in the bills of the Great Western Railway Company, are not within the exception contemplated in a covenant to cause "all trains carrying passengers, not being goods trains, or trains to be sent express or for special purposes," to stop for refreshments at the refreshment rooms of the lessee of the company; and the lessee has a sufficient interest, without his sublessee, to carry on a suit; and where the material rights of parties rest on covenant each is *primâ facie* entitled to sue either at law or in equity, though such party may be liable at the time in respect of other covenants. *Rigby* v. *Great Western Railway Co.*, 4 Rail. Ca. 175; 1 Coop. C. C. 7; 10 Jur., 488. See also *Rolfe* v. *Rolfe*, 1 Coop. C. C. 8. n.; 10 Jur. 61.

Objection of remedy at law being ineffectual by reason that each breach of covenant must be made the subject of a separate action, removed by an undertaking to pay such damages as should be ascertained in the manner to be directed by the Court. *Ib.*

The bill was filed to restrain the company from running certain trains without stopping at the Swindon station, for the purpose of refreshment of passengers, in violation of a contract between the plaintiff and the company for that purpose. Upon the motion for the injunction being made, the Vice-Chancellor, before granting it, required the plaintiff to establish his right at law, the company undertaking to keep certain accounts. Proceedings were accordingly taken at law, and resulted in favour of the plaintiff. Upon the application for an injunc-

tion being thereupon renewed, the company asked for a case to a court of law, upon a question of law, which they, by inadvertence, had omitted to have tried under the former proceedings, and they resisted the injunction being granted in the meantime. The Vice-Chancellor thought the company entitled to a case, but granted an interim injunction to the plaintiff. Upon appeal, the Lord Chancellor discharged that part of the Vice-Chancellor's order which granted an interim injunction, and in lieu thereof required an undertaking from the company, not only to keep the accounts which had been directed in the first instance, but also to pay what might be found due to the plaintiff for the injury he might sustain by their continuing to run their trains in the manner complained of. A case was accordingly taken to law, and the opinion thereon was in favour of the plaintiff. Pending the proceedings at law, the plaintiff's interest under the covenant ceased, and the injunction became unnecessary. The Court, on motion by the plaintiff for the costs of the proceedings at law and in equity, and for a reference to take the accounts which the company had been ordered to keep, made an order for a reference, but reserved its direction as to the costs, on the ground that they might possibly be affected by the result of the account. S. C. 19 L. J., N. S., Ch., 470; 14 Jur. 710. And see S. C. at law, 4 Exch. 220.

1. A railway company having covenanted with a landholder that they would use a piece of land purchased from him as a first-class station for the purpose of taking up and setting down passengers, was restrained from running any trains other than mail or express or special trains without stopping at the station built thereon. *Hood* v. *North Eastern Railway Co.*, 17 W. R. 1085; 20 L. T., N. S., 970; 8 L. R., Eq., 666.

A train on a local line running in connection with trains between London and Scotland cannot be said to lose its character of an express train by stopping at junctions connecting the line with other important lines, although it should stop at two such junctions within eight miles of one another. S. C. 19 W. R. 523.

2. A railway company covenanted with the builders of refreshment rooms at a station on the line of railway that all trains which should pass the station carrying passengers, not being goods trains or trains to be sent express or for special purposes, and except trains not under the control of the company, should stop for a reasonable period of about ten minutes. The postmaster-general, proceeding under the 1 & 2 Vict., c. 98, which was passed before the covenant was made, required the company to run a train carrying mails at a certain hour, and stopping at the station for five minutes only: —Held, that such a train was a train "not under the control of the company" within the meaning of the exception. *Phillips* v. *Great Western Railway Co.*, 7 L. R., Ch., 409; 41 L. J., Ch., 614; 26 L. T., N. S., 532; 20 W. R. 562.

3. When a branch railway Act gave a landowner the right to stop by signal all ordinary trains:—Held, that accelerated trains forming part of fast through trains from London, were not ordinary trains, though the fares charged were at the ordinary rate. *Turner* v. *London & South Western Railway Co.*, 17 L. R., Eq., 561; 43 L. J., Ch., 430.

When an Act confers upon a landowner a private right creating a burden upon a railway and restraining the directors from regulating the traffic so as best to accommodate the public, it must be construed strictly. *Ib.*

4. In 1846 two competing lines of railway, the D. N. and the L. & Y., being before Parliament, L. agreed with eleven persons (the promoters of the D. N. railway) to give them certain portions of land, at different prices; to withdraw all parliamentary opposition from them, and offer every description of opposition to the L. & Y. railway; and that if an amalgamation took place on any grounds, he would not oppose the amalgamated company. In case of the amalgamated company obtaining their bill, they were to adopt this agreement and all the covenants, etc., one of which was that the D. N. Railway Company were to build a station near T., at a point to be approved by L., at which station all trains should stop. The two companies did amalgamate, by the name of the "G. N. Railway Co." Litigation took place, both in equity and at law, upon the construction of the agreement, the validity of which was never impeached in such litigation. The G. N. Company now refused to stop their express trains at the T. station:—Held, first, that the agreement was legal in itself, was now decided by authority, but, *semble*, that if such authority had been wanting, it would not have been open to the defendants now to impeach it, after having brought it forward as a defence in former litigation. Secondly, that the balance of inconvenience on stopping such trains was in favour of a specific performance of the agreement, and that the Court would not hesitate to interfere to restrain a breach of it on interlocutory application. Thirdly, that the Amalgamated Company's Act having been passed without opposition by L., which might reasonably be supposed to be in consequence of the agreement, acts done by the company under their Act were to be looked at as if one under the agreement. *Lindsay (Earl)* v. *Great Northern Railway Co.*, 17 Jur. 522; 22 L. J., Ch., 995; 10 Hare 665; 1 W. R. 257.

Cheap Trains—Government Duty.] 5. The Midland Railway Company was entitled, upon payment of a percentage, to use a loop line belonging to the Great Western Railway Company, for the purpose of traffic originating in or extending to its own line, and it exercised its powers by its own trains and servants, but the moneys paid at the stations on the loop line were collected by the clerks and servants of the Great Western Railway Company:—Held, that the Great Western Company was bound to keep the accounts, and pay the duty required by 5 & 6 Vict., c. 79. *Great Western Railway Co.* v. *Att.-Gen.*, 1 L. R., H. L., 1; 12 Jur., N. S., 417; 35 L. J., Exch., 123; 14 W. R. 519; 14 L. T., N. S., 33.

The 7 & 8 Vict., c. 85, exempts from the duty imposed by the 5 & 6 Vict., c. 79, upon passenger traffic, the receipts of any company in respect of passengers conveyed by the trains at 1*d.* a mile, required by that Act to be run by every company, upon conditions subject to the approval of the Board of Trade. The Midland

Company ran cheap trains over the loop line, but could not comply with one of these conditions, and the Board withdrew its approval:—Held, that such cheap trains were not within the exemption. *Ib.*

1. A cheap train within the meaning of 7 & 8 Vict., c. 85, s. 6 (the fares of passengers travelling in which are exempted from the payment of duty to Government) must necessarily be a train carrying third-class passengers at an uniform rate of 1*d.* a mile, both for the whole distance between the termini of the railway on which it travels and for the intermediate distances between any one station and another on such railway. *North London Railway Co.* v. *Att.-Gen.*, 45 L. J., Exch., 315; 1 L. R., App. Cas., 148; 24 W. R. 852; 34 L. T., N. S., 297. Affirming 43 L. J., Exch., 223.

A cheap train must necessarily stop for the purposes of taking up and setting down passengers at every passenger station between each end of the trunk, branch, or junction line on which it travels. *Ib.*

The power conferred on the Board of Trade by 7 & 8 Vict., c. 85, s. 8, of dispensing with "any of the conditions hereinbefore required with regard to the conveyance of passengers," does not authorize the Board of Trade to dispense with either of the above-mentioned requisites. *Ib.*

11. Branch Railway.

2. The Taff Vale Railway obtained a lease from the trustees of the Bute Docks at Cardiff of land which they required for the purposes of their railway. The lease was for 250 years. With a view to securing that the proposed railway should not be used so as to take custom from the docks in which they were interested, the trustees inserted a covenant in the lease, on the part of the railway, that the company, so far as it was able, should cause all minerals which should be conveyed upon its line, or any part or branch of it for shipment, to be shipped into vessels in the Bute Ship Canal (West Bute Dock), or in some basin or cut thereto belonging. Also, that when any minerals which should have been conveyed along the Taff Vale Railway, or any part or branch thereof, should be shipped into any vessel in any dock or basin whatsoever other than the Bute Ship Canal (West Bute Dock), or in some dock, basin, or cut belonging thereto, the Taff Vale Railway Company should pay to the owners of the Bute Ship Canal for the time being the same wharfage dues in respect of such minerals as would have been payable for the same if such minerals had been shipped at the Bute Ship Canal. After the line of railway had been constructed on the land so leased to the Taff Vale Railway Company, the company took a lease of another line (the Penarth Railway) which terminated at Penarth Docks on the south-west side of the river Ely, the Bute Docks being on the north-east side of that river. The Penarth Docks and the Penarth Railway were one concern: the whole was leased by the Taff Vale Railway Company. The two were connected at a station on the Taff Vale Railway:—Held, that the Penarth Railway was not a part or branch of the Taff Vale Railway; that the words in the covenant, "any dock or basin whatsoever," must be controlled by some limitation, and the covenant so controlled must be confined to any dock or basin in connection with the Taff Vale Railway, or some part or branch of it, terminating in or at a dock or basin, and that as the Penarth Railway was not a part or branch of the Taff Vale Railway, the covenant did not apply to minerals shipped or unshipped at Penarth Harbour, though they were carried for a certain distance along the Taff Vale Railway. *Taff Vale Railway Co.* v. *Macnabb*, 6 L. R., H. L., 169; 42 L. J., Q. B., 153; 22 W. R. 65.

12. Book Stalls.

3. A railway company granted to two lessees the sale and exclusive licence and privilege for ten years, of selling books and other publications at such of the company's stations as the lessees should think fit, and of using the bookstalls thereat respectively, and covenanted that all books sent by the lessees to be sold, pursuant to such licence, should be conveyed by the company's train to any such station without any charge: and warranted quiet and peaceable enjoyment:—Held, first, as to stations where bookstalls were in existence at the date of the grant, that the company must be taken to have granted the user of those specific stalls, and if not, still it was incumbent on the company to show that stalls to which it attempted to remove the lessees would be equally convenient. *Holmes* v. *Eastern Counties Railway Co.*, 3 Kay & J. 675; 3 Jur., N. S., 737; 5 W. R. 870.

Held, secondly, as to other stations, that if the lessees could be entitled, in any case, to erect stalls thereat, the Court would make a declaration to that effect, because the Court could not judge whether sales from stalls, or by colportage, should be adopted; and also, because such a declaration would lead to continual applications, with reference to the gradual increase in size of the stalls. *Ib.*

Held, thirdly, that the privilege of selling books, etc., authorized a *bonâ fide* sale to passengers and such other persons as ordinarily attended the company's stations on business connected with railways, and not a general agency, consequently that the lessees were not entitled to free carriage, except in respect of books to be so sold. And on a bill filed by the lessees, an injunction was granted, restraining the company from evicting them from bookstalls, existing at the date of the agreement, notwithstanding they, the lessees, failed in their contention as to the second and third points, and notwithstanding misconduct on their part, in not strictly and honourably performing their part of the agreement, the Court being of opinion that it would be impossible, under the circumstances, to estimate the damage to which they would be exposed if an injunction were not granted. *Ib.*

13. Refreshment Rooms.

4. In a lease by a railway company of their refreshment rooms at Swindon, the company covenanted with the lessee that all trains carrying passengers, not being goods trains or

trains to be sent express or for special purposes, and except trains not under the control of the company, which should pass the Swindon station either up or down, should, save in case of emergency or unusual delay arising from accidents, stop there for refreshment of passengers for a reasonable period of about ten minutes, and that as far as the company could influence the same, trains not under its control should be induced to stop for the like purpose. The postmaster-general having in the exercise of his power required that trains carrying mails should not stop at Swindon more than five minutes:—Held, first, that those trains were not as regards stopping under the control of the company; and secondly, that the company was not by its covenant prohibited from carrying passengers by such trains. *Phillips* v. *Great Western Railway Co.*, 41 L. J., Ch., 614; 20 W. R. 562; 26 L. T., N. S., 157; 7 L. R., Ch., 409. And see *Rigby* v. *Great Western Railway Co.*, 4 Rail Ca. 175; 1 Coop. C. C. 7; 10 Jur. 488.

1. In 1840 a railway company entered into an agreement under seal to grant A. a lease for ninety-nine years of the hotel to be erected at X. station, with power for the company to determine the lease if any complaint as to the mode of carrying on the business should not be remedied within three months after notice of such complaint. It was also agreed that the lessees "should have the occupation of the refreshment rooms at X. station, subject to the same restrictions and provisions as relate to the carrying on the business of the hotel, both as regards the quality and prices of provisions, and management thereof." The lease granted in pursuance of this agreement was confined to the hotel, and contained no mention of the refreshment rooms. The refreshment rooms on the up line adjoining the hotel had been always occupied with it. In 1849 B., a director of the company (head of a firm at X., who were assignees of the lease of the hotel), erected at a cost of 200*l.* refreshment rooms on the down line, pursuant to an alleged agreement with the company that his firm should have a lease of such refreshment rooms for a term co-extensive with the lease of the hotel. The only evidence of such agreement was this minute in the books of the company: "A ground rent of 6*l.* per annum was ordered to be fixed for the new refreshment rooms built by the lessees at the down station in X." In 1867 the company gave notice to C., the assignee from B. of the lease and occupier of both refreshment rooms, that its arrangements with reference to a new station (recently erected) at X. would involve the determination of his tenancy of the existing refreshment rooms:—Held, first, as to the refreshment rooms on the down line, that no agreement of which the specific performance could be granted was proved, and that in any case the Court could not enforce specific performance of an agreement by a director with the company for the benefit of himself or his firm; and, secondly, as to the up line refreshment rooms, that the occupation was not determinable at the mere will of the company, and that C. was entitled to have the agreement of 1840 carried into effect by having a deed executed to him as the assign of A., with all proper provisions granting the right of occupation of the upper refreshment rooms to him, his assigns and nominees, being tenants of the hotel, subject to the provisions and restrictions contained in the agreement. *Flanagan* v. *Great Western Railway Co.*, 7 L. R., Eq., 116; 38 L. J., Ch. 117.

V. MINES AND MINERALS.

1. *Purchase of and Compensation for*, 6031.
2. *Working and Right to Support*, 6033.

1. Purchase of and Compensation for.

2. In claims for compensation for not working mines adjoining a railway and railway works, s. 6 and s. 78 of the Railways Clauses Act 1845 (8 & 9 Vict., c. 20) must be read together. *Smith* v. *Great Western Railway Co.*, 3 L. R., App. Cas., 165; 47 L. J., Ch., 97; 37 L. T., N. S., 645; 26 W. R. 130. Affirming 2 L. R., Ch. D., 235; 34 L. T., N. S., 267; 45 L. J., Ch., 235; 24 W. R. 443.

The 6th section gives a general right to compensation to "owners and occupiers of, and all other parties interested in, lands taken or injuriously affected by the construction" of the railway. *Ib.*

In s. 78, the person entitled to give notice to the directors of a railway company of his intention, within thirty days, to work a mine, is the owner, lessee, or occupier, who has the right and the power to work it. The directors are entitled to have an inspection of the mine, and to offer compensation to him for not working, which compensation may be settled as therein mentioned. The compensation thus settled is that to which he is individually entitled, according to the extent of his interest. If the lessee is the person thus giving notice, and receiving compensation, the owner, if he can show a right of his own beyond that of his lessee who has been compensated, is also entitled to compensation under s. 6. *Ib.*

The words "he" and "his," in two of the parts of s. 78, refer to the person entitled to compensation, whether owner, lessee, or occupier. *Ib.*

The word "lands" in s. 6 includes mines; and that section, in regard to the compensation thereby provided, is to be read with reference to the Lands Clauses Act. *Ib.*

After compensation agreed on, and obtained or tendered, a perpetual injunction may be granted against the working of the mines. *Ib.*

H. was the lessee of mines under a railway, his lease being of sufficient length to enable him to exhaust the coal; he gave the company notice of his intention to work the mines, and they gave him a counter-notice under s. 78 of the Railways Clauses Act 1845, and made compensation as provided by the section. Before the expiration of his term, H. surrendered his lease, and S. became owner of the mines in fee. On a bill by the company to restrain S. from working the mines:—Held, that the company, by compensating the lessee, became the owner of the mines; and was entitled to a perpetual injunction, but that S. might obtain compensation for any injury he had sustained, under s. 6. *Ib.*

3. Clay is a mineral within the meaning of

the Railways Clauses Consolidation Act 1845, s. 77. Therefore a railway company was held liable to the owner of land taken by it in respect of clay from such land used for puddling bridges, which clay it was not necessary to remove in the construction of its line. *Loosemore* v. *Tiverton & North Devon Railway Co.*, 22 L. R., Ch. D., 25; 51 L. J., Ch., 570; 47 L. T. 151; 30 W. R. 628.

1. The word "mines" in the 77th section of the Railways Clauses Act 1845 includes minerals, whether got by underground or by open workings; and therefore a bed of clay, on which the railway had been made, was as a mine excepted out of the conveyance of the land to the railway company, and might, unless the company were willing to make compensation to the landowner, be dug and worked by him. *Midland Railway Co.* v. *Haunchwood Brick & Tile Co.*, 20 L. R., Ch. D., 552; 51 L. J., Ch., 778; 46 L. T. 301; 30 W. R. 640.

2. The company having, by the terms of its purchase, precluded the owners of lands from working minerals in a way injurious to their property, cannot, in the absence of statutory provision to that effect, be compelled to purchase those minerals of the owners. *North Eastern Railway Co.* v. *Crosland*, 32 L. J., Ch., 353; 7 L. T., N. S., 765; 4 De G. F. & J. 550; 11 W. R. 83; 1 N. R. 72. Affirming 2 John. & H. 565.

3. A railway company compulsorily purchasing land is not entitled to a conveyance of the mines and minerals, unless they have been expressly purchased, even where the land has been valued and taken at a large price as building land. *Re Metropolitan District Railway Co. and Cotton's Trustees*, 45 L. T. 103.

4. A corporation served the usual notice on a landowner before applying to Parliament for power to take his land. The Act, when obtained, gave the corporation power to take more of his land than was described in the notice:—Held, that the corporation was not prevented from taking more land than was described in the notice. *Re Huddersfield Corporation and Jacomb*, 10 L. R., Ch., 92; 44 L. J., Ch., 96; 31 L. T. 466; 23 W. R. 100. Affirming 17 L. R., Eq., 476; 30 L. T. 78.

Held, also, that under the circumstances the corporation was not obliged to take the mines and minerals under the land taken by them. *Ib.*

5. A railway company having the usual power to purchase lands under its special Act, has, by virtue of the 6th section of the Lands Clauses Act 1845, power also to purchase the minerals under those lands compulsorily at any time before the expiration of the time limited for the exercise of its compulsory powers, if it should deem it advisable. That power is not taken away by the 77th and following sections of the Railways Clauses Act 1845, which are for the benefit, not of the mine owner, but of the company, and only exempt the company from the obligation of buying the minerals at once, together with the surface lands. The words "expressly purchased," in the 77th section are not to be confined to "purchased by agreement." There is no distinction between the severance of ownership vertically, that is, of the surface lands from the mines beneath, and the severance of ownership laterally by the taking by successive purchases of surface lands from the same landowner. So a railway company having already acquired surface lands may subsequently purchase compulsorily the minerals under those lands. *Errington* v. *Metropolitan District Railway Co.*, 19 L. R., Ch. D., 559; 51 L. J., Ch., 305; 46 L. T. 443; 30 W. R. 663.

6. The compensation in respect of which the bond is given by a railway company under s. 85 of the Lands Clauses Act, on entering upon lands before agreement, does not include compensation for minerals under the Railways Clauses Act 1845, ss. 78 and 81. *Exp. Neath & Brecon Railway Co.*, 2 L. R., Ch. D., 201; 45 L. J., Ch., 196.

A railway company, being desirous of entering upon certain lands before agreement, made the usual deposit and gave the usual bond. Afterwards, by an agreement in writing between the company and landowner, it was referred to an arbitrator to determine the purchase money for the lands taken by the company, and also the "compensation for any damage sustained by the landowner by reason of the execution of their works, and which, under the special Act, the Lands Clauses Act, or the Railways Clauses Act, the landowner was entitled to claim against the company":—Held, that the bond did not include compensation awarded by the arbitrator in respect of minerals under the Railways Clauses Act, ss. 78 and 81, and that the company, having paid the sum awarded as the purchase money and compensation in respect of the lands taken by them, had performed the condition of the bond, and was entitled to the return of its deposit. *Ib.*

7. Though a mine owner may give notice under the statutes 8 & 9 Vict., c. 20, and c. 33, of his intention to work out the minerals under a railway, the railway proprietors are not bound to any fixed period after that notice within which they must give a counter notice. They can stop the working at any time thereafter that they fear danger to the line, by a notice of their willingness to pay compensation for the minerals they desire left standing. By the 70th section of the Railways Clauses (Scotland) Act 1845 (77th section of Railways Clauses Act, England) the minerals under a railway remain the property of the owner of the land, unless they are expressly purchased by the company. The 71st section (78th section) provides that if the owner or lessee of minerals not purchased by the company is desirous of working them, he shall give the company notice in writing of his intention to do so thirty days before the commencement of working. Power is given to the company "on the receipt of such notice" to inspect the mines, and if it is desirous that such mines or parts thereof should be left unworked, and if it is willing to make compensation therefor, it is empowered to give notice to that effect. If such notice is given, then it is declared that the owner or lessee shall not work the mines or minerals comprised in such notice. The 72nd section (79th section) provides that if before the expiration of such thirty days the railway company does not give notice of its desire to have such mines left unworked, it shall be lawful for the owner or lessee to work the said mines in such manner as such owner or lessee shall

think fit for the purpose of getting the minerals contained therein. A. and B. were the lessees of the minerals, viz., limestone, under a railway passing through Caldwell. They, on the 8th of July 1878, gave notice in terms of the above sections to the proprietors of the railway that they were desirous of working, and intended to work, the "mines and minerals including limestone" lying under the railway. The proprietors of the railway did not, before the expiration of thirty days, give notice to A. and B. of their desire to have such mines and minerals left unworked, but they did give such notice on the 20th of February 1879, offering compensation for the limestone unworked. A. and B. contended that the notice of the 20th of February 1879 was too late to prevent them working out the limestone; such notice to be valid required to be given before the expiration of thirty days from the date of their notice of the 8th of July 1878:—Held, that the notice of the railway proprietors was valid. *Dixon* v. *Caledonian & Glasgow & South Western Railway Co.*, 5 L. R., App. Cas. (Sc.), 820; 43 L. T. 513; 29 W. R. 249.

Held, also, that the incidental dictum—that after thirty days had expired the time had passed for the railway proprietors to give a counter-notice—in *Smith* v. *Great Western Railway Co.* (3 L. R., App. Cas., 182)—was no judicial authority here, as it was said where it was in no way material for the decision, and where the point could not have been fully argued, no counter-notice having been given in that case. *Ib.*

2. Working and Right to Support.

1. A conveyance of land to a railway company, for the purposes of the line, gives a right by implication to all reasonable subjacent and adjacent support connected with the subject matter of the conveyance, and therefore, although in the conveyance to the company minerals are reserved, the grantor is not entitled to work them even under his own land, in any manner calculated to endanger the railway. *Caledonian Railway Co.* v. *Sprot*, 2 Macq. H. L. Ca. 449; 2 Jur., N. S., 623; 4 W. R. 659.

In a grant to a railway company for the purposes of the railway, if the line which divides the land granted from the land retained traverses a quarry, it may be that no adjacent support is necessary, and that the grantor may dig or remove the whole contiguous soil. *Ib.*

But if the dividing line traverse a bog or bed of sand, it will be incumbent on the grantor to leave untouched such an intervening measure of lateral support as will prevent any part of the land granted from retreating. *Ib.*

S. had in 1834 sold to a railway company land over which the railway was to pass, but by the same deed stipulated in these terms—"Reserving always to me, and my heirs and successors, the whole mines and minerals, of whatsoever description, within the lands conveyed, and full power and liberty to us, or any person or persons authorized by us, to search for, work, win, and carry away the same, and to make aqueducts, levels," etc. Subsequently several Acts of Parliament passed giving further powers to the company, and providing for cases of dispute with the landed proprietors as to value of land for purchase, mines, etc. S. continued to work out his minerals until August 1848, when he received notice from the company that his works were of a nature to endanger the line. A suit having been brought to try the question, and judgment given:—Held, on appeal (reversing the judgment below), that S. by his conveyance had contracted an implied obligation to afford to the land so conveyed for the purpose specified, viz., a railway, all necessary adjacent and subjacent support by his other land, underlying or contiguous to it. *Ib.*

Held, also, that the subsequent Acts of Parliament were not retrospective, and could not alter the effect of the previous bargain and conveyance. *Ib.*

2. B. gratuitously granted a portion of his land to a railway company for the purpose of forming a line of railway thereon, with a reservation to him and his heirs of all the mines and minerals in the land so granted, and with full liberty to dig, search for, work, and carry away the same, so as the same be done without entering upon or breaking the surface of the land thereby granted:—Held, that the company was entitled to the subjacent and adjacent lateral support necessary for the maintenance of the railway. *Caledonian Railway Co.* v. *Belhaven* (*Lord*), 3 Macq. H. L. Ca. 56; 3 Jur., N. S., 573.

3. The grant to a railway company, under its Act and the railway Acts, of the right to make, maintain, and use a tunnel, does not give the company such a right to support to its tunnel that the grantor, acting duly in accordance with the Railways Clauses Act, ss. 77, 78, cannot work or have the benefit of mines under and adjacent to the tunnel. *London & North Western Railway Co.* v. *Ackroyd*, 8 Jur., N. S., 911; 31 L. J., Ch., 588; 10 W. R. 367; 6 L. T., N. S., 124.

4. A conveyance of a strip of land was made to a railway company in 1834 under an Act of Parliament, which provided, that all coal or other mineral should be deemed to be excepted out of any purchase of lands by the company, and might be worked by the owners and lessees thereof, so that no damage or obstruction be done or thereby occur to or in such railway or other works; and in case of damage, reparation was to be made by the owners or lessees. And whenever the working should approach within twenty yards of any masonry or building belonging to the company, notice should be given to it, and it might deliver a declaration requiring the minerals under such masonry or building to be reserved for its protection, and in that case it should purchase the same; and in case it should not deliver such declaration, that the owners or lessees might work the minerals under the masonry or buildings, in the usual and ordinary manner of working mines, doing no avoidable damage. The land was taken for the purpose of building thereon a bridge of great weight, which was subsequently built by the company. At the time of the purchase there was beneath the land, and a large tract of adjoining land belonging to the vendor, an old mine which had been accidentally flooded, and had long previously been full of water. In 1859 a lessee, deriving title under the vendor, threat-

ened to drain the mine and renew the workings:—Held, that in addition to the special protection afforded by the Act in respect of workings within twenty yards' distance of any masonry or building, the company was entitled, by way of necessary incident to the grant of the land, to such lateral support from the adjacent land of the vendor not situate within the twenty yards as might be necessary to uphold the bridge; and that the lessee was properly restrained from working minerals under the adjacent land not the property of the company, and not within the limits of twenty yards, so as to affect the stability of the bridge. *Elliot* v. *North Eastern Railway Co.*, 9 Jur., N. S., 555; 32 L. J., Ch., 402; 11 W. R. 604; 8 L. T., N. S., 337; 10 H. L. Ca. 333; 2 N. R. 87. Affirming 2 De G. F. & J. 423; 3 L. T., N. S., 520; 30 L. J., Ch., 160; 7 Jur., N. S., 6; 9 W. R. 172. Reversing 1 John. & H. 145; 6 Jur., N. S., 817; 29 L. J., Ch., 808; 8 W. R. 603.

Held, also, that the circumstance that the conveyance of the land was compulsory and not voluntary could not, in the absence of any special enactment, affect the construction of the conveyance, nor prevent it from passing to the company the necessary right of support as an ordinary legal incident. *Ib.*

Held, however, that although the water might afford additional support to the surface, the company had no right to speculate on the continuance of such an accidental circumstance, and that the lessee ought not to be restrained from withdrawing the water from the spaces left in the old workings, if such effect should be produced by working the colliery in a proper manner. *Ib.*

In cases similar to the foregoing, it being impracticable to define beforehand the limits within which the workings ought to be restrained, an injunction is properly expressed in general terms against working so as to produce the particular evil apprehended. *Ib.*

1. A railway company is entitled to the vertical and lateral supports of the adjoining lands of the proprietor from whom the lands or easements required for the railway were purchased: and such proprietor is not at liberty to work the minerals adjoining the railway in such a way as to cause damage to it. *North Eastern Railway Co.* v. *Crosland*, 11 W. R. 83; 4 De G. F. & J. 550; 32 L. J., Ch., 353; 7 L. T., N. S., 765; 11 W. R. 83; 1 N. R. 72. Affirming 2 John. & H. 565.

In 1835 the Leeds Railway Company, constituted under an Act, which excepted mines from land purchased, and allowed the landowners to work them, provided they did no damage to the railway, bought land for its railway. In 1836 the York Railway Company was constituted under an Act, containing provisions as to mines similar to those of the Railways Clauses Act. Afterwards the York company purchased the Leeds Railway under the powers of an Act of 1844, which provided, by s. 4, that on completion of the line the Leeds Act should be repealed, provided that the repeal should not affect anything done under the Act, but that all acts done under it should remain as valid as if there had been no repeal. The 9th section provided, that all the provisions of the York Railway Act, so far as they were not repealed, altered, or otherwise provided for by the Act of 1844, or by any statute, should apply to the Leeds Railway:—Held, that the provisions as to mines in the York Railway Act were not, by the Act of 1844, made applicable to the Leeds Railway, so as to give the owners of the mines under the lands purchased by the Leeds company a right to work them to the injury of the railway, if the York Railway Company did not choose to purchase them, but that the unqualified right to support, which was incident to the grant of the lands for the purposes of the railway, remained unaffected. *Ib.*

2. A railway company bought land without the minerals thereunder, and constructed a railway upon the land. The landowner made a lease for fifteen years of the minerals. The lessee gave to the company notice of his intention to work the minerals; the company gave him notice, and paid him under the Railways Clauses Act 1845, s. 78 compensation for leaving the minerals. The lessee fell into arrear with his rent, and surrendered the lease to the landowner. A purchaser from the landowner gave to the company notice of his intention to work the minerals, and claimed compensation without regard to the payment already made to the lessee, and began to work the minerals so as to endanger the railway:—Held, that the company had obtained a right to support from the minerals, and that the landowner would be restrained from working the minerals, but might obtain compensation under the Railways Clauses Act 1845, s. 6 or s. 81, and might have obtained compensation under the Lands Clauses Act 1845, s. 68. *Great Western Railway Co.* v. *Smith*, 2 L. R., Ch. D., 235; 45 L. J., Ch., 235; 24 W. R. 443; 34 L. T., N. S., 267. Affirmed 3 L. R., App. Cas., 165; 37 L. T., N. S., 645; 47 L. J., Ch., 97; 26 W. R. 100.

3. A railway company which had taken lands for the purposes of their railway, under the Lands Clauses Act (8 & 9 Vict., c. 18) and the Railways Clauses Act (8 & 9 Vict., c. 20), and had them conveyed to them by a conveyance in the usual form, is not entitled to prevent the owner of the mines, subjacent or adjacent, from working and winning away the same without making compensation. It makes no difference that the mines and minerals are necessary for the support of the railway. *Great Western Railway Co.* v. *Bennett*, 2 L. R., H. L., 27; 36 L. J., Q. B., 133; 15 W. R. 647; 16 L. T., N. S., 186.

If the company, after notice of intention to work, refuses to make compensation for the mines requisite for the support of their railway, it can only compel the mine-owner to work his mines in a proper manner according to the custom of the district. *Ib.*

4. The plaintiffs, who were owners of a coal mine, claimed damages against the owners of an adjoining mine for having broken their barriers and worked their coal. The wrongful acts were committed in 1863, while the adjoining mine was being worked by the Hartlepool Railway Company. The boundaries of the two mines were settled by mutual agreement in 1862, and after negotiations a release was executed in 1864, by which all previous wrongful acts were condoned and released on both sides. An Act of Parliament was passed in 1863, by which the Hartlepool Railway Company was to sell its mines within five years; and in 1865 the

railway company was amalgamated with the North Eastern Railway Company, and all its assets and liabilities were transferred to it:—Held, first, that although it was *ultra vires* of the railway company to work mines, the Act of 1863 implied that the company was to have power to work its mines until the mines were sold, and that upon the amalgamation with the North Eastern Railway Company the latter became liable for the wrongful acts of its predecessors. *Ecclesiastical Commissioners for England* v. *North Eastern Railway Co.*, 4 L. R., Ch. D., 845; 36 L. T., N. S., 174; 47 L. J., Ch., 20.

Held, secondly, that the wrongful acts committed in 1863 were not condoned by the release of 1864, the plaintiffs having had no ground for suspecting that while the release was in negotiation the previous settlement of boundaries had been broken. *Ib.*

Held, thirdly, that the Statute of Limitations only commenced to run from the time of the discovery of the wrongful acts, there being no laches attributable to the plaintiffs for not having discovered the damage prior to 1870, two years before the filing of the bill. *Ib.*

VI. JUDGMENT CREDITORS.

1. *Registration of Judgment*, 6035.
2. *Sale of Surplus Lands*, 6035.
3. *Receiver*, 6035.

1. Registration of Judgment.

1. A judgment may be registered as a mortgage against an incorporated railway company, under the 13 & 14 Vict., c. 29. *Exp. Bagnall, Re Bagnalstown & Wexford Railway Co.*, 13 L. T., N. S., 63.

Where, in an affidavit to register judgment as a mortgage, the company is described as a railway company, it is unnecessary further to set forth the trade of the company, inasmuch as the description "railway company" clearly imports that the trade of the company is that of a common carrier. *Ib.*

2. Sale of Surplus Lands.

2. A writ of execution having been sued out on a judgment debt against a railway company, upon petition, the Court ordered inquiries and a sale of the company's lands in default of payment of this debt. *Re Hull & Hornsea Railway Co.*, 2 L. R., Eq., 262; 35 L. J., Ch., 838; 14 W. R. 758; 14 L. T., N. S., 855.

3. Upon the petition of a judgment creditor of a railway company, under 27 & 28 Vict., c. 112, praying for the sale of surplus lands of the company, the Court will not make an immediate order for sale, but will direct inquiries. *Gardner* v. *London, Chatham, & Dover Railway Co., Exp. Grissell*, 15 W. R. 324; 15 L. T., N. S., 644; 2 L. R., Ch., 385.

The Court will not make an order for immediate sale, unless it sees with certainty that the property in question is saleable. *Ib.*

Nature of the inquiries directed. *Ib.*

Form of order on petition by a judgment creditor for sale of superfluous lands of a railway company under 27 & 28 Vict., c. 112, s. 4. *Ib.*

4. A judgment dated in April 1867 was obtained for 30,000*l.* against a railway company, and an elegit issued in June. In November the company filed a scheme of arrangement, and in January 1868 an order for sale was made under the writ. In July 1868 the scheme was dismissed, and a petition presented by the creditors for an inquiry whether the lands in respect of which the elegit had been issued were surplus lands, upon which ground the company opposed the claim:—Order made for the inquiry as in *Gardner* v. *London, Chatham, & Dover Railway Co., Exp. Grissell* (2 L. R., Ch., 385). *Re Bristol & North Somerset Railway Co.*, 20 L. T., N. S., 70.

5. Upon the petition of a judgment creditor of a railway company an order was made, without directing inquiries, for a sale of surplus land of the company, not required for the undertaking and not used for building purposes, which had been delivered in execution to the petitioner under an elegit, the registry of which was still in force. The company was ordered to execute a proper conveyance. *Re Calne Railway Co.*, 9 L. R., Eq., 658.

6. An existing railway company was authorized to make an extension line, by an Act which enacted that the capital might be raised by an issue of new shares, to be called extension shares, and that the works authorized by it should, for financial purposes, form a separate undertaking, and that the capital and new shares created under its powers should constitute a separate capital; and that the profits of the extension line applicable to dividend should be wholly applied in payment of dividend on the extension shares; and that the extension shareholders should not be entitled to dividends out of any other profits of the company, and that the company might raise by mortgage any additional sums not exceeding 28,000*l.*; but not till all the extension capital had been subscribed for and half of it paid up; and that the money raised by new shares or mortgage should be applied only for the purposes of the extension Act. A contractor, to whom the company was indebted in respect of the construction of the original line, obtained judgment against the company, extended certain surplus lands acquired under the powers of the extension Act, and then applied to the Court for a sale:—Held, that the creditor was entitled to an order for sale; for that, whatever might be the rights of the different classes of shareholders *inter se*, the lands were lands of the company, liable to be sold for payment of any judgment debts of the company. *Re Ogilvie*, 7 L. R., Ch., 174; 41 L. J., Ch., 336.

3. Receiver.

7. The company having raised large sums of money by bond and on mortgage, and being also considerably indebted on simple contract, agreed with one of their simple contract creditors to suffer judgment to be entered up against the company at a future day. After this agreement, various negotiations took place between the bond and other creditors of the company and the company, with the view of postponing on certain terms the enforcement of all claims,

as well by specialty as simple contract, against the company for seven years: these terms were accepted by the great majority of the creditors, but rejected by the simple contract creditor. After such rejection, but before the period for issuing execution had arrived, a bill was filed by one of the bond creditors against the company and its other specialty creditors for the enforcement of his alleged equitable lien, and for the appointment of a receiver. The receiver was appointed by the consent of all parties to the suit, and entered into the possession of all the chattels of the company. The simple contract creditor then sued out execution against the company:—Held, on the petition of the simple contract creditor, that, inasmuch as the order appointing a receiver was obtained by a surprise on the Court, and did not rest on an equity which could be maintained, and would not have been made if all the circumstances of the case had been brought before the Court, the simple contract creditor ought to be allowed to levy upon the goods and chattels of the company notwithstanding the order. *Russell* v. *East Anglian Railway Co.*, 3 Macn. & G. 125; 6 Rail. Ca. 501; 20 L. J., N. S., Ch., 257; 15 Jur. 935.

Held, also, that inasmuch as all the facts of the case were admitted, and were before the Court on the petition, the Court would dispense with the usual reference to the Master to examine the petitioners *pro interesse suo*. *Ib.*

The 33rd section of the special Act empowered bond creditors and mortgagees of the company to enforce the payment of the arrears of principal and interest by the appointment of a receiver:—Held, that having regard to ss. 53 & 54 of the Companies Clauses Consolidation Act, the receiver indicated in s. 33 of the special Act was the receiver to be appointed by two justices under ss. 53 & 54 of the former Act. *Ib.*

1. A judgment creditor of a railway company to whom the company's land (including the line) has been delivered under an elegit is entitled to a receiver of the tolls and earnings, and is not accountable as a mortgagee in possession if he has not obtained beneficial possession. *Kingston* v. *Cowbridge Railway Co.*, 41 L. J., Ch., 152.

2. When a petition was presented by a judgment creditor, for the appointment of a receiver of the tolls of a railway company, and it appeared that the line had not been used by the company, although a portion of it had been occupied and maintained by another company, without payment of compensation; that the contract on which the judgment was recovered had been entered into previously to the passing of the Act; and that the service of the petition had been effected at a house which had formerly been, but was no longer, the office of the company, and on a person who had acted as, but who was not properly constituted, the secretary:—Held, that service of the petition was insufficient. *Re Beddgelert Railway Co.*, 19 W. R. 427.

Held, also, that the railway had not been opened for public traffic within the meaning of the Act; and that as the judgment had been recovered upon a contract entered into before the passing of the Act it could have no effect. *Ib.*

3. Under the Railway Companies Act 1867, s. 4, whenever a judgment creditor of a railway company is unpaid, the appointment of a receiver, or if necessary a manager, is a matter of right, and amounts to a sort of equitable execution. The words "if necessary" point to the necessity of carrying on the business, and whenever a railway company is carrying on business in the ordinary way and conducting its own traffic, a manager is necessary within the meaning of the Act, and such manager should be appointed by the Court. In order to make "due provision" for the working expenses of the company required by the section, the Court will assume control over the management of the railway and the power of seeing that the money spent is applied to the proper management of the railway. *Exp. Cambrian Railway Co., Re Manchester & Milford Railway Co.*, 14 L. R., Ch. D., 645; 49 L. J., Ch., 365; 42 L. T. 714.

A receiver would be properly appointed when the railway is a leased line, or, under a working arrangement with another company, merely takes the rent and the tolls. *Ib.*

As a general rule the directors or some of them would be appointed managers where they were acting fairly, and the order will generally be made without prejudice to any application by the directors to propose themselves or some of their number as managers. *Ib.*

The only evidence requisite in support of a petition by a judgment creditor for a manager under that section is an affidavit verifying the fact that he is a judgment creditor, that his judgment debt is unpaid, and that the company is a going concern conducting its own business. *Ib.*

4. In 1879 a railway company, whose line was partially completed, gave its secretary (the petitioner) a certificate of indebtedness, and undertaking to pay a certain sum with interest, upon which he recovered judgment and issued execution. The amount was due for services, partly rendered prior to the passing of the Railway Companies Act 1867. It appeared that the company was in considerable financial difficulties, and that there were judgment creditors to a large amount prior to that of the petitioner. The portion of the line open (about eight miles) was being worked by another company, at a remuneration of 60 per cent. of the gross earnings. The Court, on the application of the petitioner, granted a receiver over the portion of the line open for traffic, with liberty to extend him over any part of the line which may thereafter be opened. *Exp. Quinton, Re Southern Railway Co.*, 5 L. R., Ir., 165.

5. By a railway Act (35 & 36 Vict., c. 106), reciting that it was expedient that certain baronies adjoining the proposed line, which would be greatly benefited by the construction of the railway, should guarantee the payment of a limited dividend on the share capital of the company; and that, for such purpose, the lands within the said baronies should, when necessary, be chargeable with any deficiency of such limited dividend, it was enacted that if and whenever, after the opening of the whole of the railway, and for twenty-two years after, the receipts over the working expenses should not amount to a dividend of 5 per cent. on the share capital, the amount required to make up such dividend should become payable half-yearly by the baronies ratably, as by the Act

prescribed; provided that so much of the receipts over the working expenses as should be necessary for such purpose should, during the said period, be applied to the payment of the said dividend, in priority to any sum due on any mortgage deed, bond, or debenture stock, or to any dividend on any other portion of the capital. By a subsequent Act (36 & 37 Vict., c. 132), the foregoing enactments of the earlier Act were repealed, the liability was extended to other baronies, and it was enacted that, if and whenever, during the period of thirty-five years after the opening of the railway, the net profits, deducting from the gross receipts the working expenses and the interest of any debt or demand created by any mortgage deed, bond, or debenture stock, should not amount to a dividend of 5 per cent. on the share capital, the amount required to make up such dividend should be payable ratably by the baronies. The mode of ascertaining the proportions in which the baronies were to pay was regulated by s. 11 of the later Act, in which the sums were designated as the "half-yearly sums necessary to pay the interest and dividends" on the share capital; and, under a subsequent section, regulating the mode of presenting for the levy of such sums, they were to be paid by the grand juries to the treasurer of the company, or in such other manner as the company should direct:—Held, on a petition for a receiver by a judgment creditor of the company, that the baronial guarantee fund was dedicated to the payment of the dividend on the share capital, and was not general assets of the company for payment of its debts; and, it being satisfactorily shown that the undertaking was worked at a loss, the application for a receiver was refused. *Bouch v. Sevenoaks, Maidstone, & Tunbridge Railway Co.* (4 L. R., Exch. D., 213) disapproved of and not followed. *Exp. Finlayson, Re Waterford, Dungarvon, & Lismore Railway Co.*, 5 L. R., Ir., 584.

See also IV. 9 *ante*.

VII. ABANDONMENT.

Jurisdiction of Court.] 1. A warrant of abandonment of a railway was issued by the Board of Trade on condition that the money deposited as security for the completion of the railway or the securities in which the same was invested should be applied as part of the assets of the company:—Held, that the Court had jurisdiction to make an order for winding up the company without the consent of a party who had advanced the deposit on a security from the railway company. *Re Waterford, Lismore, & Fermoy Railway Co.*, 4 Ir. R., Eq., 490; 19 W. R. 145.

It is not necessary, under the Railway Abandonment Act 1869, s. 5, to save the rights of a party so circumstanced. They may be asserted and allowed in the administration of the assets of the company under the winding-up order. *Ib.*

What Company.] 2. A company, by its special Act, was authorized to construct docks and a railway. The railway was only about half a mile long, and for the purpose of connecting the docks with the London and South Western Railway, and the special Act prescribed the fares for the railway. On a petition to wind up the company:—Held, that the company was not a railway company within the exception contained in the Companies Act 1862, s. 199. *Re Exmouth Docks Co.*, 22 W. R. 104; 29 L. T., N. S., 573; 43 L. J., Ch., 110; 17 L. R., Eq., 181.

Who may petition.] 3. A creditor of a railway company whose works have been abandoned by warrant of the Board of Trade, under 13 & 14 Vict., c. 83, cannot petition for an order to wind up the company. *Re North Kent Railway Extension Railway Co.*, 8 L. R., Eq., 356; 20 L. T., N. S., 867; 17 W. R. 789.

Proof of Claims.] 4. G., having entered into a provisional contract for the construction of a railway, expended considerable sums of money for the use of the company, in payment of the costs of promoting one of the special Acts of the company, of office rent, stationery, etc. No resolutions of the board of directors authorizing the payments appeared in the minute books, but the secretary and some of the directors were at the time aware that such expenses were being defrayed by G. The railway was afterwards abandoned, and an order made for the winding up of the company:—Held, that the sums paid by G. constituted a liability on the part of the company, and that a claim by his assignees for the amount should be allowed. *Exp. Stevens, Re Dublin and Rathcoole Railway Co.*, 1 L. R., Ir., 98.

A claim for sums paid by G. to the secretary of the company, but not proved to have been applied for the company's benefit, was disallowed. *Ib.*

In order to obtain from the Board of Trade an extension of the time limited by the Act for completing the line, G. executed a bond to the Crown in 40,000*l*. The company subsequently obtained a further Act, allowing an additional extension of time for the completion of the railway, but containing a clause saving the liability of G. on foot of the bond. By the warrant of abandonment it was provided that the sum due on foot of the bond should be applied as assets of the company, and the bond was assigned by the Lords Commissioners of the Treasury to the official liquidator. G.'s claim against the company had been previously assigned to T. & Co. for valuable consideration:—Held, that the official liquidator could not set off against the claim of T. & Co. the amount due on foot of the bond. *Ib.*

Receiver.] 5. A railway company which has never commenced to acquire the lands, or construct the railways authorized by its Act, is not an "undertaking" within the meaning of s. 4 of the Railway Companies Act 1867, of which a receiver can be appointed under that section. *Re Birmingham & Lichfield Junction Railway Co.*, 18 L. R., Ch. D., 155; 50 L. J., Ch., 594; 45 L. T. 164; 29 W. R. 908.

Semble, the powers of a receiver appointed under the above section do not extend to getting in unpaid calls. *Ib.*

Costs.] 6. A railway having been abandoned

under the Railways Abandonment Acts, the costs of a petition by the depositor for the transfer out to him of the bulk of the deposit moneys were ordered to be paid out of the general assets of the company. *Re Laugharne Railway Co.*, 12 L. R., Eq., 454; 19 W. R. 1108.

1. Claims in respect of expenses incurred by parliamentary agents in getting the bill of a projected railway company passed through Parliament, and for moneys advanced by the intending contractor for the same purpose, are debts which have been incurred on account of the promotion of the company; and the Court, under the discretion given by the Railways Abandonment Act 1869, s. 5, will not hold it reasonable, as between such creditors and the surety to the bond, that their debts should be paid out of the bond, which, by the warrant for the abandonment of the railway, has been directed to be applied as part of the assets of the company. *Re Brampton & Longtown Railway Co.*, 10 L. R., Eq., 613; 39 L. J., Ch., 681; 18 W. R. 994; 23 L. T., N. S., 356.

2. A Board of Trade warrant of abandonment of a railway, under the Abandonment of Railways Act 1850, and the Railway Companies Act 1867, was made with a condition that moneys deposited in the Court of Chancery as security should be applied as part of the assets of the company:—Held, that the solicitor and parliamentary agent, not being promoters of the company, were entitled to be paid thereout their costs and charges for obtaining the Act. *Re Kensington Station Act*, 20 L. R., Eq., 197; 23 W. R. 463; 32 L. T., N. S., 183.

3. A solicitor was employed in the promotion of a railway and in obtaining the Act for its incorporation. He was then appointed solicitor of the company, and was employed in obtaining two other Acts by which the scheme was amended and fresh powers granted. The undertaking proved abortive, and the railway was never constructed. A warrant of the Board of Trade was obtained under the Railways Abandonment Act 1869 for the abandonment of the railway, which contained the usual clause that the bond which had been given for the completion of the railway should be assets of the company:—Held, that the costs of the solicitor incurred in getting up the company, and, after its incorporation, in obtaining the subsequent Acts, were costs incurred on account of the promotion of the company within s. 5 of the Railways Abandonment Act 1869, and ought not to be paid out of the bond. *Re Barry Railway Co.*, 4 L. R., Ch. D., 315; 46 L. J., Ch., 206; 25 W. R. 201; 37 L. T., N. S., 125.

VIII. ARRANGEMENT ON INSOLVENCY.

1. *Confirmation by Court*, 6038.
2. *Who bound by*, 6039.
3. *Execution, Leave to issue*, 6039.

1. Confirmation by Court.

4. A scheme which would convert mortgages of a railway company into irredeemable debenture stock is within the scope of the Railway Companies Act 1867; and the Court has jurisdiction to confirm such a scheme, if assented to by the majority of the mortgagees required by the Act, and the Court is satisfied that it would be beneficial to the company. *Re Irish North-Western Railway Co.*, 3 Ir. R., Eq., 190. Affirming 2 Ir. R., Eq., 425.

5. When a scheme under the Railway Companies Act 1867 provided for the borrowing of large sums of money, and that the entire authorized loan capital should be applied, first, in completing and stocking the line, and then to all lawful purposes of the company, and did not contain any special provisions for the payment of or arrangement with creditors, the Court refused to confirm it as a scheme of arrangement with creditors. *Re Letterkenny Railway Co.*, 4 Ir. R., Eq., 538.

6. A scheme of arrangement under the Railway Companies Act 1867 provided that, upon the allotment of certain debenture stock to the creditors, all their debts and claims should be deemed to be satisfied and their securities given up, to which almost all the outside creditors gave their assent; and, as none of them opposed the petition to confirm the scheme, the Court made an order confirming it, upon the company giving their personal security to make no allotment of the debenture stock to any of the outside creditors who had not given their assent. *Re West Cork Railway Co.*, 7 Ir. R., Eq., 96.

7. Confirmation by the Court of a scheme under the Railway Companies Act 1867, enabling a railway company to create and issue debenture stock to an amount in excess of its powers under its Acts of Parliament, and providing for payment of creditors in such stock, the preliminaries prescribed by the Act having been complied with, and nine-tenths in value of the creditors appearing and assenting to the scheme. *Re Teign Valley Railway Co.*, 17 L. T., N. S., 201.

8. When, upon a petition for the confirmation of a scheme of arrangement between a railway company and its creditors, some of the outside creditors appeared and opposed the scheme, the Court, on its appearing that their opposition was reasonable, and based on a due regard to their own interests, dismissed the petition. *Re Somerset & Dorset Railway Co.*, 21 L. T., N. S., 656; 18 W. R. 332.

9. The Court cannot sanction a scheme under the Railway Companies Act 1867, giving to the holders of debenture stock the right to vote like shareholders. *Re Stafford & Uttoxeter Railway Co.*, 41 L. J., Ch., 777; 20 W. R. 921.

10. When a scheme of arrangement between a railway company and its creditors had been confirmed, inrolment of the confirmation order was restrained on the application of outside creditors who had, within thirty days from the date of the order, set down a motion for leave to file a petition for a rehearing. *Re Devon & Somerset Railway Co.*, 6 L. R., Eq., 615.

11. A petition was presented for the confirmation of a scheme of arrangement between a railway company and its creditors, which had been assented to by all the preference and ordinary shareholders present at an extraordinary general meeting. The special Act of the company enacted that all preference shares should confer the like right of voting at meetings as ordinary shares:—Held, that the special Act did not qualify the enactments of the Railway Companies Act 1867, and that the

assent of the preference shareholders must be given in writing. *Re Cambrian Railway Co.*, 19 W. R. 871; 24 L. T., N. S., 417.

2. Who bound by.

Debenture Holders.] 1. After a scheme of arrangement by a railway company with its creditors has been assented to, in writing, by three-fourths in value of the debenture holders, although dissenting debenture holders are entitled to appear and oppose the scheme, the scheme is binding upon the minority, unless it can be shown that the vote of the majority was obtained by fraud. *Re East & West Junction Railway Co.*, 8 L. R., Eq., 87; 38 L. J., Ch., 522; 21 L. T., N. S., 86.

2. A debenture holder, although he has obtained judgment and issued execution against a railway company before the filing of a scheme of arrangement under the Railway Companies Act 1867, still remains a debenture holder for the purposes, and is therefore bound by the scheme when assented to by three-fourths in value of the holders of the company's debentures, and after enrolment of the scheme will be restrained from taking any further steps to enforce his judgment. *Potteries, Shrewsbury, & North Wales Railway Co.* v. *Minor*, 40 L. J., Ch., 685; 6 L. R., Ch., 621; 19 W. R. 883; 25 L. T., N. S., 522.

3. When at a duly convened meeting of the debenture holders of a company in a ruined condition, a scheme for the reconstruction of the company was assented to by an overwhelming majority, the Court held the will of the majority to be binding on the minority. *Re Tunis Railways Co.*, 22 W. R. 639; 30 L. T., N. S., 512. Affirmed 31 L. T., N. S., 264.

4. An outside creditor is not bound by a scheme of arrangement filed by a railway company under the Railway Companies Act 1867, and cannot derive any indirect benefit from it; his rights are entirely unaffected by it. *Stevens* v. *Mid Hants Railway Co.; London Financial Association* v. *Stevens*, 42 L. J., Ch., 694; 8 L. R., Ch., 1064; 21 W. R. 858; 29 L. T. 318.

Unpaid vendors of land sold to the company, and debenture holders of the company, do not, by accepting debenture stock under the provisions of a scheme, lose any priority which they previously had over an elegit creditor, who is not bound by the scheme. *Ib.*

Creditors.] 5. A scheme of arrangement is not binding upon outside creditors who have not assented thereto. *Re Bristol & North Somerset Railway Co.*, 37 L. J., Ch., 851; 6 L. R., Eq., 448; 16 W. R. 1112.

Whenever confirmation of such a scheme prejudicially affecting the interests of outside creditors is sought, the Court, before confirming it, will require the written assent thereto of all the outside creditors. *Ib.*

6. A scheme of arrangement under the Railway Companies Act 1867 is not, by s. 18, made binding upon unpaid landowners or general creditors of the company, but only on persons who have assented thereto, or are members of classes which, under the previous sections of the Act, have become bound by the assent of the requisite majorities. *Re Cambrian Railway Co.*, 3 L. R., Ch., 278; 37 L. J., Ch., 409; 16 W. R. 346; 18 L. T., N. S., 522.

The Court has, however, jurisdiction, under ss. 7, 9, to restrain proceedings by creditors or unpaid landowners during the maturing of the scheme. *Ib.*

The Court will not restrain proceedings by a creditor or unpaid landowner, unless the scheme makes reasonable provision for the payment of the claims of creditors and landowners. *Ib.*

A railway company constituted by the amalgamation of various other railway companies had filed a scheme for the future management and carrying on of the company. Leave was given by the Court to amend the original scheme so filed. S. C. 18 L. T., N. S., 530.

7. Notwithstanding s. 17 of the 30 & 31 Vict., c. 127, a scheme filed under that Act, but not confirmed within three months, will, until the application for confirmation has been heard, be considered as still pending so far as regards the protection by interim order against creditors afforded by s. 7. *Robertson* v *Wrexham, Mold, & Connah's Quay Railway Co.*, 17 W. R. 137.

But that protection will not be afforded against a suit for specific performance before decree by an unpaid landowner, except upon the terms of the company submitting to a decree in the suit. *Ib.*

8. Parties who have recovered a judgment against a railway company, and converted it into a statutory mortgage under 13 & 14 Vict., c. 29, are not bound by a scheme of arrangement under the Railway Companies Act 1867, to which they have not assented. *Stephens* v. *Cork & Kinsale Junction Railway Co.*, 6 Ir. R., Eq., 604.

3. Execution, Leave to issue.

9. The 7th and 9th sections of the Railway Companies Act 1867 apply only to the time between the filing of a scheme of arrangement and its enrolment, and after enrolment the Court has no jurisdiction without a bill being filed to restrain an action against the company, nor does a judgment creditor require the leave of the Court to issue execution. *Re Potteries, Shrewsbury, & North Wales Railway Co.*, 39 L. J., Ch., 273; 22 L. T., N. S., 53; 5 L. R., Ch., 67; 18 W. R. 155. Reversing 18 W. R. 87; 21 L. T., N. S., 545.

Sections 7 and 9 are co-extensive, and after the enrolment of the scheme there is no right to come to the Court under s. 9 for leave to make process available against the property of the company. *Ib.*

The creditor in this case was a mortgagee of a railway company, who had obtained a judgment previously to the filing of a scheme to which three-fourths of the mortgagees have since assented. *Ib.*

10. After publication in the Gazette of notice of the filing of a scheme of arrangement by a railway company, creditors of the company will not be allowed, without first obtaining leave of the Court, to issue execution upon a scire facias against shareholders of the company; the amount of capital remaining to be paid, in respect of which the scire facias has

been obtained, being property of the company. *Re Devon & Somerset Railway Co.*, 6 L. R., Eq., 610; 37 L. J., Ch., 914; 18 L. T., N. S., 631; 17 W. R. 133.

1. When a railway company has filed a scheme under the Railway Companies Act 1867 (30 & 31 Vict., c. 127), which has been sanctioned by one branch of the Court, a motion for leave to issue execution must be made in that branch of the Court by which the scheme was sanctioned. *Christ Church (Dean and Chapter)* v. *East & West Junction Railway Co.*, 17 W. R. 819.

2. The Cambrian Railway Company's Act 1868 restrains the commencement or continuance of actions and suits against the company by creditors except with leave of the Court. The Court will not in general give leave unless it is shown that the company has money applicable to the payment and refuses to pay. *Re Parry*, 18 W. R. 416; 22 L. T., N. S., 116.

3. Upon an application under the Companies Clauses Act, s. 36, for leave to issue execution against shareholders of a company which had been ordered to pay a sum of money and failed in doing so, the Court will give the shareholders an opportunity of questioning the validity of the order; but is not bound to do so by directing a scire facias to issue. *Healey* v. *Chichester & Midhurst Railway Co.*, 9 L. R., Eq., 148; 39 L. J., Ch., 387; 21 L. T. 811; 18 W. R. 270.

IX. RAILWAY COMMISSIONERS, ARBITRATION BY.

4. Under an Act of Parliament, any owner of mines, etc., lying within a certain distance of a canal, was authorized to apply to the commissioners of the navigation, to have a railway made over the lands of other proprietors, intervening between them and the canal, for the purpose of communicating with it; and if it should appear to the major part of the commissioners, that such road was fitting or necessary, it was to be lawful for the proprietor of the mine, etc., to make it, subject to certain restrictions expressed in the Act; and it was provided, that if any person should think himself aggrieved by anything done in pursuance of the Act, he might within six calendar months appeal to the Quarter Sessions. Under this Act, the commissioners, by their award, authorized the defendant to make a railway over the lands of the plaintiff; the plaintiff having filed his bill to restrain the execution of the work, on the ground that the railway was not fitting and necessary, an injunction was granted. *Dudley* v. *Horton*, 4 L. J., Ch., 104.

Jurisdiction of Equity.] 5. A railway company, in accordance with the provisions of an Act of Parliament, altered the gauge of its line, "on the terms of its being paid an equitable portion of the expense thereof, such expense and proportions to be borne by the several companies whose interest would be advanced by such alteration"; and it was enacted that the plaintiffs should pay to the defendants such proportion of the expense as should be agreed upon between the parties; or, in case of their differing, as might be determined by the award of the railway commissioners. The several companies not being able to agree, the question was referred to the commissioners, and an inquiry was by them instituted, at which no person on behalf of the plaintiffs attended, and at which it appeared from the evidence that no notice was formally given them to attend, but at which the expenses of the alteration were divided and apportioned among the several companies. Notice of the award by the commissioners was sent to the plaintiffs, and their portion of the expenses demanded, but, not being paid, an action was commenced. The plaintiffs impugned the fairness of the award, inasmuch as the sum demanded was the proportion of the expense for seventy-one miles, instead of for four only. On a bill by the plaintiffs to set aside the award, and to restrain the action:—Held, that the authority of the commissioners to make the award having been conferred upon them by Act of Parliament, the Court had no jurisdiction by way of appeal to set it aside; and as the plaintiffs had subsequently had recourse to, and had memorialised the commissioners, the bill must be dismissed with costs. *Newry & Enniskillen Railway Co.* v. *Ulster Railway Co.*, 2 Jur., N. S. 60; 4 W. R. 211. Affirmed 2 Jur., N. S., 936; 4 W. R. 781.

6. Two railway companies were empowered by a special Act to enter into a working agreement, but no provision was made respecting arbitration. The agreement made under this Act contained a clause providing that any difference between the companies should be determined by arbitration, in accordance with the provisions of the Railway Arbitration Act 1859. Differences having arisen, one of the companies called upon the railway commissioners to decide the differences under the 8th section of the Regulation of Railways Act 1873. The other company accordingly issued a writ for an injunction against the first company, which was amended by making the railway commissioners parties, and asking for a prohibition:—Held, that the railway commissioners had no jurisdiction to undertake the arbitration, and a prohibition was issued accordingly. *Stokes Bay Railway & Pier Co.* v. *London & South Western Railway Co.* (2 Nev. & Mac. 143) and *Portpatrick Railway Co.* v. *Caledonian Railway Co.* (3 Nev. & Mac. 189) disapproved. *Great Western Railway Co.* v. *Waterford & Limerick Railway Co.*, 17 L. R., Ch. D., 493; 50 L. J., Ch., 513; 44 L. T. 723; 29 W. R. 826.

The clause in the 8th section of the Regulation of Railways Act 1873 which enables one party to apply for the arbitration of the railway commissioners, "where any difference between railway companies is, under the provisions of any general or special Act, required or authorized to be referred to arbitration," does not apply to all cases in which the agreement under which the difference has arisen has been made under the provisions of a general or special Act, but only to cases in which the specific difference has been required or authorized by a general or special Act to be referred to arbitration. *Ib.*

RATE.

— *Parish Rates.* See LOCAL GOVERNMENT, I. v.
— *Railway Rates and Tolls.* See RAILWAY, IV. 9.
— *Preference in Bankruptcy.* See BANKRUPTCY, XXV. v.

RATIFICATION.

— *Of Acts of Agents.* See PRINCIPAL AND AGENT, III. iii.
— *Of Infant's Contract.* See INFANT, III. i. 5.
— *Of Settlement.* See SETTLEMENT.

See also CONFIRMATION — FRAUD, I. iv.— LACHES—WAIVER AND ACQUIESCENCE.

REAL ASSETS.

See EXECUTOR AND ADMINISTRATOR, XI. xiii.

REBELLION.

See PRACTICE (REBELLION, COMMISSION OF).

RECEIPT.

— *As Evidence.* See PRACTICE (EVIDENCE).
— *Effect of Co-Executors or Co-Trustees joining in Receipts.* See EXECUTOR AND ADMINISTRATOR, X. xii. 2—TRUSTS.
— *Receipt of Purchase Money by Solicitor.* See VENDOR AND PURCHASER.
— *Power to give Receipts under Trusts and Powers of Sale.* See EXECUTOR AND ADMINISTRATOR, XXII. iv. — MORTGAGE, XVI.—POWER, XXII.
— *By Executors Generally.* See EXECUTOR AND ADMINISTRATOR, X. viii. 8.
— *Payment to Married Woman on her Sole Receipt.* See HUSBAND AND WIFE.
— *Indorsed Receipt.* See DEEDS, III. 7.

1. A right is not barred, by merely signing a receipt as a witness, upon payment by the executor to the adverse party, not amounting to a release or fraud. *Holmes* v. *Custance*, 12 Ves. 279.

2. When a receipt has been given under seal it discharges at law all cause of action, and can only be set aside by the equitable jurisdiction of a court of law; but a mere receipt in writing has no such effect; it amounts simply to an acknowledgment of money paid; it cannot be pleaded in answer to an action, and it may be impeached or explained by parol evidence. *Lee* v. *Lancashire & Yorkshire Railway Co.*, 25 L. T., N. S., 77; 19 W. R. 729; 6 L. R., Ch., 527.

3. A document containing all the requisites to make it a valid contract, and purporting to be a receipt, though by reason of its being insufficiently stamped inadmissible as such, may be received as evidence of the contract. *Evans* v. *Prothero*, 1 De G. Macn. & G. 572; 21 L. J., N. S., Ch., 772. But see S. C. 2 Macn. & G. 319; 20 L. J., N. S., Ch., 448; 15 Jur. 113.

4. A. agreed that a legacy given to his wife should be set off against a sum of the same amount, which he owed to the testator on his promissory note, and he and his wife signed a receipt for the legacy, but it did not appear that the executors had delivered up the note to him. A. afterwards died, leaving his wife surviving:—Held, that she was entitled to be paid the legacy, no release having been given for it by her husband. *Harrison* v. *Andrews*, 13 Sim. 595; 13 L. J., N. S., Ch., 243.

5. Defendant bound in Chancery, to answer as to receipt of rent. *Dive* v. *Lintoft*, Cary 71.

6. N. A. made a will with certain trusts, relating to his real and personal estate, and appointed trustees to carry them into execution; one of the trusts was to pay 2,500*l.* as provision for younger children, and 5,000*l.* for R. A. B., an executor and trustee under the will. An Act of Parliament was obtained to carry some of the trusts into execution, and under it lands devised by N. A. were sold. W. L. was trustee under the Act:—Held, that R. A. B.'s receipt was no discharge of W. L.'s liability, as by the terms of the Act he was absolutely bound to pay the debts and discharge the children's portions, and it was not set up in the answer nor proved that R. A. B. had specifically received this money as trustee for his daughter. *Lawrence* v. *Blake*, 8 Cl. & F. 504.

7. The receipt granted by the collector of quit rent is evidence of the apportionment of rent. *Bowles* v. *Waller*, Hayes 439.

8. An agreement to become partners in a colliery which was to be demised upon royalties, and the royalties to be divided in certain proportions, is an interest in land within the Statute of Frauds, 21 Car. 2, c. 3, and must be in writing, signed by the parties. *Caddick* v. *Skidmore*, 3 Jur., N. S., 1185.

Receipts signed by the party sought to be charged, which partly disclosed the nature of the agreement:—Held, not sufficient to take the case out of the statute. *Ib.*

RECEIVER.

See PRACTICE (RECEIVER) and Cross References there.

RECITALS.

— *Estates by Implication from.* See WILL.
— *Notice by.* See NOTICE, VI.

See also DEEDS, III. 3.—PRACTICE (EVIDENCE)—VENDOR AND PURCHASER.

RECOGNISANCE.

— *By Tenant under Court.* See IRELAND.
— *By Receiver.* See PRACTICE (RECEIVER).
See also SURETYSHIP.

I. IN GENERAL, 6042.
II. SCIRE FACIAS, 6042.

I. IN GENERAL.

1. Recognisance by a guardian, in the matter of a minor, is not a debt to the Crown. Where a debt to the Crown is not of a public nature, Crown process should not issue. *Exp. Ushor*, 1 Ball & B. 199.

2. Recognisance of defendants, and two sureties for 2,000*l.*, discharged on payment of that sum, although, in the meantime, a larger sum appeared to be due. *Baker* v. *Jefferies*, 2 Cox 226.

3. Habeas corpus to Warden of Fleet to have defendant in court, to be charged with debt, on recognisance. *Ward* v. *Crouch*, Cary 71.

4. Where a plaintiff was ordered to give security by recognisance "in the sum of 827*l.*, being the sum stated in the defendant's answer to be due for rent up to and including the 1st of May last;" and a recognisance reciting the order, and purporting to be in pursuance of it, was entered into, but by mistake it was conditioned for such sum as should be decreed for mesne rates. The Court (for the purpose of enabling the defendant to proceed against the sureties) ordered, that the plaintiffs should within one month pay the said sum of 827*l.*, as and for the mesne rates of the lands in the pleadings mentioned. *O'Leary* v. *Purcell*, 3 Ir. Eq. R. 329; Fl. & K. 126.

5. Plaintiff, being in execution on statute, released on recognisance, no cause being shown. *Rosse* v. *Lassels*, Cary 50.

6. A. is principal in a recognisance of 5,000*l.*, and B. and C. sureties. A. afterwards jointures his wife before marriage in some lands, without notice either to the wife or her friends of this recognisance, and devises his real and personal estate to B., one of his sureties, and dies first. The personal estate of A., the principal, shall be applied towards this recognisance; then his land devised, the devisee being a volunteer; next the paraphernalia of the wife of A., the principal; and lastly, the two sureties shall contribute to make up the deficiency. *Tynt* v. *Tynt*, 2 P. W. 542; Mos. 192.

7. A recognisance not inrolled shall be looked upon as a bond, and paid as a debt by specialty. *Bothomly* v. *Fairfax*, 1 P. W. 334; 2 Vern. 750.

So a recognisance, not regularly taken, may be sued as an obligation. *Ib.*

8. Under the concluding part of the 13th section of the stat. 13 & 14 Vict., c. 51, recognisances entered into by a surety for a tenant of lands, which were the subject of a suit at the equity side of the Court of Exchequer, may, upon agreement between the Lord Chancellor and Lord Chancellor Baron, be delivered over to such persons as may be appointed by the Master of the Rolls; *sed quære*, whether recognisances so transferred become records of, and capable of being sued upon in, the Court of Chancery, unless perhaps by the Crown, under its special privilege to select its Court. *Reg.* v. *Jones*, 1 Ir. Ch. R. 524.

9. Upon the appointment of A. to the office of county treasurer, in 1831, he, together with four other persons, B., C., D., and E., entered into security by recognisance, whereby A. acknowledged himself indebted to the King in 7,000*l.* sterling; by the same instrument B. and C. acknowledged themselves to be jointly and severally indebted in 5,000*l.* sterling; and D. and E. in like manner in 2,000*l.* sterling. In the condition (which was that A. should duly account, pursuant to the 4 Geo. 4, c. 33) the instrument was described as "the foregoing recognisance." In 1837 A. resigned the office of treasurer, being a defaulter to the amount of 18,000*l.* and upwards, of which sum about 4,000*l.* was due to the Crown, and the residue to the county:—Held, that this was a recognisance securing a single sum of 7,000*l.* and no more:—Held, also, that 7,000*l.* British was the amount thereby secured, although the amount which the 4 Geo. 4, c. 33, required such treasurer to secure was 7,000*l.* Irish; and that upon payment of that sum by A., the principal, he was entitled to have the recognisance of himself and sureties vacated; but on payment of that sum by the sureties they were not entitled as against the Crown to the benefit of the recognisance acknowledged by A., the principal. *Reg.* v. *O'Callaghan*, 1 Ir. Eq. R. 439; Jon. & C. 154.

Sureties of a county treasurer paying the amount of his recognisance, are not by reason of such payment entitled to priority over the Crown, there being a debt due by such treasurer to the Crown *ultra* the amount of the recognisance. *Ib.*

10. A surety by recognisance having paid the debt, though after a *levari* issued against him, but never returned, is entitled to the benefit of the recognisance, and to stand as a creditor by matter of record against his co-surety for contribution. *Salkeld* v. *Abbot*, Hayes 576.

11. Vacating a recognisance as to one surety. *Callaghan* v. *Callaghan*, 8 Ir. Eq. R. 572.

12. Sureties in a recognisance contribute in proportion to the amounts for which they were respectively originally bound. *Re Mac Douglas*, 10 Ir. R., Eq., 269.

II. SCIRE FACIAS.

13. An action at law will lie upon a recognisance; but if it is entered into in pursuance of an order of this Court, the Court will not allow it to be sued otherwise than by a *scire facias* in this court. *Grant* v. *Stone*, 1 Vern. 313.

14. One was condemned in *scire facias* on a recognisance in chancery, the warden informing the Court that he was in the Fleet, *pro certis causis:* the Court cannot order him to be detained in execution thereof. *Paine* v. *Puttenham*, Dyer 306; pl. 62.

And moreover, the plaintiff never having prayed this sort of execution, is sufficient cause to invalidate the execution. *Ib.*

Chancery has not any authority to commit the body of a defendant condemned in

scire facias upon a recognisance, to prison, for execution, because his body is not liable, but his goods, etc., by *fi. fa.* or *elegit*. *Ib.*

1. It is not the practice, on the petty bag side of the Court of Chancery, that the *scire facias* on a recognisance should set out the condition thereof; although it would be more correct to do so; and the Court refused to alter the practice. *Regina* v. *Hurley*, 2 Dr. & War. 433; 4 Ir. Eq. R. 637. S. C. *nom. Regina* v. *Henley*, 1 Con. & L. 473.

An averment of facts, showing the jurisdiction of the officer before whom the recognisance is taken, is necessary in a *scire facias*, although the statement be omitted in the recognisance itself, but the position in the *scire facias* of the averment is unimportant; and its being intermixed with the statement of the body of the recognisance, out of which it has been omitted, was held not to be a ground for a plea of *nul tiel* record, and liberty to plead to the merits was refused. *Ib.*

A *scire facias* on a recognisance conditioned for a tenant's paying his rent, in the usual form, stated that the conusors, describing them as of the county of Cork, came before A. B., "who then and there was a Master Extraordinary, in and for said county, and duly authorised in that behalf, and then and there acknowledged themselves to be bound," etc., concluding, "as by the said recognisance of record may appear," and did not set out the condition of the recognisance. The defendants pleaded *nul tiel* record:—Held, that the omission of the condition of the recognisance in the *scire facias* was a variance, but that, as the practice appeared to be uniformly to omit the condition, the Court would sustain that practice, and not allow the objection to prevail. *Ib.*

Held, also, that the introduction into the *scire facias* of the allegation, that A. B. was a Master Extraordinary for the county of Cork, was no variance, not being a statement of the record, but an independent averment upon which issue might be taken. *Ib.*

2. Recognisance by E. N. of Mallard Lodge, *scire facias*, against E. N. of Mallew Lodge. On *nul tiel* record pleaded:—Held, sufficient. *Reg.* v. *Naghten*, 9 Ir. Eq. R. 593.

3. Two pleas to a *scire facias*, on a recognisance, the second of which commenced with the averment by leave of the Court, etc., pursuant to the statute in that case, etc., though informal:—Held, sufficient on demurrer. *Reg.* v. *Irwin*, 9 Ir. Eq. R. 546.

To a *scire facias*, on a recognisance, averring that it was taken in the county of C., before A. B., a Master Extraordinary for the county of C., it was pleaded that A. B. was not a Master Extraordinary for the county of C.:—Held, a good plea. *Ib.*

4. The Court will permit the amendment of a *scire facias*, by stating the recognisance upon which the *scire facias* issued, to be a joint, and not a several one, after the defendant has pleaded thereto. *Reg.* v. *Fennell*, 1 Dr. & Wal. 511.

5. A *scire facias* on a recognisance set forth that on, etc. (at Ballinasloe, in the county of Galway), M. F. and two others of, etc., in the county of Galway, came before J. K. (who then and there was), one of the Masters, etc. (as by the said recognisance of record and inrolled, etc., may appear). In the record of the recognisance the words within the brackets were omitted, but at the foot of the recognisance was this note, signed by the Master:—"Taken and acknowledged before me at Ballinasloe, in the county of Galway aforesaid." Upon *nul tiel* record pleaded:—Held, that there was a variance. The note at foot is not part of the recognisance. A case depending at the petty bag side of the Court may be heard and determined out of term. *Reg.* v. *Lynch*, 2 J. & L. 103.

A *scire facias* on a recognisance stated that on the 28th April 1838, J. L., of L., in the county of G., came before J. R., "who then and there was one of the Masters Extraordinary of the High Court of Chancery in Ireland, in and for the said county of G., and duly authorised in that behalf, and acknowledged himself to be indebted to us in the sum of 230*l.*:—Held, upon demurrer, that it was not sufficiently averred in the *scire facias* that the recognisance was taken within the jurisdiction of the Master Extraordinary. S. C. 1 J. & L. 462; 7 Ir. Eq. R. 263.

The jurisdiction of the person taking the recognisance must be stated, and it must appear on the *scire facias* that the recognisance was taken within that jurisdiction. *Ib.*

6. To a *scire facias* on a recognisance by a tenant under the Court, and his sureties, one of the defendants pleaded performance of the condition by the tenant, by payment of the rent, and also a discharge under the Bankrupt Act. Replication, that the tenant did not pay the said rent, contrary to the form and effect of the condition:—Held, bad, as not assigning a particular breach. *Reg.* v. *O'Donnell*, 6 Ir. Eq. R. 639; 1 J. & L. 271.

But the Crown was allowed to amend, on the terms of not proceeding personally against the bankrupt, nor against his after-acquired property. *Ib.*

7. The Statute of Limitations is not pleadable to a *scire facias* on a receiver's recognisance. *Reg.* v. *Bayly*, 1 Dr. & War. 213; 4 Ir. Eq. R. 142.

A recognisance to the Crown is not within the operation of the 8 Geo. 1, c. 4. *Ib.*

The period from which the twenty years specified in that statute are to be reckoned, is the issuing of the writ, and not the day upon which it bears teste. *Ib.*

8. It is no objection to a replication in *scire facias* on a recognisance that it purports to be pleaded by the Queen and not by her attorney-general. *Reg.* v. *Bowen*, 13 Ir. Eq. R. 241.

9. Where subsequently to the stat. 13 & 14 Vict., c. 51, a *scire facias* at the petty bag side of the Court of Chancery, upon a recognisance entered into by a surety for a tenant of lands which were the subject of a suit at the equity side of the Court of Exchequer, after reciting the recognisance, proceeded thus:—"As to the said recognisance which was on, etc., in, etc., duly inrolled in Her Majesty's said Court of Exchequer, and now remaining as a record in our said Court of Chancery, by virtue of the statute in that case made and provided, might appear:" to which *scire facias* the defendant pleaded that the Court of Chancery ought not to have or take further cognisance of the

action, because the recognisance was one, etc., duly inrolled in the Court of Exchequer, whereby that Court then and there acquired, and still retained and possessed, full jurisdiction and authority to award execution against him for the said sum of, etc., according to the tenor and effect of the recognisance, and which plea concluded with the following averment, viz.: "that there is not any such record of the said supposed recognisance now remaining in Her Majesty's said Court of Chancery, as in the said writ of *scire facias* is above alleged, and this the said defendant is ready to verify, wherefore he prays judgment whether this Court can or will take further cognisance of the action aforesaid." Upon a motion at the petty bag side to take this plea off the file as irregular, as not having been verified by affidavit, and as being false and frivolous, this Court refused to make any rule. *Reg.* v. *Jones*, 1 Ir. Ch. R. 524.

1. A rejoinder falsely traversing matter of inducement contained in a replication to a plea to a *scire facias* upon a receiver's recognisance, taken off the file with costs. *Reg.* v. *Foot*, 1 Ir. Ch. R. 9.

2. Where the sheriff returned *nihil* on two several writs of *scire facias*, issued on a recognisance, entered into by parties who resided abroad, and directed to the sheriff of the county where the estate of the party lay; rules to plead may be entered as on a return of *scire feci*. *Regina* v. *Barry*, 2 Ir. Eq. R. 189.

3. Upon a *levari* on a recognisance at the suit of a subject, the sheriff is entitled to levy 1*s.* only in the 1*l.* for the first 100*l.*, and 6*d.* for every other 100*l.* *Creed* v. *Creed*, Fl. & K. 396; 4 Ir. Eq. R. 299.

Scire Facias Generally.] See PRACTICE (SCIRE FACIAS).

RE-CONVERSION.

See CONVERSION, III.

RE-CONVEYANCE.

— *On Payment off of Mortgage.* See MORTGAGE, XI. II.
— *On Cancellation of Instruments.* See RECTIFICATION AND CANCELLATION, I. 2.

RECORDS.

— *Inrolment and Custody of in Bankruptcy.* See BANKRUPTCY, XXXIII. ii. 2.
— *Production of on Trial of Issue at Law.* See PRACTICE (ISSUES AND TRIAL BY JURY).

See also PRACTICE (EVIDENCE)—PRACTICE (JUDGMENTS, DECREES, AND ORDERS)—JUDGMENT.

RECOVERIES.

See FINES AND RECOVERIES.

RECTIFICATION AND CANCELLATION.

— *Reforming Marriage Settlements in Conformity with Articles or on Ground of Mistake.* See SETTLEMENT, XIII.
— *On Ground of Mistake Generally.* See MISTAKE.
— *Aiding Defective Execution of Powers.* See POWER, XIII.
— *Spoliation and Suppression of Deeds and Other Documents.* See TITLE DEEDS, II. AND III.
— *Of Voluntary Deeds and Settlements.* See SETTLEMENT, XVII. 4.
— *Of Mortgages.* See MORTGAGE, I. VIII.

See also BILLS OF EXCHANGE—FRAUD—GAMING AND WAGERING—HEIRS EXPECTANTS AND REVERSIONERS.

I. CANCELLATION OF DOCUMENTS BY THE COURT, 6044.
II. CANCELLATION BY PARTIES TO INSTRUMENTS. PRESUMPTION FROM, 6047.
III. RECTIFICATION OF DOCUMENTS, 6047.

I. CANCELLATION OF DOCUMENTS BY THE COURT.

1. *In What Cases*, 6044.
2. *Re-conveyance on*, 6046.

1. In What Cases.

4. Court of equity has jurisdiction to order delivery up of void deeds. *Colchester (Mayor)* v. *Lowton*, 1 Ves. & B. 244.

5. The cases in which equity orders instruments, to which there is a legal objection, to be delivered up, are rare, and the relief on terms. *Bromley* v. *Holland*, 5 Ves. 618.

6. The relief, by delivering up a contract, requires a stronger case than to resist a specific performance. *Savage* v. *Brookopp*, 18 Ves. 335.

7. Specific performance is wholly discretionary in court, as is also the jurisdiction to set aside a contract. *Mortlock* v. *Buller*, 10 Ves. 294. Affirmed 2 Dow 510.

8. Deeds not delivered up upon petition in bankruptcy. *Exp. Poole*, 1 Ves. J. 160.

9. Equity has jurisdiction to order an instrument to be delivered up, though void at law, as if against policy. *St. John (Lord)* v. *St. John (Lady)*, 11 Ves. 535.

10. Obligations performed, brought in to be cancelled. *Anon.*, Cary 17.

11. Equitable jurisdiction to grant an injunction, on order for delivery up of instrument, though it might be subject of action. *Jervis* v. *White*, 7 Ves. 413. See, however, *Hodgson* v. *Dand*, 3 Bro. C. C. 475.

12. Jurisdiction of equity to order instruments to be delivered up, even upon legal

objections, as under the Annuity Act; arising incidentally in the exercise of equitable jurisdiction; as upon extreme inadequacy of consideration and contribution among several sureties. *Ware* v. *Horwood*, 14 Ves. 28. Affirming 10 Ves. 200.

1. Persons claiming lands by will, or other voluntary disposition, and having the law on their side, are entitled, as against the heir at law, to the assistance of a court of equity for a discovery of the deeds and writings relating to the devised estate, and to have them delivered up as following the lands. *Newcastle* (*Duke*) v. *Pelham* (*Lord*), 3 Bro. P. C. 460.

2. Where a man executes a several bond, intending it to be joint, he may by bill have it delivered up. *Underhill* v. *Horwood*, 10 Ves. 225. Affirmed 14 Ves. 28.

This will also be done in bankruptcy. *Id.* 227.

3. Court will not determine in whom is the right to appoint a steward, on petition for delivery of deeds, etc., to the appointee of one of the parties. *Mott* v. *Buxton*, 7 Ves. 201.

4. Plaintiff being entitled, upon coming of age, to the produce of a West Indian estate, bills of lading of consignments previously made were decreed to be delivered up to him. *Hovey* v. *Blakeman*, 4 Ves. 609.

5. Action on bills of exchange: bill to have them delivered up, as being given on a gaming transaction; a demurrer was overruled. *Newman* v. *Franco*, 2 Anstr. 519.

6. Plaintiff prayed a discovery, injunction, and delivery of a bill of exchange; upon the answers and evidence, the right being clear, the Court refused an opportunity of trying it at law, and decreed an immediate delivery. *Newman* v. *Milner*, 2 Ves. J. 493.

7. Bill to have deeds, assigning stock, delivered up, as obtained by undue influence by a servant over her master, and an account. The evidence of direct influence considerably subsequent to the deeds. The defendant a married woman; her only separate property, stock; and not liable, therefore, without a lien. An issue being declined, bill was dismissed. *Nantes* v. *Corrock*, 9 Ves. 182.

8. Demurrer lies to bill for delivery up of will to be cancelled which has been pronounced bad by Ecclesiastical Court, and is therefore unavailable. *Jones* v. *Frost*, 3 Madd. 1.

9. Equitable jurisdiction to order a deed, forming a cloud upon a title to be delivered up, though void at law: accordingly, a demurrer to a bill to have a deed fraudulent and void, as in contemplation of bankruptcy, delivered up, was overruled. *Hayward* v. *Dimsdale*, 17 Ves. 111.

10. Under a bill to have a contract delivered up, on the ground of the defective title of the defendant, the vendor, and for compensation for the injury to the plaintiff by the failure of the contract, the decree was made for delivery up of the contract, without prejudice to an action, instead of an inquiry before the Master. *Gwillim* v. *Stone*, 14 Ves. 128.

11. The Court will not, on the motion of a creditor coming in under a decree, directing a sale of lands devised for payment of debts, set aside a lease obtained *pendente lite*, from the devisee under the will, with a leasing power. *Moore* v. *M'Namara*, 2 Ball & B. 186.

12. A bill for the delivery up of a void lease may not be demurrable, although it may appear from the statements in the bill that the lease is void on the face of it. *Molesworth* v. *Howard*, 2 Colly. 145.

13. Agreement decreed to be delivered up on the ground not of fraud but surprise, neither party understanding the effect of it, viz., a lease with covenant for perpetual renewal at a fixed rent of premises, held under a church lease renewable upon fines continually increasing. *Willan* v. *Willan*, 16 Ves. 72.

14. Court cannot, on motion, order delivery up of annuity deed, void for omission in memorial, but can only set aside judgment and warrant of attorney. *Appleby* v. *Smith*, 3 Anstr. 865. S. P. *Jeffrey* v. *Athol* (*Duke*), *id.* n.

15. Decree, on setting aside an annuity for want of a memorial registered, for an account of the consideration with interest and costs, and of all the annual payments, the balance on either side to be paid, the securities delivered up, and a re-conveyance. *Holbrook* v. *Sharpy*, 19 Ves. 131.

16. A. & Co. being indebted to D. & Co. in the sum of 4,000*l.*, deposited with them a bill of exchange to that amount, indorsed by L. for the accommodation of A. & Co. Afterwards A. & Co. having agreed to indemnify L., and having prevailed upon several persons to accept bills for their accommodation, deposited them with D. & Co. "as a collateral security for the payment" of the former bill. Further advances were made on the security of the bills. On the bankruptcy of A. & Co., D. & Co. sued the acceptors of one of the bills, who gave a cognovit, which, with the bill, was handed to L., who gave full value for it:—Held, that the deposited bills were to be the primary security for the payment of the 4,000*l.*, but L., being answerable for the residue which might remain unsatisfied by the bills, could not be compelled to give up the bill and cognovit of which he had possession. *Jones* v. *Lane*, 3 Y. & Coll. 281; 8 L. J., N. S., Exch. Eq., 41; 3 Jur. 265.

Where A. had possession of a bill of exchange accepted by B., which for reasons *dehors* the instrument he could not enforce against B. in an action:—Held, nevertheless, that B. had no equity to have the bill delivered up to be cancelled unless he could show that A. had wrongful possession of it. *Ib.*

17. Bill filed for delivery up of bills of exchange; action at law for recovery of them; verdict for defendant (the plaintiff in equity); plaintiff is still entitled to proceed for delivery up of them. *Lisle* v. *Liddle*, 3 Anstr. 649.

18. A promissory note, suspicious in itself under the circumstances, and the admitted object of it, being an improper one, even if the note were actually genuine, decreed, at the instance of the person alleged to have given it, to be deposited with the registrar of the Court in the first instance, with a declaration that the plaintiff was entitled to be relieved against it, without preventing the defendant from bringing an action on it within a reasonable time, and if delay in so doing, then to be delivered up. *Winchester* (*Bishop*) v. *Fournier*, 2 Ves. 445.

19. A. and his wife B., who had no separate estate, signed a promissory note for the payment of money due by A. to X. A. died insolvent, and X. shortly after his death got B. to sign a fresh promissory note without mentioning to her

that she was not liable on the original note; and it being doubtful whether she believed herself liable, on bill filed to have the note delivered up to be cancelled:—Decreed accordingly, and held, that the case was too plain to be sent for trial at law. *Coward* v. *Hughes*, 1 Kay & J. 443.

1. It is not the course of the Court to set aside a deed at the instance of a defendant as such, though he is entitled to the benefit of his answer, and no decree can be made against it on the testimony of a single witness; but in such a case the defendant should file a cross-bill. *Holderness* v. *Rankin*, 6 Jur., N. S., 904.

2. Principles on which courts of equity proceed, in ordering the delivery up of instruments on which actions may be brought. *Cooper* v. *Joel*, 27 Beav. 313; 1 De G. F. & J. 240.

A written guarantee was given for moneys payable by instalments; though invalid, there was no invalidity on the face of it. In an action for the first instalment the plaintiff was non-prossed:—Held, that, although there was a legal defence, the instrument ought to be cancelled, on the ground that future actions were contemplated, and that the future defence might fail from the loss of evidence. *Ib.*

3. Where a bill is filed to set aside an indenture of settlement of real and personal estate, the Court will not exert its authority to set aside the indenture partially, or as to the real estate only. *Turnley* v. *Hooper*, 2 Jur., N. S., 1081.

4. Except in cases of fraud, the Court will not, at the suit of a purchaser, order an agreement to be delivered up to be cancelled. *Onions* v. *Cohen*, 5 N. R. 400.

A court of equity will not, in the absence of fraud, entertain a bill for the cancellation of an agreement in writing relating to land, although incapable of being performed except in a case in which the existence of the agreement, if suffered to remain in the hands of the defendant, would operate as a cloud on the title. S. C. 2 Hem. & M. 354; 11 Jur., N. S., 198; 34 L. J., Ch., 338; 12 L. T., N. S., 15.

5. A deed *primâ facie* valid at law will be acted on in equity until it has been set aside, the Court never giving a defendant active relief without a cross-bill. *Jacobs* v. *Richards*, 18 Beav. 300; 18 Jur. 527; 23 L. J., Ch., 557.

A deed, though overreached by the finding of an inquisition in lunacy, is not therefore necessarily *primâ facie* void. *Ib.*

6. The Court refused to decree a bond for which no money passed at the time of its execution, to be cancelled on the evidence of the petitioner alone against the affidavit in answer of the respondent, that the bond was the free and voluntary act of the petitioner and given for past services and advances of money. *Wyse* v. *Lambert*, 16 Ir. Ch. R. 378.

7. Circumstances under which a deed executed under a mistake will be set aside considered. *Spicer* v. *Dawson*, *Spicer* v. *Spicer*, *Lamford* v. *Spicer*, 5 W. R. 431.

8. A bill alleged that an agreement was entered into by parol between the plaintiff and the defendant, and that a part of it only was reduced to writing; and that the defendant having obtained the benefit of the written part of the agreement, repudiated the other part; and the bill prayed that the written agreement might be delivered up to be cancelled:—Held, that the bill was not demurrable. *Jervis* v. *Berridge*, 21 W. R. 395; 28 L. T., N. S., 481.

The bill contained no offer by the plaintiff to repay to the defendant a sum of money which they would be bound, if they succeeded at the hearing, to repay him:—Held, that this was not a good ground for demurrer. *Ib.*

9. The plaintiff, in 1833, gave a *post obit* security on his expectancy in a certain fund, payable on the death of his father, to W., in consideration of certain gaming debts. He subsequently won a large sum of W., by bets on horseracing, and both parties having submitted to the arbitration of the Jockey Club, in 1837, the steward decided that one debt should be set off against the other, and the security given up. W. refused to give up the security, and in 1842 assigned it to C. for valuable consideration, who gave notice to the trustees of the fund. The plaintiff having filed his bill to have the security delivered up to be cancelled:—Held, first, that after the lapse of time the deed must be considered to have been for good consideration. Secondly, that the submission to the arbitration of the Jockey Club amounted to an agreement, which could not be impeached under the Acts against gaming, if any part of the account between the parties was legal. Thirdly, that although the trust fund was directed to be laid out in land, it must be treated as a mere chose in action, and C. took it subject to all the equities of W. *Hawker* v. *Wood*, 1 W. R. 316.

10. Upon the dissolution of partnership and the settlement of all accounts between the partners, A. B. (the continuing partner) took some of the debts as good debts. One turned out to be bad, the securities for it having been fraudulently abstracted by a clerk:—Held, that A. B. could not sustain a bill to rectify or set aside the settlement of accounts. *Laing* v. *Campbell*, 36 Beav. 3.

2. Re-conveyance on.

11. Where a deed is declared void in equity and cancelled, a re-conveyance is not necessary, *semble*. *Hoghton* v. *Hoghton*, 15 Beav. 278; 17 Jur. 19; 21 L. J., Ch., 482.

12. As to the necessity of a re-conveyance on setting aside a deed in equity. *Att.-Gen.* v. *Magdalen College (Oxford)*, 18 Beav. 223; 18 Jur. 363; 23 L. J., Ch., 844.

13. Deed set aside, upon the ground of ignorance and mistake as to its purport and effect, no fraud or undue influence in obtaining its execution being alleged, and the deed itself being inconsistent with the effect contended for by the grantee under it as against the plaintiff. The plaintiff intending to assist the defendant, his illegitimate son, in raising money upon mortgage, and to give security for him, had executed a deed which recited a contract for sale, and in consideration of 50*l.*, conveyed the equity of redemption in the property, which had been mortgaged, to the defendant. No consideration was ever paid; and the defendant, who insisted that the deed was a voluntary conveyance to himself from the plaintiff, had not questioned a subsequent sale of a portion of the property by the plaintiff. Deed set aside and re-conveyance ordered. *Cox* v. *Bruton*, 5 W. R. 544.

14. When a suit is instituted to set aside a

voluntary settlement of real and personal estate, and the right to the relief asked is not contested, the Court will order a re-conveyance of the property the subject of the settlement, and direct payment of the costs out of the property so settled. *Thompson* v. *Milligan*, 18 L. T., N. S., 809.

II. CANCELLATION BY PARTIES TO INSTRUMENTS. PRESUMPTION FROM.

1. Deed of gift, found cancelled among papers of grantor after death (in absence of evidence of its being satisfied), will be enforced against grantor's representative on presumption that it was cancelled improperly. *Sluyskon* v. *Hunter*, 1 Meriv. 40.

2. Marriage settlement of personal property, in general terms, all moneys, bonds, bills, debts, notes, etc:—Held, there is no inference of fraud from cancelling a note, the only instrument of that description, during the treaty, on a fair, moral consideration, the marriage not taking place on representation of particulars, or amount of such personal property. *De Manneville* v. *Crompton*, 1 Ves. & B. 354.

Spoliation of Title Deeds and other Documents.] See TITLE DEEDS, II. AND III.

III. RECTIFICATION OF DOCUMENTS.

3. Upon a bill to set aside a deed *in toto*, the Court will not reform it. *Hortopp* v. *Hortopp*, 21 Beav. 259.

4. Covenant that if A. should at any time become entitled to any property exceeding in value the sum of ——, he would assign the same to trustees upon certain trusts declared in a deed carrying out a family arrangement. A. became entitled in reversion, subject to his mother's interest during widowhood, to property which had been bequeathed to his sister by their father's will. Upon bill filed by A. to have the covenant struck out, and for a declaration that he was absolutely entitled, the Lord Chancellor (affirming decision of Stuart, V.-Ch.) refused to strike out the covenant or to make the declaration. *Fyfe* v. *Arbuthnot*, 5 W. R. 793; 3 Jur., N. S., 651.

5. A contractor made a tender for the execution of certain works, upon the understanding that he should not be bound by the decision of the surveyor as to any addition to or deduction from the amount of his tender, and entered into an agreement with the clerk of the peace acting on behalf of the magistrates for performance of the contract. This agreement provided that in case of any difference the decision of the surveyor was to be final. The bill sent in by the contractor exceeded the amount allowed by the surveyor in his certificate by a large sum. The contractor filed his bill praying payment of the sum due to him, and a declaration that he was not bound by the surveyor's certificate, or, if he was not entitled to such relief, that the agreement might be rectified so as to enable him to recover at law without being concluded by the certificate:—Demurrer to the bill overruled, the Court holding that a person executing an agreement on a particular understanding was entitled to have it rectified in equity, if as executed by him it precluded him from proceeding at law. *Simpson* v. *Metcalfe*, 3 W. R. 88.

6. Upon parol evidence explaining a term used in an agreement for a lease in regard to which there was a latent ambiguity, the lease was rectified in accordance with what was thus shown to be the intention. *Murray* v. *Parker*, 19 Beav. 305.

7. Defect in a legal conveyance not supplied in favour of a natural child. *Blake* v. *Blake*, Beat. 575.

8. A court of equity relieves against a defective execution of a power, only when the defect consists in the want of some circumstances in the manner of execution; and it will reform a deed where the intention of the parties is mistaken by the drawer, but will not correct an error in an instrument occasioned by the ignorance of the parties in matter of law. *Cockerell* v. *Cholmeley*, 1 Russ. & M. 418.

REDEMPTION.

— *Of Annuity.* See ANNUITY, VI.
— *Of Land Tax.* See REVENUE, II. II.
— *Of Mortgage.* See MORTGAGE, XII.

REDUCTION INTO POSSESSION.

— *Of Choses in Action of Wife.* See HUSBAND AND WIFE, VII. II.

RE-ENTRY.

See EJECTMENT—LANDLORD AND TENANT, IX.

REFEREE.

See PRACTICE (OFFICIAL AND SPECIAL REFEREE).

REFERENCE.

— *In Practice.* See PRACTICE (REFERENCE).
See also ARBITRATION.

REFRESHERS.

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REFRESHMENT HOUSES.

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REGISTER OF SHAREHOLDERS.

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— *In Bankruptcy.* See BANKRUPTCY, II. v.
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— *Under Bedford Level Act.* See BEDFORD LEVEL.
— *Of Bills of Sale.* See BILLS OF SALE, I. AND II.
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— *Of Composition.* See BANKRUPTCY, XLII. iv.—XLIII. viii.
— *Of Contracts Pending Promotion of Joint Stock Companies.* See COMPANY, III. iii.
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— *Of Judgments, Decrees, and Executions.* See JUDGMENT, VII.
— *Of Judgments against Railway Company.* See RAILWAY, VI. i.
— *Of Lis Pendens.* See LIS PENDENS.
— *Of Patents.* See PATENT, II.
— *Of Ships.* See SHIPPING, III.
— *Of Stock and Shares.* See COMPANY, XIII. AND XIV.
— *Of Title.* See LAND REGISTRY.
— *Of Trade Marks.* See TRADE MARK.
— *Tacking Under Irish Registry Acts.* See MORTGAGE, VIII. vi.
— *Inrolment of Particular Deeds.* See ANNUITY, II.—CHARITY, V. iv.—FEE TAIL, V. vi. 2—FINES AND RECOVERIES—HUSBAND AND WIFE, VI. iii. 2.

I. GENERAL PRINCIPLES, 6048.
II. WHAT INSTRUMENTS MUST BE REGISTERED, 6048.
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IX. OTHER CASES, 6057.

I. GENERAL PRINCIPLES.

1. Every case upon the Registry Acts, both in England and Ireland, which has been brought before a court of equity, has been determined on this ground, that these Acts do not affect the great fundamental principles of equity; but that every purchaser claiming under a registry deed is left open to any equity which a prior purchaser or incumbrancer may have. *Chandos* v. *Brownlow*, 2 Ridgw. P. C. 428.

2. The want of registration of a conveyance invalidates the deed as to subsequent purchasers only, not as to assignees of the party conveying the property. *Exp. Coles, Re Rucker*, 1 Dea. & Ch. 100; 1 L. J., N. S., Bky., 18.

3. The object of Registry Acts is only to protect subsequent purchasers. They have no effect therefore to vitiate the conveyance for want of registration, as between party taking conveyance, and him who conveyed, or his assignees under commission of bankruptcy. *Jones* v. *Gibbon*, 9 Ves. 407.

4. Deeds neglected to be inrolled, subpœna to show cause why not. *Siddenham* v. *Harrison*, Cary 97.

5. If two deeds be executed, bearing different dates, that which is first registered, even with notice of the other deed, has priority both in law and equity, although it be posterior in date and execution. On points, in which the two deeds are inconsistent, the deed last registered is personally binding on the parties who execute; and the lands and property comprised in the deed first registered, are also bound, after satisfying the trusts of the first, by the contracts and trusts of the deed last registered. *M'Neill* v. *Cahill*, 2 Bligh. 228.

6. By the Bedford Level Act (15 Car. 2, c. 17) it was enacted, that all conveyances by indenture of any part of 95,000 acres allotted to the Earl of Bedford and his co-adventurers, entered with the registrar of the level, should have equal force to convey the freehold and inheritance as a bargain and sale, inrolled under the stat. Hen. 8; and it was also provided, "that no lease, grant, or conveyance of any part of the said land, except leases for seven years or under in possession, should be of force but from the time it should be entered with the registrar":—Held, in a suit for specific performance, that the condition of registration was required only for the purpose of entitling the party to the corporate privileges conferred by the Act, and that the absence of registration did not vitiate the title to the land. *Willis* v. *Brown*, 10 Sim. 127; 8 L. J., N. S., Ch., 321.

7. Where premises had been sold under a decree:—Held, that the lien of an incumbrancer was not transferred to the purchase money, so as to be out of the Registry Act, and he was, therefore, postponed to subsequent incumbrancers. *Hennand* v. *More*, 1 Eden 327.

II. WHAT INSTRUMENTS MUST BE REGISTERED.

8. By Irish stat. 6 Ann., all deeds executed after the 25th March 1708, and not registered, are declared void. A lease of lands was neglected to be registered, which the lessor taking advantage of, granted a new lease to another person, who brought an ejectment and recovered:—Held, that the original lessee was

relievable in equity; for the statute being made to prevent frauds, shall never be used as a means to cover it. *Forbes* v. *Deniston*, 4 Bro. P. C. 189.

1. The 1 & 2 Will. 4, c. 56, s. 27, does not require certificate of the appointment of assignees to be registered, in order to protect them against subsequent purchasers of bankrupt's freehold property without notice, unless the property is in a register county. *Anon.*, 1 Dea. & Ch. 349.

2. An assignment of a legacy charged upon land is an assignment of money only, and does not affect the land within the meaning of the Registry Acts. The registration of such an assignment therefore does not postpone a prior unregistered assignment of the same legacy. *Malcolm* v. *Charlesworth*, 1 Keen 63. S. C. *nom. Wilkinson* v. *Charlesworth*, 5 L. J., N. S., Ch., 172.

3. A recovery by A., tenant for life, and B., remainder in tail; afterwards, by deeds of lease and release, the uses declared to A. for life, remainder to B. for life, remainder to his first and other sons in tail male; the deeds not registered for several years afterwards; in the interval, judgments recovered against B.:—Held, that the non-registry of the deeds was immaterial, and that the persons who so recovered judgments against B., did not thereby acquire a lien or charge on the settled estate against the issue deriving under the settlement. *Burke* v. *O'Malley*, Beat. 96.

4. A mortgagee is prevented by the operation of the Registry Act, 6 Ann., c. 2, from tacking, so as to gain a priority against mesne registered incumbrances. And for the purpose of adjusting the priorities between deeds under this Act, judgments also obtain priorities, although not generally within the contemplation of the Act. *Latouche* v. *Dunsany* (*Lord*), 1 Sch. & Lef. 137.

5. The conveyance under the former English Insolvent Acts to the provisional assignee is within the General Registry Act, nor is the registration of it dispensed with by the registration of the conveyance by the provisional to the creditors' assignees. *Battersby* v. *Roohfort*, 8 Ir. Eq. R. 284; 2 J. & L. 431.

6. A memorandum, charging leasehold premises in Middlesex with money lent, is not required to be registered, under the 7 Ann., c. 20. *Wright* v. *Stansfeld*, 5 Jur., N. S., 5; 28 L. J., Ch., 183; 27 Beav. 8. See *Moore* v. *Culverhouse*, 6 Jur., N. S., 115; 29 L. J., Ch., 419; 27 Beav. 639.

7. A judgment registered under 1 & 2 Vict., c. 110, s. 19, will not be a charge on lands in Middlesex, when it has not been registered in the county, under 7 Ann., c. 20, s. 18. *Exp. Alward*, 1 Fonbl. N. R. 217.

8. A judgment is not such a charge upon land (except it be within the 1 & 2 Vict., c. 110) as to give it precedence over an unregistered mortgage. *Cathrow* v. *Eade*, 1 Sm. & G. 423.

9. The 1 & 2 Vict., c. 110, does not repeat the 7 Ann, c. 20, but the two are to be read together; and a judgment registered in the Common Pleas is no charge against lands in Middlesex until entered on the Middlesex register under the latter Act. *Benham* v. *Keane*, 3 De G. F. & J. 313; 31 L. J., Ch., 129; 8 Jur., N. S., 604; 10 W. R. 67; 5 L. T., N. S., 439. Affirming 1 John. & H. 685; 7 Jur., N. S., 1096; 9 W. R. 765; 5 L. T., N. S., 439.

10. Under the Irish Registration Act an equity in a grant which is registered, will prevail against the right even of a *bonâ fide* purchaser to whom the original grantor has subsequently sold part of the property comprised in the registered deed. *Mill* v. *Hill*, 3 H. L. C., 828.

If a man has a limited interest in a term and settles it to a certain use, and then gets a new and extended term substituted for it, he cannot, by so doing, avoid the previous settlement. *Ib.*

In 1830 a settlement of certain property held under renewable leases was made in favour of A. In 1831 A., being about to marry, made a settlement of this property for the uses of the marriage. The deed of 1830 was not registered. The settlement of 1831 was registered. In 1840 A., being in actual possession, sold to B., and B., who had no actual notice of the settlement of 1831, entered into possession, and made alterations in the premises. After the death of A., his son, who was entitled under the settlement of 1831, filed a bill against B. to set aside the sale, for an account, and for waste:—Held, that it was not necessary to register the deed of 1830, that the registered settlement of 1831 prevailed against the *bonâ fide* purchase of B., and that the Court below had properly declared him to stand possessed of the leases as a trustee for the parties beneficially interested under the settlement. But held also, that he was entitled to indemnity against the covenants in the leases which he was thus declared to hold as trustee; that an inquiry ought to be made as to the alleged improvements and as to alleged waste; and that he was entitled to be allowed the benefits of these improvements; and that, being a *bonâ fide* purchaser, without misconduct, he ought not to be charged with costs. *Ib.*

11. The East Riding Registration Act (6 Ann, c. 35) is imperative, and unless a will of lands in that Riding is registered within six months after the testator's death, or a memorial of the impediment which disables the devisee from doing so registered in the manner pointed out by s. 15, the will is void as against subsequent purchasers and mortgagees. *Chadwick* v. *Turner*, 34 Beav. 634; 11 Jur., N. S., 333; 34 L. J., Ch., 366; 13 W. R. 447; 12 L. T., N. S., 223. Affirmed 12 Jur., N. S., 239; 35 L. J., Ch., 349; 14 W. R. 491; 14 L. T., N. S., 86.

12. A registered conveyance of premises in Middlesex for valuable consideration, established against a prior devise not registered; the evidence of notice, which ought to amount to actual fraud, not being sufficient. *Jolland* v. *Stainbridge*, 3 Ves. 478.

13. A memorandum not under seal, accompanying a deposit by way of equitable mortgage of deeds relating to lands in Middlesex, requires registration under 7 Ann., c. 20. *Neve* v. *Pennell*, *Hunt* v. *Neve*, 33 L. J., Ch., 19; 11 W. R. 986; 9 L. T., N. S., 285; 2 Hem. & M. 170.

14. A. being entitled to the benefit of certain articles of agreement entered into by the owners of land situate in Ireland, to execute to him a mortgage thereof for 42,000*l.*, by a

deed executed in 1840, reciting the articles, assigned that sum and all the securities for its payment to trustees upon certain trusts. By a deed executed in England in 1842, also reciting the articles, A. for valuable consideration assigned the same sum of 42,000*l.*, with all the securities for its payment, to M. by way of mortgage. The deed of 1842 was registered previously to that of 1840. The memorial of the deed of 1842 described the lands on which the 42,000*l.* was charged in the same manner as they were described in that deed itself, but neither the deed nor memorial mentioned the names of the baronies or parishes in which the lands were situated:—Held, that the deed of 1842 was properly the subject of registry. *Gardiner* v. *Blesinton*, 1 Ir. Ch. Rep. 79.

1. A memorandum of further charge in favour of the first mortgagee of lands in Yorkshire requires registration as much as the original mortgage, and in the absence of registration will be postponed to a second registered mortgage without notice of such further charge, nor will the first mortgagee be entitled to tack his further charge if the second mortgagee has given him notice of his charge. *Oredland* v. *Potter*, 43 L. J., Ch., 484; 18 L. R., Eq., 350; 22 W. R. 611; 30 L. T., N. S., 356. Affirmed 31 L. T., N. S., 522; 23 W. R. 36; 10 L. R., Ch., 8; 44 L. J., Ch., 169.

An owner of lands in Yorkshire mortgaged them to secure repayment of an advance of 1,100*l.* The mortgagee registered a memorial of his mortgage, not stating the amount of it, and afterwards he made a further advance, for which he received a memorandum of further charge upon the lands, which he did not register. The mortgagor subsequently mortgaged the lands to another person, to whom he gave no notice of the further charge to the first mortgagee, merely saying that the first mortgage was for 1,100*l.* The second mortgagee registered his mortgage and gave notice of it to the first mortgagee. The first mortgagee having refused to be redeemed except upon payment of the amount due upon both his mortgage and his further charge, the second mortgagee filed a bill for redemption:—Held, that the memorandum of further charge was a "conveyance" within the meaning of the Yorkshire Registry Act, 2 & 3 Ann., c. 4, and required registration; that not having been registered it was therefore void as against the second mortgagee; that the first mortgagee having received notice of the second mortgage was not entitled to tack his further charge as against the second mortgagee; and that the second mortgagee was entitled to redeem upon payment of the amount due upon the first mortgage only. *Ib.*

Held, also, that the second mortgagee was not bound, when he found the memorial of the first mortgage on the register, to inquire how much was due to the first mortgagee, and that the first mortgagee, having refused to be redeemed except upon payment of both his mortgage and his further charge, was not entitled to his costs of the suit. *Ib.*

See also VII. *post.*

Under Bedford Level Act.] See BEDFORD LEVEL.

III. FORM OF.

2. A. being entitled to the benefit of certain articles of agreement entered into by the owners of land situate in Ireland, to execute to him a mortgage thereof for 42,000*l.*, by a deed executed in 1840, reciting the articles, assigned that sum and all the securities for its payment to trustees upon certain trusts. By a deed executed in England in 1842, also reciting the articles, A. for valuable consideration assigned the same sum of 42,000*l.*, with all the securities for its payment, to M. by way of mortgage. The deed of 1842 was registered previously to that of 1840. The memorial of the deed of 1842 described the lands on which the 42,000*l.* was charged in the same manner as they were described in that deed itself, but neither the deed nor memorial mentioned the names of the baronies or parishes in which the lands were situated:—Held, that the deed of 1842 was properly the subject of registry:—Held, also, reversing the decision below, that notwithstanding the omission from the memorial of the names of the baronies and parishes, the deed of 1842 was properly registered, and therefore had gained priority over the deed of 1840. *Gardiner* v. *Blesinton*, 1 Ir. Ch. Rep. 79. Reversing as to the latter point, *Id.* 64.

3. Clerical mistakes do not vitiate inrolment under the Registry Act. *Wyatt* v. *Barwell*, 19 Ves. 435.

4. A memorial of registry, containing the substance of a covenant in a lease, though not expressly setting forth a proviso in it, is a good registration, the proviso being implied in it. *M'Alpine* v. *Swift*, 1 Ball & B. 285.

5. The third article of the ordinances for regulating the form and manner of registering deeds and other instruments in St. Lucia, made pursuant to the order in council of the 15th January 1829, orders, that the registry should set forth "the date and nature of the title, or original judgment, etc., by which the mortgage, lien, or charge was established, together with the date and nature of all subsequent instruments by which such lien, mortgage, or charge has passed into the hands of the present creditor, and become a charge of the actual debtor." The registration of a mortgage and assignment of part of an estate charged and apportioned by a previous act of liquidation, is not such a compliance with the terms of the ordinance as to give the party claiming under it a right to come in, *pari passu*, with the parties whose title is registered under the original act of liquidation. *Inglis* v. *De Barnard*, 3 Moo. P. C. 425.

6. The executor of a mortgage, a memorial of whose security was registered under the Middlesex Registry Act, conceiving that the memorial was invalid, affected to execute the mortgage deed by signing and sealing it himself in the presence of two witnesses whose names were endorsed as witnesses attesting his execution of it. Neither of the witnesses had attested the execution of the deed by any of the other parties. After this ceremony the executor memorialised the deed in due form:—Held, that the whole course of proceeding (which was said to be in accordance with the practice before the registrar) was nugatory for the purpose of the Registry Act. *Essex* v.

Baugh, 1 Y. & Coll. C. C. 620; 11 L. J., N. S., Ch., 374; 6 Jur. 1030.

1. A deed contained recitals which described two persons as concurring in settling property to which they were "respectively entitled." It afterwards contained a grant to trustees of a certain part of this property, as if made by one of these persons, when in fact that part belonged to the other. The memorial of the deed described both as the granting parties; this description was not one of the things required by the statute:—Held, not to vitiate the effect of the memorial under the Registration Act. *Mill* v. *Hill*, 3 H. L. Ca. 828.

IV. REGISTRATION OF SEVERAL INVESTMENTS ON THE SAME DAY.

2. According to the memorandum of registration endorsed on two mortgaged securities of different dates brought to the Middlesex registry, they were both registered on the same day and at the same hour; but one was numbered 764, the other 768:—Held, that the security numbered 764 must be regarded as having been registered first. *Neve* v. *Pennell*, *Hunt* v. *Neve*, 33 L. J., Ch., 19; 11 W. R. 986; 9 L. T., N. S., 285; 2 Hem. & M. 170.

3. Mortgage by demise for a term of years; the mortgagor does not deliver to the mortgagee the purchase deed conveying the freehold to the mortgagor, but keeps it back, and subsequently deposits it with another person as a security for a loan. The conveyance to the mortgagor and the mortgagee were executed within a day of each other, and were both registered on the same day. The deposit was not made for a considerable time afterwards; but no notice by the subsequent incumbrancer of the mortgage being proved, and being denied by his answer, it was held that he was entitled to the benefit of the deposit, as against the mortgagee, and was not bound to deliver up to him the conveyance. *Wiseman* v. *Westland*, 1 Y. & J. 117.

V. NOTICE BY REGISTRATION.

4. Registration in Middlesex of an equitable mortgage, is not presumptive notice of itself to a subsequent legal mortgagee, so as to take from him his legal advantage. *Morecock* v. *Dickens*, Ambl. 678. S. P. *Beckford* v. *Bacchus*, 2 Eq. Abr. 615; Ambl. 680.

5. A. mortgaged to B., which was registered, then A. borrowed from C. on a judgment also registered. B. lent farther sum without express notice of C.'s registry, etc.:—Held, B. was entitled to foreclosure, unless both debts paid. *Wrightson* v. *Hudson*, 2 Eq. Abr. 498.

6. After an assignment of a mortgage, payments to the mortgagee with notice must be allowed by the assignee; the registry of the premises being in Middlesex, is not notice for this purpose. Tender after the bill filed of the balance, deducting the payments to the mortgagee with costs, deprived the assignee of subsequent costs. *Williams* v. *Sorrell*, 4 Ves. 389.

7. The registry of deeds, etc., under the Registry Act, 6 Ann., c. 2, is not notice, but the 4th clause of that Act gives to all deeds, registered as thereby directed, efficacy in law and in equity, according to the priority of the time of registry. *Bushell* v. *Bushell*, 1 Sch. & Lef. 90.

8. The registry of a deed gives priority, but does not affect a party with notice. *Pentland* v. *Stokes*, 2 Ball & B. 75.

9. Registry is not notice within the meaning of the word, as applied by courts of equity. *Underwood* v. *Courtown* (*Lord*), 2 Sch. & Lef. 64.

10. The registry of a deed is not of itself notice as against a subsequent purchaser or incumbrancer. *Wiseman* v. *Westland*, 1 Y. & J. 117.

11. The register of a mortgage will not by itself affect a subsequent incumbrance without notice. *Cator* v. *Cooley*, 1 Cox 182.

12. Where incumbrancer on estate in G. searched the registry from a certain date only, it will not be presumed that he had notice of any of the contents prior to that date. *Hodgson* v. *Dean*, 2 Sim. & S. 221; 3 L. J., Ch., 95.

13. P., having a term of years in a house, made a mortgage thereof to M. by way of under-lease, retaining in himself a reversion of two days. He subsequently made an equitable mortgage by way of written memorandum to P. He again made a third mortgage to S., and assigned to S. the original term, including the reversion of two days. S. had no notice of the equitable notice to P., but had notice of M.'s incumbrance. P. registered in Middlesex, but S. did not search the register, and was therefore not affected by notice:—Held, by Malins V.-Ch., that the equities being equal, S. had a legal estate by virtue of the assignment to him of the original term, and the reversion of two days, which entitled him to priority over P. On appeal, the Lords Justices expressed themselves not prepared to affirm this view, and therefore desired a further question of fact to be argued; but the case was compromised before any judgment was given. *Re Russell Road Purchase Moneys*, 40 L. J., Ch., 673; 12 L. R., Eq., 78; 19 W. R. 520, 706; 23 L. T., N. S., 839.

VI. NOTICE OF UNREGISTERED INSTRUMENTS.

14. Purchaser within the Registry Act, bound by notice of a deed not registered. Purchasers bound by notice of a judgment, though not docketed. *Davis* v. *Strathmore* (*Earl*), 16 Ves. 419.

15. A registered conveyance of premises in Middlesex for valuable consideration, established against a prior devise, not registered, the evidence of notice, which ought to amount to actual fraud, not being sufficient. *Jolland* v. *Stainbridge*, 3 Ves. 478.

16. Notwithstanding the West Riding Register Act directs that no judgment shall affect lands, but only from the time when the judgment shall be registered, a purchaser, with notice of an unregistered judgment, will be bound by it. *Gosling's case*, 3 Sim. 301.

17. A registered deed, with notice of an unregistered one, shall not prevail against it. *Blades* v. *Blades*, 1 Ep. Abr. 358.

18. The intent of the Register Act was to

secure subsequent purchasers against prior secret conveyances. If a subsequent purchaser had notice of a prior conveyance, then that was not a secret conveyance by which he could be prejudiced; the enacting clause gives a subsequent purchaser the legal estate, but it does not say he is not left open to any equity which a prior purchaser or incumbrancer may have. *Le Neve* v. *Le Neve*, 3 Atk. 651.

1. To affect a registered deed by notice of a prior unregistered deed (the policy of which has been much doubted), actual notice must be clearly proved, amounting to fraud. *Wyatt* v. *Barwell*, 19 Ves. 435.

2. A person having notice of a prior unregistered deed, cannot avail himself of the registry of a subsequent deed, to defeat the priority of the other, for it would be a fraud to take a conveyance to defeat a prior deed of which there was notice. *Eyre* v. *Dolphin*, 2 Ball & B. 302.

3. Notice of an unregistered mortgage held to affect subsequent mortgagees, who had registered. *Sheldon* v. *Cox*, 2 Eden 224.

4. The intention of the Registry Act is, that the registered instrument is not to be postponed unless the notice of a prior incumbrance is very distinct. *Nixon* v. *Hamilton*, 1 Ir. Eq. R. 46; 2 Dr. & Wal. 364.

Notice of a prior unregistered deed of annuity to the solicitor of a mortgagee, whose mortgage is registered, is notice to mortgagee so as to preclude him from relying upon the provisions of the Registry Acts as against th e prior unregistered annuitant. *Ib.*

W. B. having, as land and law agent of F. H., negotiated and been party to a deed of separation and maintenance between F. H. and his wife M. H. in the year 1821, and having by fraud prevented the registry of that deed of maintenance, was four years afterwards employed throughout the negotiation of a loan of money which was advanced on a registered mortgage of the estates comprised in the deed of maintenance as solicitor both of F. H. and X. Y., the person advancing the money. In a contest for priority between the unregistered deed of maintenance and the registered mortgage:—Held, that inasmuch as the knowledge acquired in the transaction of the deed of maintenance was clearly brought home to W. B., and its continuance so clearly proved as to make it fraudulent on his part to conceal it when acting in the mortgage transaction, such fraud on the part of W. B. the agent was visitable on X. Y. his principal:—Held, also, that X. Y. should be treated as a person who through his agent had actual notice in the deed of maintenance, and that consequently X. Y.'s registered deed should be postponed to M. H.'s unregistered deed. *Ib.*

5. In the year 1805 A., who was a solicitor, executed to M. a mortgage of certain property to which he was entitled in right of his wife. In the following year, 1806, A. executed a second mortgage of the same property to N., in the transacting of which loan N. employed A. as her solicitor and agent. The mortgage of 1806 was duly registered, but the earlier mortgage of 1805 was not:—Held, that N. was affected by notice of the mortgage of 1805, in consequence of her having employed A. as her solicitor, and, therefore, was not entitled to rely on the priority derived from the registry of the mortgage of the year 1806. *Majoribanks* v. *Hovenden*, 1 Dr. 11; 6 Ir. Eq. R. 238.

6. A conveyance of, or charge on, lands within the Bedford Level is valid as against persons affected with notice, though not registered as required by the Bedford Level Act. *Willis* v. *Brown*, 10 Sim. 127; 8 L. J., N. S., Ch., 321.

7. Bill by judgment creditor upon an estate in Middlesex to be let in upon it, preferably to the defendant, a mortgagee of the same estate, on a suggestion that he had notice of the judgment before the mortgage was executed. The judgment was entered up before the mortgage was executed, but was registered after the registry of the mortgage. There being only a defendant's confession of notice proved in direct contradiction to his answer, and contrary to a positive Act of Parliament made to prevent perjury, Lord Hardwicke decreed, that so far as bill seeks to postpone defendant's mortgage, it should be dismissed with costs. *Hine* v. *Dodd*, 2 Atk. 275.

The Register Act is notice to everybody, and the meaning of it was to prevent parol proofs of notice. *Ib.*

Clear notice is a proper ground of relief; but suspicion of notice, though a strong one, will not justify the Court in breaking in upon an Act of Parliament. *Ib.*

It is only in cases of fraud the Court have broken in upon the Act, though one incumbrance was registered before another. *Ib.*

8. A subsequent incumbrancer, who at the time of taking his security has no notice of the prior incumbrance, may, by properly memorialising his security, though after notice, obtain priority over the prior incumbrancer, if the memorial of the security of the latter be defective. *Essex* v. *Baugh*, 1 Y. & Coll. C. C. 620; 11 L. J., N. S., Ch., 374; 6 Jur. 1030.

9. A conveyance of lands in Middlesex, by settlement upon a marriage of the settlor, registered under the stat. Ann. 7, c. 20, is effectual against a prior unregistered conveyance, notwithstanding the party claiming under the settlement had notice of the unregistered conveyance after the marriage, but before the registry of his settlement. *Elsey* v. *Lutyens*, 8 Hare 159. See also *Wilson* v. *Bennett*, 20 L. J., N. S., Ch., 279; 15 Jur. 912.

10. Actual notice that lands are in the tenancy of a third person, is not such notice of that person's title thereto, as will avoid the effect of the Registry Act. *Popham* v. *Baldwin*, 2 Jones 320. See *Wallace* v. *Donegal*, 1 Dr. & Wal. 462.

11. A landowner, by deed in February 1872, charged his land with two life annuities. He subsequently made several mortgages of the property by deeds, some of which recited the annuity deed. The annuity deed had not been registered as required by 18 & 19 Vict., c. 15, s. 12:—Held, by the Master of the Rolls, that the annuity deed, not being registered, was void as against all the subsequent incumbrancers, whether they had notice of it or not. But held, by the Court of Appeal, that as the 18 & 19 Vict., c. 15, s. 12, was in similar terms to the clauses in the Registry Acts, which had been decided not to make an unregistered

conveyance void as against a subsequent purchaser who had notice of it, the legislature must be taken to have used the words in the later Act in the sense given to them by those decisions, and that the annuities therefore were valid as against all the subsequent incumbrancers who took with notice of them, and against the trustee in bankruptcy of the grantor. *Greaves* v. *Tofield*, 14 L. R., Ch. D., 563; 50 L. J., Ch., 118; 43 L. T., 100; 28 W. R. 840.

1. A party taking an equitable mortgage with notice of prior equitable mortgage, cannot, by assignment to another without notice, give him a better title. *Ford* v. *White*, 16 Beav. 120.

Property in Middlesex was mortgaged to A., and afterwards to B., and subsequently to C., with notice of B.'s incumbrance. C. registered before B. and afterwards assigned to D., who had no notice of B.'s mortgage:—Held, that the interests being equitable, D. had no priority over B. *Ib.*

2. An equitable mortgagee by deposit of title deeds, unaccompanied by any memorandum in writing, takes priority over a purchaser for value claiming under a subsequent registered deed without notice of such deposit. *Re Burke's Estate*, 9 L. R., Ir., 24.

3. Constructive notice of a prior unregistered incumbrance affecting lands in Middlesex is as effectual as actual notice. *Wormald* v. *Maitland*, 35 L. J., Ch., 69; 13 W. R. 832; 12 L. T., N. S., 535; 6 N. R. 218.

A registered marriage settlement of leaseholds in Middlesex was postponed to an equitable mortgage of the same property by deposit prior in date, but registered subsequently to the settlement, the trustees of the settlement being held to have had constructive notice of the equitable mortgage in consequence of not having inquired for the title deeds when the abstract was delivered to them. *Ib.*

The equitable mortgagee held entitled to tack to his security advances made subsequently to the date and registration of the settlement of which he had no notice at the time of such advances. *Ib.*

4. A solicitor induced a client to advance money for A., on mortgage of lands in Middlesex, and soon afterwards induced a second client to advance money on mortgage of the same lands without informing him of the existence of the first mortgage. The solicitor afterwards left the country, and the holder of the second mortgage registered it before the first mortgage was registered:—Held, that the holder of the second mortgage must be taken to have had, through the solicitor, notice of the first mortgage, and could not by the prior registration obtain priority. *Rolland* v. *Hart*, 6 L. R., Ch., 678; 40 L. J., Ch., 701; 25 L. T., N. S., 191; 19 W. R. 962.

5. A purchaser or mortgagee is not bound to make any inquiries with a view to the discovery of unregistered instruments, though he may be bound by actual knowledge of such instruments. The policy of the Registration Acts is to free a purchaser from the imputation of constructive notice. In the absence of actual notice, therefore, to the principal or his agent, and of fraud, a later registered deed will have priority over a prior unregistered charge, notwithstanding that the purchaser knew that the title deeds were not in the possession of the vendor, but were in the hands of certain other persons, and abstained from inquiry. *Lee* v. *Clutton*, 45 L. J., Ch. D., 43; 33 L. T., N. S., 717; 24 W. R. 106. Affirmed 35 L. T., N. S., 84; 24 W. R. 942; 46 L. J., Ch., 48.

A firm of solicitors took an equitable charge, by a memorandum and deposit of title deeds, from their client, A., upon premises in Middlesex, which they omitted in the register. A. subsequently sold the premises to the defendant, who duly registered the conveyance. The solicitors filed a bill claiming priority for their charge, alleging that the defendant, when he took his conveyance, knew that the deeds were in their hands, and made no inquiry:—Held, that the facts alleged amounted only to constructive notice, and that in order that an unregistered charge should have priority over a subsequent registered conveyance, it must be shown that the purchaser or his agent had actual notice of the prior change, or if it is sufficient to allege anything other than actual notice, the allegation must amount to a clear charge of fraud, and not of omission to inquire only. *Ib.*

6. The plaintiff had lent money to a solicitor on the security of the deposit of title deeds of land in Middlesex, with a letter charging the land, the legal estate in which was outstanding. The solicitor afterwards, by way of security for money due to a client, made a mortgage of the land to the client, which mortgage was registered:—Held, that the client must be presumed to have had notice of the plaintiff's charge, which therefore, though unregistered, retained priority. *Bradley* v. *Riches*, 9 L. R., Ch. D., 189; 47 L. J., Ch., 811; 38 L. T., N. S., 810; 26 W. R. 910.

7. The priority as against lands in Middlesex of a judgment registered in the Middlesex registry over a judgment, which, though earlier in date, is later in order of registration on the Middlesex registry, is not lost by reason of the judgment creditor having notice of such earlier judgment at the time when his judgment is entered up. *Benham* v. *Keane*, 3 De G. F. & J. 318.

Section 13 of the 1 & 2 Vict., c. 110, giving to a judgment creditor the same remedies in equity as if the debtor had power to charge the hereditaments, and had, by writing, agreed to charge the same with the judgment debt and interest, does not make the judgment creditor a purchaser, and a subsequent judgment creditor will not be affected by notice thereof, unless it is duly registered. S. C. 31 L. J., Ch., 129; 8 Jur., N. S., 604; 10 W. R. 67; 5 L. T., N. S., 439. Affirming 1 John. & H. 685; 7 Jur., N. S., 1096; 9 W. R. 765; 5 L. T., N. S., 439.

The 1 & 2 Vict., c. 110, does not repeal the 7 Ann., c. 20, but the two are to be read together; and a judgment registered in the Common Pleas is no charge against land in Middlesex, until entered on the Middlesex register under the latter Act. *Ib.*

Therefore, where a judgment creditor, having notice of a prior judgment registered in the Common Pleas, but not in Middlesex, registered his judgment in Middlesex before the earlier judgment was so registered:—Held, entitled to priority. *Ib.*

Secus, as to a mortgagee having such a notice. *Ib.*

A judgment is a charge binding lands in Middlesex only from the time of its registration in the local registry. *Ib.*

1. A decree in equity for the payment by the defendant to the plaintiff of a sum of money on or before a certain day:—Held, in reference to the provisions of the Act 1 & 2 Vict., c. 110, not to confer any priority as against a deed executed by the defendant, conveying his freehold estate in a register county to trustees for the benefit of his creditors, or as against a vesting order, made in the defendant's insolvency, the deed having been executed, and the vesting order having been made previously to the registration of the decree. *Lee* v. *Green*, 6 De G. M. & G. 155; 2 Jur., N. S., 170; 25 L. J., Ch., 269.

A decree for payment of money gives no right as against the land before registration. *Ib.*

Held, also, that the non-registration of the deed and of the vesting order until after the registration of the decree was immaterial, it being proved that the plaintiff had notice of the deed and of the vesting order when he registered the decree. *Ib.*

2. It is inconsistent with the policy of the Irish Registration Act to impose on a mortgagee or purchaser the duty of inquiry with a view to the discovery of previous unregistered interests, but quite consistent with it, if he knows of the existence of those interests, to estop him from contending that, as to him, they are void merely because they are unregistered, *semble*. *Agra Bank* v. *Barry*, 7 L. R., H. L., 135.

VII. PRIORITY BY REGISTRATION.

3. An unregistered deed retains its priority over a subsequent judgment, where there is no memorial of registry of any other deed comprising the lands, the subject of the unregistered deed. *Crymble* v. *Adair*, Beat. 122.

It is clear from the Registry Act (6 Ann., c. 31, s. 4) that the priority given to the registered deed depends not only on the time of the registry of the memorial, but is confined to such lands only as are comprised in the memorial. *Ib.*

If there be no memorial of a deed registered, the Registry Act does not apply, and the unregistered deed will have the same validity and effect as before passing the Act. *Id.* 123.

A deed, by the common law, has effect from the date of its execution; but the Registry Act provides that it shall have priority only from the date of its registration. *Ib.*

4. The order of registration of judgments in the county register determines the priorities of the judgments; registration in the Common Pleas operates only to complete the charge. A. registered a judgment in the county register; B. afterwards registered a judgment both in the county and in the Common Pleas; A. then registered in the Common Pleas:—Held, that A.'s judgment had priority. *Neve* v. *Flood*, 10 Jur., N. S., 607; 12 W. R. 897; 10 L. T., N. S., 520; 33 Beav. 666; 34 L. J., Ch., 89.

5. Where there is an unregistered deed, and a subsequent registered deed, with judgments intervening between them, the Registry Act gives priority to the latter deed over the former; and it carries on the judgments prior to it, so as to take precedence of the unregistered instrument also. *Sparrow* v. *Cooper*, 1 Jones 72.

Semble, if a person claiming under a registered deed does not insist on his priority over the unregistered deed, the latter will take precedence of the judgments. *Id.* 75.

6. The registry of deeds, etc., under the Registry Act, 6 Ann., c. 2, is not notice, but the 4th clause of that Act gives to all deeds registered, as thereby directed, efficacy in law and in equity, according to the priority of the time of registry. *Bushell* v. *Bushell*, 1 Sch. & Lef. 90.

7. If two deeds be executed, bearing different dates, that which is first registered, even with notice of the other deed, has priority both in law and equity, although it be posterior in date and execution. On points, in which the two deeds are inconsistent, the deed last registered is personally binding on the parties who execute; and the lands and property comprised in the deed first registered, are also bound, after satisfying the trusts of the first, by the contracts and trusts of the deed last registered. *M'Neill* v. *Cahill*, 2 Bligh 228.

8. Where premises had been sold under a decree:—Held, that the lien of an incumbrancer was not transferred to the purchase money, so as to be out of the Registry Act; and he was therefore postponed to subsequent incumbrancers. *Hennand* v. *Moore*, 1 Eden 327.

9. H. K. by an unregistered deed granted a rent charge to his daughter. By the daughter's marriage settlement, executed on the following day, to which H. K. was a party, and which recited the grant, the rent charge was conveyed by the daughter to trustees. The latter deed was registered. H. K. afterwards mortgaged the land out of which the rent charge issued, by a deed which was also registered:—Held, that the rent charge, though granted by an unregistered deed, had priority over the mortgage by reason of the registration of the settlement. *Hunter* v. *Kennedy*, 1 Ir. Ch. Rep. 148. Affirmed *Id.* 225.

10. Deed of appointment of lands in a register county, pursuant to a power in a former deed, which was not registered, postponed to a mortgage made subsequent to it, and registered before it. *Scrafton* v. *Quincey*, 2 Ves. 413.

11. B., being possessed of a term in lands for so many years as he should live, with remainder for the residue of the term to E., his daughter, upon the marriage of E. with W., the term was assigned by B. and E. to trustees in trust for B. during his life, and upon his death to permit the husband to receive the rents, etc., during his life, and then for the wife and children in the usual course of marriage settlement. This deed of assignment was not registered. W. being in possession under the trusts of the settlement, after the death of B., demised the lands to K., for three hundred and forty-five years, at a rent of 145*l.*, and the indenture of lease was duly registered, and the interest under this demise was afterwards transferred from K. to T. by a deed of

assignment, which was not proved to have been registered. Upon special verdict, stating these facts, it was held, that the lease made by W. to K. being registered, was under the effect of the Irish Registry Act, 6 Ann., c. 2, valid against and preferable to the unregistered marriage settlement, and that the interest of T., under the assignment from K., although unregistered, was also valid, and preferable to the settlement. *Warburton* v. *Loveland*, 6 Bli. N. S. 1.

1. Registry of articles of agreement to convey lands will give them priority over subsequent conveyances. *Thompson* v. *Simpson*, 1 Dr. & War. 459.

2. A subsequent incumbrancer, who at the time of taking his security has no notice of the prior incumbrance, may by properly memorialising his security, though after notice, obtain priority over the prior incumbrancer, if the memorial of the security of the latter be defective. *Essex* v. *Baugh*, 1 Y. & Coll. C. C. 620; 11 L. J., N. S., Ch., 374; 6 Jur. 1030.

3. A. being entitled to lands in Ireland was discharged in England as an insolvent debtor, under the 1 Geo. 4, c. 119. The assignment of all his estate and effects to the provisional assignee was filed in the Insolvent Court, but was not registered. The sub-assignment to the general assignees was registered. Afterwards A. by deed, duly registered, conveyed his Irish estates in mortgage to B., who had no notice of the insolvency. The title of the mortgagee is to be preferred to that of the assignees of the insolvent. *Battersby* v. *Rochfort*, 2 J. & L. 431; 8 Ir. Eq. R. 284.

4. A testatrix, having lands in the East Riding, died in 1854. Her will was discovered in 1861, which devised these lands, but before any registration of it, or of any impediment, had been made, the heir mortgaged the property:—Held, that the mortgagee had priority over the devisee. *Chadwick* v. *Turner*, 34 Beav. 634; 11 Jur., N. S., 333; 34 L. J., Ch., 356; 13 W. R. 447; 12 L. T., N. S., 223; 5 N. R. 395. Affirmed 12 Jur., N. S., 239; 35 L. J., Ch., 349; 14 W. R. 491; 14 L. T., N. S., 86.

To defeat the title of a registered purchaser from the heir-at-law, there must be clear and distinct notice amounting to fraud. *Ib.*

5. The policy of the Registration Acts is to free a purchaser from the imputation of constructive notice. In the absence of actual notice, therefore, to the principal or his agent, and of fraud, a later registered deed will have priority over a prior unregistered charge, notwithstanding that the purchaser knew that the title deeds were not in the possession of the vendor, but were in the hands of certain other persons, and abstained from inquiry. *Lee* v. *Clutton*, 45 L. J., Ch., 43; 33 L. T. 717; 24 W. R. 106. Affirmed 46 L. J., Ch., 48; 35 L. T. 84; 24 W. R. 942.

A firm of solicitors took an equitable charge, by a memorandum and deposit of title deeds, from their client, A., upon premises in Middlesex, which they omitted to register. A. subsequently sold the premises to the defendant, who duly registered the conveyance. The solicitors filed a bill claiming priority for their charge, alleging that the defendant, when he took his conveyance, knew that the deeds were in their hands, and made no inquiry:—Held, that the facts alleged amounted only to constructive notice, and that in order that an unregistered charge should have priority over a subsequent registered conveyance, it must be shown that the purchaser or his agent had actual notice of the prior charge. *Ib.*

6. A. and B. were equal partners in certain mills and concerns, of which A. was the lessee. In November 1810 they took in C. as a partner for 8,500*l.* In January 1811 B. proposed to A. and C. to sell them his share for 8,500*l.*, and to let his name continue in the firm for five years, and pay the interest at 8 per cent. on his money remaining in their hands; this was accepted, and thenceforward A. had two-thirds, and C. one-third of the profits. In July 1812 A. conveyed to C. the legal estate in one-third of the mills and concerns, by a deed which was never registered. In August 1812 C., by his marriage settlement, conveyed his one-third to A. and D. as trustees for himself for life, with remainder for plaintiff as tenants in common; this deed was registered in 1814. In 1819 B. withdrew his name from the firm, and furnished A. and C. with an account current, showing a balance due to him of about 24,000*l.* This was made up of the 8,500*l.*, and interest at 8 per cent., and of advances made to the firm since 1814 on the credit of B. A mortgage of the mills was then executed by A. and C. to B., to secure this 24,000. It was soon after registered. C. died in 1820, and A. in 1823. In 1826 B. procured, from the representatives of A., an assignment of the equity of redemption, and entered into possession of the mills. The bill charged that, before the execution of the mortgage, B. was informed by A. and C. of the previous settlement. It prayed for an account and partition, and allotment of one-third. The only evidence of notice was by E., who swore that he had apprised B. of the settlement:—Held, that the registry of the mortgage of 1819 did not give it precedence of the settlement of 1812, although this latter deed was founded on the unregistered deed of July 1812; that the settlement, having been registered before the mortgage, thereby prevailed over it, even though no actual notice had been given to the defendant; and that the defendant had so claim as a creditor against the plaintiff's one-third of the partnership assets. *Steuart* v. *Ferguson*, Hayes 452.

7. An agreement to mortgage a Middlesex property does not come within the 7 Ann., c. 20, and therefore where an owner of property in Middlesex had first mortgaged to A., and then agreed to mortgage to B., and had subsequently mortgaged to C., and C. had registered, and B. had not:—Held, that C. had not obtained priority over B. *Wright* v. *Stanfield*, 27 Beav. 8; 5 Jur., N. S., 5; 28 L. J., Ch., 183.

8. A second mortgagee, who registers his mortgage in Middlesex, under 7 Ann., c. 20, is entitled to priority over a memorandum of further charge of prior date given by the mortgagor to the first mortgagee, who omitted to register the same in Middlesex. *Moore* v. *Culverhouse*, 6 Jur., N. S., 115; 29 L. J., Ch., 419; 27 Beav. 639.

A house in Middlesex was mortgaged to R., who subsequently took a memorandum of further charge. The house was then mortgaged to M. without notice of R's further charge,

and he registered his mortgage in Middlesex under 7 Ann., c. 20:—Held, that M. had obtained priority over R.'s subsequent charge, which was not registered. *Ib.*

1. A. executed a legal mortgage of property in Yorkshire to B. for 700*l.*; at the same time he borrowed 100*l.* from C., and signed a memorandum agreeing to give C. a second mortgage on the property to secure that amount. A. subsequently executed another mortgage of the property for 500*l.* to D. The first and the third mortgages were registered at Wakefield, but not the second:—Held, that the third mortgage had priority over the second. *Re Wight* or *Wright*, 16 L. R., Eq., 41; 21 W. R. 667; 28 L. T., N. S., 491; 43 L. J., Ch., 66.

2. A memorandum of further charge in favour of the first mortgagee of lands in Yorkshire requires registration as much as the original mortgage, and in the absence of registration will be postponed to a second registered mortgage without notice of such further charge, nor will the first mortgagee be entitled to tack his further charge if the second mortgagee has given him notice of his charge. *Credland* v. *Potter*, 18 L. R., Eq., 350; 43 L. J., Ch., 484; 30 L. T. 356; 22 W. R. 611. Affirmed 10 L. R., Ch., 8; 44 L. J., Ch., 169; 31 L. T. 522; 23 W. R. 366.

3. An owner of lands in Yorkshire mortgaged them to secure repayment of an advance of 1,100*l.* The mortgagee registered a memorial of his mortgage, not stating the amount of it, and afterwards he made a further advance, for which he received a memorandum of further charge upon the lands, which he did not register. The mortgagor subsequently mortgaged the lands to another person, to whom he gave no notice of the further charge to the first mortgagee, merely saying that the first mortgage was for 1,000*l.* The second mortgagee registered his mortgage and gave notice of it to the first mortgagee. The first mortgagee having refused to be redeemed except upon payment of the amount due upon both his mortgage and his further charge, the second mortgagee filed a bill for redemption:—Held, that the memorandum of further charge was a "conveyance" within the meaning of the Yorkshire Registry Act (2 & 3 Ann., c. 4), and required registration; that not having been registered it was therefore void as against the second mortgagee; that the first mortgagee, having received notice of the second mortgage, was not entitled to tack his further charge as against the second mortgagee; and that the second mortgagee was entitled to redeem upon payment of the amount due upon the first mortgage only. *Ib.*

Held, also, that the second mortgagee was not bound, when he found the memorial of the first mortgage on the register, to inquire how much was due to the first mortgagee, and that the first mortgagee, having refused to be redeemed except upon payment of both his mortgage and his further charge, was not entitled to his costs of the suit. *Ib.*

4. A son who was heir-at-law to his father, who was one of the executors and trustees of his father's will, though he had not proved the will, and whose Christian names and description were identical with those of his father, after his father's death, executed mortgages of freehold and leasehold property of the father and applied the mortgage money to his own purposes. He handed over the title deeds to the mortgagees. The transaction took place without the knowledge of his mother and sister, who were co-trustees and co-executrixes with him, and who had proved the will. The will had not been registered in the Middlesex registry, though the property was situate in that county. The mortgage deeds were registered. They purported to be executed by the absolute owner of the property, and the solicitor who acted for both parties believed the son to be the absolute owner. The son told him nothing about the father's will. The solicitor searched the Middlesex registry. The son took a beneficial interest under the trusts of the father's will. After the son's death the fraud was discovered, and the mother and sister, as trustees of the father's will, brought an action against the mortgagees, claiming a declaration that the mortgages were void against them, and delivery up of the title deeds. The other beneficiaries under the will were made defendants:—Held, that the son in executing the mortgage deeds was personating his father; that the deeds were forgeries and passed nothing to the mortgagees, except the son's beneficial interest under the father's will; and that the mortgagees could obtain no title by virtue of the Middlesex Registry Act. *Re Cooper*, *Cooper* v. *Vesey*, 20 L. R., Ch. D., 611; 51 L. J., Ch., 862; 47 L. T. 89; 30 W. R. 648. Affirming 51 L. J., Ch., 149; 45 L. T. 532; 30 W. R. 148.

Semble, the son could have been convicted of forgery by reason of his executing the mortgage deeds. *Ib.*

VIII. RIGHTS OF PURCHASER FOR VALUE WITHOUT NOTICE.

5. A plea of purchase for valuable consideration without notice, cannot avail against a prior duly registered deed, and whether a legal or equitable title be conveyed, the deed will have priority from its registration. *Eyre* v. *Dolphin*, 2 Ball & B. 300.

6. A purchase of the legal estate for valuable consideration, without notice, is not a defence to the suit for specific performance of a contract relating to the lands contained in a prior duly registered instrument. *Drew* v. *Norbury* (*Earl*), 3 J. & L. 267; 9 Ir. Eq. R. 171, 524.

7. Plaintiff claiming lands under a deed registered in 1805, filed his bill against defendant in possession under a deed executed and registered subsequently, praying an issue at law or an ejectment, and removal of temporary bars; and in the event of succeeding, an account of rents and profits. Defendant pleaded a purchase for valuable consideration without notice, in 1830 (as in *Walwyn* v. *Lee*, 9 Ves. 24), and also demurred to the account:—Held (disallowing the plea), that the prior registration gave priority both in law and equity, even as against a purchaser for valuable consideration without notice. *Semble*, a person cannot protect himself by his plea where, by due diligence, he could have discovered the real state of the title, and that neglecting to search the registry is a failure of

due diligence. *Hamilton* v. *Lyster*, 7 Ir. Eq. R. 560.

1. Renewable leaseholds were settled by a registered deed on B. for life, with remainders over. B. being in possession apparently as absolute owner, new leases were obtained under circumstances which against them would have made them grafts on the old interests, and at the same time the lands were sold by him to a purchaser for value without notice:—Held, that the equitable claim of a remainderman under the settlement was, under the Registry Act, preserved against the purchaser. *Hill* v. *Mill*, 12 Ir. Eq. R. 107.

2. The mortgagee while in possession made a lease; the mortgage was registered. The lessee set up a title as a purchaser without notice, and also relied on there being no acknowledgment to bind him:—Held, first, that the registration gave priority to the mortgagor's equitable title, which rendered notice immaterial; and secondly that the acknowledgment by the mortgagee alone was sufficient against his lessee. *Ball* v. *Riversdale* (*Lord*), Beat. 550.

3. A. mortgaged to B., which was registered; then A. borrowed from C. on judgment, also registered. B. lent further sum without express notice of C.'s judgment:—Held, that B. was entitled to foreclose unless both debts were paid. *Wrightson* v. *Hudson*, 2 Eq. Abr. 498. S. P. *Bedford* v. *Backhouse*, *id.* 615.

4. An equitable mortgagee by deposit of title deeds, unaccompanied by any memorandum in writing, takes priority over a purchaser for value claiming under a subsequent registered deed, without notice of such deposit. *Re Burke's Estate*, 9 L. R., Ir., 24.

5. Under the Irish Registration Act an equity in a grant which is registered, will prevail against the right even of a *bonâ fide* purchaser to whom the original grantor has subsequently sold part of the property comprised in the registered deed. *Mill* v. *Hill*, 3 H. L. Ca. 828.

If a man has a limited interest in a term, and settles it to a certain use, and then gets a new and extended term substituted for it, he cannot, by so doing, avoid the previous settlement. *Ib.*

In 1830, a settlement of certain property held under renewable leases was made in favour of A. In 1831 A., being about to marry, made a settlement of this property for the uses of the marriage. The deed of 1830 was not registered. The settlement of 1831 was registered. In 1840 A., being in actual possession, sold to B., and B., who had no actual notice of the settlement of 1831, entered into possession, and made alterations in the premises. After the death of A., his son, who was entitled under the settlement of 1831, filed a bill against B. to set aside the sale, for an account, and for waste:—Held, that it was not necessary to register the deed of 1830, that the registered settlement of 1831 prevailed against the *bonâ fide* purchase of B., and that the Court below had properly declared him to stand possessed of the leases as a trustee for the parties beneficially interested under that settlement. But held also, that he was entitled to indemnity against the covenants in the leases which he was thus declared to hold as trustee; that an inquiry ought to be made as to alleged improvements and as to alleged waste; that he was entitled to be allowed the benefit of those improvements; and that being a *bonâ fide* purchaser, without misconduct, he ought not to be charged with costs. *Ib.*

See also Preceding Subdivisions.

IX. OTHER CASES.

6. A vendor of land situate in a register county, part of whose purchase money remains unpaid, is under no obligation to obtain for the unpaid amount any written security which can be registered, but is entitled to rely simply on his equitable lien, which he can enforce against sub-purchasers who have notice of it, actual or constructive; and such a vendor will not, by registering the conveyance to his purchaser, if he retains the deed in his possession lose his lien as against sub-purchasers from the original purchaser. *Kettlewell* v. *Watson*, 21 L. R., Ch. D., 685; 51 L. J., Ch., 281; 46 L. T. 83; 30 W. R. 402.

Land belonging to the trustees of a charity situate in the suburbs of Leeds, in the West Riding of Yorkshire, was sold by the trustees, with the sanction of the charity commissioners, to some estate agents who occupied a good position in Leeds. They bought the land with the intention of reselling it in small lots for building purposes. A receipt for the whole purchase money, signed by the vendors, was indorsed on the conveyance, but only part of it was in fact paid. The vendors retained the deed in their possession, but, at the request of the purchasers, the vendors' solicitors registered a memorandum of it in the West Riding registry. The vendors took no written security for their unpaid purchase money, but relied only on their equitable lien. The purchasers sold the land again in lots, some of which were very small. None of the sub-purchasers had actual notice of the lien of the original vendors:—Held, that the original vendors were entitled to enforce their lien against such of the sub-purchasers as had constructive notice of it. *Ib.*

7. The plaintiff is not bound to notice assignment of prior incumbrances, although the assignments are registered, and may proceed as if there had been no assignment by the original incumbrancer, unless the inheritor will point out the proper parties. *Webb* v. *Blessington* (*Lord*), 1 Moll. 74.

8. On a case stated to obtain the opinion of the Court of King's Bench, touching the construction of the Registry Act, 6 Ann, c. 2:—Held, that a deed of marriage settlement, limiting lands, was a valid deed in respect to the estates therein limited against the judgment debts of the settlor, confessed by him subsequent to the deed, notwithstanding the non-registry of the deed previous to the confession of the judgments. *Browne* v. *Blake*, 1 Moll. 620.

A. being seised in fee by articles previous to marriage, agreed within six months to convey in such manner that he should take an estate for life, remainder to his first, etc., sons in tail male, reversion in fee in himself; the marriage took effect, but the settlement was never executed. A. afterwards confessed judg-

ments, which were entered before the registration of the articles. On his death, B., who was the only issue male, took the legal fee, and being tenant in tail in equity, reversion in fee, levied a fine, and declared the uses previous to marriage, to provide a jointure, and for the issue of the marriage subject to a life estate in himself. The conusee of the judgments revived them by *scire facias* against B., who had no defence at law, and B. afterwards made payments on account, and promised to pay the balance. Second, That although a fine without more would, under the circumstances, discharge the limitation, and bring the reversion in fee, on which the judgments were a lien, into possession, yet coupled with a declaration of uses, those uses were immediately substituted for the former, and the reversion in fee did not come into possession. *Ib.*

1. An annuitant by deed unregistered (plaintiff in fifth cause), filed a bill for arrears, making subsequent incumbrancers by deeds of annuity and mortgage, duly registered (plaintiff in second and third causes), and a creditor by judgment intermediate between the unregistered and registered deeds (plaintiff in the first cause) parties defendant. The subsequent annuitant and mortgagee answered, insisting on their priority to the plaintiff, by reason of the registration of their deeds; and the decree to account declared that their priority was admitted by the plaintiff. The judgment creditor, to whom a large sum was due, did not seek relief in this cause, and allowed the bill to be taken *pro confesso* against him. Before any demands were proved or report made, the plaintiff obtained assignments of the registered annuity and mortgage; and the Master reported that he did not find anything due upon them, the same having been assigned after decree to the plaintiff, who declined to prove any demand under them, being willing that they should remain charged upon the unsold lands. There was accordingly a final decree for the sum due on the unregistered annuity, without regard to the registered incumbrances. Another creditor (plaintiff in fourth cause) by judgment, also intervening between the registered and unregistered deeds, who was not a party in the above suit, filed his bill, and in his cause had a report of the sum due to him. The fund in court was realised in this latter cause, but was afterwards transferred to the credit of all the causes, and its amount was considerably less than the sum due upon the unregistered annuity. The judgment creditors now insisted that their judgments were entitled in priority to the unregistered prior deed by reason of the conflict and admitted priority of the registered deeds subsequent to the judgments:—Held, that the judgment creditor, who was party to the fifth cause, but allowed the bill to be taken *pro confesso* against him, and did not prove his demand in that cause, was bound by the final decree, and could not be heard to insist on his priority:—Held, also, that by conflict of unregistered and registered deeds, judgments intermediate do not obtain absolute priority to the unregistered deed, until it is absolutely postponed to the registered deed. *Murtagh* v. *Tisdall*, 3 Ir. Eq. R. 85; Fl. & K. 29.

Semble, where the decree to account declared that the plaintiff, who was entitled under an unregistered deed of the 10th July 1808, admitted the priority of A. and B., who were entitled under registered deeds of the year 1827, and then directed an account of incumbrances prior to the deed of the 10th July 1808, judgment debts prior to the registered deeds of 1827 might be proved under the decree; and, *semble*, A. and B. having assigned to the plaintiff after the decree to account, and no demand being proved, nor anything found due upon the registered deeds, the unregistered deed recovered its original priority to the intermediate judgments, at least as to all creditors not parties. *Ib.*

2. A judgment creditor, whose judgment was registered pursuant both to the Registry Act for the West Riding of Yorkshire, 5 & 6 Ann., c. 18, and the 1 & 2 Vict., c. 110, filed a bill to redeem a prior mortgagee of lands in the West Riding, and to foreclose the mortgagor. The mortgagor had confessed other judgments, and the conusees had registered them pursuant to the 1 & 2 Vict., c. 110, but not under the West Riding Act:—Held, that those conusees were not necessary parties to the suit. *Johnson* v. *Holdsworth*, 1 Sim., N. S., 106; 20 L. J., N. S., Ch., 63; 15 Jur. 31.

RE-HEARING.

— *Generally.* See PRACTICE (RE-HEARING).
— *For Costs.* See PRACTICE (COSTS).
— *Bankruptcy Petition.* See BANKRUPTCY, XVII. xii.

REJECTION OR ACCEPTANCE OF LEASES OF BANKRUPTS.

See BANKRUPTCY, XVIII.

REJOINDER.

See PRACTICE (REJOINDER).

RELATIONS.

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I. WHAT AMOUNTS TO.

1. *In General*, 6059.
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1. In General.

1. There is no authority to say a release must be signed, as well as sealed and delivered, to make it effectual. *Taunton* v. *Peplor*, 6 Madd. 166.

2. Demurrer to a bill by a surety, stating that two partners, having agreed to execute a release to the principal, in consideration of an assignment of his effects, one alone executed the release, overruled; whether a release so executed binds all the partners, *quære*. *Hawkshaw* v. *Parkins*, 2 Swan. 539.

3. A charge on lands created by deed cannot be discharged but by deed, or at least by some formal act of release. *Cupit* v. *Jackson*, 13 Price 721; M'Clel. 495.

4. A trustee paying the trust money in strict accordance with the terms of the trust, is not entitled to a release by deed; *secus*, if he is called upon to depart from the strictly expressed trusts. *King* v. *Mullins*, 1 Drew. 308.

Where a trust was created by parol for A. for life, and to provide for her funeral expenses, remainder to her two children and the tenant for life, and remaindermen called for payment:—Held, that the trustee might lawfully insist on a release under seal. *Ib.*

5. An aunt and niece lived together, the former being devisee, residuary legatee, and executrix under her husband's will, and the latter being a legatee of 2,000*l.* under the same will. An agreement was entered into between them, that the niece should release her legacy, on the aunt making a will devising to the niece part of the lands devised by the original testator. A release and will were accordingly executed, and the will remained unrevoked till the niece's death; after that event, the aunt married again:—Held, that the release must be treated as binding on the niece's representative. *Penny* v. *Watts*, 2 De G. & Sm. 501; 12 Jur. 993.

6. Owner of charge not to be presumed to have released it by permitting it to run largely into arrear, nor without proof to be suspected of so doing to prejudice those in remainder. *Aston* v. *Aston*, 1 Ves. 264.

7. An executory agreement in a cause of action, and cannot be pleaded in bar to another cause of action. *Wood* v. *Rowe*, 2 Bli. 596.

Such an agreement is totally different from a release under the seal; but considered as in the nature of a release, it could only be applied to such part of the relief sought by the bill as relates to the questions at issue between the plaintiff and the party who proposes to have the benefit of the agreement by way of plea. It could not be pleaded in bar to the whole relief; for the cause must, at all events, proceed as to the relief sought against the other parties. *Ib.*

A plea of an executory agreement, containing no averments that all the parties to the agreement are ready to perform it, is not only insufficient for want of proper averments, but could not be made a good plea by any amendment; because it is not a proper subject of plea, but a mere right of action, and cannot be a bar to another suit instituted by the party against whom the right of action is claimed, especially where a long time has elapsed between the date of the agreement and the pleading of it. *Ib.*

8. S. L., to whom, by settlement (executed in 1800), an annuity of 200*l.*, by way of jointure, was secured in the event of surviving her husband, continued, for many years after his death in 1809, to receive payment from her step-son, H. A. L., the inheritor of the estate upon which the annuity was charged. In 1830, the annuity being then two years in arrear, S. L. wrote a letter to her step-son, wherein she stated that to serve him she would feel happy in thenceforth giving up the 200*l.* annuity, which he had paid her since her husband's death, and would also make him a present of the 400*l.*, the arrears then due. In 1834 H. A. L. died. By his will he charged his real estates with the payment of an annuity of 200*l.* to his step-mother. By a codicil, he substituted a reduced annuity of 100*l.* for the annuity of 200*l.* granted by his will, accompanied by a declaration, that it was upon condition that S. L. should not seek to raise the annuity of 200*l.* secured by the settlement

of 1800. S. L. died in 1837, having previously made her will, and thereby appointed the plaintiff her residuary legatee and sole executor. It appeared that S. L. had never demanded either the annuity secured by the settlement, or that granted by the will, after the date of her letter in 1830. The plaintiff having filed a bill to raise the arrears of the annuity secured by the settlement, the Court dismissed it, so far as it claimed relief in respect of the arrears which accrued in the lifetime of H. A. L., but directed an account of what was due from his death to the death of S. L. *Langley* v. *Langley*, 2 Ir. Eq. R. 313.

1. The assignee of a lease executes a bond to indemnify the original lessees against the covenants contained in the original lease; he afterwards quits the country; the house is left untenanted, and the original lessees are obliged to pay the rent reserved; the assignee having subsequently returned to England, makes a compromise with them for the sum then due, in respect of his non-performance of the covenants, and shortly afterwards goes abroad; they demise the house to a person who continues in the possession till the end of the term:—Held, that this mode of dealing with the premises does not give the assignee any title in equity to relief against the legal effect of his bond. *Anderson* v. *Bailey*, 1 Russ. 313.

2. R. G. having died intestate, possessed of considerable personal property, and entitled, after the death of his wife, to the principal of certain bank stock, standing in the name of a trustee; his brother, by letter, expressed his intention of relinquishing his share of the intestate's estate to the said widow, executed to the trustee (transferring to the widow) a release of the bank stock, and directed the preparation of a release of the general personal estate, the execution of which was prevented by his death, but his wish to execute it continued to his last hour; the release of the stock is effectual in favour of the intestate's widow; but the intention to relinquish the share of the general personal estate not being perfected, amounts not to a gift, and she, as administratrix, must account to the representatives of the brother, but without interest. *Hooper* v. *Goodwin*, 1 Swan. 485; 1 Wils. 212.

3. Notwithstanding declaration of the testator to his executor, that he never meant to call for payment of a promissory note, it was held part of the assets which were insufficient for the legacies, a charge on the real estate failing for want of a proper attestation of the will. *Byrn* v. *Godfrey*, 4 Ves. 6.

4. "I return A. his bond," in a will, is not a release, but a legacy, and having lapsed, the bond remains in force against a surviving co-obligor. *Maitland* v. *Adair*, 3 Ves. 231.

5. Testator gave his brother and nephew legacies, and appointed them executors, but did not dispose of the residue; they were indebted to him in unequal sums: this is no release of the debts, and they are trustees for the next of kin as to the residue. *Carey* v. *Goodinge*, 3 Bro. C. C. 110.

6. Circumstances under which a proposed codicil in the testator's handwriting, but not admitted to probate, was held not to operate (according to its stated effect) in discharge of the debt due from the legatee to the testator. Observations upon *Eden* v. *Smyth* (5 Ves. 341). *Chester* v. *Urwick* (2), 23 Beav. 404.

7. C., who acted as the confidential adviser of a testator, was the obligor in a bond to the testator for 2,000*l.*, conditioned to be void on the payment of that sum within six months after demand. The executors demanded payment of C., which he resisted on the ground, first, that he never received more than 1,500*l.*; and, secondly, that what passed at an interview between himself and the testator amounted to a release of all obligation in respect of the instrument. The Court being of opinion that the evidence of what passed at the interview amounted to no more at the utmost than an intention to deliver up the bond as an act of bounty, which intention was never fulfilled:—Held, that much more was necessary to establish the release of a debt, and payment of the debt was decreed. *Woodward* v. *Humpage, Re Inspich*, 5 L. T., N. S., 382.

8. If a mortgage is found cancelled in the possession of the mortgagee, it is as much a release as cancelling a bond; but there must be some deed to revest the estate in the mortgagor. *Harrison* v. *Owen*, 1 Atk. 520.

9. Destruction by father of security given by sons for money advanced:—Held, under the circumstances, an advancement and release of debt. *Gilbert* v. *Wetherell*, 2 Sim. & S. 254; 3 L. J., Ch., 138.

10. During a treaty for a marriage, which afterwards took place, a bond creditor of the intended husband, who was an intimate friend of his family, and was aware of the proposed marriage, repeatedly declared it to be her determination never to enforce payment of the bond debt, and made these declarations under circumstances which were calculated to lead, and which did lead, to the communication of them to the friends of the intended wife. Held, by the Lord Justice Knight-Bruce, agreeing with the Master of the Rolls, that the declarations above mentioned afforded possibly sufficient ground for the interposition of a court of equity to restrain proceedings at law upon the bond, and there being, in addition, the testimony of one witness to a positive promise to the above effect, in consideration of another promise on the part of the witness, which he performed:—Held, that although this promise was denied by the answer, yet that the answer being in many respects inaccurate, showed that the defendant's memory could not be depended on, so that the testimony of the witness ought to prevail, and that the case was a proper one for a perpetual injunction, a decree for which was accordingly affirmed, dissentiente Lord Cranworth, who held, that the declarations being of intention merely, and not of fact, were not such representations as to bind the creditor, on the ground of fraud or otherwise, and that an actual contract could not, in opposition to the answer, be considered proved, by the evidence of one witness. *Money* v. *Jordan*, 2 De G. M. & G. 318; 21 L. J., Ch., 893. S. C. *nom. Jorden* v. *Money*, 5 H. L. Ca. 185; 23 L. J., Ch., 865.

Held, that forbearance to make a new settlement upon an intended marriage, would be a sufficient consideration to support the release of a debt due to a person who was a *cestui que trust* under an existing settle-

ment, which appeared to be voluntary, although it might be doubtful whether that settlement was voluntary, or could have been defeated by a subsequent settlement. *Ib.*

1. A. being indebted to B., C., and D., three sisters, who were his near relations, partly on his own account, and partly as executor of his father, executed to them a bond for 500*l.* At the time of the giving of the bond, A. objected to give it, and agreed to do so only on a verbal representation, that it was not intended to be enforced unless B., C., and D. should come to want, an event which did not happen. The bond remained in the hands of the three till the death of B., and after her death in the hands of the survivors, and after the death of C. in the hands of D., whose property (by mutual arrangements) it was at the time of her death. On the bond was found the following indorsement: "This bond is never to appear against A. Witness, C., D." It was not made clear that C.'s name was written by herself; it was said that D. had written it. It was, however, proved, that if D. had written it, she did so with the authority of C.:—Held, that without saying whether the indorsement amounted to a release, which was a legal question, there was an equity under the circumstances against enforcing the bond; that if put in suit, the action would be restrained; and that there was nothing due on the bond to the estate of D. *Major* v. *Major*, 1 Drew. 165.

2. A debtor conveyed his life interest in certain property in trust for creditors, parties to the deed; and the creditors, in consideration thereof, granted to the debtor licence to reside and attend to his affairs in any place he might think proper, without suit or molestation, in his person or his goods, chattels, and effects, by any such creditors; and that, in case of any suit or molestation by any of such creditors, contrary to the true intent and meaning of such licence, the debtor should be wholly released and acquitted of the debt, and the deed might be pleaded in bar:—Held, that this amounted only to a licence by the creditor to the debtor to live unmolested, and did not operate as a release of the debt or a discharge of the debtor's estate; and that neither a suit by creditors against the trustees and the debtor to enforce the trusts of the deed, nor an administration suit by the creditor against the estate of the debtor after his decease, for payment of so much of the debt as the trust property was insufficient to pay, was barred by the trust deed or amounted to an acquittance of the debt. Held, also, that the existence of the trust deed, and the covenants and licence therein contained, prevented the operation of the Statute of Limitations during the life of the debtor in respect of the debts, for the payment of which the trust was created. *O'Brien* v. *Osborne*, 10 Hare 92; 16 Jur. 960.

3. By a mortgage deed the debtor covenanted to pay principal and interest, and a surety covenanted to pay the interest in default. The debtor afterwards, by deed, assigned his property to a trustee on trust to sell and divide the proceeds amongst his creditors, the creditors releasing the debtor from the debts due to them respectively; but there was a proviso in the deed that nothing therein should affect any right or remedy which any creditor might have against any other person in respect of any debt due by the debtor:—Held, that this deed only amounted to a covenant not to sue the debtor, and that the surety was not released, but that the surety could pay off the principal to the creditor and recover the amount from the debtor. *Green* v. *Wynn*, 4 L. R., Ch., 204; 38 L. J., Ch., 220; 20 L. T., N. S., 131; 17 W. R. 385.

4. C., being indebted to his mother, and being under an obligation to execute a security to her, refused to do so. The mother then promised to bequeath the debt to her son if he would execute the security. This was done, but the mother died without having bequeathed the debt:—Held, that the promise to bequeath could not be enforced in equity, and that the debt formed part of the mother's estate. *Luxmore* v. *Clifton*, 17 L. T., N. S., 460; 16 W. R. 265.

5. A testator wrote in his account book, opposite an entry of two debts owing to him by his brother, one being due upon mortgage and the other upon a promissory note, the words, "Not to be enforced;" but he received interest upon both debts for several years after the date of the entry, and up to the time of his death. The document which contained the words referred to was not propounded as testamentary:—Held, that this memorandum of the testator did not amount to a discharge of either of the debts. *Peace* v. *Hains*, 11 Hare 151; 17 Jur. 1091.

Semble, the cases in which the Court has held a debtor liberated from his obligation to pay a debt which once existed, and from which he has not been discharged by any testamentary instrument, are, first, where the act or declaration relied on creates an immediate discharge, which the debtor might plead as a release, or by way of accord and satisfaction at law, or which he might enforce in equity as against the creditor; second, where the discharge, though not immediate and absolute, but conditional, becomes perfect by the condition having in the event been performed; third, where the creditor intended to discharge the obligation at his death, and communicated that intention to those who would, under this disposition, take or represent his interest upon his death, and relied upon their fulfilment of his intention; and fourth (in strictness belonging to another class of cases), where the transaction supposed to create the debt or obligation is rather in the nature of an advancement by one *in loco parentis*, or is part of a family arrangement. *Ib.*

6. By a deed of even date with a lease, the lessor covenanted that the lessee should retain part of each year's rent until satisfaction of a debt due from the lessor to the lessee:—Held, that though the covenant might be pleaded at law as a release *pro tanto* of the rent, this was only to avoid circuity of action, and the covenant was not for all purposes a release. *Ledger* v. *Stanton*, 2 John. & H. 687; 9 W. R. 848; 4 L. T., N. S., 795.

Therefore, the lessee having specially bequeathed the premises subject to the rent:—Held, as between the executors and the specific legatees, that the specific legatees took subject to the whole rent, and that the benefit of the covenant for reduction of rent went to the executors. *Ib.*

1. Where a father-in-law, to whom his son-in-law owed money upon a mortgage of the house in which his son-in-law lived, wrote to the latter, dissuading him from selling the house to pay off the debt, and saying, "Have you paid me a penny since you had the money? . . . You can live there, just as you do, without paying us any rent; it is not wished that you should give it up":—Held, on a bill for redemption, by the son-in-law after his father-in-law's death, that he was only liable for the interest which accrued after the father-in-law's death. *Yeomans* v. *Williams*, 1 L. R., Eq., 184; 35 L. J., Ch., 283; 35 Beav. 130.

2. B. borrowed 1,100*l.* from his step-mother, who lived in his house, paying 212*l.* 10*s.* a quarter for board; and it was agreed that the debt should be paid off by a deduction of 100*l.* from each quarter's payment. Deductions of this amount were made for two quarters, but on the third quarter-day the creditor refused to make any further deduction, and paid the full amount of 212*l.* 10*s.*, and continued down to the time of her death (which took place more than four years afterwards) to pay to B. the like quarterly sum. B. was appointed sole executor of his step-mother, and proved the will:—Held, that the debt was gone: first, because the appointment of B. as executor released the debt at law, and any claim in equity was rebutted by evidence of a continuing intention on the part of the testatrix to give; and, secondly, because the intention of the testatrix to give B. the 900*l.* was completed by nine quarterly payments of 212*l.* 10*s.* each. *Strong* v. *Bird*, 18 L. R., Eq., 315; 43 L. J., Ch., 814; 30 L. T., N. S., 745.

2. Consideration.

3. In a deed executed, upon a separation between a husband and wife, by them and the trustees of their marriage settlements, the wife charged her separate property, comprised in the settlements, with the payment of an annuity to the husband, and the husband released his marital rights, in respect of any future property acquired by the wife. The release of the husband is a good consideration for the grant of the annuity by the wife, and the Court will enforce the payment of the annuity. *Logan* v. *Birkett*, 1 Myl. & K. 220; 2 L. J., N. S., Ch., 52.

4. As to consideration for a release, see the case of *Noel* v. *Rochfort*, 5 Bli. N. S. 667.

5. Where a testator to whom a party was indebted, in one sum on a note, and another on a bond, in his will bequeathed to a son part of the entire debt, and afterwards by codicil revoked the bequest, and by endorsement on the bond declared that he thereby acquitted the obligor of the sum, and stated that in consequence he had revoked by codicil of the same date the bequest to the same amount:—Held, that being a volunteer, and the release without consideration, he was not entitled to come into equity for relief. *Tufnell* v. *Constable*, 8 Sim. 69.

6. Mere voluntary declarations, indicating the intention of a creditor to forgive or release a debt, if they are not evidence of a release at law do not constitute a release in equity; unless, therefore, there be a consideration or some other equitable means of distinction, equity, in such a case, follows the law. *Cross* v. *Sprigg*, 6 Hare 552; 18 L. J., N. S., Ch., 204; 13 Jur. 785.

7. A., being entitled, under a deed of 1784, to a charge affecting the estate of B., in 1814 executed a release in order to enable B. to sell the estate for the payment of creditors claiming under a trust deed of 1809; a decree to account and report the priority of incumbrances having been made:—Held, that the charge of A. retained its priority under the deed of 1784, except as to purchasers who had bought upon the faith of the release; it appearing from depositions in aid of the account, that no consideration was paid upon the execution of the release, and that the charge had not been satisfied, although the release had not been set aside or impeached in any suit instituted for that purpose:—Held, also, that the acceptance by A. of a bond with warrant, though accompanied by a release, could not under the circumstances be considered as a substituted security. *Hatchell* v. *Cremorne*, Ll. & G. *temp.* Plunk. 236.

8. In a defence founded upon an allegation that the plaintiff has released or assigned his rights for a pecuniary consideration paid to him, it is incumbent on the defendant to prove that the consideration was in fact paid. *Vandaleur* v. *Blagrave*, 6 Beav. 578.

9. A. being indebted to B., entered into an agreement, not under seal, for the repayment of the money, B. to hold a policy on A.'s life as security. B. died, and her executors reckoned the debt among her assets, and paid probate and legacy duty upon it. Communications took place between the debtor and the executors on the one hand, and the executors and residuary legatees on the other hand, as to not enforcing the debt upon payment by the debtor of the probate and legacy duty thereon. The debtor did in fact pay such duties, and the executors withdrew their claim on the policy, but neither was the agreement surrendered to A. nor cancelled, nor was any release of his debt executed:—Held, that the communications amounted to an agreement to release the debt, and that the payment of the duties was a sufficient consideration. *Taylor* v. *Manners*, 1 L. R., Ch., 48; 35 L. J., Ch., 128; 11 Jur., N. S., 986; 14 W. R. 154; 13 L. T., N. S., 388.

3. Fraud and Ignorance of Rights.

10. A release shall be avoided where there is *suppressio veri*, or *suggestio falsi*. *Jarvis* v. *Duke*, 1 Vern. 19.

11. Release set aside by reason of the misapprehension of the party. *Gee* v. *Spencer*, 1 Vern. 32.

12. Devisee under a will defectively executed, represents the will duly executed, and, for a small sum, gains a release from the heir; release set aside. *Broderick* v. *Broderick*, 1 P. W. 239.

13. Bill to be relieved against a release as gained by fraud, it appeared that there had been another release given, and though it was said that was got in the same manner, yet not being taken notice of in the bill, nor relief prayed against it, bill was dismissed. *Gray* v. *Bull*, 1 Vern. 86.

1. A freeman of London, taking advantage of his son's necessities, in consideration of a bond for securing the son an annuity of 50*l*., prevailed on him to release his share of orphanage; the father also prevailed on another of his sons to give him a release of his share of orphanage, in consideration of an annuity of the same nature; but there were not the same proofs of his being forced into the release, and the father had at times advanced him 300*l*. or 400*l*. :—Held, the plaintiff being turned out of doors, left destitute, and void of maintenance, a release extorted could not be supported; the other son was equally entitled to be relieved. *Heron* v. *Heron*, 2 Atk. 160.

If a father, merely for the sake of maintenance, and not for advancement in marriage or trade, oblige his son to release his right to the orphanage part, such release is absolutely void. *Ib.*

2. A release, *ex vi termini*, imports a knowledge in the releasor of what he releases; and therefore, where executors (who had taken the opinion of counsel, which they had not communicated), obtained a release of the orphanage share from the husband of a freeman's daughter, they were decreed to account that the parties might elect; the length of time and alleged loss of vouchers being no sufficient bar to such account. *Salkeld* v. *Vernon*, 1 Eden 64.

3. Where a release of a legal demand has been improperly obtained, a court of equity will set it aside, but will not decree payment of the legal demand. *Pascoe* v. *Pascoe*, 2 Cox 109.

4. Releases set aside as fraudulent; and that, too, though there was no express prayer that they might be set aside. *Williams* v. *Smith*, 7 L. J., Ch., 129.

5. A release from the younger brother to the elder, of certain premises which had been devised to him by his father, executed in consequence of a threat to file a bill, set aside in favour of creditors. *Peat* v. *Powell*, Ambl. 387. 1 Eden 479.

6. On suspicious circumstances in the answer, a general account was decreed against a steward, notwithstanding a receipt in full, which was allowed only as proof of a particular payment, not of a general release or discharge upon an account stated; though under circumstances it might have that effect, as upon proof that the principal never would give any vouchers, and an account kept by the steward. *Middleditch* v. *Sharland*, 5 Ves. 87.

7. A., immediately on his coming of age, released to his mother all claims on his father's estate, and after an acquiescence of five years, sought to set the release aside; though such a release must always create suspicion, yet the Court will not set it aside till the Master had taken the account, as no particular imposition was charged. *Steadman* v. *Pulling*, 8 Atk. 423.

8. A release of the equity of redemption was set aside at the instance of the mortgagee, he having been induced to accept of it, and in consideration thereof to covenant for the payment of a perpetual annuity to the mortgagor, and to give the mortgagor a perpetual right of redemption, by means of misrepresentations by the mortgagor and his solicitor (who was also the solicitor of the mortgagee) as to the title of the mortgagor, the value of the premises, and the nature of the contract he was entering into. *Roddy* v. *Williams*, 3 J. & L. 1.

9. Where a person represents to another that he is of age, and executes to him a release upon which the latter acts:—Held, that he could not afterwards impeach the validity of the release on the ground of his minority, and that it was immaterial whether he was aware or not of the incorrectness of the representation. *Wright* v. *Snowe*, 2 De G. & Sm. 321.

10. Bill, charging fraud in obtaining a release; plea, the release, supported by an answer denying the fraud; the benefit of the plea was saved to the hearing. *Lloyd* v. *Smith*, 1 Anstr. 258.

11. No reason to set aside a release because the party releasing had a right; *seous*, if ignorant of his right, or if the same was concealed from him. *Cann* v. *Cann*, 1 P. W. 727.

12. A., immediately on his coming of age, released to his mother all claims on his father's estate, and after an acquiescence of five years, sought to set the release aside; though such a release must always create suspicion, yet the Court would not set it aside till the Master had taken the account, as no particular imposition was charged. *Steadman* v. *Pulling*, 3 Atk. 423.

13. A party who, upon a compromise, had executed a general release, claimed relief on the ground of a large item, in which he was interested, having by mistake been omitted in the account:—Held, that he was entitled to relief, but that to obtain it the release must be wholly set aside. A. B., the representative of a deceased partner, having filed his bill against C. D. the surviving partner for an account, A. B., in consideration of 500*l*., released C. D. from all claims, and the bill was dismissed. By mutual error a debt of 2,000*l*., owing to the partnership, but which was not then known to exist, was omitted in the consideration by both parties. C. D. afterwards received it:—Held, that A. B., notwithstanding the release, was entitled to his share of the debt, but that to obtain it the whole account must be reopened. *Pritt* v. *Clay*, 6 Beav. 503.

14. Release of an annuity given by an illiterate person without professional assistance and for inadequate consideration set aside after several years, the price being held inadequate as to the defendant, by whose covenant the annuity was secured, although, considering the nature of the security, it might not have been so from a stranger. *Garvey* v. *M'Minn.* 9 Ir. Eq. R. 526.

15. A nephew, who was the heir-at-law and sole next of kin of the testator, having taken the opinion of counsel as to the widow's rights under the husband's will, and being advised that she took the residue absolutely, contracted to sell to her a house which had descended to him as heir; and part of the agreement was, that he should release all demands against her as executrix, or against her deceased husband's personal estate; a general release, executed in pursuance of this agreement, was held to be valid, and to invest the stock in the executrix absolutely, though it made no specific mention

of the stock. *Collier* v. *Squire*, 3 Russ. 467; 5 L. J., Ch., 186.

1. A plea of release, if the consideration be impeached, must contain averments supported fully by an answer covering the grounds upon which the consideration is impugned, and cannot extend to a discovery of the consideration. *Parker* v. *Alcock*, 1 Y. & J. 432.

2. General release from a sister to a brother, not binding as to particular rights under the marriage settlement or articles of the parent, the sister being ignorant of them, and the brother having covenanted that he was seised in fee contrary to the fact; the sister held entitled to her claims under the settlement or articles, and also the consideration recited and expressed in the deed of release, the brother being debtor to her in such amount on the face of it. *Ramsden* v. *Hylton*, 2 Ves. 305.

A general release with a particular consideration recited, will be construed according to the particular recital. *Ib.*

3. Where a release had been executed and the parties have, for a long space of time, acquiesced in it, the mere proof of errors will not, in the absence of fraud, induce the Court either to set it aside or to give leave to surcharge and falsify; but the nature and amount of the errors alleged and proved may have a very considerable effect in the consideration of the question whether the release was fairly obtained. *Millar* v. *Craig*, 6 Beav. 433.

4. A release which had been executed by a person ignorant of his rights, and where it was proved that he had no intention of releasing such rights, set aside. *Phelps* v. *Amcott*, 21 L. T., N. S., 167.

5. Where plaintiffs in an action against a railway company for compensation for injuries, filed a bill against the company for a declaration that a release given by them to the company for such injuries was a receipt only for 15*l.*, and that the company who had pleaded such release in the action might be restrained from relying on it as a release of the causes of action on the ground that the release was obtained by fraud on the part of the company's agents. Upon demurrer:—Held, that the fraud alleged was not such as a court of law could necessarily deal with, and that the plaintiffs were not precluded from coming to the Court of Chancery by reason of their having commenced the action, they not having attempted an equitable replication; and the Court overruled the demurrer. *Stewart* v. *Great Western Railway Co.*, 2 Dr. & Sm. 438. Affirmed 13 L. T., N. S., 79.

6. S. being indebted to B., and other persons, agreed with B. for a further advance on a mortgage of various estates in Ireland. By the deed S. covenanted that the lands of K., which formed part of the security, were free from incumbrances, and for further assurance. No title was furnished by S., nor search in the registry made by B. Before the entire advance was paid over to S. it was discovered that the lands of K. were subject to a mortgage to E. B. thereupon applied to S., who told him that E. would release the lands on his (S.'s) request, on which assurance B. paid over the residue of the loan to S. S. subsequently, by fraud, procured a release from E., of which release B. was made aware, but was ignorant of the fraud. The fraud was discovered after some months had elapsed:—Held, that B. was a purchaser for value of the release, as having been procured by S. in pursuance of the covenants in the mortgage deed, and that being ignorant of S.'s fraud he was entitled to retain the advantage which the release had given him. *Re Burmester*, 11 Ir. Ch. R. 1.

7. In 1841, 4,500*l.* was advanced by a testatrix to her son B., but no security or acknowledgment was executed by B. No interest was directly paid, but an allowance covenanted to be paid to B. by the testatrix was set off against the interest, which, at 4 per cent., came to the same amount. In 1843 the testatrix made a codicil, containing a declaration that the 4,500*l.* was due and owing from B., and that his appointment as executor was not to have the effect of cancelling the debt. In 1854 a further codicil was made, revoking the appointment of B. as executor, but confirming the will and codicils in all other respects. In 1855 the testatrix wrote to B. as follows: "You must know when I gave you the money I never could intend it as a loan, but as an absolute gift; and I hope you will live many years to enjoy it":—Held, that this letter being written under a misapprehension of the nature of the original transaction, and being inconsistent with the previous conduct of the parties, did not discharge the debt thereby created. *Knapp* v. *Burnaby*, 8 W. R. 305.

8. Bequest to A. for life of annuity of 100*l.*, "by interest arising out of money to be vested for that purpose by the executors" in public funds or other good security, and after his death "the capital stocks so purchased" to A.'s children. By a codicil the testator said, "What I mean in my will by securing money in the public funds, is to purchase a capital stock in the consols by my executors":—Held, that the executors might either purchase in the consols or in other good security, but having done neither in the life of A., his children were entitled to 3,333*l.* 6*s.* 8*d.* consols, and not to 2,000*l.* cash. A. died 1843, and his children, on receiving 2,000*l.*, executed a release, which, after reciting that, according to the trust, 2,000*l.* had been set apart to answer the annuity, they released the representative of the testator from all claims and demands. In 1854 the children instituted a suit to recover the amount of consols which would be required to produce 100*l.*:—Held, that having regard to the situation in life of the plaintiff, the inaccuracy of the recitals, and the absence of professional assistance, they were not barred by lapse of time. *Aspland* v. *Watte*, 20 Beav. 474.

9. Where there are three incumbrancers, the first having the legal estate, and the third incumbrancer joins with the mortgagor in creating a further mortgage, in consideration of a portion of the money advanced being paid to him, the second incumbrancer is not entitled in equity to any portion of the money so received. *Eyre* v. *Burmester*, 10 Jur., N. S., 687; 33 L. J., Ch., 652; 12 W. R. 993; 10 L. T., N. S., 673; 4 De G. J. & S. 435. And see 10 H. L. Ca. 90; 6 L. T., N. S., 838.

S. mortgaged to E. lands in Ireland, in which the legal estate was outstanding in a prior incumbrancer. He afterwards mortgaged the estate to a banking company of which he

was chairman of directors, and subsequently by substituting forged securities prevailed on E. to release his security on the estate. S. afterwards, and before the fraud was discovered, obtained the concurrence of the banking company in a mortgage of the estate to B. for 36,000*l.*, of which 1,000*l.* was retained and 35,000*l.* paid to the company in part discharge of the money due to them. B. caused the property to be sold in the Incumbered Estates Court, and received the balance of the purchase money after paying off the first mortgage, and applied the same to the discharge of his own debt. E. thereupon filed a bill against the banking company to set aside the release, and claiming by way of substitution for the security which he had released out of the 35,000*l.* received by them, a sum equal to the purchase money of the estate, less the amount of the first mortgage:—Held, that the plaintiff was not entitled to any relief. *Ib.*

1. Before accounts which have been settled, and in respect of which a release has been executed, can be reopened, a case must be shown for setting aside the release, nor is the existence of usurious items in the account of which both parties were cognisant sufficient ground for setting it aside. Very strong evidence is required for setting aside, on the ground of undue influence, a transaction between two persons actively engaged in business and competent to carry it on. *Fowler* v. *Wyatt*, 24 Beav. 232.

2. In an action by the plaintiff against the defendant for alleged breaches of covenants contained in their deed of partnership, and for fraud alleged to have been committed by the defendant in obtaining a deed of dissolution thereof; it appeared that as regards the breaches the plaintiff had, by the deed of dissolution, in consideration of the defendant having given up the whole of the partnership assets to the plaintiff, released the defendant from all matters and things whatever touching or concerning the joint trade, without prejudice nevertheless to the covenants and agreements in the deed of dissolution contained:—Held, that as the release could not be separated from the rest of the deed of dissolution, and as the plaintiff had not disaffirmed, and was not in a condition to disaffirm or rescind the contract, of which the release formed part, the same was binding upon him. *Urquhart* v. *Macpherson*, 3 L. R., App. Cas., 831.

Between Trustees and Cestuis que trustent.] See TRUSTS.

II. CONSTRUCTION AND OPERATION.

1. *General Principles*, 6065.
2. *Joint Debtors*, 6066.
3. *Other Claims and Rights*, 6066.

1. General Principles.

3. General release restrained to what was under consideration. *Cole* v. *Gibson*, 1 Ves. 507.

4. A general release, with a particular consideration recited, will be construed according to the particular recital. *Ramsden* v. *Hylton*, 2 Ves. 305.

5. A release, though unlimited in its terms:—Held, from the recitals and context, to operate only as to a particular sum mentioned in the recitals. *Lindo* v. *Lindo*, 1 Beav. 496; 8 L. J., N. S., Ch., 284.

6. A release, general in its terms, limited so as not to include a particular debt unknown to exist at the time of its execution and not intended to be released. *Moore* v. *Weston*, 25 L. T. 542.

7. Principles of the Court in giving effect to the intention of the parties to a general release, with reference to the restrictive clauses which it contains, or to the purposes for which it is made. *Squire* v. *Ford*, 9 Hare 55; 20 L. J., N. S., Ch., 308; 15 Jur. 619.

8. General words in a release are limited to those matters which were specially in the contemplation of the parties when the release was given. *London & South Western Railway Co.* v. *Blackmore*, 4 L. R., H. L., 610; 29 L. J., Ch., 713; 23 L. T. 504.

9. When a receipt has been given under seal it discharges at law all cause of action, and can only be set aside by the equitable jurisdiction of a court of law; but a mere receipt in writing has no such effect; it amounts simply to an acknowledgment of money paid; it cannot be pleaded in answer to an action, and it may be impeached or explained by parol evidence. *Lee* v. *Lancashire & Yorkshire Railway Co.*, 6 L. R., Ch., 527; 25 L. T. 77; 19 W. R. 729.

10. Acceptance of the release of a right or compromise of dispute is in no case an acknowledgment that a right existed. *Underwood* v. *Courtown* (*Lord*), 2 Sch. & Lef. 68.

Purchasing quiet of an adverse claimant no admission to him of right. *Ib.*

11. Plaintiff, having released the principal in a fraud, cannot go on against the other parties, though they would have been secondarily liable. *Thompson* v. *Harrison*, 2 Bro. C. C. 164.

12. Claims, though not barred by prescription, may be extinguished by a release, or the remedy destroyed by conduct operating as a release. *Motz* v. *Moreau*, 13 Moo. P. C. 377.

13. In an action by the plaintiff against the defendant for alleged breaches of covenants contained in their deed of partnership, and for fraud alleged to have been committed by the defendant in obtaining a deed of dissolution thereof; it appeared that as regards the breaches the plaintiff had, by the deed of dissolution, in consideration of the defendant having given up the whole of the partnership assets to the plaintiff, released the defendant from all matters and things whatever touching or concerning the joint trade, without prejudice nevertheless to the covenants and agreements in the deed of dissolution contained:—Held, that as the release could not be separated from the rest of the deed of dissolution, and as the plaintiff had not disaffirmed, and was not in a condition to disaffirm or rescind the contract of which the release formed part, the same was binding upon him. *Urquhart* v. *Macpherson*, 3 L. R., App. Cas., 831.

14. Where a release in terms extends to sums of money which the releasee has openly, but without justification, taken from the releasor,

the latter cannot file a bill in equity to compel the releasee the pay these sums, though at the time the release was given, the releasor was, in fact, ignorant of the fraud committed by the releasee. The remedy of the releasor in such a case is to have the release set aside *in toto*; and if, in consequence of dealings subsequent to the release, that cannot be done, the releasor can have no relief in equity. *Skilbeck* v. *Hilton*, 2 L. R., Eq., 587.

1. Effect of a general release by a party entitled to a charge on real estate secured by a term of years to the trustees of the term, the term itself not being assigned or merged. *Clifford* v. *Clifford*, 9 Hare 675.

2. Release expressing that administrator had received "all" the property, Court will not suppose he has received anything since so as to direct an account. *Taunton* v. *Pepler*, 6 Madd. 166.

3. F. B., in consideration of natural love and affection for his sisters, by indenture released a particular freehold estate to B., his heirs and assigns; and assigned a particular leasehold estate, and all other the property in Great Britain or Ireland, whether real or personal, which he might be entitled to at the time of executing the indenture to B., his executors, administrators, and assigns, upon trust, that B., etc., should stand possessed thereof upon trust to pay the rent, interest, dividends, or annual produce arising therefrom, or the moneys arising from the sale thereof, equally between his three sisters. F. B. was, at the date of this indenture and of his death, seised of a share in a freehold house situate in K. street, not mentioned in the lease or release:—Held, that the release could not operate as a covenant to stand seised of the house in K. street, there being therein no mention of that house, and the general words being, from the frame of the deed, applicable only to leasehold or other personal estate. *Doungworth* v. *Blair*, 1 Keen 795; 6 L. J., N. S., Ch., 263; 1 Jur. 620.

2. Joint Debtors.

4. Proof under bankruptcy of one joint debtor after receiving composition from the other, expunged; release to one being a release to both. *Exp. Slater*, 6 Ves. 146.

5. A release to one obligor is a release to both, in equity as well as at law. *Bower* v. *Swadlin*, 1 Atk. 294.

Where there is an assignment of bond in trust for others, precedent to a release, though without consideration, it will be a material question whether the obligee could release, or if it could operate to the release, as he is a trustee in the assignment. Every man is supposed to be cognisant of a deed to which he is himself a party. *Ib.*

6. A testator bequeathed all debts and sums of money which should at the time of his death be due to him by B., unto B., his executors, administrators, and assigns, for his and their own use and benefit, and he directed his trustees to deliver up to B., his executors, administrators, or assigns, all securities which he should at the time of his death hold for such debts and sums of money, and also, when required by B., his executors, administrators, or assigns, to execute to him or them a release from all such debts and sums of money. At the date of the will and of the testator's death, B. owed the testator a debt of 50*l.*, and he and his partner owed the testator 2,600*l.*, which the latter had lent to the firm, and for which B. and his partner had given the testator their joint and several promissory notes. B. and his partner having filed a liquidation petition, the executors claimed to prove in the liquidation for the 2,600*l.*:—Held, that as there was a separate debt due from B. to which the release could apply, it could not be extended to the partnership debt, and that the executors' proof must be admitted. *Exp. Kirk, Re Bennett and Glave*, 36 L. T., N. S., 431; 5 L. R., Ch. D., 800; 46 L. J., Bky., 101; 25 W. R. 598.

7. A partner sued in equity for a money demand, alleged by his bill that his co-partner had released the debt, which was still due to the partnership:—Held, that the release created such a difficulty in suing at law for the debt, that the bill was not demurrable for want of equity. *Pieroy* v. *Fynney*, 40 L. J., Ch., 404; 12 L. R., Eq., 69; 19 W. R. 710.

8. A bank proved in the liquidation of A. for a debt of 5,600*l.*, which they claimed for him, and afterwards sued for the same debt S., who had given them a guarantee of 1,000*l.* on behalf of A., and whom they alleged to have been a partner with A. S. denied the partnership, and ultimately a compromise was entered into between him and the bank, by which the bank was to receive 2,800*l.* in satisfaction of their claim against him and against another person who had given another guarantee on behalf of A. The guarantee of S. was given up to him, with a receipt indorsed upon it by the bank, expressed to be for 1,000*l.*, "in payment and discharge of the within guarantee, and also of all claims against him in reference to or in connection with" A.'s firm:—Held, that assuming S. to have been a partner with A., this receipt did not operate as a release of S., and consequently that the bank was entitled to maintain their proof. *Exp. Good, Re Armitage*, 46 L. J., Bky., 65; 5 L. R., Ch. D., 46; 25 W. R. 422; 36 L. T., N. S., 338.

The rule that a release of one joint debtor operates to release the other is founded upon the fact that the second would, if he was sued by the creditor, have a right to enforce contribution from the first. The rule, therefore, does not apply to a release of a merely ostensible partner, between whom and the person with whom he has held himself out to be a partner, no such right of contribution exists. S. C. 5 L. R., Ch. D., 46; 46 L. J., Bky., 65; 25 W. R. 83; 35 L. T., N. S., 554.

3. Other Claims and Rights.

9. A. possibility cannot be assigned, but it may be released. *Thomas* v. *Freeman*, 2 Vern. 563.

10. It is now well known that a possibility may be both assigned and released. *Jewson* v. *Moulson*, 2 Atk. 417.

11. A., and B. his surety, executed a joint and several bond to C., conditioned to be void on payment of 5,000*l.* by A.; C. proved 5,000*l.* as a specialty debt under the decree in a suit instituted by A.'s creditors after his death.

Afterwards B. paid the 5,000*l.*, and thereupon C. executed him to a general release of all claims and demands in respect of the bond, and by the same deed covenanted to stand possessed of all moneys to be received under the proof and of all the securities for the 5,000*l.* in trust for B., and to use his utmost endeavours to obtain payment of that sum for B.'s benefit:—Held, that the legal effect of the release was not controlled by the covenant, and that the Master, when he made his report, in pursuance of the decree, was justified in disallowing the 5,000*l.* as a specialty debt, and in allowing it merely as a simple contract debt to B. *Warwick* v. *Richardson*, 14 Sim. 281.

1. Mortgagees with notice of a specific charge for payment of debts upon devised estates were held, notwithstanding releases of the executors to the devisees (such devisees being themselves two of the executors, and the releases not showing that the charge had been raised and paid), to be bound to see to the application of the mortgage money. *Braithwaite* v. *Britain*, 1 Keen 206.

2. In general a release to the principal debtor is in equity a release to the surety, but if the surety has previously to the release given by the creditor paid part of the debt, and given a security for the remainder, the general rule will not apply, but the creditor, notwithstanding the release, will, in the absence of evidence to the contrary, retain his right against the surety. *Hall* v. *Hutchons*, 3 Myl. & K. 426; 3 L. J., N. S., Ch., 45.

3. Voluntary release by a party to his adversary not to defeat the clerk in court of his lien for costs; if the suit had ended in a *bonâ fide* compromise for a reasonable consideration paid, it would have been otherwise. *Anon.*, 2 Ves. 25.

4. The bankrupt, previously to his marriage, entered into a bond, that in case his wife should survive him, and should within two months after his death, at the costs and charges of his heirs or devisees, release her dower, his heirs or executors should, within three months after his death, pay to her 2,000*l.* The wife survived the bankrupt, but did not within two months after his death release her dower, although she was always ready and willing to do so:—Held, that the bond was not provable, either under the first or the last part of the fifty-sixth section of the Bankrupt Act, inasmuch as the contingency had not happened, and no value could be set upon it. *Exp. Davies*, 1 Dea. 115.

5. The wife of a partnership creditor of an intestate, being one of the intestate's next of kin, duly executed a proxy of renunciation of the administration of the intestate's effects. A few days afterwards the creditor executed a deed-poll, by which, after reciting the insolvency of the intestate's estate, and that a composition deed had been executed by the creditors, in which they had agreed that A. should have administration of the intestate's effects, and reciting that A. had executed to the creditor a bond which the latter had agreed to accept in satisfaction of the debt, it was declared that the same when paid should be accepted by him, the creditor, in full payment and satisfaction of all and every sum and sums of money due, or owing by or from, the said intestate to him the said creditor on account of the partnership or any other account whatsoever, and of all claims and demands whatsoever of him the said creditor on the estate and effects of the said intestate:—Held, that this amounted to a release by the creditor of the wife's distributive share in the residue of intestate's personal estate, although such residue was not mentioned or referred to in the deed-poll. *Skaffington* v. *Whitehurst*, 3 Y. & Coll. 1; 7 L. J., N. S., Eq., 65.

6. A., being entitled under a deed of 1784 to a charge affecting the estate of B., in 1814 executed a release in order to enable B. to sell the estate for the payment of creditors claiming under a trust deed of 1809, a decree to account and report the priority of incumbrances having been made:—Held, that the charge of A. retained its priority under the deed of 1784, except as to purchasers who had bought upon the faith of the release; it appearing from depositions, in aid of the account, that no consideration was paid upon the execution of the release, and that the charge had not been satisfied, although the release had not been set aside or impeached in any suit instituted for that purpose:—Held, also, that the acceptance by A. of a bond with warrant, though accompanied by a release, could not, under the circumstances, be considered as a substituted security. *Hatchell* v. *Cremorne*, Ll. & G. *temp.* Plunk. 236.

7. Whether a release by will of all debts, accounts, and demands will transfer the property of goods which defendant then had in his hands belonging to plaintiff's testator, *quære*. *Fish* v. *Jesson*, 2 Vern. 114.

8. The decision of the Common Pleas in *Handcock* v. *Handcock* (10 Ir. Law Rep.) on the effect of a release of part of the debtor's lands from a judgment in discharging his other lands, doubted. *Handcock* v. *Handcock*, 11 Ir. Eq. R. 472.

9. A settlement was made of the choses in action of a female infant, on her marriage, in trust for her husband for life; and after his decease, in trust for her for life; and after the death of the survivor, and in default of children, in trust for such persons as she should by will appoint, with ultimate trust for her next of kin. The marriage, of which there was no issue, was dissolved by Act of Parliament, and the husband executed a release of his rights in her property under the settlement:—Held, that the property of the wife was not bound by the settlement, and that she was at liberty to resettle it on her second marriage. *Hastings* v. *Orde*, 11 Sim. 205.

10. If two joint tenants are plaintiffs, and one releases, the cause is not thereby abated. *Bulstrod* v. *Letchmere*, 2 Freem. 6.

11. Although an executor does actually release, yet he must be a party to the suit. *Smithby* v. *Hinton*, 1 Vern. 31.

12. An intestate at his death was indebted to D. M. in 1,687*l.*; disputes, however, arose between the administrator and next of kin as to the legality of the debt, and an agreement was come to between them and the brother of the intestate, whereby, reciting that all the property had been got in, and, excluding the disputed debt, amounted to 533*l.*; that doubts having arisen as to the validity of

that debt, and that being desirous of maintaining the good fame and character of the deceased, the three parties had agreed to waive all questions as to the validity of the debt, and raise a fund to make good the deficiency; that the next of his kin had agreed to "relinquish all claim to any residue or surplus;" that the intestate's brother should furnish 384*l.* towards payment of the debt; and the administrator should make good all the residue; it was witnessed that the next of kin released to the administrator all his right, etc., to the personal estate of the intestate, as his next of kin or otherwise, the brother covenanted to pay his part, and the administrator covenanted to pay the residue out of his own money, and also to pay all other debts, etc., of the intestate. The debt was paid, and other funds afterwards fell into the intestate's estate:—Held, that the administrator was not, under the release, entitled thereto. *Lindo* v. *Lindo*, 1 Beav. 496; 8 L. J., N. S., Ch., 284.

1. Creditors having brought a joint action against the bankrupt and A. and B., and having procured bankrupt to plead bankruptcy, undertaking to release and discharge him, and having entered a *nolle prosequi* as to him, and obtained judgment by default against A., and verdict and judgment against B.; *quære*, whether the right against bankrupt's estate is not merged and gone *in toto*. *Exp. Bauerman, Re Lomax*, Mont. & Ch. 569; 3 Dea. 476.

2. R., on entering into partnership with a firm, procured in 1801 from N. & Co., bankers, on the security of four bonds and a warrant of attorney, a credit for 10,000*l.* to bring into the firm, which was afterwards exhausted in meeting bills drawn by his partners. The firm became insolvent in 1804, owing N. & Co. upwards of 120,000*l.* in respect of transactions, some of which were prior to R.'s joining it. In N. & Co.'s accounts the 10,000*l.* was charged against the firm. A composition was entered into for 42,000*l.*, whereof 10,000*l.* was to be paid by R., who gave a mortgage on his estate to secure the same. The remaining 32,000*l.* was otherwise secured, and thereupon N. & Co. executed a release to the firm, releasing them, and every or any of them, from all claims or demands by N. & Co.:—Held, that the mortgage was not a substitution for the bonds, and that the release did not, in equity, extended to the balance due on the bonds. *Noel* v. *Rochfort*, 4 Cl. & F. 158; 10 Bli. N. S. 483.

3. *Quasi* entail of an estate for lives barred by release. *Moody* v. *Walters*, 16 Ves. 313.

4. A bond from the owner of an estate charged to incumbrancer, who signed a receipt for the amount, is not a substitution for the charge, but merely an additional security, and the estate is not thereby released. It is not incumbent on the creditor to prove that it was not the intention of the parties to this transaction that the bond should be a substitution of the charge, but it lies on the owner of the estate to make out that the estate is discharged. *Saunders* v. *Leslie*, 2 Ball. & B. 509.

5. Plea of general release containing the words "decree and orders of the Court of Chancery," is good bar to any demand set up under a decree of that court made prior to the date of the release; and if the defendant, by his answer, denies all charges of fraud, etc., in obtaining the release, such answer is sufficient to corroborate the plea. *Walter* v. *Glanville*, 5 Bro. P. C. 555.

6. A. devises 100*l.* to B.; and by will released to B. all debts and demands, and afterwards A. lends B. 100*l.*; whether this 100*l.* is released by the will, *quære*. *Bentham* v. *Alston*, 2 Vern. 136.

7. A charge on lands created by deed cannot be discharged but by deed, or at least by some formal act of release. *Cupit* v. *Jackson*, 13 Price 721; M'Clel. 495.

8. A sum of 600*l.*, to which a married woman was entitled for her separate use, was paid to her husband, who, by his will, gave her 2,800*l.*, and directed his executor to pay all his debts, and to take all the residue of his property. The husband died, and his widow received the legacy of 2,800*l.*, and executed a general release to the executor as to all matters under the will. The widow filed her bill for payment of the 600*l.*:—Held, that the 600*l.* existed as a debt, and that the legacy of 2,800*l.* was not intended to be in satisfaction of it, and that the plaintiff was entitled to payment, notwithstanding the execution of the release. *Rowe* v. *Rowe*, 2 De G. & Sm. 294; 17 L. J., N. S., Ch., 357; 12 Jur. 909.

9. W. H. being seised of an estate in tail in Whiteacre, certain judgments were obtained against him in 1824. Upon his marriage subsequently in that year, Whiteacre was settled upon him for life, with remainders over for the benefit of the issue of the marriage, and a recovery was suffered to the uses of the settlement. In 1825 W. H., by purchase, acquired Blackacre in fee. In 1826 several other judgments were obtained against him. In 1829 the plaintiff agreed to lend W. H. 2,000*l.* upon mortgage of his fee in Blackacre, and of his life estate in Whiteacre, provided that the judgment creditors of 1824 would release Blackacre from their judgments, to which they assented; and then, 1829, executed a deed-poll, which recited that W. H., being desirous to have Blackacre clear of incumbrances, had requested the judgment creditors of 1824 to release it from the incumbrances thereupon by the judgments, and that they, being satisfied that the residue of W. H.'s lands were a sufficient security for their judgments, agreed thereto, and by the operative part they released, exonerated, and for ever discharged Blackacre from their respective judgments, and from all writs of execution and executions, and every other writ then sued out, or thereafter to be sued out, against Blackacre by virtue of their respective judgments or otherwise in relation thereto, and they agreed for their respective judgments only to indemnify W. H. for all costs, damages, and expenses which should at any time be incurred by reason of Blackacre being attached in execution under those judgments: afterwards W. H. executed the proposed mortgage to the plaintiffs:—Held, that, both at law and equity, the operation and effect of the deed-poll of 1829 was to exonerate Whiteacre as well as Blackacre from the rights and remedies of the judgment creditors of 1824. *Handcock* v. *Handcock*, 1 Ir. Ch. R. 444.

1. The release by husband and wife of a sum of money secured by bond to A., and payable to the wife after A.'s death:—Held, not binding on the wife on her surviving both A. and her husband. *Rogers* v. *Acaster*, 14 Beav. 445.

When a feme covert is entitled to a reversionary interest in a chose in action, the release of the husband is as inoperative as his assignment to bind his wife's right by survivorship. *Ib.*

2. A creditor brought an action against the executor and devisee of his debtor, and recovered judgment for 146*l.*, and then assigned it for value to a brother-in-law of the executor. The executor and devisee absconded, but was found out by his brother-in-law, who, in May 1842, gave him notice of the assignment of the judgment to himself; but, in fact, he had in the previous April assigned the judgment, by way of mortgage, to the plaintiffs, who received the original assignment of the judgment debt, but gave no notice of the assignment to them to the executor, who was entirely ignorant of it. In order to pay the amount and to manage his affairs, the executor authorised his brother-in-law to receive the rents of the testator's property devised to him, which he did until 1848, when, after angry altercation, accounts were settled between them, 10*l.* was paid to the executor, and mutual releases, reciting and including the judgment, were given. On this settlement, the assignment to the brother-in-law was not asked for or referred to. The brother-in-law kept down the interest on the mortgage security he had given till 1849, when he became bankrupt. Shortly afterwards, the plaintiffs gave notice to the executor of the assignment to them, and at their instance the judgment creditor revived the judgment at law by *sci. fa.* Upon a suit by the plaintiffs against the executor and devisee and the other devisees of the original debtor, as creditors, seeking the administration of the estate:—Held, that the judgment was equitably released by the mutual releases in 1848, as regarded any interest which the plaintiffs could have in it against the executor and the estate of the original debtor; and the bill was dismissed with costs. *Stooks* v. *Dobson*, 5 De G. & Sm. 760; 17 Jur. 233. Affirmed 17 Jur. 539; 22 L. J., Ch., 884.

3. A. died insolvent; his widow, M., took out letters of administration. A deed of release was entered into between some of his creditors, who were described as simple contract creditors, of the one part, and M., as administratrix, of the other part, reciting that after payment of the specialty debts of A., there remained 373*l.* applicable to the payment of the simple contract debts, and that M. had proposed to divide that sum ratably among the persons parties thereto, in full discharge of their debts; the parties to the release, in consideration of the composition therein mentioned, paid to them on the amount of their debts, released the estate of the insolvent, and also his administratrix and her estate, from all claims and demands whatsoever which they had or might have against the insolvent. The debts were inserted in a schedule in a column, and W. signed the deed opposite to 86*l.* due to him for services as curate, and received the composition upon that amount. W. succeeded A. as rector, and had a claim of 200*l.* against his estate for dilapidations to the parsonage house. M., by her will, charged her real and personal estates with the payment of her husband's debts. In a suit for the administration of her estate:—Held, that, taking the deed and the will together, the execution of the release by W. operated as a discharge of all claims against A.'s estate, including the claim for dilapidations. *Burgess* v. *Bissett*, 2 Jur., N. S., 1221; 23 Beav. 278; 26 L. J., Ch., 697.

4. The parties beneficially entitled under the will of a creditor, wrote to the executor, authorising him to release and discharge a debtor from all debts and securities owing and given by him, and added, that as the debtor virtually succeeded to the money, he should pay his proportion of the probate and legacy duty. The debtor did pay the proportion of probate and legacy duty payable in respect of the debt:—Held, that the transaction amounted to a release of the entire debt. *Taylor* v. *Manners*, 11 Jur., N. S., 986.

5. Jurisdiction in equity to restrain execution upon a judgment against a defendant at law, on the ground of a subsequent release by the plaintiff at law of his claims under the judgment for a valuable consideration, paid by the defendant at law, notwithstanding that a rule obtained by the defendant at law to set aside the judgment on the ground of such subsequent release, had been discharged, and a writ of *audita querela* on the same ground had been set aside by the court of law. *Williams* v. *Roberts*, 8 Hare 315.

6. The rule that an executor who pays a legacy is personally liable to pay the amount of the legacy to any creditor of the testator whose claim is unsatisfied, whether he has notice or not of the claim, applies to a case in which the creditor has given the testator what purports to be a release of his claim, and the executor *bonâ fide* believes the release to be valid, and the creditor does not question its validity till some years after the executor has paid the legacy, and fails in the first instance, but succeeds in setting aside the release on appeal. *Jefferys* v. *Jefferys*, 19 W. R. 464; 24 L. T., N. S., 177.

7. A deed, reciting that all the testator's assets, save a small sum retained to meet contingencies and some doubtful debts, had been received by the executrix and applied in payment of debts, and that there remained only a sum sufficient to pay the legatees, in consideration of the sums paid on account of these legacies, released the executrix from all claims which they then had, or thereafter might have, against her as executrix, or against the residuary estate:—Held, that the deed did not operate to release the right of the legatees to be paid out of further assets which afterwards came, unexpectedly, to the hands of the executrix. *Lawe* v. *Lawe*, 8 Ir. R., Eq., 327.

8. W. H. was entitled for life to the interest of certain residuary estate, to the principal of which the wife of A. J. was entitled absolutely. W. H. being largely indebted to A. J., executed an indenture, assigning to A. J. all his, W. H.'s, interest in the said residuary estate. It was subsequently discovered that the residuary estate consisted partly of a fund, the existence of which was

unknown to either of the parties at the time of the execution of the indenture. W. H. thereupon filed a bill which, not complaining that the indenture had been executed by fraud, sought to exclude from its operation the additional fund by treating the indenture merely as a security for the amount then due from W. H. The Lord Chancellor, however, dismissed the bill, holding that the words of the indenture were sufficient to pass the interest of W. H. in the fund in question, and that no case was made on the pleadings for reforming the instrument. *Howkins* v. *Jackson*, 2 Macn. & G. 372; 2 H. & Tw. 301; 19 L. J., N. S., Ch., 451.

1. In consideration of certain payments by an executrix, persons interested in the estate gave a release of all claims on the estate to the executrix. It was afterwards discovered that property in which the testator was entitled to a share had during his life been sold at an undervalue. The executrix instituted and succeeded in a suit to set the sale aside, and recovered a large sum of money as part of the testator's estate:—Held, that this money was not included in the release, and that the persons who gave the release were entitled to share in the money so recovered as part of his estate. *Howkins* v. *Jackson* (2 Macn. & G. 372) distinguished. *Turner* v. *Turner*, *Hall* v. *Turner*, 14 L. R., Ch. D., 829; 42 L. T. 495; 28 W. R. 859.

III. POWER TO MAKE.

2. If the wife insist upon her equity against the assignees in bankruptcy of her husband, it attaches for the benefit of her children, and she cannot afterwards release it in favour of her husband. *Barker* v. *Lea*, 6 Madd. 330.

3. A solicitor has a lien upon costs, ordered to be paid to his client upon a petition in bankruptcy, although there be no fund in court; nor can the client release the benefit of the order to the prejudice of the solicitor. *Exp. Bryant*, 2 Rose 237.

4. Appointment by will (professedly in execution of a power in a marriage settlement) to A. for life, or until he should incumber, and upon his death or incumbering to the wife of A. for life for her separate use, and after her death to A.'s children, and if A. should die without wife or children to B., who was A.'s brother. A. and B. took other benefits under the will. The appointment to the wife and children of A. being an excessive execution of the power:—Held, that A. was bound to elect, but that B. might release to A. all his interest under the appointment. *Kater* v. *Roget*, 4 Y. & Coll. 18.

IV. PRESUMPTION OF.

5. Length of possession, as a ground for presuming a release, depends on the nature of the possession, whether adverse or not. *Fenwick* v. *Reid*, 1 Meriv. 114.

6. Courts of equity will presume a release within the same limits of time within which juries will be directed to presume it, whether any statute of limitation is applicable to the case or not. *Baldwin* v. *Peach*, 1 Y. & Coll. 453.

RELIGION.

— *Gifts for Superstitious or Ecclesiastical Purposes.* See CHARITY.

See also COPYRIGHT—ECCLESIASTICAL PERSONS AND PROPERTY—JEW—QUAKER—ROMAN CATHOLIC—TOLERATION ACT.

REMAINDERS AND REVERSIONS.

— *Generally.* See VESTED CONTINGENT AND FUTURE INTERESTS—MERGER.
— *When Barred.* See FINES AND RECOVERIES—FEE TAIL, V.
— *Reversions as Assets.* See EXECUTOR AND ADMINISTRATOR, XI. x.
— *Discovery of Deeds.* See PRACTICE (DISCOVERY, PRODUCTION, AND INSPECTION).
— *Rights of Assignee of Reversion.* See LANDLORD AND TENANT.
— *Action by Reversioner for Nuisance.* See NUISANCE, II. 12.
— *Cross Remainders.* See VESTED CONTINGENT AND FUTURE INTERESTS.
— *Rights of Tenant for Life and Remainderman.* See LIFE, ESTATE FOR.
— *Remoteness of.* See PERPETUITY.

REMITTER.

7. Tenancy in tail, creation of base fee and remitter to original title. *Woodroffe* v. *Daniell*, 7 Jur. 959.

8. Disseisin and remitter by entry, no revocation of will. *Att.-Gen.* v. *Vigor*, 8 Ves. 282.

RENEWAL.

— *Of Leases.* See IRELAND, V. 5—LANDLORD AND TENANT, VIII.—LIFE, ESTATE FOR, IV.
— *Trusts of Renewed Leases.* See TRUSTS.
— *Of Promises.* See LIMITATIONS, STATUTE OF.
— *Of Writ.* See PRACTICE (WRIT OF SUMMONS UNDER THE JUDICATURE ACT).

RENT.

— *Apportionment of.* See APPORTIONMENT, VI.
— *On Sales.* See VENDOR AND PURCHASER.
— *Reservation of on Leases under Powers.* See POWER, XXII. IV. 4.
— *Limitation of Time for Recovery of.* See LIMITATIONS, STATUTE OF, XIII. IX.

See also QUIT RENT—LANDLORD AND TENANT, X. — RENT-CHARGE — RENTS AND PROFITS.

9. Since the Statute of *Quia Emptores* there cannot be a grant in fee-farm. *Brady* v.

Fitzgerald, 11 Ir. Eq. Rep. 55. And see S. C. 12 Ir. Eq. R. 273. S. P. *Pennefather* v. *Stephens*, *id.* 61.

1. The term "rent" used in a decree under stat. 37 Hen. 8, c. 12, relating to tithes in London, means rent actually and *bonâ fide* received without fraud or covin; and not the annual value of the premises let. Fines to whatever amount, paid on the renewal of leases of dwelling houses, are not to be considered as increase of rent, or to be taken into calculation in estimating the amount of the tithes due, provided the rent reserved is equal to that which the houses have been at any time before let. *St. Paul's (Minor Canons)* v. *Crickett*, 5 Price 14.

2. A rent is a tenement; and therefore cannot pass by will without three witnesses, if not of freehold; the word "tenement" being in the Statute of Frauds. *Habergham* v. *Vincent*, 2 Ves. J. 231; 4 Bro. C. C. 353.

3. A bill lies to recover an ancient rent, the origin of which is unknown, and the lands charged not accurately ascertainable, especially where the parties liable to pay it, have by selling parts of the lands charged, and charging others by way of indemnity to the purchaser, and long acting on that arrangement, rendered the owner's right more uncertain. *Dublin (Archbishop)* v. *Trimleston (Lord)*, 12 Ir. Eq. R. 251.

4. Where an answer suggested that the plaintiff had for a certain time occupied a house of which he was tenant in common with several others, and that by virtue of such occupation, rent became due from him to those parties, and the bill was thereupon amended by charging that the plaintiff's occupation was not exclusive, and no further answer was put in:—Held, that the suggestion did not warrant an inquiry whether the plaintiff had been in occupation of the premises during any and what time, and if so, whether he ought to be charged with any, and what sum, in respect of such occupation. *M'Mahon* v. *Burchell*, 2 Ph. 127; 1 Coop. C. C. 457. Varying 3 Hare 97.

5. Part of a rent may be granted, not a new rent reserved or granted out of the whole. *Stafford* v. *Buckley*, 2 Ves. 177.

6. A rent, the amount of which may fluctuate according to the happening of certain events, is not an uncertain rent. *Exp. Voisey, Re Knight*, 21 L. R., Ch. D., 442; 52 L. J., Ch., 121; 47 L. T. 362; 31 W. R. 19. Affirming S. C. *sub. nom. Exp. Isherwood*, 46 L. T. 539.

7. An annual rent of merely nominal amount, *e.g.*, 3*s.*, is not "a rent having no money value" within s. 65, sub-s. 1, of the Conveyancing Act 1881, even though it may have in practice not been regularly paid, those words meaning, rather, a rent which, when received, has no money value. *Re Smith & Stott's Contract*, 48 L. T. 512; 31 W. R. 411.

RENT-CHARGE.

— *In Bar of Dower.* See DOWER, IV.
— *Jointure Rent-Charge.* See JOINTURE.
— *Limitation of, Time for Recovery of.* See LIMITATIONS, STATUTE OF, IX. XIII.
See also ANNUITY—QUIT RENT—RENT.

I. GENERAL INCIDENTS, 6071.
II. CREATION, 6071.
III. CESSER, 6072.
IV. REMEDIES IN RESPECT OF, 6073.
V. OTHER MATTERS, 6074.

I. GENERAL INCIDENTS.

8. *Quære*, as to rent-charge being subject of compensation; though when small, Court has allowed them to be such. *Esdaile* v. *Stephenson*, 1 Sim. & S. 122.

Rent-charge not incident of tenure. *Ib.*

9. Rent-charge in fee, granted out of gavelkind land, shall descend in gavelkind. *Edwin* v. *Thomas*, 1 Vern. 489.

10. As to a fine of land, not barring a rent-charge issuing out of the lands. *Whitfield* v. *Fausset*, 1 Ves. 387.

11. Whether an annuity or rent-charge out of the profits of the New River Company, is to bear the full assessment to the land-tax, or is to have the benefit according to the proportion of a reduction, in consequence of an assessment upon the profits of the company at an undervalue, *quære*. The bill by the annuitant was dismissed, the Court refusing to raise an equity as to the profit arising from disobedience to the Act. *Adair* v. *New River Co.*, 11 Ves. 429.

12. A testator devised his freehold estates to trustees in trust, to permit his wife to receive the rents for her life, and after decease upon trust to permit his nephew, his heirs and assigns, to hold and enjoy the said estates, and receive the rents and profits subject to the payment of 20*l.* yearly and every year for ever, to his niece, her executors, administrators, and assigns; and the testator made chargeable his said freehold estates with the payment of the said sum. The annuitant died, and her devisees contracted to sell the rent-charge, which was stated to have been given to the testator's niece, her heirs, executors, administrators, and assigns:—Held, that the rent-charge might be legally distrained for, and that the thing contracted to be sold was within the words of the contract, and a decree was made for specific performance. *Ramsay* v. *Thorngate*, 16 Sim. 575; 18 L. J., Ch., 238.

II. CREATION.

13. Part of a rent may be granted, not a new rent reserved or granted out of the whole. *Stafford* v. *Buckley*, 2 Ves. 177.

14. A rent out of copyhold aliened by surrender and admittance for a valuable consideration, good in equity. *Spindlar* v. *Wilford*, 5 Vern. 16.

15. By deed of 1769 A. granted a perpetual yearly rent-charge of 134*l.*, payable out of certain lands held by him for three lives, perpetually renewable. That deed was lost, but it appeared from a memorial thereof that A. had granted to B. and C., for the uses mentioned in the deed, a yearly rent-charge of 134*l.* for ever, issuing out of the said lands. The rent-charge was paid by the owners of the lands, from 1769 down to 1860, when a petition was presented to the Landed Estates Court for a sale of the rent-charge:—Held, that the

memorial, coupled with evidence of the payment of the rent-charge down to 1860, was sufficient evidence of a perpetual subsisting rent-charge, so as to enable the Court to sell. *Re Harding*, 11 Ir. R., Ch., 23.

1. By the settlement made upon the marriage of R. with S., P. gave, granted, and confirmed unto S. and her assigns, in case she survived P. and R., a yearly rent-charge to be charged and chargeable upon certain manors of or to which P. or any other person or persons in trust for him was seised or entitled for an estate of inheritance at law or in equity, to hold the said rent-charge, but subject and without prejudice as to such of the said hereditaments as were charged with a mortgage for a certain term made to D. P. also, for himself, his heirs and assigns, covenanted, granted, and agreed with S., her executors, administrators, and assigns, that in case the rent-charge should remain unpaid for certain periods, she should have powers of distress and entry. A term of one hundred years was also created for better securing this rent-charge. By his will, P. gave his real estates, subject to D.'s mortgage and the rent-charge, to S., and the term for securing the same to trustees for a term of five hundred years, upon trust to pay his debts and apply the money so raised in exoneration of his personal estate. S. survived both R. and P., but no part of the rent-charge had ever been received by her. A decree had subsequently to the death of R. and P. been made in a suit, the effect of which was to cut down the interest of P. in the estates charged with the rent-charge to a life interest, and withdraw them from the operation of the settlement. Upon a claim by S. as a creditor for the arrears of her annuity in the administration of P.'s estate:—Held, that the words used in the creation of the rent-charge did not amount to a covenant either at law or in equity, so that the claim by S. for the arrears of her rent-charge could not be allowed. *Monypenny* v. *Monypenny*, 6 W. R. 382; 4 Kay & J. 174; 27 L. J., Ch., 369.

2. Upon the admission of the heir-at-law that the will of the testator, which was lost, was duly executed and attested; and that thereby certain lands were devised to him, subject to a perpetual rent-charge; and upon evidence of the contents of the will by two witnesses who heard it read, but could not state that it was executed and attested as by law required, further than that the person reading it read out the names of the testator and of certain persons, as if they had executed and attested it; and upon proof of the payment of the rent-charge for thirty-five years up to the year before the filing of the bill, the Court declared that the lands were well charged with the annuity, and that the heir-at-law, and the persons deriving title with notice under a settlement of the lands executed by him on the marriage of his son, and duly registered, and also the judgment creditor of the heir-at-law, were bound to give effect to the devise of the rent-charge. *Wise* v. *Wise*, 2 J. & L. 603.

3. A testator seised of P. and other lands, directed all his just debts, funeral expenses, and legacies to be paid by his executors, and devised all his real and freehold estates, save a part devised to his wife, upon trust that his wife and her assigns should, after his decease, receive a rent-charge, with power of distress, and three of his daughters should receive rent-charges, with like remedy by distress and entry as provided with respect to the rent-charge to his wife. The testator then bequeathed pecuniary legacies to his children, and left all the residue and remainder of his real, freehold, and personal estates, subject to his debts and the aforesaid legacies and annuities, to the trustees:—Held, that the rent-charges to the daughters were specifically charged on the same lands as the rent-charge to the wife, and had priority over the legacies which were charged by the residuary clause only. *Weir* v. *Chamley*, 1 Ir. Ch. R. 295.

III. CESSER.

4. Under a suspension of a rent-charge by act of the parties, the rent ceases *pro tempore*. *Cook* v. *Fountain*, 3 Swan. 596.

5. A rent-charge of 20*l.* granted in consideration of 240*l.* redeemable on repayment of the consideration to the grantee's heirs, within a year after notice of the death of his wife, ceases on repayment of the sum stipulated to his executors, the conveyance being considered as a security for money. *Stokes* v. *Verrier*, 3 Swan. 634.

6. By a deed of 1709 the lands of S., together with twelve other denominations, were conveyed to J. B., subject to a rent of 126*l.*, which was to cease upon payment of 1,800*l.* In the will of J. B., dated 1717, and in family settlements executed in 1756 and 1778, no notice was taken of the existence of this rent. In 1841 the lands of S. were sold under a decree in the foreclosure suit. In the rental and abstract the lands were described as fee-simple, and in a declaration made by the defendant, under 4 & 5 Will. 4, c. 62, he stated, that no part of the rent had ever been paid by him or any of his ancestors out of the lands of S. There was no evidence to show that the rent had not been paid out of the other denominations:—Held, that there were not sufficient grounds to presume that the rent was either released or extinguished, and that it was a valid objection to the title. *Warren* v. *Bateman*, Fl. & K. 448.

7. Where, by the conveyance to a purchaser in fee of freehold property, certain outstanding rent-charges were conveyed to a trustee in trust for the purchaser, his heirs and assigns, the fee being conveyed to the purchaser to uses to bar dower, and afterwards the purchaser specifically devised the property, but without mention of the rent-charges:—Held, that the property was devised free from the rent-charges, and the trustee was ordered to convey them so that they be legally extinguished in the inheritance. *Vallance* v. *Vallance*, 2 N. R. 229.

8. It is no objection to a title that two fee-farm rents, created by letters patent by James I., are not shown to have been extinguished, it being proved that no claim had been made by the Crown for the rents, from the year 1706, and no proof of any previous claim. *Simpson* v. *Gutteridge*, 1 Madd. 609.

Where adult female, before marriage, agrees to accept, in lieu of dower, a rent-charge, she is bound to see that the grantor has title to lands charged therewith; and therefore, a purchaser of other lands belonging to grantor, which might otherwise have been liable, in case of failure of such security, is not entitled to see, from title-deeds, that grantor has title to such charged lands. *Ib.*

IV. REMEDIES IN RESPECT OF.

1. Purchaser of one of several parcels, into which land had been divided, shall not be subject to the rent-charge on the whole; other purchasers must contribute; grantor restrained by order. *Anon.*, Cary 2. S. P. *Dolman* v. *Vavasor*, *id.* 92.

2. In like case, where one tenant files a bill against grantee, he must make all who should contribute; parties defendant to show cause why they should not contribute. *Anon.*, Cary 23.

3. Devisee of a rent-charge out of lands, with power of distress, dies; his executrix brings a bill for the arrears: decreed, that she may enter, and hold and enjoy till paid the arrears. *Foster* v. *Foster*, 2 Vern. 386; Pre. Ch. 122.

4. The Court will entertain a suit to raise the arrears of a rent-charge, although the plaintiff may appear by his bill to have full legal remedies. *Ahearne* v. *O'Callaghan*, Hay. & J. 339.

5. The augmentation of vicarage by yearly payments of corn and money out of rectory, is a charge on rectory impropriate, into whose hand soever it shall come. Where vicar brings bill for arrears of certain annual payments issuing out of impropriate rectory, he shall recover against the impropriator, though a considerable time has elapsed between the commencement of arrears and impropriator's possession: but purchaser, with notice of such claim, pending such suit, shall only account for arrears after his possession. *Cooke* v. *Smee*, 2 Bro. P. C. 184.

6. Arrears of annuity chargeable by deed (a marriage settlement) on land, or a rent-charge:—Held, to be recoverable by bill in equity, filed by personal representatives of grantee against son of grantor, the devisee of estate, although powers of entry and distress, and a right to permanency of rents, etc., in satisfaction of annuity when in arrear, were expressly given and reserved to grantee by the deed; and although the right to those remedies may have devolved on the representative, or he might have other remedies by statute or otherwise. *Cupit* v. *Jackson*, 13 Price 721; M'Clel. 495.

7. A bill in equity does not lie to recover a rent-charge, for which there is a legal remedy, merely because of the difficulty of proceeding at law; the rule being that a party must abide by the legal remedy his deed provides for him unless that is defeated by fraud, or rendered insufficient by some contingency. *Cupit* v. *Jackson* (13 Price 721) and other cases on this subject observed on. Where an annuity deed contained a covenant to pay a rent-charge, and for a further assurance of it, and the grantor becoming insolvent, questions arose as to the applicability of rents received by his assignees to discharge arrears, and a judgment and execution was had for some past gales on which questions of satisfaction were raised, and the assignees submitted to the appointment of a receiver in a suit founded on the deed, who brought a fund into court:—Held, that these circumstances gave jurisdiction to entertain the suit. *Roberts* v. *Hughes*, Beat. 417.

8. Bill in equity lies for payment of an entire rent out of a manor where there are no demesne lands on which to distrain. But it seems that the lands must be indisputably of greater value than the rent. *Leeds* (*Duke*) v. *Powell*, 1 Ves. 171.

9. A bill in equity does not lie to recover the arrears of a rent-charge, unless it be proved that there are circumstances which render the legal remedies useless or very difficult. *Brady* v. *Fitzgerald*, 12 Ir. Eq. R. 273. Reversing 11 Ir. Eq. R. 55. S. P. *Pennefather* v. *Stephens*, *id.* 61.

The several authorities respecting bills for annuities and rent-charges reviewed and observed on. *Ib.*

10. Order made for payment of a rent-charge to sequestrators by a party out of whose estate the same was issuing, and which was payable to the person whose estate was sequestered. *Wilson* v. *Metcalfe*, 1 Beav. 270; 8 L. J., N. S., Ch., 331; 3 Jur. 601.

11. A testator devised his freehold estates to trustees, in trust, to permit his wife to receive the rents for her life, and after her decease, upon trust, to permit his nephew, his heirs, and assigns, to hold and enjoy the said estates, and receive the rents and profits, subject to the payment of 20*l.* yearly, and every year for ever, to his niece, her executors, administrators, and assigns, and the testator made chargeable his said freehold estates with the payment of the said sum. The annuitant died, and her devisees contracted to sell the rent-charge, which was stated to have been given to the testator's niece, her heirs, executors, administrators, and assigns:—Held, that the rent-charge might be legally distrained for, and that the thing contracted to be sold was within the words of the contract; and a decree was made for specific performance. *Ramsay* v. *Thorngate*, 16 Sim. 574; 18 L. J., N. S., Ch., 238.

12. Where the deeds by which a rent-charge was granted were lost, and the rent had been paid twelve years, equity decreed the arrears and future payment to be secured. *Collet* v. *Jaques*, 1 Ch. Ca. 120.

Receiver.] 13. If a purchaser of the legal estate in lands, subject to an equitable rent-charge, refused to pay the rent-charge, a receiver will be appointed. *Pritchard* v. *Fleetwood*, 1 Meriv. 54.

Interest.] 14. It is a general rule, that where a party is prevented by Court from proceeding to establish his right at law, it is the duty of the Court to see no injury arise to him in consequence of its interference; therefore, where an annuitant was restrained by injunction from proceeding at law to recover the arrears of rent-charge, interest was allowed. *O'Donel*

v. *Browne*, 1 Ball. & B. 262. S. P. 6 Ves. 93. See also 2 Y. & J. 73; 1 Vern. 74.

Sale of Lands Charged.] 1. A sale of lands decreed to raise arrears of a rent-charge granted with powers of distress and entry, there being nothing to distrain on, and there being twenty other concurrent rent-charges with like remedies. *White* v. *James*, 26 Beav. 191; 4 Jur., N. S., 1214.

Suit by a grantee of a rent-charge, on behalf of himself and twenty others, to raise the arrears by sale, sanctioned. *Ib.*

2. When land near Manchester was subject to a chief rent, which, owing to the land being unproductive, had not been paid for more than twenty years, the Court, in a suit for that purpose by the persons entitled to the chief rent, ordered the sale of the land for the payment of all the arrears of the rent. *Horton* v. *Hall*, 22 W. R. 391; 17 L. R., Eq., 437.

3. The grantee of a rent-charge secured by a term for years and a judgment, is not entitled to have the lands sold discharged of a lease made before suit, and after the grant of the rent-charge, where it did not appear that the lands, if sold subject to the lease, would not produce sufficient to satisfy his demand, even though not enough to satisfy the incumbrances subsequent to his demand. *Stamer* v. *Nisbitt*, 3 J. & L. 447; 9 Ir. Eq. R. 96.

4. The plaintiff was entitled to a rent-charge created by a deed of 1778, which contained a power on non-payment to enter upon the premises charged, and receive the rents until satisfaction of all arrears of the rent-charge, "together with all such costs, charges, and expenses as should be laid out and expended by him, or occasioned by reason of the non-payment thereof." In 1844, the rent-charge being in arrear, and the property so dilapidated as to be unproductive, the plaintiff entered into possession, and expended money in repairs:—Held (affirming 20 Beav. 639; 1 Jur., N. S., 949; 25 L. J., Ch., 62; 3 W. R. 636; 3 Eq. Rep. 988), that he had no lien on the land for the moneys so expended, whether the defendant, the owner of a subsequent rent-charge, had notice of such repairs and had acquiesced in the making thereof or not, and that the remedy of the plaintiff, if any, was at law, and depended on the construction of the deed of 1778. *Hooper* v. *Cooke*, 2 Jur., N. S., 527; 25 L. J., Ch., 467.

Parties.] 5. Upon a bill for equitable relief as to a rent-charge, all the persons whose estates are liable must be parties. The rule dispensed with under circumstances, making it impracticable, or highly inconvenient. *Att.-Gen.* v. *Jackson*, 11 Ves. 369.

6. A rent-charge for a certain period of time, in arrear, charged by an order made by the Inclosure Commissioners upon the inheritance of glebe lands of a rectory, under the provisions of the General Land Drainage and Improvement Company's Act of 1849 (12 & 13 Vict., c. xci.), was, under the provisions of the same Act, ordered to be raised by a sale of the glebe lands. In an action by the owners of a rent-charge, in arrear, charged on glebe lands, for a declaration that they were entitled under the order made by the Inclosure Commissioners to a charge on the lands for the sums due and to become due of the rent-charge, and asking for a sale of the lands, the ecclesiastical commissioners were made defendants:—Held, on demurrer, that they were not necessary parties. *Scottish Widows' Fund* v. *Craig*, 20 L. R., Ch. D., 208; 51 L. J., Ch., 363; 30 W. R. 463.

Lapse of Time and Statute of Limitations.] See LIMITATIONS, STATUTE OF, IX. XIII.

V. OTHER MATTERS.

7. A woman entitled to a rent-charge marries, and at the husband's death there are arrears due; they shall go to the wife surviving, notwithstanding she had a settlement, there being no express or implied intention that the husband should be a purchaser of all her fortune. *Salwey* v. *Salwey*, Ambl. 692.

8. S. had a rent-charge granted to him and his assigns for three lives. S. and his wife mortgaged it to A., his executors, administrators, and assigns. *Habendum* to him, his heirs, and assigns, during the three lives, upon trust that A., his executors, administrators, and assigns should enjoy 100*l.* per annum out of it, till the mortgage was satisfied. A. made an unattested will, and appointed plaintiff his executor, who brought his bill against the heir of A. for this 100*l.* per annum. Decreed, that the heir of S. should take this rent-charge, but for the benefit of the executor, agreeably to the trust in the mortgage deed. *Kendal* v. *Micfeild*, Barn. Ch. Rep. 46.

9. A. is tenant in tail, subject to a rent-charge to B., for life; A. dies, the rent-charge being in arrear; the issue in tail not liable, by the stat. of 32 Hen. 8, c. 38, to the arrears incurred in the life of his ancestor. *Fairfax* (*Lord*) v. *Derby* (*Lady*), 5 Co. 118. a.; 2 Vern. 612.

10. Eton College was entitled to 34*s.* per annum, under a royal grant, issuing out of certain lands, but the college did not know the particular lands. Decreed, the executors of the terre-tenant should be answerable for the arrears. *Eton College* v. *Beauchamp*, 1 Ch. Ca. 121.

11. A., on his marriage, settled a rent-charge on his wife for her jointure, and afterwards devises to the wife part of the land charged with the rent-charge: bill is, that the rent-charge might be apportioned. Bill dismissed. *Knight* v. *Calthorpe*, 1 Vern. 347.

RENTS AND PROFITS.

— *Excess of Accumulations.* See ACCUMULATION, IV.
— *Apportionment.* See APPORTIONMENT, VI.
— *Rights of Execution Creditor.* See ELEGIT, —PRACTICE (SEQUESTRATION).
— *Timber, Rights respecting, and Account* See WASTE AND TIMBER.

— *Of Property of Charity and Increased Revenue.* See CHARITY, VI. VI. AND VII. —X.
— *Income of Property pending Conversion.* See CONVERSION, I. IV. 8—LIFE, ESTATE FOR, VI. I.
— *Rights of Mortgagor and Mortgagee.* See BANKRUPTCY, XXVII. iii. 5—MORTGAGE, VI. VIII.
— *Rights of Lessor and Lessee.* See LANDLORD AND TENANT, X.
— *Royalties and Rents in case of Mines.* See MINES AND MINERALS, III. 6.
— *Charges on and Directions to raise Money Out of.* See EXECUTOR AND ADMINISTRATOR—LEGACY—PORTION—POWER.
— *Of Tenant for Life of Residue and Wasting Property.* See LIFE, ESTATE FOR.
— *On Sales of Land.* See VENDOR AND PURCHASER.
— *Devise of. What Passes.* See WILL.
— *Under Shifting Clauses.* See VESTED CONTINGENT AND FUTURE INTERESTS.

See also ACCRETION AND BONUS—ACCOUNT—BANKRUPTCY — COPYRIGHT — INTEREST —PATENT — POSTHUMOUS CHILDREN—QUIT RENT — RENT — RENT CHARGE — PRACTICE (RECEIVER) — SETTLEMENT. VESTED CONTINGENT AND FUTURE INTERESTS—WILL.

I. BILL IN EQUITY. IN WHAT CASES, 6075.
II. ACCOUNT. WHEN DIRECTED, 6075.
III. ACCOUNT. FOR WHAT PERIOD, 6076.
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I. BILL IN EQUITY. IN WHAT CASES.

1. A bill may be exhibited for mesne profits after a decree giving the possession. *Coventry* v. *Hall*, 2 Ch. Rep. 259.

2. Equity will not decree an account of mesne profits, unless in case of trust, or an infant, where no entry is made by the person entitled to the mesne profits. *Hutton* v. *Simpson*, 2 Vern. 724.

3. The rule in equity is the same as at law; as trespass will not lie for mesne profits till possession is recovered, so neither can a bill for an account thereof be brought till then. *Norton* v. *Frecker*, 1 Atk. 525.

4. Special election to proceed at law in an ejectment for the land, and in equity for an account of profits. *Anon.*, 1 Vern. 105.

5. An action for mesne profits lies where one tenant in common recovers against another in ejectment by default. *Goodtitle* v. *Tombs*, 3 Wils. 168.

6. No action for mesne profits lies against an executor. *Pulteney* v. *Warren*, 6 Ves. 80.

Mere death of occupier will not sustain a bill for account of mesne profits under the head of accident. *Id.* 6 Ves. 88.

Bill for account of mesne profits does not lie by heir as such merely, unless there is some impediment at law. *Id.* 89.

Dowress may bring bill for account of mesne profits. So also will it lie in the case of mines. Also in case of tithes. *Ib.*

7. A lessor suffers the lessee to hold the lands after the lease is determined; equity will not compel the tenant to account for the mesne profits, unless the lessor was hindered from entering by fraud, or some extraordinary accident. *Bolton* v. *Deane*, Pre. Ch. 516.

8. If a suit for possession be properly cognisable in equity, there may be an account of rents and profits; but if the plaintiff has a legal right to the possession, he has no right to proceed by bill for an account of rents and profits. *Barnewall* v. *Barnewall*, 3 Ridgw. P. C. 66.

9. A., by an unattested will, devises lands to B.; B. receives the rents, and by a will, also unattested, gives the lands, together with a legacy, to the heir at law of A. The heir may receive the legacy, and also call for an account of the rents received by B. *Gardiner* v. *Fell*, 1 Jac. & Walk. 22; 2 Wils. 32.

10. A., after the death of his wife, continued, by mistake, in the receipt of the rents of real estate to which she was entitled for life. Demurrer to a bill by the persons entitled to the property after the death of the wife against the personal representative of A., for an account of rents and profits received by him since the death of his wife, and if such representative did not admit assets, for an account, and for delivery up of title deeds, overruled. *Caton* v. *Coles*, 1 L. R., Eq., 581; 12 Jur., N. S., 205; 35 L. J., Ch., 836; 14 L. T., N. S., 51.

Such a bill is not within the rule laid down in *Whitchurch* v. *Golding* (2 P. W. 541) requiring an affidavit to be annexed to the bill. *Ib.*

11. A person out of possession alleging a perfectly good legal title cannot file any bill against a person in possession for an account of rents and profits without first establishing his title at law. A bill so filed is demurrable. An infant cannot maintain a bill for an account of rents and profits received during his infancy against a person who has been in possession of his estate, and who claims by an adverse title either legal or equitable, unless, previously to the entry of such person, the infant was in possession by himself or his guardian, or unless the infant first establishes his legal title by an ejectment; and a demurrer to a bill for this purpose, stating a legal title in the infant, and an adverse equitable claim by the defendant, was allowed. *Crowther* v. *Crowther*, 5 W. R. 238.

II. ACCOUNT. WHEN DIRECTED.

12. Under bill to put term out of way, account of past rents is given in some cases. *Exp. Wilson*, 2 Ves. & B. 252; 1 Rose 444.

13. In a case of a mere equitable title, where the legal estate is in trustees to attend the inheritance, the plaintiff is barred at law; and if he cannot make out such a case as will entitle him to an account of the rents and profits, praying general relief will not entitle him to it. *Dormer* v. *Fortescue*, 3 Atk. 131.

14. Though Court decreed specific performance of agreement to let plaintiff into trade (see *contrà*, 9 Ves. 357), account of mesne profits refused. *Anon.*, 9 Ves. 630.

15. Though shares in waterworks are a legal estate and corporeal inheritance, yet no one proprietor can receive the profits himself; and as there is no other way of getting at it

proper to come into equity for mesne profits. *Townsend* v. *Ash*, 3 Atk. 337.

1. Bill for an account under covenant upon sale of goodwill not to carry on the trade. *Scott* v. *Mackintosh*, 1 Ves. & B. 503.

2. Whether a mortgagee could, in an action for mesne profits after judgment in ejectment against the mortgagor in possession of the mortgaged premises, recover the value of the crops severed, and sold subsequent to the day of the demise, laid in the declaration, but before the delivery of possession by the sheriff, *quære*. *Exp. Temple*, 1 G. & J. 216.

3. Where an agent had permitted his principal to expend money on an estate, which the agent afterwards claimed as his own, and to which his real representative established a legal title by ejectment, the Court granted an injunction to restrain an action brought by the agent's representative for some profits. Where an action for trespass for mesne profits is brought against a party who has a cross claim against the plaintiff at law for money expended on the land, the Court will grant an injunction to restrain the proceedings at law, there being no right of set-off in such an action. *Cawdor* (*Lord*) v. *Lewis*, 1 Y. & Coll. 427.

4. In a suit instituted by the remainderman against the trustee for the restitution of the trust fund, which had been improperly invested, to which suit the tenant for life was a party defendant:—Held, that the latter could not have an account against the trustee of the arrears of interest, although he had asked such relief by his answer, the point not being raised by the bill, and there being no admission of the claim in the answer of the trustees. *Goodwin* v. *Clewley*, 2 Beav. 30; 3 Jur. 552.

5. Though an account of real estate can only be had at the suit of a creditor in a bill on behalf of all creditors, still, if in a suit not so entitled, it becomes expedient to take such an account, the Court will, at the hearing, direct the bill to be taken as a bill on behalf of creditors. There is no objection to a bill for an account of the estates of two testators who are joint debtors. *Woods* v. *Sowerby*, 14 W. R. 9.

6. An account of rent and mesne rates decreed under circumstances of complexity of title, occasioned by the acts of the tenant, and in order to avoid a multiplicity of suits, the bill also seeking the delivery of a deed to be cancelled. *Nixon* v. *Robinson*, 2 J. & L. 4; 7 Ir. Eq. R. 520.

III. ACCOUNT. FOR WHAT PERIOD.

7. A person is entitled to mesne profits but from the time of his entry. *Tilly* v. *Bridges*, 2 Vern. 519.

8. Where one in possession of lands belonging to an infant, if the infant, when he comes of age, makes out his title, he shall recover the profits in equity from the first accruing of his title, and not from the filing of his bill only. *Bennet* v. *Whitehead*, 2 P. W. 645.

So defendant shall account for the profits from the time the plaintiff's title accrued, and not from the filing the bill only, if the defendant has concealed the deeds and writings making out plaintiff's title. *Ib.*

9. If a possessory bill filed for recovery of estate wrongfully detained pray an account of the intermediate rents and profits, the general rule is, to decree the same from the time of filing the bill. *Edwards* v. *Morgan*, 13 Pri. 782; 1 M'Clel. 541. Affirmed 1 Bli. N. S. 401.

In case of mere adverse possession the Court does not decree account of rents and profits beyond the time of filing the bill. *Ib.* S. P. *Pulteney* v. *Warren*, 6 Ves. 93.

10. Where a widow claims dower merely upon a legal title, but cannot ascertain the lands, equity will assist her to find them out; and if her title to it is established, will give her the profits from the time her title accrued. If a dowress comes into equity to have a term removed which is established, equity will decree her an account of the rents and profits from the time her title accrued; *secus*, if the term had been out of the way, and she had no need to come into equity. *Dormer* v. *Fortescue*, 3 Atk. 130.

11. Under particular circumstances of fraud, imposition, and delay, a court of equity will decree an account of rents and profits of an estate, after an adverse possession of fifty years. *Stackpoole* v. *Davoren*, 1 Bro. P. C. 9.

12. The rule of the Court of Chancery in a suit to recover land in the nature of equitable ejectment, is not that the Court never gives an account of rents beyond the filing of the bill, but it is a rule of discretion, and where the circumstances justified the delay, the Court gave an account of rents antecedent to the filing of the bill. *Wright* v. *Chard*, 4 Drew. 673. S. C. on appeal 1 De G. F. & J. 567; 6 Jur., N. S., 476; 29 L. J., Ch., 415.

Where the circumstances are special, such as where the person entitled was a lunatic, and his committee in possession did not apply the rents for the lunatic's benefit, and on his death his personal representative filed a bill to obtain them, the Court will not apply the rule. S. C. 5 Jur., N. S., 1334; 1 L. T., N. S., 138.

A., a lunatic, under a will of difficult construction, became entitled to real estate; but the trustee to the separate use of V., a married woman, entered into possession, being aware of A.'s claim. After the death of A., W., who then claimed, commenced proceedings, and established his right against V. W. took out administration to A., and soon after the right of A. and W. had been established, which was nearly six years after the death of A., commenced proceedings against V., and the trustee to her separate use, to recover rents received by the trustee and paid to V., during the life of A.:—Held, that W. was not precluded by the lapse of time, under the circumstances; and that V., and her trustee, having been aware of A.'s claim, must account for the rents, without reference to the time when the bill was filed. *Ib.*

Held, also, that the trustee was liable to account for the rents he had received and handed over to the married woman. *Ib.*

Held, also, that the separate estate of the married woman was not liable for the rents she had so received. *Ib.*

Held, that the committee of the lunatic was liable to account for moneys received by him, and paid to another person, under the belief that the moneys delivered did not belong to the lunatic, although the committee had obtained his quietus. *Ib.*

An account of the produce of timber cannot be obtained under a charge of occupation rent or rents received. *Ib.*

1. Account of rents and profits confined to six years, by analogy to the action for mesne profits. *Reade* v. *Reade*, 5 Ves. 744.

2. In a doubtful case, an account of rents and profits directed only from the time of the filing of the bill. *Forder* v. *Wade*, 4 Bro. C. C. 521.

3. J. having a devise in common with P., whom he survived, took possession of two houses, and enjoyed them: he was decreed to account as far back as the death of P. *Prince* v. *Heylin*, 1 Atk. 493.

4. The Court only removes fraudulent conveyances out of the way, but will not decree profits back against the original debtor and owner of the estate, received *pendente lite*, in favour of judgment creditors, from the filing of the bill. *Higgins* v. *York Buildings Co.*, 2 Atk. 107.

5. The general rule appears to be, that when a party has slept for a long time on his rights, an account of rents and profits, etc., if he be entitled to one, will be directed only from the filing of the bill. *Mulhallen* v. *Marum*, 3 Dr. & War. 336. *Thornhill* v. *Glover*, *Id.* 195.

6. The plaintiff filed his bill to set aside an instrument for fraud, and to obtain possession of certain lands which had been devised to him. Before the determination of the suit, the original defendant died. The suit having been revived against his devisee and personal representative, the Court decreed the plaintiff entitled to mesne rents from the time of the accruer of the plaintiff's title with costs. *Blackwood* v. *Gregg*, Hay. & J. 310.

7. The widow of a testator, with the acquiescence of his heir, was let into possession of certain freehold houses, under an erroneous supposition that they passed by the will along with other property, in which a life interest was devised to her; and before the error was discovered or her right disputed, she died. On a bill filed by the heir against her personal representative, praying the delivery of the title deeds, and an account:—Held, that the suit was maintainable for the rents received during her continuance in possession; that as the defence of the Statute of Limitations was not raised upon the pleadings, the account should be taken from the time when the plaintiff's title first accrued; and that the plaintiff was not at liberty to set off the amount of such rents against payments made by the widow in her character of executrix, those payments being, by virtue of a special trust, a primary charge upon the estates, of which, subject to the widow's life interest, the plaintiff was devisee. *Monypenny* v. *Bristow*, 2 Russ. & M. 117; 1 L. J., N. S., Ch., 88.

8. C. being in possession of property under a settlement for the residue of a term of ninety-nine years, determinable with the life of the settlor, who died in 1830, continued by mistake in possession till her own death in 1835. D., who became entitled on the death of the settlor under a deed of gift from him, discovered the mistake in 1839, by consulting that deed, which had been in his possession the whole time, and then sued the executors of C. for the rents received by her after 1830:—Held, that inasmuch as D. had been guilty of laches in not finding out the mistake earlier by the means which were in his power, he was entitled to an account only for the period allowed by analogy to the Statute of Limitations, which in this case was six years before the filing of the bill, and an additional period during which he was abroad. *Denys* v. *Shuckburgh*, 4 Y. & Coll. 42; 5 Jur. 21.

9. Where the heir of the lessor was lunatic, and through the laches of the receivers no rent was paid for a period of nearly thirty years, and the committee having in a court of law recovered the premises in ejectment for non-payment of rent according to the covenants:—Held, that in the absence of any proof of fraud and collusion with the former receivers, or surrender, the mere laches was not a bar to the action for the recovery of arrears of rent, and the House refused to interfere, and affirmed the judgment below. *Lopdell* v. *Creagh*, 1 Bli. N. S. 255.

10. A. by will in 1807 appointed the manor of W. to uses, under which B. became entitled in 1831, and devised his residuary real estate, consisting of leaseholds under a 900 years term, upon trust for sale. In 1814 C. purchased from the trustees of the will one lot of six acres, two acres of which had belonged to the manor of W. in 1793, and were freehold, the remaining four being leasehold. C. at the time of his purchase had full notice of the limitations in favour of B. B. attained twenty-one in 1849:—Held, that B. was entitled to the two acres freehold, parcel of the manor of W., and to an account of the rents thereof since his title accrued, notwithstanding that the confusion of the freehold, improperly sold by the trustees, with the leasehold, had arisen from the person under whom B. derived his title. *Hicks* v. *Hastings*, 3 Kay & J. 701.

11. Account of rents directed at the suit of the issue in tail for six years previously to the filing of the bill. *Gibbons* v. *Snape*, 1 De G. J. & S. 621.

12. A. by will, dated in 1836, gave freehold and leasehold estates, and the residue of his personal estate to his son B., and appointed his wife C. his sole executrix. The son died intestate in 1838, leaving his two sisters D. and E. and his niece F. his co-heiresses at law, and them and his mother his sole next of kin. The mother took out letters of administration to her son, and by her will, appointed her daughter D. sole executrix and universal legatee, and died in 1841. In December 1858 D. took out letters of administration *de bonis non* to her brother B.'s estate; and in the same month F. his niece and her husband filed a bill to recover her share of the real and personal estates of B., and for the administration of the same:—Held, that the plaintiffs were entitled only to an account of the rents of the real estate, for a period of six years before the suit; but that the 3 & 4 Will. 4, c. 27 was no bar to an account of the personal estate, and of the rents of the leasehold estate received by C. the mother and administratrix, or by D. her executrix, from the time of the death of the intestate B., notwithstanding the 102nd section. *Obee* v. *Bishop*, 29 L. J., Ch., 148; 6 Jur., N. S., 132.

13. Account of back rent given only from the filing of the special case on the ground of laches. *Schroder* v. *Schroder*, 3 W. R. 55;

18 Jur. 987; 3 Eq. Rep. 79; 1 Kay 578; 2 W. R. 621; 2 Eq. Rep. 875.

1. The rule that where an account in equity is directed against a person in receipt of rents without any title to them, the account will be taken only from the time the proceedings were commenced, does not apply where there has been no laches on the part of the person really entitled. *Hickman* v. *Upsall*, 46 L. J., Ch., 245; 4 L. R., Ch. D., 144; 25 W. R. 175; 35 L. T., N. S., 919.

Trusts.] 2. If an estate is devised in trust to pay debts, the heir must account for rents and profits from the time of filing bill. *Chambers* v. *Harvest*, Mos. 124. Vide *Montagu* v. *Ford*, 2 Ch. Ca. 225; 1 Vern. 282.

3. Where on a bill to call a trustee to account, he by answer submits readily to it, though found in debt, shall pay the interest for the balance only from the time of the account liquidated, and no costs. *Secus*, if he controverts the account; then, if found in arrear, he shall pay interest and costs. *Parrot* v. *Treby*, Pre. Ch. 254.

4. Account of rents and profits confined to filing of the bill under special circumstances; as laches by the *cestui que trust* in not asserting his right. *Pettiward* v. *Prescott*, 7 Ves. 541.

5. Account of rents and profits of estate held of trustees (the Statute of Limitations being insisted on) ordered from six years before filing of bill. *Pearce* v. *Newlyn*, 3 Madd. 186. S. P. *Hercy* v. *Ballard*, 4 Bro. C. C. 486.

6. The grant of the office of registry of the Court of Chancery for lives in trust for the Duke of St. Albans, his heirs and assigns, descends to the heirs general; and does not follow the title; and being assignable, the claim of the mortgagee was established, but not to the bygone profits. (See 3 Ves. 25.) The duke being trustee, but having obtained possession without title as heir, the Court, though the plaintiff was an infant, inclined not to carry the account further back than the time of filing the bill, if the profits had not been paid into court at an earlier date in the suit instituted by the mortgagee. *Drummond* v. *St. Albans* (*Duke*), 5 Ves. 433.

7. The manor of W. was, by settlement, vested in trustees, upon such trusts as E. B., a married woman, should by will appoint. Before any will was made, a piece of copyhold land was, under an Inclosure Act, allotted to the trustees of the settlement as lords of the manor, and in compensation of their interest in the soil of the manor. Under the same Act, two copyhold allotments were made to two other persons in respect of copyhold interests. The trustees of the settlement, in exercise of a power vested in them for that purpose, bought the two last-mentioned allotments, and held them upon the same trusts as the manor. Afterwards, in 1807, E. B. made her will, devising the manor, with its appurtenances, to the father of the plaintiff for life, with remainder to his first son in tail, with remainder to his second son the plaintiff, and devising the residue of her property to trustees on trust to sell. E. B. died in 1813, and the copyhold allotment made to the trustees of the settlement, and the two allotments purchased by them, were then treated by the trustees of the will as part of the residue, and in 1814 were sold to a person from whom the defendant subsequently purchased. The plaintiff, while an infant, became entitled, in 1831, by the deaths of his father and elder brother, to the manor under the devise. He attained twenty-one in 1849, and soon afterwards filed a bill, claiming the three allotments as part of the manor:—Held, that, as to each allotment, there had been, under the circumstances, an extinguishment of the copyhold in the manor, and that they all passed to the plaintiff under the devise of the manor, there being nothing on the face of the will to show that the testatrix intended to use the word in any other than its ordinary legal meaning:—Held, also, that the plaintiff was entitled to an account of rents and profits from the time his title accrued in 1831. *Hicks* v. *Sallitt*, 3 De G. M. & G. 782; 18 Jur. 915; 22 L. J., Ch., 571.

The rule is that, in the absence of special circumstances, a party found to be wrongfully in possession of property is to account for rents and profits during the whole period of time that his wrongful possession has continued. The authorities on this point referred to and observed upon, and the decision in *Drummond* v. *St. Albans* (*Duke*), 5 Ves. 433, held not to be law. *Ib.*

IV. OTHER CASES.

8. The account of rents given against a purchaser for value, who, after being in possession, is evicted by a party having a better title, ought not to extend to such rents as, without his default or neglect, might have been received if no special case of fraud is made against him. The decree for such an account ought to contain a direction for just allowances. *Howell* v. *Howell*, 2 Myl. & C. 478; 1 Jur. 492.

9. In taking an account of rents with which a defendant is charged by the decree, any allowance for lasting improvements can only be co-extensive with the period of accounting. *Att.-Gen.* v. *Craven* (*Earl*), 21 Beav. 392.

10. In the year 1827 letters of preference of escheated property in the island of Jamaica were granted under the Great Seal of the island; by the terms of which it was provided that the grantee should, within twelve months from the date thereof, or such further time as the governor of the island should limit and appoint, take the necessary steps to prosecute the rights of the Crown to the escheated property, otherwise the preference thereby given was to be void. The grantee entered into possession and received the rents and profits, but took no further steps to prosecute the escheat to final judgment for the Crown. Upon an information filed in 1835, by the attorney-general of Jamaica, praying that the grantee might be declared accountable to the Crown in respect of the rents and profits received by him since he had been in possession:—Held, by the Court of Chancery of Jamaica, and affirmed on appeal by the Judicial Committee, that the grantee was bound to prosecute the escheat to final judgment for the Crown within a proper time; and that he was liable to account to the Crown within a proper time; and that he was liable to account to the Crown for the rents and profits received by him from the

time of entering into possession. *Mason* v. *Jamaica* (*Att.-Gen.*), 4 Moo. P. C. 228.

1. A., B., and C., being successive tenants in tail of property held under an inalienable parliamentary title, and B. having, after the death of A., entered into possession of the estates, and, together with them, of certain leaseholds formerly in the possession of A., his executors brought an ejectment against B. to recover possession of the leaseholds as part of his estate. B. having died before trial of the action, another action was brought against C., the successor in title. C., who was also executor of B., compromised the action on terms of giving judgment and buying the leaseholds at a certain price, with a further stipulation that 4,000*l.* should be allowed as a debt from B.'s estate in respect of rents received by B. Before the compromise, a creditors' suit was instituted and a decree made for the administration of B.'s estate, which was insolvent. On a summons by A.'s executors to prove against B.'s estate for the amount of the rents actually received by him: —Held, that the judgment in the action against C. was not evidence of wrongful possession by B., which could serve as a foundation for the claim, and that the admission by the executor as to mesne profits in the compromise was inoperative, being made after the decree. *Talbot* v. *Shrewsbury* (*Earl*), 14 L. R., Eq., 503; 20 W. R. 854.

REPAIRS.

— *By Lessee.* See LANDLORD AND TENANT, XII. VII.
— *Duty of Tenant for Life.* See LIFE. ESTATE FOR, III. IV.

REPLEVIN.

See LANDLORD AND TENANT, X. VI.—PRACTICE (WRIT).

REPLICATION.

See PRACTICE (REPLICATION) — PRACTICE (REPLY UNDER JUDICATURE ACT).

REPLY.

— *Of Counsel.* See PRACTICE (COUNSEL).
— *Pleading.* See PRACTICE (REPLICATION) —PRACTICE (REPLY UNDER JUDICATURE ACT).

REPORT OF MASTER.

See PRACTICE (MASTER, REPORT OR CERTIFICATE).

REPORTS, CITING IN ARGUMENT AND AUTHENTICITY OF.

See PRACTICE (REPORTS CITING IN ARGUMENT)—ADDENDA (CASES OVERRULED, ETC.).

REPRESENTATION.

— *False or Fraudulent.* See FRAUD—LANDLORD AND TENANT—SPECIFIC PERFORMANCE—VENDOR AND PURCHASER.
— *On Descent of Freeholds.* See DESCENT.
— *Ad Litem.* See PRACTICE (PARTIES).

REPRISES.

2. The word "reprises," being of uncertain signification, ought to be construed *secundum subjectam materiam*. Spelman has not the word in all his glossary, though it is explained in Blount's Law Dictionary, and in Cowell's Interpreter. *Blandford* v. *Marlborough*, 2 Atk. 545.

REPUBLICATION OF WILL.

See WILL.

REPUTED OWNERSHIP.

See BANKRUPTCY, XIX.

RE-SETTLEMENT.

See FAMILY ARRANGEMENTS—FRAUD—SETTLEMENT.

RESIDENCE.

— *Conditions as to.* See CONDITION, XVI.—WILL.
See also DOMICIL.

RESIDUE.

— *Conversion of Wasting Property.* See LIFE. ESTATE FOR, VI.
— *Right of Executor.* See EXECUTOR AND ADMINISTRATOR, VIII.
— *Residuary Bequests and Devises. Order of Assets.* See EXECUTOR AND ADMINISTRATOR, XIII.
— *Residuary Bequests and Devises Generally* See WILL.
See also DISTRIBUTION OF ESTATE.

RESIGNATION BOND.

See ECCLESIASTICAL PERSONS AND PROPERTY, III.

RESPONDENTIA.

See SHIPPING, VI.

RESTORING CAUSE OR ACTION.

— *After Dismissal for want of Prosecution.* See PRACTICE (DISMISSAL OF BILL UNDER PRACTICE BEFORE JUDICATURE ACT).
— *After Judgment for Default.* See PRACTICE (JUDGMENTS, DECREES, AND ORDERS).

RESTRAINT OF MARRIAGE.

See CONDITION, VIII.—WILL.

RESTRICTIVE COVENANTS.

See ALE AND BEER HOUSE—COVENANT—LANDLORD AND TENANT, I. VII.—XII.—VENDOR AND PURCHASER.

RESTS.

See ACCOUNT, III.—EXECUTOR AND ADMINISTRATOR, X. XIII. 8—MORTGAGE, VI. I. 2—TRUSTS.

RESULTING TRUSTS.

See ADVANCEMENT—CONVERSION—TRUSTS, and Cross References there.

RETAINER.

— *Of Debt by Executor.* See EXECUTOR AND ADMINISTRATOR, IX.
— *Of Solicitor by Client.* See SOLICITOR.

RETAINING BILL.

See PRACTICE (ISSUES AND TRIAL BY JURY).

REVENUE.

— *Gifts and Legacies free from Taxes and Duties.* See ANNUITY, X. 5—LEGACY, XIV. 1.
— *Deduction of Taxes and Duties on Payments.* See ANNUITY, XII. 2—LANDLORD AND TENANT, XI.—LEGACY, XII. VIII.—PAYMENT, VI.—VENDOR AND PURCHASER.
— *Stamps.* See PRACTICE (EVIDENCE)—STAMPS.

I. INCOME AND PROPERTY TAX, 6081.
II. LAND TAX.
  I. *Property Liable and Exemptions*, 6081.
  II. *Redemption.*
    1. *In General*, 6082.
    2. *Merger*, 6082.
    3. *Lunatics and Infants. Property of*, 6083.
    4. *Mines and Minerals*, 6083.
    5. *Construction of Statutes*, 6084.
    6. *Under Lands Clauses Act.* See LANDS CLAUSES ACT, XIII. VII.
  III. *Persons Liable*, 6084.
III. LEGACY DUTY.
  I. *On what Instruments*, 6085.
  II. *On what Gifts or Interests.*
    1. *In General*, 6085.
    2. *Property Appointed*, 6086.
    3. *Property Converted*, 6087.
    4. *Debts Forgiven or Paid*, 6087.
    5. *Charitable Legacies*, 6087.
    6. *Foreign Property or Domicil*, 6088.
    7. *Other Property*, 6091.
  III. *Scale and Amount*, 6091.
  IV. *Certificate and Proof of Payment*, 6091.
  V. *Other Matters*, 6091.
IV. PROBATE AND INVENTORY DUTY.
  I. *On what Property or Interests.*
    1. *In General*, 6093.
    2. *Property Appointed*, 6093.
    3. *Property Converted*, 6094.
    4. *Foreign Property or Domicil*, 6094.
  II. *Payment.*
    1. *Fund Liable for*, 6095.
    2. *Non-payment. Effect*, 6095.
  III. *Return of*, 6095.
V. SUCCESSION DUTY.
  I. *Operation of Act*, 6095.
  II. *On What Property or Interests*, 6095.
  III. *Foreign Property or Domicil*, 6097.
  IV. *Valuation of Property*, 6098.
  V. *Succession, What is, and Scale of Charge*, 6098.
  VI. *Allowances*, 6101.
  VII. *Instalments*, 6101.
  VIII. *Fund set Apart for*, 6102.
  IX. *Vendor and Purchaser*, 6102.
  X. *Other Matters*, 6102.

I. Income and Property Tax.

1. A testator, by his will, in 1854, directed his trustees to pay to his widow during her life the annual sum of 500*l.*, "free from legacy duty and other deductions":—Held, that the annuity was subject to income tax under the 16 & 17 Vict., c. 34, to be paid out of the annuity itself. *Sadler* v. *Rickards*, 4 Kay & J. 302.

2. By an ante-nuptial settlement executed before the passing of the Property Tax Act, lands were appointed to the use that the intended wife might, after the intended husband's death, receive a jointure rent-charge in lieu of dower out of any lands to which the husband was or might become entitled, without any deduction in respect of any tax then already or thereafter to be imposed on the jointure or on the jointress in respect thereof:—Held, first, that the jointress was not as a purchaser for value or otherwise exempt from property tax. *Floyer* v. *Bankes*, 3 De G. J. & S. 306; 2 N. R. 7.

Held, secondly, that she was entitled to have the tax raised and paid out of the land in addition to or exoneration of the jointure. *Ib.*

3. A testator gave to his wife an annuity or clear yearly rent-charge, clear of all taxes and deductions:—Held, that the annuity was subject to property tax. *Wall* v. *Wall*, 15 Sim. 513; 11 Jur. 403; 16 L. J., Ch., 305.

4. When a company is being wound up under the provisions of the Companies Act 1862, the Crown has a right to payment in full of a debt due from the company for property tax before the commencement of the winding up, in priority to the other creditors. *Re Henley & Co.*, 9 L. R., Ch. D., 469; 39 L. T., N. S., 53; 26 W. R. 885. Reversing 48 L. J., Ch., 147; 38 L. T., N. S., 742.

5. A tenant of minerals, though he may be under a constant vanishing expense in sinking new pits as the old ones become exhausted, is not entitled, in computing the profits for assessment of income tax, to deduct from the gross profits a sum estimated as representing the amount of capital expended in making bores and sinking pits, which have been exhausted by the year's working. See Lord Penzance's opinion as to the method of taxation intended by the Legislature to be applicable to mines. *Knowles* v. *McAdam* (3 L. R., Exch. D., 23) held wrongly decided. *Coltness Iron Co.* v. *Black*, 6 L. R., App. Cas. (Sc.), 315; 51 L. J., Q. B., 626; 45 L. T. 145; 29 W. R. 717.

6. A corporation was constituted for the management of the Mersey Docks estate by an Act which provided that the moneys to be received by them from their dock dues and other sources of revenue should be applied in payment of expenses, interest upon debts, construction of works, and management of the estate; and that the surplus should be applied to a sinking fund for the extinguishment of the principal of the debts; and that after such extinguishment the rates should be reduced; and that, except as aforesaid, the moneys should not be applied for any other purpose whatsoever; and that nothing should affect their liability to parochial or local rates:—Held, that under the Income Tax Acts the corporation was liable to income tax in respect of the surplus, though applicable to the above-named purposes only. *Mersey Docks* v. *Lucas*, 8 L. R., App. Cas. 891; 53 L. J., Q. B., 4; 49 L. T. 781; 32 W. R. 34. Affirming 51 L. J., Q. B., 114.

Deduction of.] See ANNUITY, XII. 2—LANDLORD AND TENANT, XI.—LEGACY, XII. VIII. —PAYMENT, VI.—VENDOR AND PURCHASER.

II. Land Tax.

I. *Property Liable and Exemptions*, 6081.
II. *Redemption*, 6081.
III. *Persons Liable*, 6084.

I. PROPERTY LIABLE AND EXEMPTIONS.

7. An owner of a quit-rent shall pay taxes only in proportion to what the land pays; but where the matter has been examined by the Commissioners of the Land Tax, the Court will not re-examine it. *Brockman* v. *Honeywood*, 1 P. W. 328.

8. The 38 Geo. 3, c. 60, s. 37, applies to leaseholds renewable by custom. *Neame* v. *Moorsom*, 15 W. R. 51; 36 L. J., Ch., 274; 3 L. R., Eq., 91; 12 Jur., N. S., 913.

9. Taxing Acts must be construed strictly. And where therefore land which, in 4 Will. & M., being employed for charitable purposes, as the sight of an almshouse or hospital, was on that account declared by a statute then passed (4 Will. & M., c. 1) to be exempt from the land tax at that time imposed—and the like words of exemption were used in 38 Geo. 3, c. 5, the fact that other land had since been applied to the same charitable purposes, and the original land had been, by order of the Court of Chancery, directed to be held by the trustees of the charity to their own use, freed from its charitable trusts, did not, without more, render it liable, even in the hands of a tenant, to the taxation from which it had been previously exempt. *Cox* v. *Rabbits*, 3 L. R., App. Cas., 473; 47 L. J., Q. B., 385; 38 L. T., N. S., 430; 26 W. R. 483. Affirming 3 L. R., Q. B., 307; 25 W. R. 594; 46 L. J., Q. B., 498; 36 L. T. 455.

10. Upon an exchange of lands under 6 & 7 Will. 4, c. 115 (which contains a clause assimilating the tenure and quality of lands exchanged and allotted to that of the lands in respect of which the allotment or exchange is made), the statute does not transfer a liability to land tax from one property exchanged to the other. *Cooch* v. *Walden*, 46 L. J., Ch., 639.

II. REDEMPTION.

1. *In General*, 6082.
2. *Merger*, 6082.
3. *Lunatics and Infants. Property of*, 6083.
4. *Mines and Minerals*, 6083.
5. *Construction of Statutes*, 6084.
6. *Under Lands Clauses Act.* See LANDS CLAUSES ACT, XIII. VII.

1. In General.

1. A man who redeems his land tax, must be presumed to do so, to exonerate his estate from a periodical and troublesome outgoing, and not to transmit as money to his personal representatives. *Weld* v. *Tew*, Beat. 275.

2. A., being under a settlement tenant for life in remainder, after prior estates for life in tail with remainder to his own first and other sons in tail, with an ultimate remainder in fee, which afterwards became vested in the first tenant for life, redeemed the land tax upon the settled estate during the life of the first tenant for life, and took an assignment to himself under the Land Tax Act. The prior tenant for life afterwards died without issue, having devised to A. the ultimate fee; and A. being in a dying state and having no issue, made his will and devised the fee of the settled estate, without declaring any intention with respect to the land tax redeemed. The land at his death continues to be part of his personal estate. *Trevor* v. *Trevor*, 2 Myl. & K. 675.

3. The Court will not declare the land tax on an estate to have been redeemed merely for the benefit of a trustee for sale, and to supply an alleged defect of title, although such redemption has in fact taken place. *Exp. Sparkes*, M'Clel. 518.

4. A person having a partial interest, redeemed the land tax on three several tenements, by one contract and at one price:—Held, that the three charges were not consolidated so as to give him one aggregate charge on all tenements, but he acquired three separate charges on the three several tenements. *Cox* v. *Coventon*, 31 Beav. 378; 8 Jur. 1142; 7 L. T., N. S., 78.

5. A person who had entered into an agreement for the purchase of land, which was formerly part of the glebe of a rectory, and had been before sold for the redemption of the land tax, is not bound to complete his purchase, where it appears that upon the prior sale for the redemption of the land tax, the rector was himself the actual purchaser in the name of his curate. *Grover* v. *Hugell*, 3 Russ. 428.

6. A., tenant for life, with remainder to his children, redeems the land tax on the estate, with his own money, introducing into the contract for the redemption his own name, and that of another person, as trustees. A. afterwards became bankrupt; on bill by his assignees against a purchaser of his life estate, and of the land tax so redeemed, a specific performance decreed, as being within the stat. 1 Jac. 1, c. 15, s. 5. *Emly* v. *Guy*, 3 Meriv. 702.

7. On petition by a tenant for life, the Court ordered that a sum of money, which the deputy remembrancer had received for lands taken for the public service, might be applied in part of a sum previously paid by the petitioner to redeem the land tax, he not having taken advantage of the clause in the Redemption Act which enabled him to sell part of the lands, although the next in the remainder was a minor. *Re Shephard*, Wightw. 131.

8. A. agreed with B. to grant him the lease of a house (to be built), when it was complete, finished, and fit for habitation. B. being constantly on the premises during the building, took possession, and then made various objections on the ground that the house was not complete, finished, and fit for habitation. A. claimed 3*l.* per annum additional rent, on the ground that the Crown, since the contract, had redeemed the land tax which A. was liable to pay:—Held, that s. 120 of 42 Geo. 3, c. 116, did not apply. *Faulkner* v. *Llewellin*, 11 W. R. 1055; 9 L. T., N. S., 251. Affirmed 12 W. R. 193; 9 L. T., N. S., 557.

9. Land tax having been redeemed, was bequeathed by will to a married woman. Afterwards the husband, having registered his marriage in the land tax office in the manner required by 38 Geo. 3, c. 60, s. 78, mortgaged the land tax in the form of assignment which is prescribed by the Act; he (by a deed of even date) covenanting to pay the mortgage debt, and reserving the equity of redemption to himself alone. The wife survived:—Held, that the husband of a proprietor of land tax, upon registering the marriage under the Act, acquires an absolute power of disposition over it. *Pigott* v. *Pigott*, 4 L. R., Eq., 549; 16 L. T., N. S., 766; 37 L. J., Ch., 116.

Held, also, that as the husband had disposed of the land tax only to the extent of the mortgage debt, the right of the surviving wife to the property, subject to payment of the debt, was not alienated. *Ib.*

Surplus Stock.] 10. Surplus stock, arising from sales under the Acts for the redemption of the land tax, will be ordered to be transferred to the party who, if it were laid out in the purchase of lands, would be entitled to have the lands conveyed to him in fee. *Re Fortesque*, 3 Russ. 128.

11. Surplus stock purchased under 42 Geo. 3, c. 116, s. 100, for the redemption of the land tax, cannot be applied to permanent improvement of the lands in respect of which the land tax was redeemed. *Re Nether Stowey Vicarage*, 22 W. R. 180; 17 L. R., Eq., 156; 29 L. T., N. S., 604.

2. Merger.

12. The owner of a leasehold interest redeemed the land tax under 38 Geo. 3, c. 60, by the transfer of stock to the commissioners; he exercised no option as to keeping the charge on foot:—Held, that there was no merger of the charge, but that he was owner of a specific charge on the premises. *Neam* v. *Moorson*, 36 L. J., Ch., 274; 3 L. R., Eq., 91; 12 Jur., N. S., 913; 15 W. R. 51.

In 1798 C. redeemed the land tax upon lands held by him on renewable leases for years determinable upon lives. He bequeathed the lands to M. D. and J. D. equally, and his residuary personal estate to the same persons. M. D. died, and T. D., her father, took out administration to her. Subsequently, by an indenture of settlement, reciting an intention to assign the lands, but making no mention of the redeemed land tax, T. D. and J. D. assigned the lands and all the estate to trustees. T. D. never received any portion of the rent-charge substituted for the redeemed land tax. He bequeathed all his residuary personal estate to J. D. The lessors refused to renew:—Held,

that the charge was not comprised in the settlement, and not merged in the land, but belonged to the personal representative of C., and that the mode of dealing with the property afforded no sufficient indication of a contrary intention. S. C. 12 Jur., N. S., 913.

Held, also, that the land tax did not revive on the expiration of the lease. *Ib.*

1. Guardians of an infant tenant in tail redeemed the land tax on the entailed estate. The tenant in tail died, having bequeathed the land tax to the next tenant in tail. The latter tenant in tail suffered a recovery, and settled the estate, but always dealt with the redeemed land tax as a subsisting charge. The settlement contained in its operative part the usual general words "all the estate, etc.":—Held, that the land tax was not merged by its redemption, by the recovery, by the operation of the settlement, or otherwise, but passed by a bequest of it in the settlor's will. *Blundell* v. *Stanley*, 3 De G. & Sm. 433; 18 L. J., N. S., Ch., 300; 13 Jur. 998.

2. The guardians of an infant tenant in tail of lands, redeemed the land tax under statute 38 Geo. 3, c. 60, without declaring an option under ss. 17 and 37, to be considered on the footing of third persons purchasing the tax. Subsequently the lands became vested in fee in Sir W. S., who conveyed them to trustees and their heirs, upon trusts for sale for his benefit. The trustees, by his direction, purchased and took a conveyance of the land tax or rent-charge in lieu of land tax chargeable "upon the lands," upon the like trusts:—Held, that the land tax, *quâ* tax, was extinguished upon its redemption by the guardians; that the rent-charge which remained in lieu of land tax was not a statutory tax, capable of being enforced by the remedies provided by the Act, but a charge effected by the operation of equity, and that such charge merged upon being conveyed to the trustees. *Bulkeley* v. *Hope*, 1 Kay & J. 482; 1 Jur., N. S., 864; 24 L. J., Ch., 356; 3 W. R. 360.

Semble, had Sir W. been merely tenant for life of the lands, the legal merger would have had no effect upon his equitable interest. *Ib.*

3. Lunatics and Infants. Property of.

3. Notwithstanding the provisions contained in the Land Tax Redemption Act (42 Geo. 3, c. 116), it is the duty of the committee of a lunatic to obtain the sanction of the Lord Chancellor before proceeding to a sale of any part of the lunatic's estate, for the purpose of raising moneys wherewith to redeem the land tax. *Re Wade*, 1 H. & Tw. 202.

4. Land tax on a lunatic's estates redeemed by order out of the produce of decaying timber, ordered to be cut for payment of debts, under the Master's report, that it was for his benefit: no equity for a charge in favour of the next of kin. *Exp. Phillips*, 19 Ves. 118.

5. In the application of the personal estate of an infant tenant in tail to redeem the land tax, by persons not having authority within the Act, the Court will determine by analogy to the option to be reserved by guardians, etc., under the Act for the personal representative of the infant to charge the estate in possession of the remainderman. *Ware* v. *Polhill*, 11 Ves. 257.

6. The guardian of an infant tenant in tail redeemed the land tax on the estate, but made no declaration, in pursuance of the 38 Geo. 3, c. 60, so as to make the land tax a charge on the inheritance. In a suit by the guardian who was also administrator of the infant tenant in tail, it was declared that the land tax was an annuity or rent charge in favour of the infant's personal estate, and the Court directed proper deeds to be executed by the then tenant for life and tenant in tail, charging the estate with the amount of land tax as an annuity. This was done by deeds not affecting the estate in remainder after the estate tail. On the death of the survivor of the tenant for life and tenant in tail, the personal representative of the infant claimed the benefit of the decree against the inheritance:—Held, that the declaration effectually charged the inheritance, and (the legal charges executed by the tenant for life and tenant in tail having failed) the tenant in remainder after the determination of these estates was directed legally to charge the estate with the annuity. *Ware* v. *Polhill*, 5 De G. & Sm. 455.

7. Persons acting as guardians of an infant tenant in tail redeemed the land tax out of his personal property; and in a suit against the tenant in tail in remainder, the Court charged the real estates with an annuity equal in amount to the land tax for the benefit of the infant's personal estate, and directed the tenant in tail to give a legal security on the estates. No recovery was ever suffered, and a subsequent tenant in tail sold the estate free of land tax to a purchaser for value. No express notice of the annuity was given to the purchaser, but the abstract of title disclosed the fact that the land tax was redeemed by the guardians of an infant tenant in tail, and that he died before attaining 21:—Held, that this was sufficient constructive notice of the annuity; and the annuity declared to be a subsisting charge on the land. Held, also, that negligence on the part of the annuitant was no answer to his claim. *Ware* v. *Egmont*, 2 W. R. 126; 23 L. J., Ch., 499; 18 Jur. 371; 4 De G. M. & G. 460; 1 Jur., N. S., 97; 24 L. J., Ch., 361.

8. Testamentary guardian of infant sold part of the estates for redemption of land tax. Vendee paid purchase money to agent of vendor, who was also agent for vendee, and conveyance was executed; but agent did not pay money into bank as required by 38 Geo. 3, c. 60. Purchaser entered and continued in possession for many years paying land tax. Nearly twenty years after, attaining his age, heir-at-law brought ejectment against purchaser; bill by purchaser to restrain which and obtain confirmation of contract, was dismissed without costs. *Hicks* v. *Morant*, 3 Y. & J. 286; Affirmed 2 Dow & Cl. 414; 5 Bli. N. S. 643.

4. Mines and Minerals.

9. The 39 Geo. 3, c. 21 only applies to sales subsequent to the Act. *Wilson* v. *Grey*, 36 L. J., Ch., 62.

A contract for the sale of lands, with their appurtenances, belonging to a rector, was entered into under 38 Geo. 3, c. 60, and

1. In General.

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2. A., being under a settlement tenant for life in remainder, after prior estates for life in tail with remainder to his own first and other sons in tail, with an ultimate remainder in fee, which afterwards became vested in the first tenant for life, redeemed the land tax upon the settled estate during the life of the first tenant for life, and took an assignment to himself under the Land Tax Act. The prior tenant for life afterwards died without issue, having devised to A. the ultimate fee; and A. being in a dying state and having no issue, made his will and devised the fee of the settled estate, without declaring any intention with respect to the land tax redeemed. The land at his death continues to be part of his personal estate. *Trevor* v. *Trevor*, 2 Myl. & K. 675.

3. The Court will not declare the land tax on an estate to have been redeemed merely for the benefit of a trustee for sale, and to supply an alleged defect of title, although such redemption has in fact taken place. *Exp. Sparkes*, M'Clel. 518.

4. A person having a partial interest, redeemed the land tax on three several tenements, by one contract and at one price:—Held, that the three charges were not consolidated so as to give him one aggregate charge on all tenements, but he acquired three separate charges on the three several tenements. *Cox* v. *Coventon*, 31 Beav. 378; 8 Jur. 1142; 7 L. T., N. S., 78.

5. A person who had entered into an agreement for the purchase of land, which was formerly part of the glebe of a rectory, and had been before sold for the redemption of the land tax, is not bound to complete his purchase, where it appears that upon the prior sale for the redemption of the land tax, the rector was himself the actual purchaser in the name of his curate. *Grover* v. *Hugell*, 3 Russ. 428.

6. A., tenant for life, with remainder to his children, redeems the land tax on the estate, with his own money, introducing into the contract for the redemption his own name, and that of another person, as trustees. A. afterwards became bankrupt; on bill by his assignees against a purchaser of his life estate, and of the land tax so redeemed, a specific performance decreed, as being within the stat. 1 Jac. 1, c. 15, s. 5. *Emly* v. *Guy*, 3 Meriv. 702.

7. On petition by a tenant for life, the Court ordered that a sum of money, which the deputy remembrancer had received for lands taken for the public service, might be applied in part of a sum previously paid by the petitioner to redeem the land tax, he not having taken advantage of the clause in the Redemption Act which enabled him to sell part of the lands, although the next in the remainder was a minor. *Re Shephard*, Wightw. 131.

8. A. agreed with B. to grant him the lease of a house (to be built), when it was complete, finished, and fit for habitation. B. being constantly on the premises during the building, took possession, and then made various objections on the ground that the house was not complete, finished, and fit for habitation. A. claimed 3*l.* per annum additional rent, on the ground that the Crown, since the contract, had redeemed the land tax which A. was liable to pay:—Held, that s. 120 of 42 Geo. 3, c. 116, did not apply. *Faulkner* v. *Llewellin*, 11 W. R. 1055; 9 L. T., N. S., 251. Affirmed 12 W. R. 193; 9 L. T., N. S., 557.

9. Land tax having been redeemed, was bequeathed by will to a married woman. Afterwards the husband, having registered his marriage in the land tax office in the manner required by 38 Geo. 3, c. 60, s. 78, mortgaged the land tax in the form of assignment which is prescribed by the Act; he (by a deed of even date) covenanting to pay the mortgage debt, and reserving the equity of redemption to himself alone. The wife survived:—Held, that the husband of a proprietor of land tax, upon registering the marriage under the Act, acquires an absolute power of disposition over it. *Pigott* v. *Pigott*, 4 L. R., Eq., 549; 16 L. T., N. S., 766; 37 L. J., Ch., 116.

Held, also, that as the husband had disposed of the land tax only to the extent of the mortgage debt, the right of the surviving wife to the property, subject to payment of the debt, was not alienated. *Ib.*

Surplus Stock.] 10. Surplus stock, arising from sales under the Acts for the redemption of the land tax, will be ordered to be transferred to the party who, if it were laid out in the purchase of lands, would be entitled to have the lands conveyed to him in fee. *Re Fortesque*, 3 Russ. 128.

11. Surplus stock purchased under 42 Geo. 3, c. 116, s. 100, for the redemption of the land tax, cannot be applied to permanent improvement of the lands in respect of which the land tax was redeemed. *Re Nether Stowey Vicarage*, 22 W. R. 180; 17 L. R., Eq., 156; 29 L. T., N. S., 604.

2. Merger.

12. The owner of a leasehold interest redeemed the land tax under 38 Geo. 3, c. 60, by the transfer of stock to the commissioners; he exercised no option as to keeping the charge on foot:—Held, that there was no merger of the charge, but that he was owner of a specific charge on the premises. *Neam* v. *Moorson*, 36 L. J., Ch., 274; 3 L. R., Eq., 91; 12 Jur., N. S., 913; 15 W. R. 51.

In 1798 C. redeemed the land tax upon lands held by him on renewable leases for years determinable upon lives. He bequeathed the lands to M. D. and J. D. equally, and his residuary personal estate to the same persons. M. D. died, and T. D., her father, took out administration to her. Subsequently, by an indenture of settlement, reciting an intention to assign the lands, but making no mention of the redeemed land tax, T. D. and J. D. assigned the lands and all the estate to trustees. T. D. never received any portion of the rent-charge substituted for the redeemed land tax. He bequeathed all his residuary personal estate to J. D. The lessors refused to renew:—Held,

that the charge was not comprised in the settlement, and not merged in the land, but belonged to the personal representative of C., and that the mode of dealing with the property afforded no sufficient indication of a contrary intention. S. C. 12 Jur., N. S., 913.

Held, also, that the land tax did not revive on the expiration of the lease. *Ib.*

1. Guardians of an infant tenant in tail redeemed the land tax on the entailed estate. The tenant in tail died, having bequeathed the land tax to the next tenant in tail. The latter tenant in tail suffered a recovery, and settled the estate, but always dealt with the redeemed land tax as a subsisting charge. The settlement contained in its operative part the usual general words "all the estate, etc.":—Held, that the land tax was not merged by its redemption, by the recovery, by the operation of the settlement, or otherwise, but passed by a bequest of it in the settlor's will. *Blundell* v. *Stanley*, 3 De G. & Sm. 433; 18 L. J., N. S., Ch., 300; 13 Jur. 998.

2. The guardians of an infant tenant in tail of lands, redeemed the land tax under statute 38 Geo. 3, c. 60, without declaring an option under ss. 17 and 37, to be considered on the footing of third persons purchasing the tax. Subsequently the lands became vested in fee in Sir W. S., who conveyed them to trustees and their heirs, upon trusts for sale for his benefit. The trustees, by his direction, purchased and took a conveyance of the land tax or rent-charge in lieu of land tax chargeable "upon the lands," upon the like trusts:—Held, that the land tax, *quâ* tax, was extinguished upon its redemption by the guardians; that the rent-charge which remained in lieu of land tax was not a statutory tax, capable of being enforced by the remedies provided by the Act, but a charge effected by the operation of equity, and that such charge merged upon being conveyed to the trustees. *Bulkeley* v. *Hope*, 1 Kay & J. 482; 1 Jur., N. S., 864; 24 L. J., Ch., 356; 3 W. R. 360.

Semble, had Sir W. been merely tenant for life of the lands, the legal merger would have had no effect upon his equitable interest. *Ib.*

3. Lunatics and Infants. Property of.

3. Notwithstanding the provisions contained in the Land Tax Redemption Act (42 Geo. 3, c. 116), it is the duty of the committee of a lunatic to obtain the sanction of the Lord Chancellor before proceeding to a sale of any part of the lunatic's estate, for the purpose of raising moneys wherewith to redeem the land tax. *Re Wade*, 1 H. & Tw. 202.

4. Land tax on a lunatic's estates redeemed by order out of the produce of decaying timber, ordered to be cut for payment of debts, under the Master's report, that it was for his benefit: no equity for a charge in favour of the next of kin. *Exp. Phillips*, 19 Ves. 118.

5. In the application of the personal estate of an infant tenant in tail to redeem the land tax, by persons not having authority within the Act, the Court will determine by analogy to the option to be reserved by guardians, etc., under the Act for the personal representative of the infant to charge the estate in possession of the remainderman. *Ware* v. *Polhill*, 11 Ves. 257.

6. The guardian of an infant tenant in tail redeemed the land tax on the estate, but made no declaration, in pursuance of the 38 Geo. 3, c. 60, so as to make the land tax a charge on the inheritance. In a suit by the guardian who was also administrator of the infant tenant in tail, it was declared that the land tax was an annuity or rent charge in favour of the infant's personal estate, and the Court directed proper deeds to be executed by the then tenant for life and tenant in tail, charging the estate with the amount of land tax as an annuity. This was done by deeds not affecting the estate in remainder after the estate tail. On the death of the survivor of the tenant for life and tenant in tail, the personal representative of the infant claimed the benefit of the decree against the inheritance:—Held, that the declaration effectually charged the inheritance, and (the legal charges executed by the tenant for life and tenant in tail having failed) the tenant in remainder after the determination of these estates was directed legally to charge the estate with the annuity. *Ware* v. *Polhill*, 5 De G. & Sm. 455.

7. Persons acting as guardians of an infant tenant in tail redeemed the land tax out of his personal property; and in a suit against the tenant in tail in remainder, the Court charged the real estates with an annuity equal in amount to the land tax for the benefit of the infant's personal estate, and directed the tenant in tail to give a legal security on the estates. No recovery was ever suffered, and a subsequent tenant in tail sold the estate free of land tax to a purchaser for value. No express notice of the annuity was given to the purchaser, but the abstract of title disclosed the fact that the land tax was redeemed by the guardians of an infant tenant in tail, and that he died before attaining 21:—Held, that this was sufficient constructive notice of the annuity; and the annuity declared to be a subsisting charge on the land. Held, also, that negligence on the part of the annuitant was no answer to his claim. *Ware* v. *Egmont*, 2 W. R. 126; 23 L. J., Ch., 499; 18 Jur. 371; 4 De G. M. & G. 460; 1 Jur., N. S., 97; 24 L. J., Ch., 361.

8. Testamentary guardian of infant sold part of the estates for redemption of land tax. Vendee paid purchase money to agent of vendor, who was also agent for vendee, and conveyance was executed; but agent did not pay money into bank as required by 38 Geo. 3, c. 60. Purchaser entered and continued in possession for many years paying land tax. Nearly twenty years after, attaining his age, heir-at-law brought ejectment against purchaser; bill by purchaser to restrain which and obtain confirmation of contract, was dismissed without costs. *Hicks* v. *Morant*, 3 Y. & J. 286; Affirmed 2 Dow & Cl. 414; 5 Bli. N. S. 643.

4. Mines and Minerals.

9. The 39 Geo. 3, c. 21 only applies to sales subsequent to the Act. *Wilson* v. *Grey*, 36 L. J., Ch., 62.

A contract for the sale of lands, with their appurtenances, belonging to a rector, was entered into under 38 Geo. 3, c. 60, and

39 Geo. 3, c. 6, which enabled ecclesiastical corporations to sell lands for the redemption of land tax. Before the payment of the purchase money into the Bank of England, as directed by the Acts, and the execution of the conveyance, the 39 Geo. 3, c. 21 was passed, which enacted that all minerals under lands belonging to any ecclesiastical corporation which should be sold, should be absolutely excepted and reserved; and that the provisions of that Act should, in the execution of the former Acts, be applied as if they had been specially enacted in those Acts:—Held, that the minerals passed to the purchaser. S. C. 3 L. R., Eq., 117.

1. The 39 Geo. 3, c. 21, s. 12 in effect provides that upon sales of lands by ecclesiastical corporations for redemption of land tax, the minerals shall not pass by the conveyance of the lands, but shall be always absolutely excepted or reserved to such ecclesiastical corporations. A conveyance of prebendal land, executed under this statute in 1799, contained a general exception of minerals, but purported to except out of such exception the clay under twenty perches of the land:—Held, that the exception out of the exception was not rendered effectual by 57 Geo. 3, c. 100, s. 25, for that Act was intended to remedy defects in the mode of conveyance, and not in the subject matter conveyed, and that the property in the clay under the twenty perches did not pass by the deed of 1799. *Whidborne* v. *Ecclesiastical Commissioners for England*, 47 L. J., Ch., 129; 7 L. R., Ch. D., 375; 37 L. T., N. S., 346.

Held, also, that, on the evidence, the grantees of the surface were entitled to support as against the grantees of the clay. *Ib.*

5. Construction of Statutes.

2. As to construction of the Land Tax Redemption and Sale Act. See *Williams* v. *Steward*, 3 Meriv. 472.

3. The Confirming Statutes, 54 Geo. 3, c. 173, and 57 Geo. 3, c. 100, have removed any objection to a sale and conveyance under the Land Tax Redemption Acts, arising from the property so sold not having been originally saleable, or not having been property sold, within the meaning and according to the directions of the Acts. *Beaden* v. *King*, 9 Hare 499; 22 L. J., N. S., Ch., 111.

The restriction expressed or implied in the words of s. 25 of the confirming stat. 57 Geo. 3, c. 100, "the titles derived under such sales," construed to mean that the Acts were not to operate upon titles anterior to the sales under those Acts, and not to limit the confirmation to the titles of such purchasers only. *Ib.*

Under the statutes for the redemption of the land tax, the Lords Commissioners are placed in the position of vendors, and, therefore, if the trustees of a charity should purchase the property of the charity under those Acts, they would not be purchasing from themselves, but from the Lords Commissioners. *Ib.*

The Confirming Statutes, 54 Geo. 3, c. 173, and 57 Geo. 3, c. 100, remove any objection which might have been raised on the ground of the party selling, under the Acts, being both vendor and purchaser. *Ib.*

An objection to the validity of a sale under the Land Tax Redemption Acts, upon the ground that the lands were not properly saleable, and, apart from any question of fraud, were not properly sold under the Acts, is a legal objection; and there being no impediment to the trial of that question at law, a bill in equity on such a ground cannot be supported. *Ib.*

If it were shown that a purchase under the Land Tax Redemption Acts had been effected by fraud, the Court would rectify it notwithstanding the confirming statutes, for a purchase so effected would not acquire validity from those statutes. *Ib.*

III. PERSONS LIABLE.

4. Whether an annuity or rent-charge of the profits of the New River Company is to bear the full assessment to the Land Tax, or to have the benefit according to the proportion of a reduction in consequence of an assessment upon the profits of company at an under value, *quære*. The bill by the annuitant was dismissed, the Court refusing to raise an equity as to the profit arising from disobedience to the Act. *Adair* v. *New River Co.*, 11 Ves. 429.

5. Where an annuity is given to a relation for life, and has been paid for any length of time, without a deduction for land tax, it will be presumed to have been so paid by mutual consent, and the payer is not entitled to be relieved. *Nichols* v. *Leeson*, 3 Atk. 573.

6. Land tax shall not be apportioned as between tenant for life and remainderman, the statute of 11 Geo. 2, c. 19, s. 15, having no application to this case. *Sutton* v. *Chaplin*, 10 Ves. 66.

7. Where a man had a power to make a jointure without any deduction for any charges imposed, or to be imposed, parliamentary or otherwise, it does not mean only such as are fixed and certain, but the land tax, though fluctuating, is clearly within that power. But a bishop, covenanting to pay all charges, ordinary or extraordinary, does not subject himself to the land tax, because he cannot bind his successors; otherwise in the case of a common person, who can bind his heirs. *Blandford* v. *Marlborough*, 2 Atk. 542.

Landlord and Tenant.] 8. Agreement between a landlord and tenant for a lease of a farm for a term of years, at a yearly rent, "free of all outgoings":—Held, that the word "outgoings" included the land tax and tithe commutation rent-charge. *Parish* v. *Sleeman*, 6 Jur., N. S., 385; 29 L. J., Ch., 96; 8 W. R. 166.

9. A. agreed with B. to grant him the lease of a house (to be built), when it was complete, finished, and fit for habitation. B. being constantly on the premises during the building, took possession, and then made various objections on the ground that the house was not complete, finished, and fit for habitation. A. claimed 3*l.* per annum additional rent, on the ground that the Crown, since the contract, had redeemed the land tax which A. was

liable to pay:—Held, that s. 120 of 42 Geo. 3, c. 116, did not apply. *Faulkner* v. *Llewellin*, 11 W. R. 1055; 9 L. T., N. S., 251. Affirmed 12 W. R. 193; 9 L. T., N. S., 557.

III. Legacy Duty.

I. *On What Instruments*, 6085.
II. *On What Gifts or Interests*, 6085.
III. *Scale and Amount*, 6091.
IV. *Certificate and Proof of Payment*, 6091.
V. *Other Matters*, 6091.

I. ON WHAT INSTRUMENTS.

1. An instrument, vesting property in trustees for the benefit of the grantor for his life, and after his decease for the benefit of other persons, with a power of revocation, is not testamentary, and consequently not liable to the payment of legacy duty. *Tompson* v. *Browne*, 3 Myl. & K. 32; 5 L. J., N. S., Ch., 64.

2. A., by deed, gave his leasehold and personal property to trustees, for the use of himself for life, and of several persons at his death. A. reserved a power of revocation, but never parted with the deed, or with any of the property. By his will he confirmed this disposition in most respects:—Held, that the two instruments shall be construed together as testamentary instruments, and that the property passing under them will pass as legacies, and be subject to the legacy duty. *Att.-Gen.* v. *Jones*, 3 Price 368.

3. Where three sisters, in Scotland, executed an instrument by which they assigned all their present and future property to and in favour of each other, and the heirs and the assigns of the survivor of them:—Held, that, on the death of one of them, legacy duty was not payable upon the property so assigned, the instrument not being testamentary, but a gift *inter vivos*. *Brown* v. *Advocate-General*, 1 Macq. H. L. Ca. 79.

4. A., being possessed of some pure personalty, but of considerable property in mortgages, executed some years before his death an indenture, by which, declaring a wish to found certain charities, he covenanted to pay, or that if he did not pay during his lifetime, his executors should, within twelve months after his death, subject to his debts and legacies, pay to certain persons therein named 60,000*l*., to be invested in their names on the trusts thereby declared; the trusts were charitable trusts. This deed was never enrolled in Chancery. On the same day he made a will, giving certain legacies, and appointing executors, most of whom were the persons named in the deed. These papers were never communicated by him to anybody. Just before his death he caused the papers to be produced from the drawers, and handed them to the persons attending upon his death-bed. They were tied up with a memorandum, which declared that they had been prepared in that form, under advice, to save the legacy duties, and in order that if probate duty was paid, in the first instance, it might be got back again in consequence of the covenant creating a debt to be paid out of the assets:—Held, that the indenture was a deed, and not a testamentary paper. *Jeffries* v. *Alexander*, 8 H. L. Ca. 594. See *Patch* v. *Shore*, 11 W. R. 142.

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1. In General.

5. A testator devised real estates to the use of trustees for a term of 500 years, to commence from his decease, and subject thereto and the trusts thereof to A. and B., their heirs and assigns, during the life of C., an infant, to preserve contingent remainders, and after the decease of C., to the use of the first and other sons of C. in tail, with remainder over. The testator declared, that the trustees of the term should, until C. attained twenty-one or was married, in aid of another fund provided by the will for the same purpose, apply so much of the rents and profits not exceeding in the whole in any one year, including other payments thereby directed, 2,000*l*., as they in their discretion should think fit, in maintaining and educating C., and should invest and accumulate the residue of the rents and profits for the absolute benefit of C., in case she attained twenty-one or was married; but if she should die under twenty-one and unmarried, the accumulated fund was to go over for the benefit of the parties to whom the real estates were in the same event limited:—Held, that legacy duty was not payable upon such portion of the rents and profits as had been applied for the maintenance of C. in each year, during her minority, until the time of her marriage. *Shirley* v. *Ferrers* (*Earl*), 1 Ph. 167; 6 Jur. 1047; 12 L. J., N. S., Ch., 111.

6. A. made a mortgage in fee to secure a sum lent to him by the trustees of his marriage settlement. On his death, his daughter became entitled to the equity of redemption of the mortgaged estate as his heir, and under his marriage settlement to the mortgage money. The trustees then conveyed the estate to her, subject expressly to the equity of redemption, and did not release her father's covenant for repayment of the money. Afterwards, she granted an annuity to M., and, as a security for it, conveyed the estate and assigned the money to a trustee for him. By her will she devised the estate, but did not dispose of her personal estate:—Held, that the money was subject to probate and legacy duty. *Swabey* v. *Swabey*, 15 Sim. 502.

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6. A. made a mortgage in fee to secure a sum lent to him by the trustees of his marriage settlement. On his death, his daughter became entitled to the equity of redemption of the mortgaged estate as his heir, and under his marriage settlement to the mortgage money. The trustees then conveyed the estate to her, subject expressly to the equity of redemption, and did not release her father's covenant for repayment of the money. Afterwards, she granted an annuity to M., and, as a security for it, conveyed the estate and assigned the money to a trustee for him. By her will she devised the estate, but did not dispose of her personal estate:—Held, that the money was subject to probate and legacy duty. *Swabey* v. *Swabey*, 15 Sim. 502.

7. A testator, by his will, bequeathed a sum of 30,000*l*. to his three children, and directed his personal estate to be applied, in the first instance, in payment of that sum; he then devised certain real estates to trustees, upon trust, to invest the rents and profits from time

to time in government stock, until a fund should be realised, which, with the produce of his personal estate, would be sufficient to pay the legacies. A bill having been filed to carry the trusts of the will into execution, a receiver was appointed over the real estate, by whom a large fund was brought into court, which was reported to be applicable to the payment of the legacies:—Held, that, under the true construction of the statutes 54 Geo. 3, c. 92, and 56 Geo. 3, c. 56, the legacies, though paid out of this fund, were liable to legacy duty. *Cleland* v. *Ker*, Dr. 227; 6 Ir. Eq. R. 35; *id.* 288.

1. Under the Acts of 1795 and 1805, no legacy duty is payable on the value of personal estate given up by one legatee to another under the doctrine of election; but where the testator devises his own real estate to A., and bequeaths A.'s personal estate to B., the legacy duty is payable on the value of the personal estate so charged on the testator's real estate. *Laurie* v. *Clutton*, 15 Beav. 131; 16 Jur. 825; 21 L. J., Ch., 226.

A testator having large sums of stock invested in the joint names of himself and his wife made his will, by which he gave several specific legacies to his wife, to whom he also devised certain real estates. He also made several devises and bequests of real and personal estate to trustees upon trust for his wife for life, and after her decease for the benefit of other persons: he also gave a legacy of 10,000*l.* to his daughter for life, with remainder to her children; and he appointed his wife sole executrix. Upon the decease of the testator his personal estate was found wholly insufficient to pay several specialty debts, and the legacies given by his will, and, under a deed executed by his wife reciting these facts, she transferred 36,000*l.* and 10,500*l.* stock, part of the funds which had been invested in the joint names of herself and her husband, to the trustees of his will, for the purpose of being applied to satisfy the debts, among others the legacy of 10,000*l.* The Commissioners of Stamps and Taxes claimed legacy duty in respect of this payment: but upon a petition by the executors of the testator and his wife, who had since died, to obtain the opinion of the Court:—Held, that no claim for legacy duty had arisen, under the 36 Geo. 3, c. 52, or the 45 Geo. 3, c. 28, and that none was payable. *Ib.*

2. By a marriage settlement after trusts for the husband and wife for life and trusts for the children (which failed by reason of there being no issue), personal property was settled in trust for the persons who would, at the death of the wife, have been entitled to her personal estate under the Statute of Distributions, in case she had died unmarried and intestate. The wife died in 1831, and her mother became entitled under the trust as her next of kin. She died in 1832, having left the property by will to executors in trust for certain legatees. In 1868 the husband died, and the bequests fell into possession:—Held, that the Crown was entitled to legacy duty only. *Att.-Gen.* v. *Littledale*, 24 L. T., N. S., 921; 5 L. R., H. L., 290; 40 L. J., Exch., 241; 20 W. R. 473. Affirming 5 L. R., Exch., 275; 39 L. J., Exch., 207; 23 L. T. 192; 18 W. R. 1036.

3. A testator bequeathed annuities to certain persons all subject to the same rate of duty, and directed his trustees to continue at interest sums which should be amply sufficient to pay out of the income such of the annuities as should be existing, and to divide the residue of the principal moneys between the surviving annuitants and their respective children, including the children of the deceased annuitants, and to divide among the children of the first-named annuitants, on the death of one or more of the others, such parts of the principal moneys as would not be required for payment of the subsisting annuities until all the principal money provided by the sale of the residuary estate should be paid and divided among such children to whom he bequeathed the same. In other parts of the will the testator spoke of the annuities and residuary estate distinctly:—Held, that the legacy duties were payable on the annuities as annuities within s. 8 of the 36 Geo. 3, c. 52, by four equal payments, of which the first instalment was to be made at the end of the first year of the annuity, and not at once on the whole residuary estate as bequeathed in succession to persons chargeable with the same rate of duty under s. 12. *Crow* v. *Robinson*, 4 De G. F. & J. 337; 31 L. J., Ch., 516; 10 W. R. 306; 6 L. T., N. S., 372.

2. Property Appointed.

4. J. R., by will, directed his real estates to be sold and converted into personalty; and after giving certain legacies, he thereby vested the residue in trustees for the use of his daughter I. A. P., for life, with power to her to appoint the same by will, but expressly excluding from the benefit certain persons named or indicated in his will; and directed that the appointment, so far as such appointment should be incomplete, the residue should be held by the trustees of the next of kin of D. R. This power was exercised by I. A. P., by her will, partly in favour of other persons:—Held, affirming the decree of the Master of the Rolls, first, that she must be considered to have had, notwithstanding the special exclusion in her father's will, an absolute power of appointment within the meaning of the 36 Geo. 3, c. 52; and that, consequently, legacy duty was payable by her appointees, upon the bequests made by her, as being, under the 7th section, made by her out of personal estate which she had the power of disposing of. Secondly, that this property, though subject to her power of disposal, was not so strictly her own property, as to render it, under the 18th section, liable to probate duty under her will, as property which she died possessed of or entitled to. *Drake* v. *Att.-Gen.*, 10 Cl. & F. 257. Affirming S. C. *nom. Platt* v. *Routh*, 3 Beav. 257; 10 L. J., N. S., Ch., 131. And see S. C. at law, 6 M. & W. 756; 10 L. J., N. S., Exch., 105.

5. A testator gave to his sons certain real estates, with power to appoint to any woman they might respectively marry, a jointure in bar of dower:—Held, that an appointment under this power was a gift within the 45 Geo. 3, c. 28, and liable to legacy duty. *Sweeting* v. *Sweeting*, 1 Drew. 331; 17 Jur. 123; 22 L. J., Ch., 441.

Held, that the duty was at 10*l.* per cent. S. C. 1 W. R. 122.

3. Property Converted.

1. Where testamentary papers were construed as amounting not merely to a power of sale for the purposes of the trust, but to a direction to sell in case the testator should die without leaving any heir of his body living at the time of his death:—Held, therefore, that though in fact the real estate was not sold, the positive direction to sell rendered it liable to legacy duty. *Williamson* v. *Advocate General*, 10 Cl. & F. 1; 13 Sim. 153.

2. A devise of real property to trustees to be sold, and the produce to be deemed part of the residue of the testator's estate, or go in aid (if necessary) of his residue, in discharge of money legacies (given by will or codicil), was held liable to the legacy duty imposed by the 41 Geo. 3, c. 149, though the residuary legatee took the property *in statu quo*, and the trustees did not convert it into money by sale; for in equity the subject of such a bequest would go, after the legatee's death, to his personal representatives. *Att.-Gen.* v. *Holford*, 1 Price 426.

3. The legacy duty Acts are to be construed strictly, and in favour of the subject. *Hobson* v. *Neale*, 17 Beav. 178.

A will empowered the trustees, with the consent of A., to sell the real estate, and invest a sufficient sum to answer two annuities. The rents being deficient to pay the annuities, the Court ordered a sale out of the produce, and 20,000*l.* consols were purchased to provide for the annuities. Legacy duty being claimed on the corpus of the consols:—Held, that the validity of this claim depended on whether the sale had taken place under the general jurisdiction of this Court, or under the power in the will; and the Court having held the former, determined that no legacy duty was payable. *Ib.*

4. A., by will, gave his lands unto trustees, for the benefit of his children on their attaining twenty-one, and authorised his trustees to sell such of his lands as they might see fit, and to invest the moneys in any way which might appear unto them best, and to pay such sums as they might think right for the maintenance and education of the children. In an administration suit the estates were directed to be sold:—Held, that legacy duty was payable on the proceeds, and that succession duty was payable on the dower to which the widow was entitled out of a portion of the estate. *Harding* v. *Harding*, 7 Jur., N. S., 906.

Where a testator directs a sale of real estate, or it takes place under a power, legacy duty is payable; but where property is sold under the direction of the Court, legacy duty is not payable. *Ib.*

5. Where trustees for sale under a will, who had entered into a contract with a purchaser, and paid legacy duty on the amount of the purchase money, afterwards vested the estate in the person to whom (subject to the trust) the land was devised, whereby he became the proper party to convey. *Semble*, that succession duty, and not legacy duty, ought to have been paid. *Howe* (*Earl*) v. *Lichfield* (*Earl*), 2 L. R., Ch., 155; 36 L. J., Ch., 313; 15 W. R. 323. Reversing on this point 35 Beav. 370; 1 L. R., Eq., 641; 14 W. R. 468.

6. Prior to the Succession Duty Act, 16 & 17 Vict., c. 51, legacy duty was not chargeable upon real estate, except where its conversion into personalty took place under some imperative trust or direction to that effect. Hence, where the conversion was a thing done at discretion, for the convenience and benefit of the parties, the claim of the Crown did not arise. In such cases the words "to pay" did not necessarily denote conversion. They might be taken for "to transfer." *Advocate-General* v. *Smith*, 1 Macq. H. L. Ca. 760.

The case of *Re Evans* (2 C. M. & R. 206), held by Lord St. Leonards not to have been overruled either by *Att.-Gen.* v. *Simcox* (1 Exch. 749) or by *Att.-Gen.* v. *Mangles* (5 M. & W. 120). *Ib.*

4. Debts Forgiven or Paid.

7. A., who had been a bankrupt in 1822, by his will, dated in 1851, directed his just debts to be paid, in which he included the unpaid-in-full debts proved in the bankruptcy, and directed his executors to pay to the official assignee, in trust to pay all the creditors under the bankruptcy, so much money as would make the dividend on the estate equal to 20*s.* in the pound:—Held, that legacy duty was payable on the amount. *Turner* v. *Martin*, 3 Jur., N. S., 397; 26 L. J., Ch., 216; 7 De G. M. & G. 429.

8. A specific fund was bequeathed for payment of debts. A claim being made in respect of a debt barred by the statute, the administrator offered 1,150*l.* as the price to be paid for a release of all claims. Legacy duty was claimed on this account:—Held, that it must be borne by the administrator, and not by the creditor. *Greville* v. *Greville*, 27 Beav. 596.

5. Charitable Legacies.

9. Testator gave his residuary estate (which amounted to 13,000*l.*) to his executors, to be by them appropriated to the education of the poor in Ireland, principally those in or about Limerick:—Held, that legacy duty was payable on the residue. *Att.-Gen.* v. *Fitzgerald*, 13 Sim. 83; 7 Jur. 569.

10. A legacy of 50*l.* a year to be laid out in bread for the poor of a parish, is liable to the legacy duty; although the poor were so numerous that no one received more than the value of 2*s.* per annum. *Re Franklin's Charity*, 3 Sim. 147; 3 Y. & J. 544.

11. Bequest to trustees of 2,000*l.* consols, to divide the income yearly between twelve poor persons, but no person to be eligible two years in succession:—Held, liable to legacy duty. *Re Pearce*, 24 Beav. 491.

12. A charitable legacy is liable to pay duty, notwithstanding a direction that the fund is to be distributed among the individual objects in sums of less than 20*l.* *Harris* v. *Howe* (*Earl*), 7 Jur., N. S., 383; 30 L. J., Ch., 612; 9 W. R. 404.

Bequest for poor persons, but no person to receive more than 5*l.*:—Held, that legacy duty was payable on the whole fund. S. C. 29 Beav. 261.

13. By 56 Geo. 3, c. 56, Sched., Part 3, and

5 & 6 Vict., c. 82, s. 38, legacies given for charitable purposes are exempt from duty, but such exemption does not extend to legacies absolute on the face of the will, but bound by a secret trust for charitable purposes. *Cullen* v. *Att.-Gen. (Ireland)*, 1 L. R., H. L., 190; 12 Jur., N. S., 531; 14 W. R. 869; 14 L. T., N. S., 644.

1. Bequest by a parish priest in Ireland of "all my property and money to the poor." The assets were all in Ireland, and the will was proved there:—Held, liable to legacy duty. To bring a legacy, for a purpose merely charitable, within the exemption from legacy duty in the 5 & 6 Vict., s. 38, c. 82, it must appear by the will itself that the charitable purpose is to be restricted to Ireland. *Kenny* v. *Att.-Gen.*, 11 L. R., Ir., 253.

Duty. How Paid.] See LEGACY.

6. Foreign Property or Domicil.

2. Personal property having no situs of its own follows the domicil of its owner. The law of the domicil of a testator or intestate decides whether his personal property is liable to legacy duty. A British-born subject died domiciled in a British colony; at the time of his death he was possessed of personal property locally situated in Scotland; probate of his will was taken out in Scotland for the purpose of there administering his property; and out of the fund thus obtained by the executor legacies were paid to legatees residing in Scotland:—Held, that legacy duty was not payable in respect of these legacies. *Thompson* v. *Advocate-General*, 12 Cl. & F. 1; 13 Sim. 153; 9 Jur. 217.

3. A British subject went to settle in France in 1762, and afterwards purchased an estate and became naturalised there. In 1791 he left France and came to England, in consequence of the French revolution, and shortly afterwards his property was confiscated by the revolutionary Government. In January 1802 he made a will in London, by which he left his property partly to a charity in Ireland and partly to individuals resident in England, and appointed one of those individuals his executors. In April 1802 emigrants were permitted to return to France, and soon afterwards he returned to that country. In 1804 he made a will in Paris, in which he stated that he was born at Waterford, and had come to France to obtain restitution of his estate; and after referring to his former will (which he had mislaid in London), he recapitulated very nearly its contents, and concluded by expressly confirming it. He died in Paris in 1806; and his two testamentary papers were proved both in France and in England. Under the treaty of peace between England and France in 1815, a large sum of French stock was set apart by the then French Government, for the purpose of compensating British subjects whose property had been confiscated by the revolutionary Government, and part of that sum was awarded by commissioners, appointed by the British Government, to the testator's executors for the loss of his property in France. The commissioners, under the powers of an Act of Parliament, sold the stock so awarded, and paid the proceeds into the Court of Chancery:—Held, that the testator was domiciled in France at his death, and that the fund in court was not subject to legacy duty. *Commissioners of Charitable Donations* v. *Devereux*, 13 Sim. 14; 11 L. J., N. S., Ch., 362; 6 Jur. 616.

4. The proceeds of land in England devised by a British subject domiciled in France, on trust to sell and pay the proceeds to his daughters born of a French mother before marriage, but afterwards legitimated according to French law, are liable to legacy duty at 1*l.* per cent. only. *Skottowe* v. *Young*, 11 L. R., Eq., 474; 40 L. J., Ch., 366; 24 L. T., N. S., 220; 19 W. R. 583.

A person of English birth, but domiciled in France, gave, by his will, shares in the proceeds of converted real estate in England to his two daughters, who were not born in wedlock, but had been legitimated according to the law of France:—Held, that the status of the daughters in England must be their status according to the law of France, *i.e.*, that of legitimate children and not of "strangers in blood," and that legacy duty of the rate of 1*l.* per cent. was payable upon the shares taken by them under their father's will. *Ib.*

5. A testator gave a rent-charge, to issue out of lands in England, to A. for life, and directed that after her death it should be continued, and equally divided between B., C., and D., during their lives and the life of the longest liver. B. died domiciled abroad, leaving an English will, by which she disposed of her personal estate. On the death of A., who was survived by C. and B., the Crown claimed from B.'s executors legacy duty in respect of B.'s third share of the rent-charge:—Held, that such duty was payable, for that the interest in the rent-charge which passed to B.'s executors was, by the Wills Act, "an estate *pur autre vie*, applicable by law in the same manner as personal estate," and therefore fell within 36 Geo. 3, c. 52, s. 20, and that it was not exempt from duty by reason of B.'s foreign domicil, inasmuch as, although it was by law applicable in the same manner as personal estate, it was not by any of the statutes made personal estate, but was realty not following the person. *Chatfield* v. *Berchtoldt*, 7 L. R., Ch., 192; 41 L. J., Ch., 255; 26 L. T. 267; 20 W. R. 401. Reversing 12 L. R., Eq., 464; 25 L. T., N. S., 121; 20 W. R. 53.

6. When personal property is bequeathed by a person not domiciled in this country, it is not, in the first instance, liable to legacy or succession duty on being paid to the legatee. But where the executor directed to collect foreign property and invest it here, has discharged the duty imposed on him, and has placed the fund, in the way required, in this country, any subsequent devolution of it becomes liable to duty, though the party on whom it may devolve may (like the testator) be domiciled abroad. *Att.-Gen.* v. *Campbell*, 5 L. R., H. L., 524; 41 L. J., Ch., 611.

7. Upon a claim, on the part of the Crown, for payment of legacy duty, treating the testator as domiciled in England, it appeared that the testator (whose name was English, but whose place of birth was unknown) had held a commission in the English army, but had sold out in 1810, and retired to France,

where he resided until his death in 1820, placing an illegitimate son at a French school. His will, made at Paris in 1818, was in the English form. He left property in the French funds, and none in England:—Held, that the presumption was against an English domicil, and that in the absence of proof by the Crown of English domicil, legacy duty was not payable. *United States (President)* v. *Drummond*, 10 Jur., N. S., 533; 33 L. J., Ch., 501; 12 W. R. 701; 10 L. T., N. S., 321; 33 Beav. 449; 4 N. R. 7.

1. An English testator by will gave a fund to trustees to pay the income to his daughter for life, and after her death to hold the fund in trust for such persons as the daughter should by will appoint. The daughter for some time previously to and up to her death was domiciled in Jersey. She disposed of the fund by will, giving legacies to two persons, and the residue to her husband:—Held, that the legacies were not liable to legacy duty, but were liable to succession duty. *Re Wallop*, 10 Jur., N. S., 328; 33 L. J., Ch., 351; 12 W. R. 587; 1 De G. J. & S. 656; 3 N. R. 679.

The legacies, by reason of the domicil in Jersey, were not liable to legacy duty; but, notwithstanding the fact of such domicil, were liable to succession duty. *Semble. Ib.*

2. Notwithstanding the constitution of the Supreme Court of China and Japan, and the jurisdiction conferred on that Court over British subjects having a fixed place of residence in China, a British subject cannot acquire by residence in China a new domicil so as to exempt his personal estate on death from the operation of the Legacy Duty Acts. *Re Tootal's Trusts*, 23 L. R., Ch. D., 532; 52 L. J., Ch., 654; 48 L. T. 816; 31 W. R. 653.

British subjects resident in Chinese territory cannot acquire in China a domicil similar to that existing in India, and commonly known as Anglo-Indian. *Ib.*

India.] 3. A testator resident in India, and having all his property there, bequeathed his residuary personal estate to his brother J. H., and his sister H. L., in equal shares, but in case his sister should die before him, then to her children. The executor, who was also resident in India, having proved the will there, remitted the residue to his agent in England, with a letter, in which he desired the agent to appropriate the fund according to the annexed extract of the will, by which it would be perceived that half went to J. H., and half to H. L. or her children. H. L. had died in the lifetime of the testator, leaving nine infant children. A suit having been instituted by the children against the agent, and also against the executor and J. H., who were both out of the jurisdiction, for the purpose of having a moiety of the fund secured:—Held, that no legacy duty was payable upon such moiety. *Logan* v. *Fairlie*, 1 Myl. & C. 59. Reversing 2 Sim. & S. 284; 3 L. J., Ch., 152.

Where a testator dies in India leaving personal estate there only, and his executors reside and prove his will there, no duty is payable on a legacy remitted to a legatee in England. S. C. 2 Sim. & S. 291; 3 L. J., Ch., 152.

4. A testator, resident in India, bequeaths to an infant a sum of money to be invested in the company's securities, of which the interest is to be applied to her maintenance, and the principal to be settled upon herself for life, with remainder to her children. He is lost on his voyage to England, leaving all his property in India. Executors resident in that country prove his will at Calcutta, invest the legacy in the company's securities, and for several years remit the interest to their correspondents in London for the benefit of the legatee, who had come to England. A part of that interest is brought into court in a suit established by her for the appointment of a guardian, and for the allowance of maintenance, and an order is made for the payment to her guardian out of the fund so created of 200*l.* a year as maintenance:—Held, that there was a specific appropriation in India of the legacy, and that the payment of 200*l.* a year was not liable to the legacy duty. *Hay* v. *Fairlie*, 1 Russ. 117.

5. A man possessed of personal estate, situate partly in England, but principally in the East, where he was employed in the service of the East India Company, made his will in the East Indies and died there. After specifically bequeathing his property in England to his wife, his will gave considerable pecuniary legacies to his infant children, and to various other persons, some of whom were native inhabitants of India. One of the executors lived in Calcutta, and proved the will there, and having collected the Indian assets, and thereout paid the testator's Indian debts and funeral expenses, he remitted the surplus to England to the other executors, by whom probate of the will in respect of property in England had been already obtained in this country. In a suit instituted in this court by the testator's children, against the executors, for the administration of the estate, the fund so remitted was transferred into court, and having proved insufficient to pay the pecuniary legacies in full, it was ultimately ordered to be apportioned among the different legatees, in proportion to their respective legacies:—Held, that the legacy duty was not payable, in respect of any of the sums so appropriated to the respective legatees. *Arnold* v. *Arnold*, 2 Myl. & C. 256; 6 L. J., N. S., Ch., 218; 1 Jur. 265.

The personal assets, situate in India, of a testator who resides, and makes his will, and dies in India, are not subject to legacy duty, although such assets are afterwards remitted to this country, by an executor who has proved the will in India, to executors who have proved the will in England, and are administered under a decree of the Court of Chancery here. *Ib.*

6. A testator born in Scotland, but having for many years resided in India, died there, leaving real and personal property situated in India, but no assets in England. By his will and testamentary papers, all executed in India, he left the whole of his property, in equal divisions, to his four natural children or the survivors of them and their heirs, subject to some small legacies and annuities. His executors, who were in India before and at the time of his death, having obtained an Indian probate, paid the debts and bequests, and got in the testator's estate and converted the principal part thereof into money, which they sent to their bankers in England, and afterwards invested in the funds in their own names. A

suit was afterwards instituted in the Court of Chancery in England, to ascertain the claims of the residuary legatees under the will; whereupon the stock was transferred into the name of the accountant-general of the Court of Chancery, and that Court made a decree declaring the shares of the several claimants. In that suit a claim was made on behalf of the Crown for the legacy duty on the residuary fund:—Held, that legacy duty was not payable on the legacies, annuities, or shares of the residue bequeathed. *Att.-Gen.* v. *Forbes*, 2 Cl. & F. 48. S. C. *nom. Att.-Gen.* v. *Jackson*, 8 Bli. N. S. 15; 3 Tyrw. 982. Affirming *Jackson* v. *Forbes*, 2 Tyrw. 354; 2 Cromp. & J. 382; 1 L. J., N. S., Exch., 159.

1. Legacies bequeathed by a British subject in the East Indies, out of his personal estate, to persons in England, are liable to the duty, if the executor proves the will in England, and pays the legacies here, notwithstanding the testator realised and possessed his property in India, resided and made his will there, and although the executors were in India at the time of their appointment, and the will was originally proved there. *Att.-Gen.* v. *Cockerell*, 1 Price 165.

2. A testator, who was an English-born subject and an officer in the royal navy on half-pay, in 1829 obtained leave of absence for the purpose of going to India, and went to Calcutta, where he established a lucrative business. In 1830 he married, and subsequently had three children, born in Calcutta. He continued to receive his half-pay and to obtain renewals of his leave of absence until 1839. In that year he made his will, and died at Calcutta, without having at any time returned to England:—Held, that at the time of his death the testator's domicil was Indian, and therefore that no legacy duty was payable on his personal property. *Cockrell* v. *Cockrell*, 2 Jur., N. S., 727; 25 L. J., Ch., 730; 4 W. R. 730.

3. A testator had an Irish domicil of origin. In 1790 he went to India, and entered into partnership in business there. In 1800 the partnership was dissolved. In 1802 he came to England, and took an assignment of a leasehold house in London, and purchased the furniture in the house. In 1811 he sold the house and furniture, and went to reside at Clifton. In 1812 he went to Madeira for his health, and in 1814 he there made his will. In 1815 he went to Lisbon by advice, and died there:—Held, that the domicil of the testator at the time of his death was English, and that the Crown was entitled to legacy duty on the bequests in his will. *Att.-Gen.* v. *Fitzgerald*, 25 L. J., Ch., 743; 3 Drew 610; 4 W. R. 797.

4. A testator had a Scotch domicil of origin. In 1807 he sailed from England for the East Indies; the vessel was wrecked, and he was taken prisoner and confined at Verdun till 1814. In that year he was released. In 1815 he went to India, and set up in business. In 1835 he made his will at Calcutta, describing himself as of that place, and appointing two persons resident at Calcutta his executors. In 1836 he sailed from India in a vessel bound for an English port, and died in *itinere*:—Held, that the domicil at the time of his death was Indian, and therefore no legacy duty was payable upon his personal property. *Lyall* v. *Paton*, 25 L. J., Ch., 746; 4 W. R. 798.

5. A Scotchman went to India, entered into business, and resided there for eighteen years. He then returned to England for the benefit of his health, leaving all his property in India. He spent eleven months in England, and six months in Scotland, having no fixed abode; after which time he went back to India, made his will, describing himself as T. C., coffee planter, Mysore, and died in India a few months after:—Held, that he had abandoned his domicil of origin, had acquired an Anglo-Indian domicil, which he retained at his death, and consequently that his property was not liable to legacy duty. *Allardice* v. *Onslow*, 10 Jur., N. S., 352; 33 L. J., Ch., 434; 12 W. R. 397; 9 L. T., N. S., 674.

Semble, the circumstance that a foreign fixed residence is adopted merely with the view to the acquisition of a fortune, and with an ulterior intention of returning home, is not sufficient to prevent the place of residence from becoming that of domicil. *Ib.*

6. Legacy duty is payable upon the share of a deceased partner, a domiciled Englishman, in the proceeds of freehold property in Bombay used for the purposes of the partnership, and forming a partnership asset. *Forbes* v. *Steven*, *Mackenzie* v. *Forbes*, 10 L. R., Eq., 178; 39 L. J., Ch., 485; 18 W. R. 686; 22 L. T., N. S., 703.

7. Notwithstanding the constitution of the Supreme Court of China and Japan, and the jurisdiction conferred on that Court by the Order in Council of China and Japan 1865, over British subjects having a "fixed place of residence in China," a native of this country cannot acquire by residence in the empire of China an Anglo-Chinese domicil analogous to that known as Anglo-Indian, and the estate of a British subject whose fixed place of residence is in the empire of China is, on death, within the operation of the Legacy Duty Acts. *Re Tootal's Trusts*, 23 L. R., Ch. D., 532; 52 L. J., Ch., 664; 48 L. T. 816; 31 W. R. 653.

Colonies.] 8. A British-born subject died domiciled in a British colony. At the time of his death he was possessed of personal property, locally situated in Scotland. Probate of his will was taken out in Scotland, for the purpose of administering his property, and out of the fund thus obtained by the executors legacies were paid to legatees residing in Scotland:—Held, that legacy duty was not payable in respect of these legacies. *Thompson* v. *Advocate-General*, 12 Cl. & F. 1; 13 Sim. 153; 9 Jur. 217.

9. A testator whose assets consisted partly of personal estate in the colony of Victoria, where duty is payable on the property of all deceased persons, died domiciled in England, and by his will gave many pecuniary legacies, and divided the residue among some of the pecuniary legatees:—Held, that the duties attaching in Victoria, and all expenses of realisation, were payable out of the general estate before distribution, and that the pecuniary legatees were entitled to their legacies, free of all colonial duties and expenses except the English legacy duty. *Peter* v. *Stirling*, 10 L. R., Ch. D., 279; 27 W. R. 469.

7. Other Property.

1. The profits arising from the tolls of a lighthouse are real estate, and not subject either to probate or legacy duty. *Att.-Gen.* v. *Jones*, 1 Macn. & G. 574; 1 H. & Tw. 493; 19 L. J., N. S., Ch., 266; 14 Jur. 379.

2. A lady, who was entitled to one-third share of an annuity charged on land in England for the lives of herself and her two sisters, and the longest liver of the three, died domiciled in Hungary, having by her will given all her personal estate to trustees upon trust:—Held, that the annuity was an estate "*pur autre vie*, applicable by law in the same manner as personal estate" within the Legacy Duty Act, 36 Geo. 3, c. 52, s. 20, but that, though applicable by law in the same manner as personal estate, it continued to be, by the common law of England, real estate, and therefore was not exempted from the payment of legacy duty by the fact of the testatrix having had a foreign domicil. *Chatfield* v. *Berchtoldt*, 26 L. T., N. S., 267; 7 L. R., Ch., 192; 41 L. J., Ch., 255; 20 W. R. 401.

III. SCALE AND AMOUNT.

3. The legacy duty is to be paid upon the aggregate amount of the residue of the testator's property, at the time of the executor's delivering into the Stamp Office the note of what he intends to retain as residuary legatee. *Att.-Gen.* v. *Cavendish*, Wightw. 82.

4. When a legacy is not paid at the time appointed by the testator, legacy duty is payable not merely on the capital sum bequeathed, but on the aggregate amount of capital and interest which is ultimately received by the legatee. *Thomas* v. *Montgomery*, 3 Russ. 502.

5. J. R., after directing his real estates to be sold and converted into personalty, bequeathed the general residue of his personal estate to his daughter J. A. P., and J. R., J. S., and J. G., his executrix and executors, upon trust to permit his daughter to receive the rents and dividends during her life, and after her decease, for such person or persons (other than and except J. W. and his relations, M. H. and his relations, and the relations of the late husband of the testator's daughter, and every of them) in such parts, shares, and proportions, and in such manner and form, as J. A. P., whether sole or covert, should by will appoint; and in default of appointment, in trust for the next of kin of D. R. And the testator declared, that, in case his daughter should intermarry with J.W., or any of his relations, or should reside with or receive visits from him or them, the bequests in her power should utterly cease. After the testator's death, J. A. P. married G. E. P., and the interest and dividends of the testator's residuary estate were regularly paid to her until her death. Previously to her death she made a will, and, in exercise of the power under her father's will, she gave 10,000*l.* consols to the descendants of the before-named D. R.; and gave all the rest of her father's property to various persons, strangers in blood to both her father and herself. D. R. was the son of a brother of J. R., the testator:—Held, first, that, on the death of J. A. P., a duty of 1 per cent. became payable in respect of the bequest, in the will of J. R., of the residue of his estate and effects to J. A. P., after allowing any duty already paid in respect thereof. *Platt* v. *Routh*, 6 M. & W. 756; 3 Beav. 257.

Held, secondly, that legacy duty was payable in respect of the bequests contained in the will of J. A. P., at the same rate at which it would have been payable if they had been mere legacies given by her payable out of her own personal estate. *Ib.*

6. A testator gave to his executors all the residue of his property, to be by them appropriated to the education of the children of the poor in Ireland, principally those in or about the city of Limerick, or as they, his executors, should in their better judgment deem meet, to give the bequest the most extensive efficacy. Pursuant to the Master's report approving of a scheme for the charity, part of the residue of the testator's estate, which was very considerable, was directed to be applied in establishing a school, and the interest of the residue to be applied towards the expenses of keeping up the school:—Held, that legacy duty at 10*l.* per cent. was payable in the first instance upon the gross amount of the residue, and not merely upon individual shares in the event of particular children deriving a benefit equivalent to 20*l.* *Att.-Gen.* v. *Fitzgerald*, 7 Jur. 569.

IV. CERTIFICATE AND PROOF OF PAYMENT.

7. On a petition for payment of a fund out of court, the certificate from the Inland Revenue Department of payment of legacy duty ought to be produced. Where that certificate was refused on other grounds, although duty had been paid, and an affidavit to that effect was produced, the Court ordered such affidavit to be served on the solicitor for the Inland Revenue, together with notice to show cause within seven days why the fund should not be paid out, and in default, that it should be so paid. *Re Marsham, Re Playford*, 9 L. T., N. S., 533; 12 W. R. 45.

8. A certificate from the Inland Revenue Office, that the duty is paid in respect of the land contracted to be sold, discharges a purchaser, and no particular form of certificate can be required by a purchaser. *Howe (Earl)* v. *Lichfield (Earl)*, 1 L. R., Eq., 641; 14 W. R. 468; 35 Beav. 370. Affirming on this point 2 L. R., Ch., 155; 36 L. J., Ch., 313; 15 W. R. 323.

9. A copy of an entry in the stamp office books of the payment of the duty on a legacy is evidence of the payment of the duty (36 Geo. 3, c. 52, s. 27). *Harrison* v. *Borwell*, 10 Sim. 380.

V. OTHER MATTERS.

10. The Legacy Duty Acts are to be construed strictly, and in favour of the subject. *Hobson* v. *Neale*, 17 Beav. 178.

11. Husband and wife being entitled in succession, under the will of the wife's aunt, to life interests in the dividends of stock standing in court, the wife being the first annuitant, the husband granted an annuity

to E. charged upon the life interests of his wife and himself. The legacy duty on the wife's annuity was duly paid: and upon the death of the wife E. procured an order in the suit for payment to him of all the dividends of the fund towards payment of his annuity and arrears, undertaking to pay the surplus to the husband. On the death of the husband, who died insolvent, it was ascertained that no part of the legacy duty on his annuity had been paid. Under the circumstances, the Court, considering that the omission of the Court in making the order for payment of the dividends without providing for the payment of the legacy duty, under the 36 Geo. 3, c. 52, s. 25, had been caused by the conduct of E.'s solicitor, ordered E. to pay the amount of the duty, and the costs of the application. *Bryan* v. *Mansion*, 3 Jur., N. S., 473; 26 L. J., Ch., 510.

Held, construing this statute liberally, that this annuity was a legacy within the meaning of the 25th section, and that the receipt of the annuity, without deducting the legacy duty, made E. a debtor to the Crown. *Ib.*

1. Where the Crown succeeds in imposing the legacy duty, it is entitled to costs out of the property; but where it fails, there should be no costs. *Lyall* v. *Paton*, 25 L. J., Ch., 746.

2. A testator left annuities and legacies, the duty on some of which was charged on the residue. The executor paid the legacy duty on the annuities, and paid the legacies, but not the duty on them, and afterwards became bankrupt. The residue of the estate would be insufficient after payment of the costs of an administration suit, and of the payment of the duty unpaid, to provide for the annuities:—Held, that the Crown had no claim on the estate. *Wright* v. *Barnewall*, 19 L. J., N. S., Ch., 38; 13 Jur. 1041.

3. Pending a suit for the administration of assets, and before the accounts had been taken, the attorney-general presented a petition for payment out of the assets of a sum which, under false representations, had been returned to the administrators as over-paid in respect of probate duty, and for the legacy duty payable by the administrator on his share of the residue. The administrator had wasted the assets, and the widow, who was entitled to one-third, had not been paid:—Held, that the application was premature, and the petition was dismissed. *Hicks* v. *Keat*, 3 Beav. 141.

Quære, whether the money thus repaid formed a primary charge on the fund. *Ib.*

In an administration suit the Court provides for the payment of the legacy duty before payment to the legatees. *Ib.*

Payment and Appropriation of Legacy.] 4. A legacy was given by one (who died in 1771) to an executor, in trust to pay the interest thereof to testator's natural child for life, and on his death to pay over the principal to his children; the interest was regularly paid to the legatee for life until his death in 1812 (his children having died long before that time, and previously disposed of their interest in the bequest). This was held, within the 48 Geo. 3, c. 149, s. 3, as being a legacy given by will of a person dying before the 5th April 1805, and not paid, retained, satisfied, or discharged, till after the 10th October 1808, and consequently liable (as to the interest taken by the representatives of the children) to the duty of 8*l.* per cent. imposed by that statute on such legacies, when given for the benefit of strangers in blood to the testator; and that, notwithstanding the principal had, in 1794, been invested in the funds by the executors, in their own names, to answer the purposes of the will. *Att-Gen.* v. *Manners* (*Lady*), 1 Price 411.

5. By will 3,000*l.* given to trustees, upon trust to invest, and to pay the interest to A. for life, and after her death to transfer the principal to B. Under a decree this legacy is paid by the trustees into court, and invested in stock in the name of the accountant-general, previous to the imposition of the duty on legacies, by 20 Geo. 3, c. 28, B. being then an infant, and therefore incapable of discharging the trustees. This is a sufficient appropriation of the legacy within the words of the Act 48 Geo. 3, c. 149, "paid, retained, satisfied, or discharged," before the 10th October 1808, and therefore, upon a question arising at the time of the principal becoming payable, it was determined that no legacy duty was chargeable in respect of it. *Hill* v. *Atkinson*, 2 Meriv. 45.

6. Legacies not paid under a charge upon real estate in aid of the personal without production of the stamp under the Legacy Act, 36 Geo. 3, c. 52, s. 7, until it is ascertained that there is no personal estate applicable. *Holme* v. *Stanley*, 8 Ves. 1.

7. A testator bequeathed a sum of money to A. for life, and after her decease to her children, as she should appoint, and in default of appointment, equally among all her children, who if sons should attain twenty-one, or if daughters should attain that age or be married; and if she should have no such children, then according to her appointment, and, in default of appointment, over. Upon the death of the testator, a suit was instituted for the purpose of having this legacy secured; under the decree made in that suit in the year 1798, the executors paid the amount into court, and prior to November 1802, the whole of it was invested in stock in the name of the accountant-general and placed to the separate account of A., who continued to receive the dividends during her life:—Held, that this was a sufficient payment of the legacy within the 55 Geo. 3, c. 184, and therefore, that upon A.'s death, in the year 1834, the parties interested in the remainder, who were children of A., were entitled to receive their several shares of the fund, without producing receipts for the legacy duty. *Coombe* v. *Twist*, 1 Myl. & C. 69.

IV. Probate and Inventory Duty.

I. *On what Property or Interests*, 6093.
II. *Payment*, 6094.
III. *Return of*, 6095

I. ON WHAT PROPERTY OR INTERESTS.

1. *In General*, 6093.
2. *Property Appointed*, 6093.
3. *Property Converted*, 6094.
4. *Foreign Property or Domicil*, 6094.

1. In General.

1. Testatrix, as heir, was entitled to the equity of redemption, and also entitled, under her settlement, to the mortgage money. She devised the estate, but did not dispose of her personal estate:—Held, that the money was subject to probate duty. *Swabey* v. *Swabey*, 15 Sim. 502.

2. All money received by an executor by virtue of probate is subject to probate duty. *Att.-Gen.* v. *Brunning*, 8 H. L. Ca. 243; 6 Jur., N. S., 1083; 8 W. R. 362; 30 L. J., Exch., 379.

A sum recoverable by an execution for damages in negligently causing his testator's death, is not a subject of probate duty. *Ib.*

3. Shares in a banking company purchased by executors with the assets of their testator in the name of a party who was entitled to the dividends for life, are included in the probate stamp, and do not require to be covered by the stamp upon the letters of administration granted to the estate and effects of the party in whose name the purchase was made. *Hennell* v. *Strong*, 25 L. J., Ch., 407.

If the bankers refuse to transfer the shares after an affidavit made by the executor of the testator in conformity with the 48 Geo. 3, c. 149, they do so at the peril of costs. *Ib.*

4. The tolls of a lighthouse are not subject to probate duty. *Att.-Gen.* v. *Jones*, 1 Macn. & G. 574; 1 H. & Tw. 493; 19 L. J., N. S., Ch., 266; 14 Jur. 379.

5. The stamp duty upon letters of administration is to be calculated not only on the principal money which constituted the property of the intestate at the time of his death, but also upon accumulations of interest between the death and the grant of the letters of administration. *Att.-Gen.* v. *Partington*, 3 H. & C. 193; 10 Jur., N. S., 825; 33 L. J., Exch., 281; 13 W. R. 54; 10 L. T., N. S., 751. Affirmed 4 L. R., H. L., 100; 38 L. J., Exch., 205; 21 L. T., N. S., 370.

By the law of England, if a married woman becomes entitled to the property of a deceased relative situated in England, and her husband takes no step to reduce her rights into possession, and she dies, and her husband does not take out administration to her and he dies, the child of these married persons must take out two administrations, one to his father, the other to his mother, on each of which, as on a distinct devolution of property, duty is payable to the Crown. *Ib.*

If this child is domiciled in a foreign state, where his parents were also domiciled, and empowers a person in England to take out administration for him, the same course must, under the same circumstances, be pursued, even though the property, when obtained, is to be distributed in the foreign state, where the law might not require this double authority of administration. *Ib.*

Where such property, no next of kin appearing, had been taken possession of by the solicitor to the Treasury, who had paid off all the debts of the intestate, and then paid over the balance to the Crown, and, after some years, the claim of the next of kin was established, and the solicitor of the Treasury ordered to pay over the principal amount, with interest, to the next of kin, the interest as well as the principal is chargeable with duty; the rule being that whatever is recoverable by virtue of the letters of administration is so chargeable, and the interest was so recoverable, being, in fact, part of the estate for which administration was granted. *Ib.*

6. A testator having died in the colony of Victoria whilst Act No. 388 was in force, and probate to his will having been applied for and granted before Act No. 523 was passed, but after the time fixed for its coming into operation retrospectively: — Held, that the duty payable on the testator's estate under the former Act having been directed by s. 10 to be deemed a debt of the testator to Her Majesty, accrued due *eo instanti*, on his death, at the rate prescribed by that Act, although the amount of such duty might have to be subsequently ascertained. *Bell* v. *Master in Equity of Supreme Court* (*Victoria*), 2 L. R., App. Cas., 560; 36 L. T., N. S., 936.

Probate duty in England is a stamp duty payable upon the value of the property the subject of the probate at the time it is granted. The duty payable under Act No. 388 is more in the nature of a succession duty, payable, whether probate is sought or not, on the value of the estate at the time of the testator's death. *Ib.*

7. Administration duty must be paid on the whole personal estate belonging to an intestate, including contingent interests. *Lord* v. *Colvin*, 3 L. R., Eq., 737; 36 L. J., Ch., 354; 15 W. R. 485; 16 L. T., N. S., 53.

Where such duty was not paid on a contingent interest, which afterwards fell into possession:—Held, that administration duty must be paid on the present value of the absolute interest, and not on the value of the contingent interest at the date of administration only; although if duty had been paid on the value of the contingency, the Crown would not have been entitled to any further duty by reason of the contingency having subsequently fallen into possession. *Ib.*

8. When the whole beneficial interest in a testator's estate was under his will vested in his widow and children, with a limitation in favour of his grandchildren, the defeasible character of each child's interest only affecting the shares of the children or grandchildren *inter se*, with a gift over on the happening of a contingency, probate must be delivered on payment of duty at the rate of 5 per cent., notwithstanding that additional duty is payable on the gift over taking effect. *Armytage* v. *Wilkinson*, 3 L. R., App. Cas., 355; 47 L. J., P. C., 31; 26 W. R. 559; 38 L. T., N. S., 185.

2. Property Appointed.

9. Where a testator, having a general power of appointment over a fund, exercises it by

will, probate duty must be paid in respect of the fund. *Palmer* v. *Whitmore*, 5 Sim. 178.

1. A married woman, having a testamentary power to appoint a fund, exercised it in favour of her husband, and appointed him her executor:—Held, that if the husband claimed the fund as his wife's executor, he must pay probate duty on the fund. *Nail* v. *Punter*, 5 Sim. 563.

2. A testator gave to A. a power to dispose by her will of 5,000*l.*, part of his estate, on which probate was paid. A. exercised the power by her will:—Held, that probate duty was not again payable in respect of the 5,000*l.* *Vandiest* v. *Fynmore*, 6 Sim. 570.

3. A testator gave his residuary estate in trust for his daughter for life, remainder to such persons, other than A., B., and C., and their relations, as she should by will appoint; and if she married or received visits from A., or any of his relations, the power was to be forfeited. The daughter afterwards appointed the property by her will:—Held, first, that the property, as bequeathed by the father, was liable to legacy duty, under s. 18 of the 36 Geo. 3, c. 52, though that section applies in terms only to the case of a "general and absolute power;" secondly, that as bequeathed by the daughter, it was subject to the legacy duty as "property which she had power to dispose of;" thirdly, that no probate duty was payable in respect of it upon the daughter's will, under s. 2 of the 55 Geo. 3, c. 184. *Platt* v. *Routh*, 3 Beav. 257; 10 L. J., N. S., Ch., 101. Affirmed S. C. *nom. Drake* v. *Att.-Gen.*, 10 Cl. & F. 257. And see S. C. at law 6 M. & W. 756; 10 L. J., N. S., Exch., 105.

4. When the provisions in a marriage settlement constitute a debt, inventory duty is not chargeable under 5 & 6 Vict., c. 79, s. 23. *Lord Advocate* v. *Hagart*, 2 L. R., H. L. (Sc.), 217.

In a marriage settlement the husband became bound to make a provision for his children, the contract giving him a power of appointment, in the exercise of which power he appointed to one of his sons 10,000*l.*, which was duly paid to him. The executors claimed a return of duty in respect of this sum, on the ground that it constituted a debt of the deceased:—Held, that their contention was right, and that they were entitled to a return of 150*l.* *Ib.*

3. Property Converted.

5. As to the right of the Crown to probate duty on realty of a deceased party impressed in equity with the character of personalty. *Matson* v. *Swift*, 8 Beav. 368; 14 L. J., N. S., Ch., 354; 9 Jur. 521.

J. S. conveyed fee simple estates upon trust by sale, etc., to pay certain debts, and the residue to himself, his executors, administrators, and assigns, without any equity thereon in favour of his heirs or real representatives, notwithstanding the estate might remain unconverted at the time of his death. The estate was sold after his death:—Held, that no part of the produce was liable to probate duty. Operation of a probate in evidencing the will, and authenticating the title of the executor to property not comprised within the grant of administration. *Ib.*

6. The share of a deceased partner in freehold and copyhold property of the partnership:—Held, not to be personal estate for the purpose of probate duty on his share. *Custance* v. *Bradshaw*, 4 Hare 315; 14 L. J., N. S., Ch., 358; 9 Jur. 486.

7. The shares of partners in realty forming part of the partnership property must be regarded as personal estate in the absence of any agreement between the partners to the contrary; and probate duty is payable on a deceased partner's share in such realty irrespective of the question whether or not there is in the event any actual conversion into personalty. *Custance* v. *Bradshaw* (4 Hare 315) discussed. *Att.-Gen.* v. *Hubbuck*, 10 Q. B. D. 488; 52 L. J., Q. B., 464; 48 L. T. 608. Affirmed 53 L. J., Q. B., 146; 13 L. R., Q. B. D., 275; 50 L. T. 374.

8. All moneys recoverable by an executor by virtue of a probate, in whatever form recovered, whether through the agency of a court of equity, or of a court of law, are part of the estate and effects of the testator, and are liable to probate duty. *Att.-Gen.* v. *Brunning*, 8 H. L. Ca. 243; 6 Jur., N. S., 1083; 30 L. J., Exch., 379; 8 W. R. 762.

Probate duty is payable in respect of the purchase money of real estate on a contract for its purchase, made before, but completed after, the death of the testator. *Ib.*

4. Foreign Property or Domicil.

9. Where a testator dies in this country possessed of personal property here and also in foreign funds, and the executor takes out probate here and pays probate duty on the amount of the property in this country, he is not chargeable with the duty in respect of the property in the foreign funds, although he afterwards obtain such property and administer it. *Att.-Gen.* v. *Hope*, 2 Cl. & F. 84; 8 Bli. N. S. 44.

10. Probate duty is payable only on property actually within the jurisdiction of the ecclesiastical courts at the time of the probate being taken out. Accordingly, where a testator held securities of the Indian Government, which he had agreed, before his death, to exchange for East India stock; but such conversion did not actually take place till after probate had been granted:—Held, that the duty was not payable. *Pearse* v. *Pearse*, 9 Sim. 430.

11. The executor of a testator domiciled in Scotland having obtained confirmation of the will in Scotland on payment of the duty assessed according to the scale adopted in Scotland, is entitled to have the confirmation sealed in England, so as to have the effect of probate under 21 & 22 Vict., c. 56, s. 12, without any further payment of duty, although, according to the mode of assessing the duty in England, a higher amount would be payable. *Re Booth*, 1 Giff. 46; 5 Jur., N. S., 619; 28 L. J., Ch., 800.

II. PAYMENT.

1. *Fund Liable for*, 6095.
2. *Non-payment. Effect*, 6095.

1. Fund Liable for.

1. A wife who had a power of appointment over a fund invested in Government stock, by her will gave legacies of specified sums of the fund:—Held, that the legacies were specific, and carried interest from her death. *Davies* v. *Fowler*, 16 L. R., Eq., 308; 29 L. T., N. S., 285; 43 L. J., Ch., 90.

The legacies so given did not exhaust the fund, and there was a residuary gift of the fund after payment of the testatrix's debts, funeral and testamentary expenses:—Held, that though the disposition of the residue of the fund was also specific, the words of the will threw the payment of the whole of the probate duty upon the residue. *Ib.*

2. An heir-at-law, though liable for debts, held not liable to pay probate duty, either directly or indirectly, which, in case of a deficiency of the impure personalty, after payment of debts and costs, was ordered to be borne by the specific bequest to a hospital. *Shepheard* v. *Beetham*, 46 L. J., Ch., 763; 6 L. R., Ch. D., 597; 36 L. T. 909; 25 W. R. 764.

2. Non-Payment. Effect.

3. Letters of administration, under which a plaintiff makes title, must be stamped *ad valorem*. *Harper* v. *Ravenhill*, Taml. 145.

4. Legacies not paid under a charge upon real estate, in aid of the personal, without production of the stamp, under the Legacy Act, 36 Geo. 3, c. 52, s. 7, until it is ascertained that there is no personal estate applicable. *Holme* v. *Stanley*, 8 Ves. 1.

5. Although, where no objection has been taken, the Court will make an order for payment at the hearing, on a proper administration being then produced; yet, if the objection be taken, the Court will not grant even a stop order to a party claiming as administrator, except upon an administration stamped according to the full value of the claim. *Christian* v. *Devereux*, 12 Sim. 264.

6. *Semble*, a party suing as executor or administrator cannot sustain proceedings to recover a larger sum than that upon which the probate duty is calculated. *Jones* v. *Howells*, 2 Hare 342; 12 L. J., N. S., Ch., 365.

7. A plaintiff sued to recover a large unliquidated sum due to her testatrix, but the stamp on the probate did not cover the amount claimed:—Held, that the plaintiff could not obtain a decree even for accounts and inquiries until the probate had been properly stamped. The cause stood over, and the commissioners stamped the probate and gave credit for the duty. *Howard* v. *Prince*, 10 Beav. 312.

III. Return Of.

8. Pending a suit for the administration of assets, and before the accounts had been taken, the attorney-general presented a petition for payment out of the assets of a sum which, under false representations, had been returned to the administrator, as overpaid in respect of probate duty, and for the legacy duty payable by the administrator on his share of the residue. The administrator had wasted the assets, and the widow, who was entitled to one-third, had not been paid:—Held, that the application was premature; and the petition was dismissed. *Hicks* v. *Keat*, 3 Beav. 141.

Quære, whether the money thus repaid formed a primary charge on the fund. *Ib.*

In an administration suit the Court provides for the payment of the legacy duty, before payment to the legatee. *Ib.*

V. Succession Duty.

I. *Operation of Act*, 6095.
II. *On what Property or Interests*, 6095.
III. *Foreign Property or Domicil*, 6097.
IV. *Valuation of Property*, 6098.
V. *Succession, what is, and Scale of Charge*, 6098.
VI. *Allowances*, 6101.
VII. *Instalments*, 6101.
VIII. *Fund set Apart for*, 6102.
IX. *Vendor and Purchaser*, 6102.
X. *Other Matters*, 6102.

I. Operation of Act.

9. The 4th section of the 16 & 17 Vict., c. 51, does not restrict the operation of the duty as regards appointments to cases where the powers are created by wills taking effect, or by settlements made after the commencement of the Act. *Re Lovelace*, 4 De G. & J. 340; 5 Jur., N. S., 694; 28 L. J., Ch., 489. Reversing 5 Jur., N. S., 428.

A., being tenant for life of a fund, with a general power of appointment over the same by deed or will, executed such power in favour of certain persons by will, dated in 1852. In 1853 the 16 & 17 Vict., c. 51, came into operation. In 1856 A. died:—Held (5 Jur., N. S., 428), that succession duty was payable by the appointees of A. *Ib.*

10. The property of a remainderman whose estate vested upon his birth, before the 16 & 17 Vict., c. 51, came into operation, but did not fall into possession until the death of the tenant for life, which took place after the Act came into operation, but before it received the royal assent, is liable to succession duty. *Wilcox* v. *Smith*, 4 Drew. 40; 3 Jur., N. S., 604; 26 L. J., Ch., 596; 5 W. R. 667.

Devise in 1826 to his son A. for life, remainder to his son's first and other sons in tail. A. died in 1827, leaving his son the tenant for life. The tenant for life died on the 18th July 1853, leaving B., his eldest son, surviving, who was born before the 19th May 1853. The 18 & 19 Vict., c. 51, was passed on the 4th August 1853, but came into operation on the 19th May:—Held, that B. was within the Act, and succession duty attached. *Ib.*

II. On what Property or Interests.

11. A tontine is a contract for value, and therefore within the exceptions of s. 17 of the 16 & 17 Vict., c. 51. *Oldfield* v. *Preston*, 8 Jur., N. S., 107; 31 L. J., Ch., 256; 10 W. R. 257; 5 L T., N. S., 650; 3 De G. F. & J. 398.

An interest accruing immediately under a tontine does not create the relation of predecessor and successor, so as to make succession duty payable in respect of the accrued interest. *Ib.*

Where a father subscribed to a tontine in the names of three of his children, two of whom died before the time appointed for the commencement of the Act, but the third survived it:—Held, in the absence of evidence to the contrary, that such surviving child took, not by succession, but in its own right, by way of advancement, and that no duty was payable in respect thereof. *Ib.*

1. A., by will, gave his lands unto trustees, for the benefit of his children on their attaining twenty-one, and authorised his trustees to sell such of his lands as they might see fit, and to invest the moneys in any way which might appear unto them best, and to pay such sums as they might think right for the maintenance and education of the children. In an administration suit the estates were directed to be sold:—Held, that succession duty was payable on the dower to which the widow was entitled out of a portion of the estate. *Harding* v. *Harding*, 7 Jur., N. S., 906.

2. By a marriage settlement made in 1822, B. and A. (father and son), in pursuance of a joint power of appointment in them vested, limited two rent-charges to the wife of C., if she survived her husband (which event happened); and it was provided that the rent-charges should be in lieu of dower, thirds, and freebench, and should be payable without any deduction or abatement whatsoever on account or in respect of any taxes, charges, impositions, or assessments already imposed or charged, or to be thereafter imposed or charged, upon the hereditaments or upon the jointure; and for the purpose of better securing the same, certain hereditaments were demised for a term of years, upon trust, in case the rent-charge should fall into arrear, to raise and pay the same, with all costs, charges, and expenses which should be sustained by reason of the non-payment thereof, or otherwise in relation thereto. The husband died in 1856:—Held, that succession duty was payable by the jointress in respect of the rent-charge. *Floyer* v. *Bankes*, 9 Jur., N. S., 1255; 33 L. J., Ch., 1; 12 W. R. 28; 9 L. T., N. S., 353; 3 De G. J. & S. 306; 3 N. R. 16. Reversing 2 N. R. 217.

Marriage, or a release of dower, is not a valuable consideration "for money or money's worth" within the intent and meaning of s. 17 of the 16 & 17 Vict., c. 51. *Ib.*

Held, also, that the jointress was entitled to have her rent-charge free of the duty, and that the same was, therefore, a charge upon the estate. *Ib.*

3. A subscriber to the Customs Annuity and Benevolent Fund, established by 56 Geo. 3, c. 73, constituting a fund in the nature of an insurance fund, out of which a sum becomes payable on the death of a subscriber, according to rules made under the authority of the Act, under which one-third goes to the widow of the subscriber, and the remainder to his children, relatives, or appointees, other than relatives, nominated with the consent of the directors, appointed part of the fund to which he would be entitled on his death to the trustees of a life insurance society by way of mortgage. The subscriber's family disputed the validity of the appointment, but it having been decided to be valid, succession duty was claimed by the Crown at the rate of 10 per cent.:—Held, that the part of the fund which was payable to the life insurance office was not liable to succession duty. *Re Maclean*, 31 L. T., N. S., 632; 44 L. J., Ch., 145; 23 W. R. 206; 19 L. R., Eq., 274.

4. By a private Act a fund was directed to be raised for the conditional benefit and relief of widows, children, and other relatives of the officers and others employed in the department of customs in England; and that rules and regulations should be made for the formation of such fund, and directors and other officers appointed who were to have the management of the same. The code of rules in force at the time of the execution of the following instrument was dated the 28th July 1836. The rules provided, that the admission by the directors of a nominee of a subscriber should take place during the lifetime of such subscriber; and that the subscriber should have power to direct, by any instrument in writing, to be deposited with the directors, or by his will, that the whole capital money insured or forthcoming at his death should be paid, in any manner he might think proper, for the benefit of his widow, children, or relatives, or of his nominee who should have been duly admitted. P. was in July 1826 admitted as a subscriber to the fund for 1,200*l.* In March 1840 a letter was sent from the fund office to P., in which his attention was drawn to the rules of 1836, and acquainting him that if he gave directions by will as to the manner in which the sum insured was to be appropriated at his death, he must make specific mention of his insurance in the Customs Fund; that "relatives," used in the rules, included only relations by blood, and not sons-in-law or daughters-in-law; and if he had disposed of his insurance to a son-in-law, or to any other party who was not a relation by blood, the directors must at his instance, during his lifetime, admit him his nominee, to entitle him to receive the sum set apart for his benefit. In October 1845 P., in pursuance of the rules, signed an instrument, in which he directed that the capital money forthcoming at his death should be invested in the purchase of 3*l.* per cent. stock, and the interest applied for the benefit of his wife during her life, if she should survive him, and at her death the stock should be divided between his two daughters B. and C., in equal proportions; and in the event of either of them marrying and leaving issue, then her or their shares to her or their children respectively; and in case both his daughters should die without issue, then over to his son. P. directed, that if he survived his wife, the whole sum forthcoming should be paid to his daughters B. and C. or their children, or to his son. This instrument was in October 1845 deposited by P. with the directors of the fund, and he died in December 1855. In May 1852 P. by will bequeathed all his estate and effects unto his daughters B. and C., and appointed them executrixes, but he made no specific mention of the fund. The wife of P. died in 1847, and the son died intestate and unmarried in 1851. B. and C. applied to the

directors for payment to them of the fund, but were informed that G., who in November 1826 intermarried with L., another daughter of P., had given notice to the directors not to pay it to them. G. alleged, that by an indenture of the 13th August 1832 (after reciting that on his marriage no settlement was made, but that upon the treaty for such marriage it was agreed that upon the decease of P., G., and L. his wife, should take a share, equal with J. P.'s other daughters who should be living at his decease, of and in all his property), P. covenanted with G. and L. his wife, that they, or such of them as should be living at his decease, should immediately after his decease take a share equal to his other daughters of all the property which he might be seised or possessed of, or in any manner entitled unto or interested in, at the time of his death; and that he would forthwith make his last will, whereby he would give, devise, and bequeath all his property in such manner as to effectuate the intentions thereinbefore expressed, and would not revoke or alter such will. L., the wife of G., died in 1852. The capital money was, under the 10 & 11 Vict., c. 96, paid by the directors of the fund into court. On petition presented by B. and C.:—Held, that under the instrument of nomination B. and C. were, in the events which had happened, entitled to take the fund absolutely. *Quære*, whether succession duty was payable on the interest taken under the instrument of nomination. *Re Powell's Trust*, 2 Jur., N. S., 799.

III. FOREIGN PROPERTY OR DOMICIL.

1. The 16 & 17 Vict., c. 51 applies to a succession under a British settlement to British property vested in British trustees, and falling under the jurisdiction of a British Court, although the persons entitled are aliens domiciled abroad. *Re Lovelace*, 4 De G. & J. 340; 5 Jur., N. S., 694; 28 L. J., Ch., 489.

Personal property appointed under a general power, and not coming within the 4th section, ought not to be treated as the property of the donee, so as to be, in the case of the donee being domiciled abroad, exempt from succession duty. *Ib.*

2. In 1845 a testator, domiciled in the Mauritius, left stock in the funds to his widow for life with remainders over. In 1852 all parties joined in a deed appointing persons trustees in the room of the executors, the trusts of the deed being the same as those of the will. The tenant for life died in 1863:—Held, that succession duty was payable. *Re Smith*, 12 W. R. 933; 10 L. T., N. S., 598.

3. The operation of the 16 & 17 Vict., c. 51 is confined to successions to which persons become entitled by the laws of this country. *Wallace* v. *Att.-Gen.*, *Jeves* v. *Shadwell*, 11 Jur., N. S., 937; 14 W. R. 116; 13 L. T., N. S., 480; 1 L. R., Ch., 1; 35 L. J., Ch., 124.

Therefore, where a testator domiciled abroad died, leaving pure personalty situate in England:—Held, that no succession duty was payable in respect thereof. *Ib.*

4. A married woman, domiciled abroad, having exercised by her will a general absolute power of oppointment, given to her by the will of her father, over property situate in England:—Held, per Turner, L. J., that legacy duty was not, but that succession duty was payable by the appointees; Knight Bruce, L. J., expressing no further opinion than that one duty or the other (it being immaterial which) was payable. *Re Wallop*, 10 Jur., N. S., 328; 33 L. J., Ch., 351; 12 W. R. 587; 10 L. T., N. S., 174; 1 De G. J. & S. 656; 5 N. R. 679.

The 16 & 17 Vict., c. 51, applies to persons wherever domiciled, and the rule *mobilia sequuntur personam* cannot, as under the Legacy Duty Acts, be made the ground of an exemption from duty. *Semble. Ib.*

5. A testator who was domiciled in Belgium, but for the last ten years of his life resided and carried on business in England, by his will (made and proved in England), gave to his brother all his interest in their partnership business, provided he should within a certain time pay his co-executor 12,000*l.*; and he directed 12,000*l.* to be invested in consols and held in trust for A. for life, with remainder for his nephews and nieces, most of whom were Belgians:—Held, that upon the death of A. succession duty was payable on the amount. *Re Badart*, 10 L. R., Eq., 288; 39 L. J., Ch., 645; 18 W. R. 885; 24 L. T., N. S., 13.

6. By a marriage settlement executed in England, the husband assigned to trustees (all domiciled and resident in England) an English policy of assurance, effected on his own life for 2,000*l.*, payable at the expiration of six months after his death, and the sum of 1,047*l.* 3*s.* 8*d.* consols, and covenanted to pay to the trustees within three years 1,000*l.*; and it was declared that the policy moneys and the 1,000*l.* should be held upon trusts for investment and payment of the income to the wife for life, and then to the husband for life, and then for division among the children of the marriage. The husband died within three years, having been at the time of his marriage, and thenceforth, up to the time of his death, domiciled in New South Wales. The wife survived only three months, and left one child, who was also domiciled abroad. At the time of the wife's death, neither the policy moneys nor the 1,000*l.* covenanted to be paid to the trustees of the settlement had been paid to them:—Held, that succession duty was payable by the child on the funds to which he became entitled under the settlement. *Lyall* v. *Lyall*, 15 L. R., Eq., 1; 42 L. J., Ch., 195; 21 W. R. 34; 27 L. T., N. S., 530.

By his will, the husband appointed trustees and executors in New South Wales to collect his residuary estate (which was all locally situate in that country), and transmit it to trustees and executors in England, who were to invest the funds so transmitted in Government funds or real securities, and pay the income to his wife for her life, and after her death to divide it among the children. At the time of the wife's death, no part of the residuary estate had reached the hands of the English trustees, but large remittances were afterwards made to them:—Held, that no succession duty was payable by the child on the funds to which he became entitled under the will. *Ib.*

When a person, whether an alien or a British subject, succeeds to property under a British settlement, vested in British trustees, he is liable to pay succession duty, whether the

settlement is made by an alien or by a British subject, and whether the settlement is made by deed or by will, and wherever the property is locally situate. *Ib.*

1. The word "property," in s. 2 of the Succession Duty Act 1853, includes foreign movable property—as, for instance, funds or shares of a foreign government or trading corporation—comprised in a British settlement, vested in trustees subject to British jurisdiction, and recoverable by action in a British Court. *Re Cigala*, 7 L. R., Ch. D., 351; 47 L. J., Ch., 166; 38 L. T., N. S., 439.

The mere fact of a person beneficially entitled under a settlement being a foreigner is not sufficient to exempt him from payment of succession duty. *Ib.*

By an English settlement executed in England on the marriage, in 1838, of an English lady with a domiciled Italian, the lady assigned property belonging to her, consisting of French rentes, shares in the Bank of France, and English Government securities, to four trustees, of whom one was an Italian, and the other three were English, upon trusts, after the death of the survivor of the husband and wife, for the children of the marriage. The settlement contained provisions usually inserted in English settlements, including a power for the trustees to reinvest in British or French securities. From the date of the marriage until their deaths the husband and wife resided in Italy. The Italian trustee having died, an English trustee was appointed in his place. The husband survived the wife and died in 1877, leaving two children, the only issue of the marriage, the several trust funds being then in the names of four English trustees. Both the children being domiciled Italians, the question arose whether, under the Succession Duty Act 1853, duty was payable on their succession to their father in respect of the French rentes and bank shares:—Held, that succession duty was payable, inasmuch as the settlement was a British settlement, the trustees or persons having the legal ownership were subject to British jurisdiction, and the forum for deciding any claim by the children in respect of the trust funds was a British Court. *Ib.*

IV. VALUATION OF PROPERTY.

2. The value of property for the purposes of the succession duty is to be ascertained at the time when the interest of the successor accrues. If the property has then no saleable value, nor any actual or potential annual value, it is not capable of being assessed. Neither possible increase nor diminution in the value of the property after the succession accrued is dealt with by the Act. *Att.-Gen.* v. *Sefton* (*Earl*), 11 H. L. Ca. 257; 12 L. T., N. S., 242; 5 N. R. 436. Affirming 2 H. & C. 362; 9 Jur., N. S., 1296; 32 L. J., Exch., 230; 8 L. T., N. S., 794.

S. succeeded to land in the neighbourhood of a large town, which land was not at that time capable of being let or sold, though soon afterwards it acquired a high value as building land:—Held, that the value of the succession was to be calculated as at the devolution of the succession, and not as to the prospective or future condition of the land. *Ib.*

Semble, if the land at the time of succession is incapable, in its existing state, of yielding any annual income, yet, if it is saleable, then such property has an annual value within the meaning of the Succession Duty Act, namely, a value equal to 3*l.* per cent. on the saleable value at the time of succession. *Ib.*

V. SUCCESSION, WHAT IS, AND SCALE OF CHARGE.

3. In consideration of C., tenant for life (without issue male), joining with G., tenant in tail, in executing a disentailing deed, and of his paying to G. an immediate annuity of 2,250*l.*, secured upon the life estate of C., G. joined with C. in appointing the estates comprised in the disentailing deed to trustees for a term of 3,000 years upon trust to raise 25,000*l.*, and subject thereto, to the use of G. in fee. The trusts of the 25,000*l.* were declared to be, to stand possessed of 5,000*l.*, part, as C. should appoint; and as to the 20,000*l.*, residue upon the trusts declared by a deed executed by C. and G. in favour of the daughters of C., their husbands and issue. It was also declared that the 25,000*l.* was to be payable only in the event of G. coming into possession of the estates:—Held, that with respect to the 20,000*l.*, C. was the "predecessor" of his daughters within the 16 & 17 Vict., c. 51, s. 2, and therefore a succession duty of 1*l.* per cent. was payable; and that as to the 5,000*l.*, no succession duty was payable, it forming part of C.'s general estate. *Re Jenkinson*, 3 Jur., N. S., 279; 26 L. J., Ch., 241; 24 Beav. 64; 5 W. R. 301.

4. In 1810 B., being tenant for life, and W. his son, being tenant in tail in remainder expectant on B.'s death of settled estates, joined in suffering a recovery, and barring the entail and re-settling the property to such uses as father and son should jointly appoint, in default of appointment to the use of the father for life, remainder to such uses as the son, if surviving the father, should appoint, remainder to the old uses. In 1821 both exercised their joint power, and limited the estates to B. for life, with remainder to W., the son, for life, and to his sons in tail male, with remainder to G., another son of B., for life, and to his sons in tail male, with remainders over; and power was given to successive tenants for life in possession to charge portions for younger children. B. died in 1834, and was succeeded by W., who died without issue in 1855, when G., his next brother, succeeded as tenant for life in possession:—Held, that G. derived the whole of his succession from his brother W. as predecessor, and was liable in succession duty at 3 per cent. *Att.-Gen.* v. *Floyer*, *Att.-Gen.* v. *Smythe*, 9 H. L. Ca. 477, 498; 9 Jur., N. S., 1; 31 L. J., Exch., 404; 10 W. R. 762; 7 L. T., N. S., 47.

In 1855 E., the eldest son of G., with the consent of his father as protector, disentailed the estates, and conveyed them to such uses as both should appoint, and in default to the old uses. Next day they exercised this joint power, and limited the estates for a term of 500 years to trustees, and, subject thereto, to G. for life, with remainders over. The trusts of the term were to pay to E. 4,000*l.* a year and power was given to G. to charge portions to

the younger children. G. died in 1856, and E. succeeded:—Held, that E. derived under a disposition made by himself, and under s. 12 of the 16 & 17 Vict., c. 51, being at the time of such disposition expectantly entitled to succeed his uncle W. as predecessor, was chargeable with 3 per cent. duty. *Ib.*

In 1855 G., under the power in the settlement of 1855, charged the estates with portions to his younger children:—Held, that the younger children derived their interest either from their uncle W., or their brother E., as predecessor, and in either case were chargeable with 3 per cent. duty. *Ib.*

1. A tenant in tail in remainder cannot vary the amount of his liability to succession duty by barring the entail, and re-settling the estate in his own favour. The person from whom he derives the estate is his predecessor. *Braybrooke (Lord)* v. *Att.-Gen.*, 9 H. L. Ca. 150; 31 L. J., Exch., 177; 7 Jur., N. S., 741; 9 W. R. 601; 4 L. T., N. S., 218.

Devise in 1796 of freehold estates to A. for life, remainder to his eldest son B. for life, remainder to the first and other sons of B. in tail male. In 1841, A. being tenant for life in possession, A. and B. executed a disentailing deed, to which two other persons were parties as trustees, and granted to the trustees, to hold, subject to the life estate of A., to such uses as A. and B. should appoint; and in default, if B. should survive, to such uses as he should appoint, and in default to B. for life, and to his first and other sons in tail male. In 1850, by another deed which recited the former, and by which A. brought new estates into settlement, and discharged all the estates from a charge of 10,000*l.*, and B. gave up advantages to which he was entitled, an annuity to B. during the life of A. was charged upon all the premises, and subject thereto they were appointed to A. for life, remainder to B. for life, remainder to the use of his first and other sons in tail male:—Held, that these deeds must be taken as having been executed on the same day, that they constituted, within s. 12 of 16 & 17 Vict., c. 51, a disposition made by B. in favour of himself, and made out of the estates to which he was entitled under the will of 1796; that consequently his succession must be treated as happening under that will; and he was liable thereupon to the amount of duty charged in respect of his succession to the testator, on a disposition made under it by himself. *Ib.*

The nature of the consideration upon which the disposition was made did not affect the question. *Ib.*

The annuity, according to the terms of its creation, ceased on the death of A., at which time B. entered into possession of the estates. *Ib.*

Held, also, that he was entitled, under s. 38, to an allowance as on account of property of which he had been "deprived" within the meaning of that section. *Ib.*

The Act is not to be construed according to the technicalities of the law of England or Scotland, but according to the popular use of the language employed. *Ib.*

The protector of a settlement giving his consent to a disposition of property cannot be treated as a creator of such disposition. *Ib.*

Held, also, that as A. gave up a charge of 10,000*l.* on the property by the deed of 1850, B. must be charged only 1 per cent. on that extent of the succession. *Ib.*

2. S., by deed of entail in Scotland, gave an estate to her eldest son, A., and to the heirs of his body, whom failing, she gave the same to her grandson, C., and the heirs of his body, with remainders over. A. died without issue:—Held, that S. was the "predecessor," within the meaning of 16 & 17 Vict., c. 51, and therefore that the duty payable by the grandson was 1*l.* per cent. *Saltoun (Lord)* v. *Advocate-Gen. for Scotland*, 3 Macq. H. L. Ca. 659; 6 Jur., N. S., 713; 8 W. R. 565.

Semble, where the succession is by provision, the settlor is the predecessor; but where by devolution, the last possessor is the predecessor. Hence C. took by provision. He must be considered in the situation of a remainderman in tail, according to English law, taking *per formam doni*, to whom the donor, and not the last person who held under the first estate tail, would be considered the "predecessor." *Ib.*

Semble, where there is an entail giving an estate tail to one, with remainder to another, the donee or remainderman who takes by purchase is the "successor," and the entailer the "predecessor;" and with respect to the heirs of the body, the donee in tail is the "ancestor," and the heir of the body is the "successor." *Ib.*

3. By a marriage settlement, 10,000*l.*, the property of the husband, was settled upon trust for the husband and wife successively for life; and after the death of the survivor, upon trust for the children of the marriage; and in default of such children then to be divided between the children of the intended wife by her former marriage, as she should appoint; and in default of appointment, equally. The wife survived, and died without issue by the second marriage, and without having exercised the power of appointment:—Held, that the second husband was the predecessor, and that the children by the former marriage were accordingly chargeable with a duty of 10*l.* per cent. as strangers in blood. *Re Ramsay*, 7 Jur., N. S., 1,225; 30 L. J., Ch., 849; 30 Beav. 75; 9 W. R. 910; 5 L. T., N. S., 166.

Where a settlement contains a power of appointment in some one other than the settlor, and the exercise of the power transfers the property from the settlor to some one else, the donee of such a power is the predecessor of the appointee. *Ib.*

4. Appointees taking upon the death of the appointor are successors to him. *Re Chapman*, 11 Jur., N. S., 708; 13 L. T., N. S., 144.

Therefore, appointees liable to legacy duty, and as such exempt from succession duty, becoming entitled in possession to property chargeable also with a duty in respect of the succession of the appointor to the donor of the power, are successors, and liable to one duty only at the highest rate. *Ib.*

5. Where an interest in personal property has been transmitted before it has ripened into enjoyment, it matters not whether the person originally entitled died before or after the commencement of the Succession Duty Act, only one duty is payable on any succession to such property, whether such duty be legacy or succession duty. If the duty is succession

duty and the interest has passed through more than one successor, then under s. 14 the duty payable shall be the highest that would have been paid by any of such successors. If the duty be legacy duty, then, under s. 18, no succession duty of any kind is payable. *Att.-Gen.* v. *Littledale*, 5 L. R., H. L., 290; 40 L. J., Exch., 241; 20 W. R. 473; 24 L. T. 921. Affirming 5 L. R., Exch., 275; 39 L. J., Exch., 207; 23 L. T. 192; 18 W. R. 1036.

The successor from whom duty is payable is the person who, on the happening of the death, eventually becomes beneficially entitled in possession; that which was conferred upon any previous successor was only an expectant interest, not a succession. The interest of an executor, not being beneficial, is not a succession within s. 2, or within s. 15; for s. 15 imposes no new duty, only a duty in substitution for that imposed by s. 2. *Ib.*

1. The trustees of a settlement made in 1829 upon a marriage, stood possessed of the settled property (subject to the husband's life interest, and to a general power of appointment in the wife which was never executed) in trust for the next of kin of the wife. She died in August 1831, and D. was her sole next of kin. D. died in 1832, having bequeathed her property to executors in trust for the benefit of nephews and nieces. The owner of the life estate died in 1868. Upon his death, the trustees having paid under protest succession duty at the rate of 1 per cent., and a claim having been made by the Crown for payment of 3 per cent. legacy duty in addition:—Held, that the trustees were liable for legacy but not for succession duty, the latter part of s. 18 of the Succession Duty Act, 16 & 17 Vict., c. 51, relieving them as liable for legacy duty from payment of succession duty under that Act. *Ib.*

The true successor in the sense of the individual liable to pay the duty is the person entitled upon the expiration by death or otherwise of the particular intervening estate. *Ib.*

2. C. was domiciled in Portugal, but on a visit to this country made his will in the English form, and appointed executors, some of whom resided in England. He desired his executors to collect his property, which was in Portugal, to convert it into cash, pay certain legacies, and invest the residue in the English 3 per cents., to appropriate what they should think necessary to pay a life annuity of 50*l.* to his sister, on the termination of which the appropriated fund was to revert to and form part of his residuary estate, and be divided (like the rest) among his three children. The executors exactly performed the directions of the trust; when the sister died, the part appropriated to satisfy her annuity became divisible among the children:—Held, that this constituted a succession within s. 2 of the Succession Duty Act, and was liable to the payment of succession duty. *Att.-Gen.* v. *Campbell*, 5 L. R., H. L., 524; 41 L. J., Ch., 611.

3. When a testator domiciled abroad directs a part of his residuary personal estate which is to be invested in English securities in the names of English trustees, to be set apart to answer a life annuity, and on its determination to fall into the residue, the increase of benefit accruing on the death of the annuitant to the residuary legatees is not a succession within the operation of s. 5. *Callanane* v. *Campbell*, 40 L. J., Ch., 195; 11 L. R., Eq., 378; 24 L. T., N. S., 175; 19 W. R. 406.

4. A testator died in 1850, having devised his real estates to trustees to accumulate the rents for twenty-one years, and then to convey and assure the estates and accumulations to the person or persons who should then answer the description of his "heir or co-heiresses at law." He died a bachelor, leaving an heir-at-law who died in 1865. Four co-heiresses of the testator succeeded to the property in 1871:—Held, that succession duty was payable. *Ring* v. *Jarman*, 14 L. R., Eq., 357; 41 L. J., Ch., 535; 20 W. R. 744; 26 L. T., N. S., 690.

5. A person succeeding on the death of an uncle to an estate, either in England or in Scotland, under an entail created by a direct ancestor, becomes beneficially entitled to the property by devolution by law within s. 2 of the Succession Duty Act, and has not derived the interest from the original settlor, and he is, therefore, liable to pay succession duty at the rate of 3 per cent. *Zetland* (*Earl*) v. *Lord Advocate*, 26 W. R. 725; 38 L. T., N. S., 297; 3 L. R., App. Cas. (Sc.), 505.

6. Where a power is created, to be exercised over an estate, the donor of the power, the person out of whose estate a benefit or "succession" is to be derived, is, within s. 2 of the Succession Duties Act, the "predecessor" of the person taking such benefit or "succession." *Charlton* v. *Att.-Gen.*, 4 L. R., App. Cas., 427; 27 W. R. 921; 40 L. T. 760; 49 L. J., Exch., 86. Affirming 2 L. R., Exch. D., 398; 46 L. J., Exch., 750; 37 L. T. 211; 26 W. R. 154. Reversing 1 L. R., Exch. D., 204; 45 L. J., Ch., 354; 34 L. T. 503; 24 W. R. 788.

St. J., tenant for life in possession, and W., tenant in tail in remainder of certain estates, barred the entail and settled the estates to such uses as they should jointly appoint. On the following day they appointed the estates to such uses as they should jointly appoint, and in default of appointment to St. J. for life, remainder to W. for life, remainder to the first and other sons of W. in tail male, remainder to such uses as St. J. and T. should jointly appoint, and in default of appointment to T. for life, remainder to the first and other sons of T. in tail male, with remainders over. W. died in 1864, a bachelor, without having exercised his power of appointment. In 1866 St. J. and T. appointed the estates, subject to the life estate of St. J., in the events which happened, to the use that A., the widow of St. J., should receive an annuity, and subject thereto, and to an annuity given in certain events which had not happened to the wife of T., to the use of D. during so much of a certain period as she should live. St. J. died in 1873, and the uses limited in favour of A. and D. thereupon took effect:—Held, that the case fell within s. 2, and was not within s. 4 of the Succession Duty Act. *Ib.*

The case is not to be treated as an alienation within the 15th section of the statute. *Ib.*

And, held, following *Braybrooke* (*Lord*) v. *Att.-Gen.* (9 H. L. Ca. 150; 31 L. J., Exch., 177), *Att.-Gen.* v. *Floyer* (9 H. L. Ca. 477; 31

L. J., Exch., 404), and *Att.-Gen.* v. *Smythe* (9 H. L. Ca. 497; 31 L. J., Exch., 404), that duty was payable upon the interests of A. and D. as successions derived from W. as predecessor. *Ib.*

1. A tenant for life and the reversioner in fee under a will mortgaged their respective interests, with the usual powers of sale, to the same persons. This power of sale was exercised, and the transferee of the mortgages became absolutely entitled, and devised the estates on trust for sale. Succession duty was paid on the succession to the vendor, the transferee of the mortgages. On a sale exception was taken by the purchaser to the title, on the ground that succession duty was payable also on the succession to the original testator:—Held, that the duty was not so payable. *Re Cooper and Allen*, 35 L. T., N. S., 890; 25 W. R. 301; 46 L. J., Ch., 133; 4 L. R., Ch. D., 802.

"By alienation or by any title not conferring a new succession," in s. 15 of the Succession Duty Act 1853, means either by alienation or by any title other than alienation, in both cases not conferring a new succession. *Ib.*

Settlement after the Succession Duty Act: A. tenant for life; D. remainder in fee. A. and B. convey their estates for money to C. in fee. C. dies, having devised to D. in fee. D. pays duty on his succession from C., and then sells. On A.'s death no more succession duty will be payable than has already been paid by D. *Ib.*

2. A conveyance or an assignment by way of *bonâ fide* sale does not create a succession within the meaning of the Succession Duty Act, 16 & 17 Vict., c. 51. *Fryer* v. *Morland*, 3 L. R., Ch. D., 675; 45 L. J., Ch., 817; 25 W. R. 21; 35 L. T., N. S., 458.

Where the purchaser of a reversionary life interest in settled property had contracted to sell it to the tenant for life in possession, in consideration of a sum of money paid down and a further sum payable on the death of the tenant for life, secured by a charge on the reversion:—Held, that there was no succession created within the meaning of s. 2, and that no duty would be payable on the death of the tenant for life in respect of the charge. *Ib.*

3. Lands charged with payment of a jointure were settled, and a power of sale, with the consent of the tenant for life for the time being, was thereby given to the trustees. A portion of the property was sold with the consent of the tenant for life and the jointress:—Held, that the land sold would not be subject to succession duty on the determination of the jointure, and that the purchaser must complete without indemnity against it. *Dugdale* v. *Meadows*, 9 L. R., Eq., 212; 39 L. J., Ch., 181; 18 W. R. 310. Affirmed 6 L. R., Ch., 501; 24 L. T. 113; 40 L. J., Ch., 140.

The proviso in the Succession Duty Act, s. 42, applies to a case where the power of sale relates to the successor's estate only, and does not overreach the antecedent estate, upon the determination of which succession duty will become payable. *Ib.*

4. A. died intestate and without having been married. He was entitled to an interest in reversion expectant on his father's death, in a settled fund. The father, to whom letters of administration of A.'s estate were granted, paid 3 per cent. administration duty under s. 27 of the Customs and Inland Revenue Act 1881, upon the estimated value of A.'s estate, including the above reversionary interest:—Held, that the father was exempted by s. 41 of the same Act from paying duty at 1*l.* per cent. in respect of A.'s succession, to his father, under s. 10 of the Succession Duty Act 1853. *Re Haygarth's Trusts*, 22 L. R., Ch. D., 545; 52 L. J., Ch., 416; 48 L. T. 24; 31 W. R. 316.

VI. ALLOWANCES.

5. In 1796, a testator devised freehold estates to his cousin N., for life, with remainder to R. N., eldest son of N., for life, with remainder to the first and other sons of R. N. in tail male. In 1841, R. N. (being tenant for life in possession), and his son (being tenant in tail in remainder), executed a disentailing deed, whereby they limited the estates, subject and without prejudice to the life estate of R. N., to such uses as he and his son should appoint, and in default of such appointment, to such uses as his son, in case he survived him, should appoint, and in default to him for life, with remainder to his first and other sons in tail male. In 1850, R. N. and his son executed a joint appointment, whereby they limited the estate to such uses as R. N. and his son should appoint, and in default thereof (subject to a rent-charge to the son of 1,200*l.* a year), to the use of R. N. for life, with remainder to the son for life, with remainder to his first and other sons in tail male. R. N. died in 1858:—Held, that his son was entitled to an allowance in respect of the 1,200*l.* a year, which ceased on the death of R. N. *Braybrooke* (*Lord*) v. *Att.-Gen.*, 9 H. L. Ca. 150; 31 L. J., Exch., 177; 7 Jur., N. S., 741; 9 W. R. 601; 4 L. T., N. S., 218.

6. If a tenant for life, and his son, the first tenant in tail under a will or a previous settlement, re-settles the estate, and by such re-settlement an annuity, charged upon the estate, is given to the son during his father's life, and the father dies and the son succeeds to the estate on which the annuity is charged, there must be, in calculating the succession duty under the Succession Duties Act, s. 38, an allowance made to the son in respect of the amount of the annuity. *Commissioners of Inland Revenue* v. *Harrison*, 7 L. R., H. L., 1; 43 L. J., Exch., 138; 22 W. R. 559; 30 L. T. 274. Affirming 26 L. T. 73.

7. Whether the re-settlement was made before or after the Succession Duties Act came into operation makes no difference. *Ib.*

VII. INSTALMENTS.

8. The power of a tenant in tail in possession to enlarge his estate so that he shall become competent to dispose by will of a continuing interest in the entailed property is incident to the estate which such tenant takes under the instrument creating the entail; and if he exercises the power, he must be treated for the purpose of succession duty as if he had succeeded to such enlarged estate; and any instalments of succession duty that may be unpaid at his decease will become a continuing charge on the property in the hands of his successor or other owner for the time being.

Lilford v. *Att.-Gen.*, 36 L. J., Exch., 116; 2 L. R., H. L., 63; 15 W. R. 595; 16 L. T., N. S., 184.

VIII. FUND SET APART FOR.

1. A fund set apart by the testator for the payment of the legacy and succession duty, "in consequence of his death," is liable to pay the duty upon every succession which occurs upon his death, and not merely upon those successions which are created by his will. *Powlett* (*Lord*) v. *Hood*, 12 Jur., N. S., 85; 14 W. R. 298; 13 L. T., N. S., 783.

A tenant for life directed his executors to pay, out of a particular fund, his pecuniary legacies and annuities, "and the legacy and succession duty payable for the same or in consequence of his death":—Held, that the succession duty payable by the next remainderman, under a prior settlement and in respect of family estates not devised, was charged on the fund. S. C. 35 Beav. 234.

2. B., being entitled to 3,500*l.*, surrenders his interest to his son, who would be entitled to it at his death under a trust deed; and on petition presented by father and son, under the 16 & 17 Vict., c. 51, ss. 15 and 53, that the Court should provide 1*l.* per cent. to answer succession duty:—Held, that inasmuch as the sum was stock, and not money, 1*l.* 10*s.* per cent. must be set apart, with a personal undertaking of the son to pay the money. *Bailey* v. *Tindal*, 2 W. R. 129; 18 Jur. 668; 2 Eq. Rep. 538.

IX. VENDOR AND PURCHASER.

3. An executor and devisee in trust sold a leasehold interest, and also the reversion in fee, subject to an intermediate life interest, to a purchaser:—Held, that the vendor must pay the succession duty on the leasehold interest; but the purchaser must pay the duty on the reversion. *Cooper* v. *Trenby*, 8 W. R. 299; 28 Beav. 194.

4. A person devised real estate to trustees by sale or mortgage, to raise a certain sum of money, and subject thereto for his son. The trustees sold the estate by auction in lots, and L. became the purchaser of two of the lots. Pending the investigation of the title, the required sum was received out of the purchase money of the other lots. The commissioners of inland revenue having charged and received legacy duty in respect of the purchase money of the lots sold to L.:—Held, that the lots were protected by the Succession Duty Act, 16 & 17 Vict., c. 51, s. 18, from any charge for succession duty. *Howe* (*Earl*) v. *Lichfield* (*Earl*), 36 L. J., Ch., 313; 2 L. R., Ch., 155; 16 L. T., N. S., 436; 15 W. R. 323.

Where a certificate has been obtained from the Inland Revenue Office, that all duty in respect of land sold has been properly paid, the purchaser is not entitled to any more exact or formal one, saying whether succession or legacy duty is the proper duty. S. C. 1 L. R., Eq., 641; 14 W. R. 468; 14 L. T., N. S., 122.

5. Estates subject to a jointure rent-charge were settled subject to a power of sale, with trusts for re-investment of the purchase money in lands to be settled to the like uses, and were sold under the power of sale:—Held, that the charge of succession duty that would become payable on the extinction of the jointure, was shifted by s. 42 of the Succession Duty Act from the lands sold to the purchase money, and the lands on which it might be re-invested, and therefore the purchaser was not entitled to require it to be paid for. *Dugdale* v. *Meadows*, 6 L. R., Ch., 501; 40 L. J., Ch., 140; 24 L. T. 113. Affirming 9 L. R., Eq., 212; 39 L. J., Ch., 181; 18 W. R. 310.

6. The effect of a sale by the Court under the powers conferred by the Settled Estates Act 1877, of any settled estates, is, by the operation of the 22nd section of that Act, to revoke the uses of the settlement; and by the operation of the 42nd section of the Succession Duty Act 1853, the duty is shifted from the land sold to the purchase money or its investments, and the land in the hands of a purchaser is freed from the succession duty. *Re Warner's Settled Estates*, *Warner* to *Steel*, 17 L. R., Ch. D., 711; 50 L. J., Ch., 542; 45 L. T. 37; 29 W. R. 726.

X. OTHER MATTERS.

7. Where an application is made for payment out of the Court of Chancery of a sum of money on which duty will afterwards become payable for succession duty, the Court will recommend the petitioner to commute the duty. *Bailey* v. *Tindall*, 18 Jur. 668.

8. A testator bequeathed a legacy to C. "for her absolute use and benefit, except as hereinafter limited," and directed the same, with other legacies to females, to be invested, and the interest to be for the legatees' separate use; and in case any of the legatees should become bankrupt, or assign the interest bequeathed to her, the same was to fall into his residuary estate, "except in respect of C., whose legacy is to go to her children, according to her appointment, and in default to them absolutely." By C.'s marriage settlement her husband had covenanted to settle all after-acquired property of his wife. C. died without having become bankrupt or assigned her interest in the legacy, and having, by will, appointed the same to her children equally. The commissioners of inland revenue thereupon insisted that C.'s share did not go to her children directly under the will, but that her husband must take out administration to her estate, in order to obtain possession of it. By consent the question was raised upon a petition for the opinion of the Court under 22 & 23 Vict., c. 35, s. 30:—Held, that by consent the question, although between the Crown and a subject, might be decided on this petition; and that under the will the legacy upon C.'s death went directly to her children. *Re Ware*, 41 L. J., Ch., 121; 25 L. T., N. S., 737; 20 W. R. 142.

9. Costs of trustees of rendering the necessary accounts for the purpose of paying the succession duty in respect of a life estate, are payable by the tenant for life. *Cowley* (*Earl*) v. *Wellesley*, 35 Beav. 642.

10. When a person absolutely entitled to a reversionary interest in personalty settled it on the usual trusts of a marriage settlement, and, on the reversion falling in, paid the whole of the succession duty, which had become payable thereon, out of his own moneys:—Held, that, having regard to s. 32 of the Succession

Duty Act, 16 & 17 Vict., c. 51, he was entitled to be recouped out of the corpus of the settled fund. *Cuddon* v. *Cuddon*, 4 L. R., Ch. D., 583; 46 L. J., Ch., 257; 25 W. R. 341.

1. Real and personal estate was given by will to A. and B. to permit X. to receive the income during his life, remainder to the use of an infant. On the death of X. leaving his widow and the infant otherwise unprovided for, the Court made an order for the payment of the whole income of the property for her maintenance, to the widow, by A. and B. Shortly afterwards the circumstances of the widow improved, but A. and B., till the death of B., in 1851, and after that event A. alone, still paid the gross income (without ever paying succession duty) to the widow during the minority of the child. The child attained twenty-one in 1873, married, and sought to charge A. and the estate of B. with, first, excess of payments for maintenance, having regard to the widow's altered circumstances; second, dilapidations; third, amount paid for succession duty, with interest:—Held, first, that the order was a protection during the joint lives of A. and B., but that the trust so created did not survive, and that an inquiry must therefore be directed whether A. properly paid the whole income from 1861. *Brown* v. *Smith*, 46 L. J., Ch., 866.

Held, secondly, that they were under no liability for dilapidations; third, that they were liable for succession duty, but not for the interest. *Ib.*

The widow, in 1863, married J. W., who died in 1872. On the 7th May 1874 she married R. W. Y. sought to charge J. W.'s estate, Y.'s separate estate, if any, and R. W. in the same way:—Held, first, that J. W.'s liability in respect as well of his wife's receipt of income, from 1861 to 1863, as of her accountability for succession duty, terminated with the coverture. *Ib.*

Held, secondly, that R. W. was similarly protected by s. 12 of the Married Women's Property Act 1870. *Ib.*

Held, thirdly, that J. W.'s estate was liable for the receipts of income from 1863 to 1872. *Ib.*

REVERSION AND REVERSIONER.

See EASEMENT — INJUNCTION — LANDLORD AND TENANT—MERGER—NUISANCE, II. 12—VESTED CONTINGENT AND FUTURE INTERESTS.

REVIEW.

— *Supplemental Bill in Nature of Bill of, and of Review of.* See PRACTICE (REVIEW, SUPPLEMENTAL BILL IN NATURE OF) —PRACTICE (ABATEMENT, REVIVOR, AND SUPPLEMENT).
— *Bill of.* See PRACTICE (REVIEW, BILL OF).
— *Commission of.* See PRACTICE (REVIEW, COMMISSION OF).
— *Costs as to.* See PRACTICE (COSTS).
— *Of Report.* See PRACTICE—MASTER (REPORT OR CERTIFICATE).

REVISING BARRISTER.

2. The court of a revising barrister is not "a court of law" within the Solicitors Act, so as to exclude the jurisdiction of this Court to order the taxation of a bill containing items for business done in that court. *Re Andrews*, 17 Beav. 510; 17 Jur. 1145; 23 L. J., Ch., 129; 2 W. R. 46.

REVIVOR.

See PRACTICE (ABATEMENT, REVIVOR, AND SUPPLEMENT).

REVOCATION.

— *Of Submission to Arbitration.* See ARBITRATION, II. 2.
— *Of Power of Attorney.* See POWER OF ATTORNEY, IV.
— *Of Testamentary Appointment.* See POWER, VIII. XII.
— *Powers of Revocation and New Appointment.* See POWER, XVIII.
— *Of Voluntary Settlement.* See SETTLEMENT, XVII. V.
— *Of Will.* See WILL.

RIVER.

— *Rights of Fishing.* See FISH AND FISHERY.
— *Pollution of.* See WATER AND WATERCOURSE.
— *Inland Streams, Rights of Riparian owners in.* See WATER AND WATERCOURSE.

See also HARBOURS, DOCKS, AND PIERS—SEWERS.

I. RIGHTS OF CROWN, 6103.
II. NAVIGABLE, OBSTRUCTION OF, 6104.
III. NAVIGABLE, RIPARIAN RIGHTS IN, 6104.
IV. TOWING PATH, 6105.
V. OVERFLOW, DAMAGE BY, 6105.

I. RIGHTS OF CROWN.

3. There is no authority to show that the Crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake. *Bristow* v. *Cormican*, 3 L. R., App. Cas., 641.

4. The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is vested in the Crown, but subject to the right of navigation which belongs by law to the subjects of the realm, and of which the right to anchor forms a part; and

every grant made by the Crown of the bed or soil of an estuary or a navigable river must be subject to such public right of navigation. *Gann* v. *Free Fishers of Whitstable Co.*, 11 H. L. Ca. 192; 35 L. J., C. P., 29; 13 W. R. 589; 12 L. T., N. S., 150.

The ownership of the soil of navigable rivers and estuaries which is vested in the Crown, is, and always has been. No grant of the bed of a river or estuary could, even before Magna Charta, have been made by the Crown, except subject to the public right of navigation. A claim to levy toll, by virtue of the ownership of the soil of an estuary, from ships casting anchor on such soil, where no special consideration is offered in return for such toll, is bad, and cannot be supported by any length of enjoyment. S. C. 5 N. R. 432.

II. NAVIGABLE, OBSTRUCTION OF.

1. A wharf-owner drove piles into the bed of a river, extending the wharf so as to occupy three feet out of a breadth of about sixty feet available for navigation:—Held, that this was such an obstruction as would be restrained at the suit of a corporation empowered by Act of Parliament to remove obstructions. *Att.-Gen.* v. *Terry*, 9 L. R., Ch., 423; 22 W. R. 395; 30 L. T., N. S., 215. Affirming 22 W. R. 200; 29 L. T., N. S., 716.

An owner of land at the side of a public navigable river has no right to erect on the bed of the river, for the benefit of his own trade, any structure, whether any actual obstruction to the navigation of the river will or will not be thereby occasioned; and any benefit to his own trade is too remote to be held for the advantage of the public generally, and so to justify the erection. *Ib.*

2. A navigable river is a public highway, navigable by all Her Majesty's subjects in a reasonable manner and for a reasonable purpose. A riparian owner has a right to moor a vessel of ordinary size alongside his wharf for the purpose of loading or unloading, at reasonable times and for a reasonable time. *Original Hartlepool Collieries Co.* v. *Gibb*, 5 L. R., Ch. D., 713; 46 L. J., Ch., 311; 36 L. T., N. S., 433.

The Court will restrain by injunction the owner of adjoining premises from interfering with the access of such vessel, even though the vessel may overlap his own premises; though such vessel would not be allowed to interfere with the proper right of access to the neighbouring premises if used as a wharf, nor to the free entrance to or exit from such premises, if used as a dock, by other vessels. *Ib.*

The plaintiffs were owners of a wharf 125 feet long, on a navigable river, and of a collier boat 176 feet long which stopped there at intervals of time for the purpose of unloading, and while there necessarily projected over part of the defendant's wharf, close to the entrance of a dock where he carried on the business of repairing ships, the wharf itself not being used. The defendant moored a raft of timber used in his business in front of his own wharf so as to interfere with the access of the collier to her berth:—Held, that the raft was an obstruction to the navigation; and that the collier had a right to come at reasonable times to, and remain a reasonable time alongside of, the wharf of the plaintiffs, although she projected over the defendant's wharf while doing so. *Ib.*

3. Where a public body is, under an Act of Parliament, entrusted with powers and duties for a public purpose, the Court will give credit to them as being the best judges of what they want for that purpose. *Att.-Gen.* v. *Great Eastern Railway Co.*, 6 L. R., Ch., 572; 19 W. R. 788.

A railway company was restrained from taking a large quantity of water for the use of its station from a river under the control of conservators, credit being given to the evidence on their part that taking such water would impede the navigation, against the evidence on the part of the company that taking such water would produce no appreciable effect. *Ib.*

4. Under the Thames Conservancy Act 1857, the conservators of the Thames were empowered to erect piers at any convenient place, of such form and construction as they should deem advantageous to the public, and causing the least obstruction to the navigation. The plans were to be first approved by the Admiralty:—Held, that a court of equity had no jurisdiction to interfere by injunction at the suit of the attorney-general, on the ground of the alleged inconvenience of proposed piers; or, at most, that it could only interfere where it was shown that the piers would be entirely useless. *Att.-Gen.* v. *Conservators of River Thames*, 1 Hem. & M. 1; 8 Jur., N. S., 1203; 11 W. R. 163.

The statute directed that, whenever the conservators should remove or obstruct the free use and enjoyment of any public stairs or landing-places marked by the Waterman's Company, they should erect equally convenient stairs or landing-places in substitution for them:—Held, that the substitution of new stairs or landing-places was not a condition precedent to the removal or disturbance, and that where the conservators had prepared plans for piers which would interfere with such old stairs without showing any adequate provision in substitution for them, a court of equity would not assume that the duty would be neglected, and would not interfere at the suit of the attorney-general to restrain the works until proper substitutes should be provided for the old stairs. *Ib.*

III. NAVIGABLE, RIPARIAN RIGHTS IN.

5. The rights of a riparian proprietor against adjoining or opposite riparian proprietors are not greater in respect of a tidal than in respect of a non-tidal river. *Att.-Gen.* v. *Lonsdale* (*Earl*), 38 L. J., Ch., 335; 7 L. R., Eq., 377; 17 W. R. 219; 20 L. T., N. S., 64.

The plaintiff and defendant were opposite riparian proprietors on the banks of a navigable tidal river:—Held, that the defendant could not, for the protection of his own soil or otherwise, construct a jetty projecting into the bed of the river, whereby the tidal water was thrown with greater violence upon the plaintiff's shore, and the public navigation of the river was or might be impeded; and that a suit by information and bill in equity to

restrain the erection of such a jetty was properly instituted. *Ib.*

Held, also, that the fact of the river traffic having been almost entirely superseded by local causes did not affect the right of the public to have the navigation conserved. *Ib.*

1. The owner of land abutting on a tidal navigable river has, *jure naturæ*, a right of access to and from the stream wholly distinct from the right of navigation which he enjoys in common with the rest of the public. *Lyon* v. *Fishmongers' Co.*, 25 W. R. 165; 46 L. J., Ch., 68; 1 L. R., App. Cas., 662; 35 L. T., N. S., 569. Reversing 10 L. R., Ch., 679; 14 L. J., Ch., 747; 24 W. R. 1.

There is no distinction between the position of a riparian owner of land abutting on a tidal and that of an owner of land abutting on a non-tidal stream, as far as regards right of access from the stream to his own land, and *vice versâ*. *Ib.*

Such right of access is a private right distinct from the right of navigating the stream, which is common to the riparian owner and the rest of the public, and it is not to be interfered with by a licence to embank, under s. 53 of the Thames Conservancy Act 1857 (20 & 21 Vict., c. 147), but is protected by s. 179 of that Act. *Ib.*

The right of a riparian owner to the use of the stream does not depend on the ownership of the soil of the stream. *Ib.*

2. A riparian proprietor may have a private right of access to a navigable river distinct from his right as a member of the general public. *Att.-Gen.* v. *Conservators of the River Thames*, 1 N. R. 121; 1 Hem. & M. 1; 8 Jur., N. S., 1203; 11 W. R. 163.

3. Alluvial lands which are gradually gained from the river, belong, by way of accretion, to the lands of the adjoining proprietor. *Mussumat Imam Bandi* v. *Hurgovind Ghose*, 4 Moo. Ind. App. 403.

An order giving possession of lands made by Foujdarry (police magistrate's) Court, upon a charge of a breach of the peace coming before the magistrate, is not a determination respecting the rights to such lands. *Ib.*

Lands having been submerged by a change of the course of the river Ganges, after several years, reappeared. Upon a disputed question of right to such lands by two adjoining proprietors, each claiming the lands to be part of his mouza, the Sudder Court held the plaintiff's claim to be barred, first, by the Bengal regulations of limitation from lapse of time; and, secondly, that the lands were alluvial, and attached to the mouza of the defendant. Such decree, upon appeal, reversed, the Judicial Committee holding, first, that the question of limitation not having been put in issue by the pleadings, could not be allowed to operate upon the case; and, secondly, that the Court had mistaken the question in supposing it one of alluvion, the point at issue being one of boundary only, and that the plaintiff had made out his title to possession. *Ib.*

IV. TOWING PATH.

4. Provisions in different Acts of Parliament appointed conservators of a river navigation and gave them full powers to do what was necessary for carrying the object of the Acts into effect, including powers to purchase land and levy tolls. The conservators executed the powers of the Acts so far as related to the improvement of the river navigation, and the making of towing paths—and they levied tolls. There was no evidence that they had actually purchased any of the land that lay along the course of the navigation, and had been used to form the towing paths:—Held, that, as the Acts might be carried into effect without purchasing, the burden of proof lay on the conservators to show that they had purchased; and since they had failed to show it, though they were entitled to an injunction to prevent any owner of adjoining land from so using the towing paths as to obstruct in any way their free use for the purposes of the navigation, they were not entitled to be treated as owners of the soil of the towing-paths. *Lee Navigation Conservators* v. *Button*, 6 L. R., App. Cas., 685; 51 L. J., Ch., 17; 45 L. T. 385; 30 W. R, 233. Affirming 12 L. R., Ch. D., 383.

A right of way along the bank, of the nature of a towing path, is not a necessary incident to an inland navigation. *Ib.*

V. OVERFLOW, DAMAGE BY.

5. A dock company, which was empowered by Act of Parliament to make and maintain a dock and works according to the levels defined on the deposited sections, constructed its dock communicating with the Thames by an artificial channel, the height of the retaining bank of which and of the dock was shown on the sections to be 4 feet above Trinity high-water mark. The natural level of the land surrounding the dock was some 8 feet below Trinity high-water mark, and the river was kept from overflowing it by means of a river wall 4 feet 2 inches above Trinity high-water mark. The company allowed part of its retaining bank to be some inches below the height of 4 feet above Trinity high-water mark. An extraordinarily high tide took place, the water rising to 4 feet 5 inches above high-water mark, and the water in the dock overflowed the bank and damaged the property of an adjoining landowner. In an action for damages by the latter:—Held, that the company was liable to damages, because it had broken its statutory obligation to maintain its retaining bank at the height of 4 feet above high-water mark; that, independently of the Act, the company was bound, as a riparian proprietor, to keep the bank up to the level of the rest of the river wall, and was liable to damages for negligence in not doing so; and that, although the extraordinarily high tide was an act of God, that fact did not free the company from its liability, though, if it could show that some of the damage which actually happened was exclusively attributable to a cause beyond its control, it would be entitled to a proper deduction in that respect. *Nitro-Phosphate and Odam's Chemical Manure Co.* v. *London and St. Katharine's Docks Co.*, 39 L. T., N. S., 433; 9 L. R., Ch. D., 503; 27 W. R. 267.

6. Commissioners of sewers are entitled to restrain a railway company by injunction until the hearing, from interfering with a

natural deposit of beach, forming a protection to the country from the inundations of a tidal navigable river, within the survey of the commissioners; and this notwithstanding a purchase by the company from the lord of the manor, under parliamentary powers, of the spot in question. *Crossman* v. *Bristol & South Wales Union Railway Co.*, 11 W. R. 981; 1 Hem. & M. 351.

Semble, that "banks and walls, etc.," by tidal and navigable rivers, as well as by the sea coasts, are included in 3 & 4 Will. 4, c. 22. *Ib.*

ROAD.

See HIGHWAY—LOCAL GOVERNMENT, VII. —WAY.

ROMAN CATHOLIC.

— *Gifts for Superstitious Uses.* See CHARITY, IV. v. 8.

— *Status of Church of in Canada.* See COLONIES AND COLONIAL LAW, X. vii. 3.

See also MONK—NUN.

I. DISABILITIES, 6106.
II. CONFORMITY, 6108.

I. DISABILITIES.

1. The Court granted a receiver, on a bill filed to raise the arrears of an annuity granted to a lady who afterwards became a nun, the law as to civil death ceasing at the Reformation, and not being revived by the 10 Geo. 4, c. 7. *Evans* v. *Cassidy*, 11 Ir. Eq. R. 243.

2. Whether a creditor who is a papist is entitled to be paid his debts out of money arising by sale of the real estate, under the appointment in the will, *quære*. *Foone* v. *Pinkard*, Ambl. 320. *Foone* v. *Blount*, *id.* 767.

3. Where trusts are made to papists they are void, and the legal estate will be void likewise, by 11 & 12 Will. 3. *Adlington* v. *Cann*, 3 Atk. 155.

Devisee from a papist by reason of the penal law, which would attach upon him from the incapacity in the devisor to devise, is not compelled to discover whether devisor was a papist. *Smith* v. *Read*, 1 Atk. 526.

4. Plea to bill, to discover whether A. was not a papist upon conveying to defendant, allowed. *Harrison* v. *Southcote*, 1 Atk. 528.

5. A papist may be tenant by the curtesy. *Withrington* v. *Banks*, Sel. Ch. Ca. 30. And see 3 P. W. 49. n.

6. Devise of land to trustees, in trust, if the elder son of A. turn protestant, then to such eldest son:—Held, a good devise to a papist, but not to a protestant. *Carteret* v. *Carteret*, 2 P. W. 132.

7. By 11 & 12 Will. 3, c. 4, s. 4, a papist was not only disabled from purchasing lands himself, but also from taking either by devise or settlement; but that statute is now repealed, in these respects, by 18 Geo. 3, c. 60. *Papists (case of)*, 2 P. W. 3.

8. A papist cannot take a freehold or leasehold estate by will, because taking by will is taking by purchase, and by the express words of the statute 11 & 12 Will. 3, c. 4, a papist is disabled to take by purchase; also terms for years are expressly mentioned in the statute. (*Davers* v. *Dewes*, 3 P. W. 46.) For this reason it has been held that a papist cannot extend land on a judgment, for that would give him an interest in the land, and it is the same where the judgment is given in trust for the papist. *Lowther* v. *Fletcher*, 3 P. W. 46. n.

9. By 11 & 12 Will. 3, c. 4 a papist under eighteen is disabled from taking only till conformity; but if more than six months above eighteen, he is disabled for ever. *Vane* v. *Fletcher*, 1 P. W. 353.

10. T., a papist, seised in fee of lands purchased before the stat. 2 Ann, c. 6, by articles on the marriage of his son in 1708, covenanted to settle not only those lands, but others acquired since the statute, in strict settlement:—Held, that these articles had no operation; neither on the lands purchased before the statute, because such a disposition was made void by that statute; nor on the lands purchased afterwards, because, by the statute, T. was disqualified from holding an estate sufficient to support the covenants. *Moore* v. *Butler*, 2 Sch. & Lef. 249.

Articles executed in 1714, and a settlement in pursuance thereof, in 1720, made between T., and J., his eldest son (both being papists), settling lands acquired since 1708, and resettling the former lands on J. for life, remainder to his then first and other sons for life, remainder to their issue in strict settlement:—Held, also inoperative, except as to making a provision for younger children, and not sufficient to put the son of J. to an election:—Held, therefore, that, under a Protestant Discovery Act, decree obtained in 1751, in trust for, and assigned to, J. the younger (the son of J., the settlor), J. the younger was not a trustee for the persons claiming under that settlement, but that the effect of that decree was to subject the premises comprised therein to the mortgage of J. the younger. *Ib.*

11. A conviction of recusancy cannot be given in evidence against a third person, under 11 & 12 Will. & M., c. 4 (an Act against papists), but the facts must be proved. *Hanbury* v. *Bateman*, 2 Atk. 65.

12. A papist by marriage articles, previous to the disabling statute, 11 & 12 Will. 3, covenants to lay out 12,000*l.* on the purchase of land. The money is never laid out, and therefore shall still be considered as money, and go to the personal representative instead of even a protestant heir. *Bowes* v. *Shrewsbury*, 5 Bro. P. C. 148.

13. Papist tenant in tail, in the year 1766, confessed judgments to a trustee, in trust, for the use of a settlement made on the marriage of his nephew, and afterwards, in 1770, suffered a recovery:—Held, that the judgments were not a fraud on the then existing disabling statutes, that the recovery (not having any operation to defeat the provisions of those statutes) was valid, and that the issue of the marriage claiming under the settlement had a

right to raise the amount of the judgments out of the lands in the hands of a purchaser with notice. *O'Fallon* v. *Dillon*, 2 Sch. & Lef. 13.

1. A decree obtained by a protestant discoverer under the popery laws was capable of being a trust for the papist, who had been antecedently seised, and the only effect was to make the former estate again discoverable. Such a decree, under the circumstances of this case, was held to be a trust, and a judgment confessed by the papist attached upon the lands by the force of the statute 17 & 18 Geo. 3, c. 49. Inquiry directed whether the papist against whom the decree was obtained had an estate in fee, without sending the question to law. A moiety only can be sold for payment of a judgment debt. *O'Gorman* v. *Comyn*, 2 Sch. & Lef. 137.

2. A papist, by articles on his marriage, in 1764, agreed "to convey to trustees in strict settlement, in case he should at any time thereafter during his life be qualified by law so to do." In 1778 he became qualified, by the statute of 17 & 18 Geo. 3, to carry these articles into execution:—Held, that the lands were not specifically bound by these articles until 1778; and therefore judgments subsequent to 1764, but before 1778, were prior liens; for to hold that the articles of 1764 bound the lands specifically, would defeat the intent of the parties, by giving a title to protestant discoverer:—Held, also, that judgment creditors were not bound by the articles of 1764, but that they were bound from the passing of the statute 17 & 18 Geo. 3, c. 49. *Kennedy* v. *Daly*, 1 Sch. & Lef. 355.

3. A papist seised in fee previously to her marriage with plaintiff, a papist, in consideration thereof, and of his covenanting to make up her dower 800*l.* per annum, and provide for younger children, covenanted for her and her heirs to pay 8,000*l.* as her marriage portion, to be applied in procuring assignments of charges on his estate, in trust for the heir male of the marriage; but if no issue male, then for the daughters; if no issue, for plaintiff; 4,000*l.* was paid; the marriage took effect, and the wife died without issue; whereupon her lands came to her sisters, as her heirs-at-law, against whom plaintiff filed his bill for the residue of the 8,000*l.* Lifford, C., held he was entitled to recover in respect of the lands come to the heirs, for they are real assets, and there is nothing in the popery laws (2 Ann, c. 6, and 8 Ann, c. 3) which prevents a papist from binding his heirs to a papist for a fair debt, or a fair and valuable consideration, or at all alters the law with respect to lands descending being real assets in the hands of the heir. *Aylmer* v. *Bellew*, Vern. & Scriv. 15.

4. A Roman Catholic, entitled to real estate, did not take the oath necessary under the statute to qualify him to hold it, and was not in enjoyment of the lands, nor were proceedings taken to enforce his title until after the passing of the Roman Catholic Relief Act (10 Geo. 4, c. 7):—Held, that s. 23 of that Act removed his former disability. *O'Connell* v. *O'Callaghan*, 7 Ir. Eq. R. 596.

5. By an Act of Parliament made in Ireland, 2 Ann, to prevent the growth of popery, no person professing that religion can be the guardian of an infant; but such guardianship, where the person entitled to it is a papist, shall be disposed of by the Court of Chancery in that kingdom to some near relation of the infant, being a protestant, and one to whom the infant's estate cannot descend; but if there shall be no such protestant relation, then to some other proper person, who will use his utmost care to educate the infant in the protestant religion until the age of twenty-one. *Preston* v. *Ferrard* (*Lord*), 4 Bro. P. C. 298.

6. A lease granted by a papist at the full improved yearly value, but to commence at the next succeeding quarter-day, is not such a future or reversionary lease as papists are prohibited from taking. *Power* v. *Windis*, 5 Bro. P. C. 472.

7. Papists are not prohibited from devising lands to protestant trustee to be sold *bonâ fide* for payment of debts, etc. *Cusack* v. *Gilbert*, 5 Bro. P. C. 465.

8. Where bill is filed by protestant discoverer to have the benefit of a lease granted to a papist, on the ground of the rent reserved being of less than two-thirds of yearly value; the fact ought to be tried by jury, upon trial of proper issue. *Kealey* v. *Dawes*, 5 Bro. P. C. 460.

9. A papist having a power of revocation under a settlement made prior to the Irish Popery Acts executes that power after the Acts passed:—Held, that the revocation was good. *French* v. *Caddell*, 3 Bro. P. C. 266.

10. R. seised in fee of lands, demised the same in 1696 to T., a papist, for lives; T. died in 1727, when W., his eldest son, also a papist, became seised as special occupant; in 1741 he conveyed all his interest to M., in consideration of 500*l.* M. died in 1750, leaving C., respondent's wife, and his heir-at-law, and F., who obtained administration. W. died in 1751, leaving an infant daughter A., and B. his widow, who entered and received the rents. Appellants intermarried in 1770, during the minority of A., who became of age in 1772; and in 1778 appellants filed their bill, charging that W. was almost an idiot, and was imposed upon by K., for whom M. was only a trustee; that no consideration was paid; that the consideration pretended was made up of false accounts by K., who, being an attorney, had alarmed W. by telling him that his interest was discoverable under the popery laws, and that therefore he must convey to some protestant to protect it, though K. knew that the original demise in 1696 was prior to the Popery Acts; that in 1741 K. filed a bill in the name of D., as a protestant discoverer against W., praying to be decreed the benefits of the demise in 1696, and of the renewals, on an allegation that X., the father of W., had by his will in 1727 devised his interest to papists; that K. proceeded in the cause, prepared the answers of all the defendants, and in 1742 the Court decreed in favour of D. the protestant, which decree was drawn up by K., who caused it to be inserted; that depositions were read at the hearing, though by the registrar's minutes it appeared that none were taken in the cause; that in 1742, D. assigned the decree to M. in trust for K., who purchased the inheritance of the lands. Appellants, after adducing many evidences of fraud and inadequacy of consideration, prayed that the decree in 1742 might be set aside for fraud, and a renewal of the

original lease of 1696. Respondents, by their answer, insisted on the fairness of the transaction, which they explained, and insisted on the Statute of Limitations as to matters of account, and on length of time since the original purchase. Whereupon the Court dismissed the bill, and their decree of dismissal was on appeal affirmed by the Lords. *Mulcahy* v. *Kennedy*, 1 Ridgw. P. C. 331.

1. The protestant next of kin are only entitled to the profits in case of descents, for in case of a purchase or grant by a papist, they are void by statute 11 & 12 Will. 3. *Michaux* v. *Grove*, 2 Atk. 210.

2. If A. by a bond binds himself, his heirs, executors, etc., to a papist, who obtains judgment and takes out an *elegit*, such papist cannot maintain an ejectment, yet the bond binds the representative or obligor. *Sorresby* v. *Hollins*, 9 Mod. 223.

3. The next protestant kin may redeem a mortgage by a popish heir. *Jones* v. *Meredith*, Bunb. 346; Com. 661.

So may a tenant by *elegit*, statute merchant, staple, or tenant by curtesy, or in dower, as well as the mortgagor, his heir, assignee, or subsequent incumbrancer. *Ib.*

4. Lands leased to a papist at less than two-thirds of improved value, or for any term above thirty-one years, are forfeited to the discoverer, being a protestant. *Blake* v. *Blake*, 5 Bro. P. C. 384.

5. Dividends of a fund in court ordered to be paid to a tenant for life, a professed nun, on petition, without inquiry into the circumstances under which the petition was presented, the Court holding the solicitor who filed it responsible. *Re Holdsworth's Trusts*, 2 Eq. Rep. 1090; 2 W. R. 692.

6. A papist being tenant in tail, suffered a common recovery, and declared the uses to himself and his heirs; this is not a purchase within the statute 11 & 12 Will. 3, c. 4. *Derwentwater* (*Lord*), *Appeal of*, 9 Mod. 172.

7. By Irish Act of Parliament for preventing the growth of popery, papists are disabled from holding leases of lands for any term exceeding thirty-one years, and under a rent of not less than two-thirds of the improved yearly value at the time of making the lease. The Court of Chancery may upon evidence determine the question of value without sending it to a jury, and may also give full relief to a protestant discoverer under those Acts, without putting him to his remedy at law. *Cusack* v. *Bulkley*, 5 Bro. P. C. 369.

8. Where the eldest son of a papist had conformed to the Established Church, and thereby rendered his father tenant for life, under the 2 Ann, c. 6, a bill having been filed to secure the benefit of his reversion in fee, and to restrain the father from committing waste, an injunction was granted upon the answer. *Cockburn* v. *Hussey*, Wall. Lyn. 234.

9. On an issue directed to try the validity of a will it was a sufficient finding that the testator was a papist, such having been at the time incapacitated from devising. *Farrell* v. *Crosbie*, Wall. Lyn. 162.

10. Testator gave a legacy in trust for his daughter for life, remainder in trust for her children who should attain twenty-one, remainder in trust for two of his sons absolutely; and he gave the residue of his personal estate to his other children. By a codicil he declared that, finding that his daughter intended to become a nun, he revoked the bequest, in the event of her carrying her intention into effect, and excluded her from all reversionary advantages from his will. The daughter became a nun:—Held, that the condition annexed by the codicil was a lawful one, and that, though the bequest in favour of the daughter was merely revoked, and there was no gift over on breach of the condition, her interest under the bequest ceased on her becoming a nun. *Exp. Dickson's Trust*, 1 Sim., N. S., 37; 20 L. J., N. S., Ch., 33; 15 Jur. 282.

11. An English convent may be a devisee or legatee of real or personal estate. *Cooke* v. *Manners*, 40 L. J., Ch., 640; 12 L. R., Eq., 574; 24 L. T., N. S., 869; 19 W. R. 1053.

A testatrix by her will appointed the residue of her disposable property equally between the following religious institutions, viz.,—The Newport Catholic Chapel, for the general purposes thereof (and payable to the officiating priest for the time being); the Brighton Catholic Chapel, in Upper St. James's Street (payable for the like purposes, to the officiating priest); the Dominican Convent at Carisbrook (payable to the superior for the time being); and the Sisters of the Charity of St. Paul, at Selley Oak, near Birmingham (payable to the superior for the time being). The receipts of the priests and superiors were respectively made discharges for the same. The testatrix died seised of considerable realty, and pure and impure personalty, all subject to her appointment. The priests each claimed only one-fourth of the residue of the pure personalty, which was not disputed:—Held, that the appointment in favour of the Dominican Convent was valid, *in toto*, but that in favour of the Sisters at Selley Oak was good as a charitable bequest only. *Ib.*

12. The prohibition of monastic bodies in the Roman Catholic Relief Act 1829 (10 Geo. 4, c. 7) applies to such bodies as settled in the realm after the passing of the Act as well as to those who were then residing in it:—Held, therefore, that a trust for the benefit of a church belonging to the Society of St. Vincent de Paul, who came to Ireland in 1838, having left it in 1690, and who are bound by religious or monastic vows, is void. *Liston* v. *Keegan* 9 L. R., Ir., 531.

II. CONFORMITY.

13. An attorney, a papist, petitioned for leave to take the oath prescribed by stat. 31 Geo. 3, c. 32, s. 22, instead of the oath of supremacy, on being admitted a master extraordinary in chancery; but refused. *Exp. Agar*, 3 Ves. & B. 160.

14. A papist neglecting to take the oaths prescribed by the stat. 17 & 18 Geo. 3, c. 41, within six months, etc., was not protected by that statute from a protestant information, nor enabled to sue; but the consequences of such neglect are removed by stat. 33 Geo. 3, c. 21, upon his performing the requisites therein mentioned. *Kennedy* v. *Daly*, 1 Sch. & Lef. 355, 381.

15. The bishop's certificate of the conformity of a papist must state, in the words of the

statute, that he conformed, etc. A certificate, stating the facts of the papist appearing in church, declaring his renunciation, etc., is not sufficient. Such certificate does not preclude evidence that the alleged conformist continued to be a papist. *Moore* v. *Butler*, 2 Sch. & Lef. 249.

1. The conformity of an eldest son for the purpose of making his popish father tenant for life, under the popery laws, is invalid, unless it was had before the bishop of the diocese which the conformist did inhabit. *Cockburn* v. *Hussey*, 2 Ridgw. P. C. 510.

2. An Irish papist conforming anywhere out of Ireland, cannot purchase lands in that kingdom before he had complied with the several requisites of the Irish Acts, 2 Ann, c. 6, and 8 Ann, c. 3. *Carrol* v. *Vicars*, 5 Bro. P. C. 396.

3. In a certificate of conformity under the stat. 2 Ann, c. 6, the precise words of the statute need not be followed, the object of the Act being fully satisfied if the fact be sufficiently certified; therefore, where a certificate was questioned because that it did not in precise words state that the party had conformed, it was held that the certificate was sufficient, though the word "conformed" was not in it, since it clearly certified the fact. *Loveland* v. *Lynch*, 2 Dow P. C. 324.

4. Plaintiff, whilst a papist, assigned advowson to defendant for ninety-nine years, and having conformed, brought his bill for reassignment of the term, suggesting he had only assigned it in trust for himself, to avoid the penalties of the statutes 3 Jac. 1, c. 4, and 1 Will. & M., c. 26. *Semble*, if the defendant had demurred, such a fraudulent conveyance would at the hearing have been absolute against the grantor. *Cottington* v. *Fletcher*, 2 Atk. 156.

The Act of 12 Ann, c. 14, does not, in the case of a papist, make the whole trust void, but only the turn upon the avoidance; which is vested in the universities. *Ib.*

Papists on their conformity are freed from any penalties they might otherwise sustain in respect of their recusancy. *Ib.*

RULES.

— *Of Benefit Societies.* See BUILDING SOCIETY, I.—FRIENDLY SOCIETY, I.
— *Of Cost Book Mines.* See MINES AND MINERALS V. I.
— *Of Court.* See PRACTICE (RULES AND GENERAL ORDERS).

See also STATUTES.

SABBATH.

See SUNDAY.

SAILOR AND SEAMAN.

See SHIPPING.

SAINT LUCIA.

See COLONIES AND COLONIAL LAW, X. XXXI.

SALARY.

See BANKRUPTCY—MASTER AND SERVANT—OFFICE—PENSIONS AND PAY.

SALE.

— *By Agents and Auctioneers.* See AUCTION AND AUCTIONEER — VENDOR AND PURCHASER.
— *Of Bankrupt's Estate.* See BANKRUPTCY, XVII. xliii.
— *Bill of.* See BILLS OF SALE.
— *By the Court.* See BANKRUPTCY—EXECUTOR AND ADMINISTRATOR, XXIII.—MORTGAGE, XV.—VENDOR AND PURCHASER.
— *Of Commission.* See ARMY AND NAVY, V.
— *Of Land.* See VENDOR AND PURCHASER.
— *By Mortgagee.* See MORTGAGE, XVI.
— *Of Offices and Pensions and Pay.* See OFFICE—PENSIONS AND PAY.
— *Of Settled Estates.* See SETTLED ESTATES ACTS.
— *Of Ships.* See SHIPPING, IV.

SALE OF GOODS.

— *Delivery Orders and Dock Warrants.* See NEGOTIABLE INSTRUMENTS.
— *Specific Performance of Sales of Chattels.* See SPECIFIC PERFORMANCE.

See also BANKRUPTCY—HORSE AND HORSE DEALER—STOPPAGE IN TRANSITU.

I. THE CONTRACT,
1. *Sale, What is*, 6110.
2. *Statute of Frauds. Effect*, 6110.
3. *Property passing by*, 6111.
4. *Sale in Market Overt*, 6112.
5. *Sale or Hire*, 6113.
6. *Warranties and Conditions*, 6114.
7. *Delivery by Instalments*, 6114.
8. *Rescission*, 6115.
9. *Breach of, Damages for*, 6115.
II. INJUNCTION AGAINST, 6116.
III. RIGHTS OF UNPAID VENDOR.
1. *Lien*, 6117.
2. *Stoppage in Transitu.* See STOPPAGE IN TRANSITU.

I. THE CONTRACT.

1. *Sale, What is*, 6110.
2. *Statute of Frauds. Effect*, 6110.
3. *Property passing by*, 6111.
4. *Sale in Market Overt*, 6112.
5. *Sale or Hire*, 6113.
6. *Warranties and Conditions*, 6114.
7. *Delivery by Instalments*, 6114.
8. *Rescission*, 6115.
9. *Breach of, Damages for*, 6115.

1. Sale, What is.

1. The plaintiff had employed the defendant, who was a corn-factor, to sell a cargo of corn, which he accordingly sold to C. on the 15th May. Information was afterwards received that before this sale the corn had already been sold, on the 24th April, by the captain of the vessel chartered by the plaintiff. This was not known at the time to either of the parties. C. subsequently gave notice to the defendant that he repudiated the contract, on the ground that the cargo did not exist at the time of the sale to him. The plaintiff sought to recover the price of the cargo from the defendant, who was a factor, on a *del credere* commission:—Held (affirming 9 Exch. 102; 17 Jur. 1127), that the defendant was not liable for the amount, as it was the sale of a cargo which did not exist at the time. *Couturier* v. *Hastie*, 5 H. L. Ca. 673; 2 Jur., N. S., 1241; 25 L. J., Exch., 253.

2. A bailment on trust implies that there is reserved to the bailor the right to claim a redelivery of the property deposited in bailment. *South Australian Insurance Co.* v. *Randell*, 3 L. R., P. C., 101; 22 L. T. 843.

Wherever there is a delivery of property on a contract for an equivalent in money, or some other valuable commodity, and not for the return of the identical subject-matter in its original or altered form, this is a transfer of property for value—it is a sale and not a bailment. *Ib.*

Where, therefore, corn was deposited by farmers with a miller, to be stored and used as part of the current consumable stock or capital of his trade, and was by him mixed with other corn deposited for the like purpose, subject to the right of the farmers to claim at any time an equal quantity of corn of the like quality, without reference to any specific bulk from which it was to be taken, or in lieu thereof, the market price of any equal quantity, on the day on which he made his demand, with a small charge for general purposes:—Held, that such a transaction amounted to a sale by the farmer to the miller, and was not a bailment of the corn, and entitled the miller to claim in respect thereof upon a policy of insurance against fire as for his own property, notwithstanding that such corn was not specifically insured, or described, as required by the conditions of the policy, as "goods held in trust and on commission," upon which condition the claim was resisted by the insurers. *Ib.*

3. A proposal to receive tenders for certain things to be sold (specifying no limitation or qualification), and an acceptance (also specifying no limitation or qualification), is a contract for the whole. *Thorn* v. *Public Works Commissioners*, 32 Beav. 490.

The defendants advertised that offers would be received for old Portland stone of Westminster Bridge. The plaintiffs made an offer for the stone of a particular quality, which was accepted:—Held, that this was a contract for the purchase of all the stone of that quality. *Ib.*

4. Circumstances in the conduct of two parties may establish a binding contract between them, although the agreement, reduced into writing as a draft, has not been formally executed by either. *Brogden* v. *Metropolitan Railway Co.*, 2 L. R., App. Cas., 666.

In such a case the word "approved," written by one of the parties at the end of the draft agreement, must be taken as an approval of the substance of the draft, and not, as in the case of a conveyancer's or solicitor's draft, an approval of the mere form. *Ib.*

B. had for some years supplied a railway company with coals. At last it was suggested by B. that a contract should be entered into between them. After their agents had met together the terms of agreement were drawn up by the agent of the company and sent to B. B. filled up certain parts of it which had been left in blank, and introduced the name of the gentleman who was to act as arbitrator in case of differences between the parties, wrote "approved" at the end of the paper, and signed his own name. B.'s agent sent back the paper to the agent of the company, who put it in his desk, and nothing farther was done in the way of a formal execution of it. Both parties for some time acted in accordance with the arrangements mentioned in the paper. Coals were supplied and payments made as therein stated, and when some complaints of inexactness in the supply of coals, according to the terms stated in the paper, were made by the company, there were explanations and excuses given by B., and the contract was mentioned in the correspondence, and matters went on as before. Finally disagreements arose, and B. denied that there was any contract which bound him in the matter:—Held, that these facts, and the actual conduct of the parties, established the existence of such a contract, and there having been a clear breach of it B. must be held liable upon it. *Ib.*

B. was the chief partner in a partnership of three persons. The word "approved" written by him and signed with his name was treated as an assent binding on all the partners (whose names were mentioned in the paper), although the usual form of signature of the partnership was that of "B. & Sons." *Ib.*

A mere mental assent to the terms stated in a proposed contract would not be binding, but acting upon those terms, by sending coals in the quantities and at the prices mentioned in it, amounted to sufficient to show the adoption of the writing previously altered and sent, and to constitute it a valid contract. *Ib.*

The *onus* of showing that both parties had acted on the terms of an agreement which had not been, in due form, executed by either, lies upon the party who rests his case on that circumstance. *Ib.*

2. Statute of Frauds. Effect.

5. Plea of the Statute of Frauds to an executory contract overruled. *Rondeau* v. *Wyatt*, 3 Bro. C. C. 154.

6. Teas are sold, to be paid for at appointed days, the sales being made according to the custom of the trade, whereby the goods, when sold, are left as pledge for full payment with the vendor, who in case of non-payment is at liberty to resell, and charge the loss to the original purchaser. The purchase money is not paid at the appointed time; the purchaser becomes bankrupt, and the vendor, having sold part of the teas before the fiat and the rest

afterwards, gives the estate credit for the clear proceeds of the sales:—Held, that although there was no delivery of the goods, the original sale was a binding contract within the Statute of Frauds, and that the vendors were entitled to prove for the residue of the purchase money unsatisfied by the sale. *Exp. Moffat, Re Tute*, 2 M. D. & De G. 170; and see 1 M. D. & De G. 282.

1. C. & Co. and H. & Co. were merchants at Calcutta. H. & Co. sold to C. & Co. a large quantity of indigo through the medium of a broker, who drew up a sold note addressed to H. & Co., and submitted it to H. for his approval, when H. having objected to a particular word remaining, the broker took the sold note to C., and informed him of H.'s objection. C. struck his pen through the word objected to by H., placing his initials over that erasure, and returned it to the broker, who thereupon delivered it, so altered, to H. & Co. The broker delivered to C. & Co. on the following day a bought note, which differed in certain material terms from the sold note. In an action brought by H. & Co. against C. & Co. for non-performance of the contract contained in the sold note, the Supreme Court at Calcutta was of opinion that the sold note alone formed the contract, and found for the plaintiffs:—Held, upon appeal, that the transaction was one of bought and sold notes, and that the circumstances attending C.'s alteration of the sold note and affixing his initials, were not sufficient to make that note alone a binding contract, and that there being a material variation in the terms of the bought note with the sold note, they, together, did not constitute a binding contract. *Cowie* v. *Remfry*, 5 Moo. P. C. 232; 10 Jur. 789.

2. The parties to any contract or bargain within section 17 of the Statute of Frauds, or section 7 of Lord Tenterden's Act, must be specified either nominally or by description, or by reference, in the note or memorandum in writing required by those statutes; the name of the seller, as well as of the buyer, must appear; of the party by whom goods are to be supplied, as well as of him to whom they are to be supplied; or of the party to be guaranteed, as well as of him who is to guarantee. Hence, where a memorandum in these words, "I will furnish H. with funds for the purchase of a steam-engine and machinery for a flour-mill, on his suiting himself with the same, and notifying the purchase to me," was signed by A., but not addressed to any one, and was delivered to B., with the consent of the signer, and afterwards orally acknowledged to B. by him:—Held, that this writing was not within the clauses of the above-named statute, and that A. was not liable. *Williams* v. *Byrnes*, 2 N. R. 47.

3. Where, in a sale between brokers, the bought and sold notes were not exchanged, and there was no evidence that the seller had notice of the contract, but the contract was in part performed:—Held, that there was a binding memorandum within the Statute of Frauds. *Exp. Thomas, Re Thorp*, 11 Jur., N. S., 49; 11 L. T., N. S., 586; 5 N. R. 230.

4. Upon a sale by auction subject to conditions of sale, the auctioneer's entry in his book is void under the Statute of Frauds, unless the entry contains such reference to the conditions as to identify them upon production as being the conditions mentioned therein. *Rishton* v. *Whatmore*, 26 W. R. 827; 47 L. J., Ch., 629; 8 L. R., Ch. D., 467.

3. Property passing by.

5. By the law of England, under a contract of sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties. If the seller is to do something to the goods sold, the property will not be changed until he has done it, or waived his right to do it. *Gilmour* v. *Supple*, 11 Moo. P. C. 551; 6 W. R. 445.

A. entered into a contract, in writing, for the sale to B. of "a raft of timber now at Carouge, in Canada, containing white and red pine, the quantity, about 71,000 feet, to be delivered at Indian Cove Booms. Price, for the whole, 7¾d. per foot. Payment, one-third cash, one-third 60 and 90 days after date." Shortly before the contract was signed, the raft had been measured by a public officer, called the Supervisor of Cullers, appointed under a Canadian Act, and the number of pieces of timber and the contents of each piece were set down in a specification thereof, which made a total of 71,445 feet, and this specification was delivered by A. before the execution of the contract to B., and sent by him to the place where the raft was to be delivered. The raft was towed to the Indian Cove Booms, the appointed place for delivery, where it arrived in the afternoon, and notice of its arrival given to the servants of B., who assisted in fastening the raft outside the Booms. This was done at the instance of B.'s servant, as, from the state of the tide, the raft could not be placed inside the Booms. During the night a storm arose, by which the raft was carried away, broken to pieces, and dispersed, and a great portion of it lost. B. employed his servants in collecting as much of the wood as was saved, and that was put into B.'s Booms:—Held, that, as A. had ascertained the price of the raft by the measurement previously made, the specification of which was in B.'s possession, and as the contract did not show that any future measurement of the raft was necessary, no act then remained to be done by A., or by B., and that the raft, upon delivery at the Indian Cove Booms, had wholly passed to B., and the loss incurred must be borne by him. *Ib.*

6. If the terms of a contract of sale do not show an intention of immediately passing the property until something is done by the seller before delivery of possession, then the sale cannot be deemed perfected, and the property does not pass until that thing is done. *Logan* v. *Le Mesurier*, 11 Jur. 1091.

And although, where the sale was of a specific chattel for a fixed price, assuming it to contain a certain quantity, and the price was paid, but, according to the terms of the contract, the seller was to retain possession, to carry the chattel to a certain place, there to deliver it at a certain time, and that if, upon measurement, the quantity should turn out more than as assumed, the surplus was to be paid for

at a fixed rate by the purchasers on delivery, but that, should it fall short, the difference was to be refunded by the sellers: yet it was held, that, until measurement and delivery, the sale was not complete; and that part of the property having been lost by a storm, the risk remained with the sellers. *Ib.*

After the day stated in the contract of sale for the delivery of goods, and before delivery, a storm dispersed the goods (timber), and the purchasers took possession of a large portion of them which were saved, and paid salvage:—Held, that this taking possession of a part could not be considered as showing, by the parties' admission, that the property in the goods had passed to the purchasers before the loss, where the terms of the contract show that it did not so pass. *Ib.*

1. A bill of sale and assignment of goods, described as being in certain warehouses belonging to A., was given by him for the loan of a sum expressed to have been paid on the day of the date thereof. Upon an action of trover brought against the assignee of A., who had seized the goods, it appeared in evidence that a portion only of the goods was in the warehouse specified at the date of the sale, and that no part of the loan was paid on that day, the same being discharged by instalments a few days afterwards; whereupon the judges of the Supreme Court held that there had been no valid transfer, and consequently no conversion, and gave an interlocutory judgment and verdict in accordance with such view:—Held, by the Judicial Committee, on appeal from such judgment and verdict, and from an order refusing a new trial, that the judgment and verdict were not justified by the evidence, and must be reversed, and a new trial granted. *Muttyloll Seal* v. *O'Dowda*, 4 Moo. Ind. App. 382; 6 Moo. P. C. 324.

2. The purchaser of a cargo of rice which is to be loaded on board a ship expected to arrive at a certain port, where it is to load for a voyage, he agreeing to pay a certain sum per cwt. cost and freight, has no insurable interest in the purchase; so that, should the rice be put on board before the loading is completed, he cannot recover on a policy of insurance effected on goods in the vessel. *Anderson* v. *Morice*, 1 L. R., App. Cas., 713; 35 L. T., N. S., 566; 25 W. R. 14.

A. contracted for the purchase of rice in the following terms: "Bought for account of A. of B. & Co., the cargo of new crop Rangoon rice, per *Sunbeam*." The day after making this contract, A. insured the rice at and from Rangoon to the United Kingdom, "as interest may appear." The ship proceeded to Rangoon, and after the greater part of the cargo had been shipped, she suddenly sank at her anchors, in fine weather, and the rice already shipped was wholly lost. In an action on the policy:—Held, that A. had no insurable interest in the rice, it not being at his risk till the cargo was completed. *Ib.*

3. L. was a manufacturer in Ireland. Alfred Blenkarn, who occupied a room in a house looking into Wood Street, Cheapside, wrote to L., proposing a considerable purchase of L.'s goods, and in his letter used this address—"37, Wood Street, Cheapside," and signed the letters (without any initial for a christian name) with a name so written that it appeared to be "Blenkiron & Co." There was a respectable firm of that name, "W. Blenkiron & Co.," carrying on business at 123, Wood Street. L. sent letters, and afterwards supplied goods, the letters, the goods, and the invoices accompanying the goods being all addressed to "Messrs. Blenkiron & Co., 37, Wood Street." The goods were received by Blenkarn at that place, and disposed of to a purchaser who was entirely ignorant of the fraud:—Held, that no contract was made with Blenkarn; that even a temporary property in the goods never passed to him, so that he never had a possessory title which he could transfer to this purchaser, who was consequently liable to L. for the value of the goods. *Cundy* v. *Lindsay*, 3 L. R., App. Cas., 459; 47 L. J., Q. B. D., 481; 38 L. T., N. S., 573; 26 W. R. 406; 14 Cox C. C. 93. Affirming 2 L. R., Q. B. D., 96; 25 W. R. 417; 36 L. T., N. S., 345; 46 L. J., Q. B., 233; 13 Cox C. C. 583. Reversing 45 L. J., Q. B., 381; 1 L. R., Q. B. D., 348; 24 W. R. 730; 34 L. T., N. S., 314.

When the original owner has parted with the chattel to A. upon a *de facto* contract, though there may be circumstances which enable that owner to set aside that contract, the *bonâ fide* purchaser from A. will obtain an indefeasible title. *Ib.*

The question, therefore, in many such cases, will be, was there a contract between the original owner and the intermediate person? *Ib.*

4. Merchants in London were in the habit of dealing with Reed Brothers, of Old Town Street, Plymouth. On receipt of an order from Joseph Reed & Sons, of Mincing Lane, Plymouth, they forwarded the goods asked for, under the mistaken belief that they were dealing with their old customers. The person trading as Joseph Reed & Sons was an uncertificated bankrupt, and his trustee at once seized the goods:—Held, that the trustee was bound to restore the goods, or to pay the amount due for them. *Exp. Barnett, Re Reed*, 3 L. R., Ch. D., 123; 45 L. J., Bky., 120; 34 L. T. 664; 24 W. R. 904.

4. Sale in Market Overt.

5. The real owner of goods does not lose his property, though the possessor makes a sale of them, unless it be in market overt; but there is no instance where a sale, made by the mere possessor, has been held to change the property, where it has marks by which it may be known. *Hartop* v. *Hoare*, 3 Atk. 49.

6. A ship is not like an ordinary chattel, which passes by delivery, and there is no market overt for ships. *Hooper* v. *Gumm*, *M'Lellan* v. *Gumm*, 36 L. J., Ch., 282; 2 L. R., Ch., 282; 15 W. R. 464; 16 L. T., N. S., 107. Affirming 15 L. T., N. S., 187.

7. The Contagious Diseases (Animals) Act 1869, s. 57, does not render the sending of diseased animals to a public market an actionable wrong, in the absence of any warranty of soundness or of any evidence of fraud or misrepresentation. *Ward* v. *Hobbs*, 27 W. R. 114; 4 L. R., App. Cas., 13.

A number of pigs was sold by auction in a public market, subject to conditions of sale which provided that no warranty would be given, and that the animals should be removed "with all faults." Shortly after the sale it was found that the pigs were infected with

typhoid fever, from which the greater part of them died:—Held, that the seller of the pigs had not been guilty of misrepresentation by conduct, and was not liable in an action for misrepresentation at the suit of the purchaser. *Ib.*

1. The purchaser of a chattel takes it, as a general rule, subject to what may turn out to be informalities in the title. *Cundy* v. *Lindsay*, 3 L. R., App. Cas., 459; 47 L. J., Q. B. D., 481; 38 L. T., N. S., 573; 26 W. R. 406; 14 Cox C. C. 93. Affirming 2 L. R., Q. B. D., 96; 25 W. R. 417; 36 L. T., N. S., 345; 46 L. J., Q. B., 233; 13 Cox C. C. 583. Reversing 45 L. J., Q. B., 381; 1 L. R., Q. B. D., 348; 24 W. R. 730; 34 L. T., N. S., 314.

By a purchase in market overt the title obtained is good against all the world. *Ib.*

If not so purchased, though purchased *bonâ fide*, the title obtained may not be good against the real owner. *Ib.*

5. Sale or Hire.

2. A. and B. contracted for the purchase by B. of a billiard-table, the price to be paid by instalments. The table was delivered, and part of the price paid. B., having failed to pay some of the instalments as they became due, was induced by A. to sign the following agreement for the hire of the table at a monthly rent: "This agreement is signed for A.'s satisfaction, and will become null and void on B. carrying out the original agreement." Upon the bankruptcy of B. the trustee sold the table and received the proceeds:—Held, that the trustee was entitled to the proceeds of the sale, upon the ground that the agreement for the purchase was not abrogated by the agreement for hire, and that consequently the table, being the property of the bankrupt, passed to the trustee. *Exp. Orme, Re Lloyd*, 38 L. T., N. S., 328.

3. A timber merchant hired from manufacturers of engines an engine upon the terms of an agreement of hiring and suspensory sale, the payment to be by monthly instalments, with liberty to the manufacturers to retake possession upon his default, the name of the manufacturers in the meanwhile to remain on engines as owners. He became bankrupt before all the instalments were paid, and his trustees claimed to retain the engine as against the manufacturers:—Held, that the manufacturers continued owners under the agreement, and that there was no reputed ownership on the part of the bankrupt as against them. *Exp. Stooke, Re Bampfield*, 20 W. R. 925.

4. A trader hired a piano from H. & Co. at 15*l.* a year, payable by monthly instalments, on the terms that in the event of default in payment of the instalments, or of his death, bankruptcy, or insolvency, or execution issuing against him, H. & Co. might put an end to the hiring and take possession of the instrument; and that when the instalments amounted to 45*l.*, H. & Co. should assign the piano to the debtor, but that till such payment the debtor should have no property in the piano. The debtor paid one instalment under the agreement, and four months afterwards filed a liquidation petition, still having the piano in his possession:—Held, that a custom to let pianos on hire on the above terms being established, there was nothing in the agreement obnoxious to the provisions of the Act of 1869, s. 15, sub-s. 5, and that the piano did not pass to the trustee under the order and disposition clause. *Exp. Hattersley, Re Blanchard*, 47 L. J., Bky., 113; 38 L. T., N. S., 619; 26 W. R. 636; 8 L. R., Ch. D., 601.

5. By a written agreement, R. hired furniture of the value of 63*l.* from L. & Co. R. was to pay for it by monthly instalments. In the event of non-payment of any instalment, L. & Co. might seize and remove the furniture and retake possession of it. On payment of all the instalments, the furniture was to become his property, but until such payment it was to remain the sole property of L. & Co. This agreement was not registered as a bill of sale. The furniture comprised in the agreement was in the possession of R. at the commencement of his bankruptcy:—Held, that the property in the furniture did not pass to him until all the instalments had been paid; that neither the agreement nor the licence to seize the furniture amounted to a bill of sale by R., and therefore that registration was unnecessary. *Exp. Lewin & Co., Re Robertson*, 9 L. R., Ch. D., 419; 47 L. J., Bky., 94; 39 L. T. 12; 26 W. R. 733.

6. The defendants agreed to hire forty-four waggons from the plaintiffs, paying in respect of twenty specified waggons an annual rent of 285*l.* for five years, and in respect of the other twenty-four an annual rent of 249*l.* for three years. It was agreed that the said waggons should, at the expiration of the respective terms of the demise, and after payment of the rents reserved during the said terms respectively, become the absolute property of the lessees without any further payment whatsoever; and that until full payment of the several rents respectively reserved should be actually made, the ownership of the said waggons respectively should remain and continue in the lessors. The defendants having paid the first two years' rent in respect of the twenty-four waggons, sent to the plaintiffs the whole of the remaining one year's rent with a letter stating that this sum was paid in discharge of all rent or other payment due in respect of the twenty-four waggons. The rent in respect of the other twenty waggons was then in arrear. The plaintiffs' agent declined to receive the payment upon the terms of the letter, and entered it in the plaintiffs' ledger as a payment in respect of the entire number of waggons:—Held, that the contracts in respect of the twenty-four waggons and the twenty were several, and the hirers were entitled to the property in the twenty-four waggons upon payment of all the instalments that remained to be paid in respect of them, notwithstanding that there were unpaid instalments in respect of the twenty, and that the contract being in effect one of sale, and the provision for payment by instalments a provision solely in favour of the purchaser, he was entitled to anticipate the time fixed for the transfer of the property in the waggons by anticipating the time for payment. *Lancashire Waggon Co.* v. *Nuttall*, 42 L. T. 465.

7. C. & Co., upholsterers, lent furniture on hire to the defendants (who were hotel-keepers) to be paid for by monthly instal-

ments, and on payment of the full price agreed upon, it was to become the property of the defendants. Until this had been done it was to remain the property of C. & Co. Upon one instalment being unpaid C. & Co. put a man in possession of the furniture, and the defendants executed an assignment of the lease of the hotel, and of all their personal chattels and effects, including the hired furniture, to C. & Co., and afterwards became bankrupts. The trustee in bankruptcy claimed the furniture on the ground that it was at the date of the bankruptcy in the possession of the bankrupts, as reputed owners, with the consent of the true owners, C. & Co.:—Held, that the assignment of the whole property which was duly registered was an act of bankruptcy, but that C. & Co.'s furniture not having been paid for remained their property, and was not in the order and disposition of the bankrupts, and did not pass by the assignment; that the assignment was good so far as it was a mortgage of the leasehold, but was void so far as it was an assignment of personalty as being an act of bankruptcy, and that the trustee was entitled to all the personal effects of the bankrupts, but not to the hired furniture. *Cramcour* v. *Salter*, 18 L. R., Ch. D., 30; 45 L. T. 62; 30 W. R. 21; 51 L. J., Ch., 495.

6. Warranties and Conditions.

1. Warranty on sale against obvious defects is not binding. *Dyer* v. *Hargrave*, 10 Ves. 507.

2. If an article sold is described, the description amounts to a warranty or a condition precedent that it shall be an article of the kind described. *Bowes* v. *Shand*, 2 L. R., App. Cas., 455; 46 L. J., Q. B., 561; 36 L. T. 857; 25 W. R. 730.

3. M., on behalf of the firm of M. & Co., merchants in Quebec, of which he was a member, entered into the following contract with R. M.: "R. M. sells, and Messrs. M. & Co. buy, all of the spars manufactured by R. M., say about 600 red pine spars, averaging by culler's measurement in Quebec sixteen inches, at the sum of, etc., delivered free of charge in Quebec. The above spars will be out of the lot manufactured by B., the lengths of which, according to his specification, I am satisfied with." The lot manufactured by B. was found to consist of 603 spars, of which only 496 averaged sixteen inches:—Held, that M. & Co. were bound to accept the 496 spars at the rate agreed on, the words, "say about 600 red pine spars," being words of expectation and estimate only, and not amounting to a warranty. *M'Connel* v. *Murphy*, 5 L. R., P. C., 203.

4. If, in the case of a contract of sale and delivery, which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied. By a written contract A. agreed to buy of B. a digging machine, if it fulfilled certain conditions, one of which was that it should be capable of excavating a given quantity of clay in a fixed time on a "properly opened-up face" at the C. railway cutting. The machine failed at another cutting to excavate the required quantity, and on its being removed to the "C." cutting and tried at a face not a "properly opened-up one," and breaking down, after a few days' work, A. refused to give it any further trial or to pay the price of the machine:—Held, that B. was entitled to a decree against A. for payment of the price of the machine. *Mackay* v. *Dick*, 6 L. R., App. Cas. (Sc.), 251.

5. A salesman who sells in a public market meat which has no defect discoverable by an ordinary inspection, but which is afterwards found to be unfit for human food, to a purchaser who selects it himself, does not impliedly warrant that the meat is good, and is not liable to refund the price to the purchaser. *Smith* v. *Baker*, 40 L. T. 261. And see *Ward* v. *Hobbs*, 4 L. R., App. Cas., 13; 27 W. R. 114.

6. In England, if goods are sold by sample, and they are delivered, and accepted by the purchaser, he cannot return them; but if he has taken the delivery conditionally, he has a right to keep the goods for a sufficient time to enable him to give them a fair trial, and if they are found not to correspond with the sample, he is then entitled to return them. *Couston* v. *Chapman*, 2 L. R., H. L. (Sc.), 250.

In England, if a horse is sold with a warranty of soundness, and it turns out to be unsound, the purchaser cannot return the horse unless there is a stipulation that if the horse does not answer to the warranty the purchaser shall be at liberty to return it. But in Scotland, it would appear to be law that there would be an absolute right to return the horse upon the discovery of its unsoundness, without any specific stipulation to that effect. *Ib.*

7. Delivery by Instalments.

7. An agreement is made between A., an iron company, and B., the owner of an adjoining colliery, for the supply of coals, to be raised and delivered at the rate of 500 tons per week, A. also agreeing to loose and drain the unworked coal in B.'s colliery:—Held, that no interval in the performance of this agreement (which was continuous in its nature) should have been allowed; and that A., after the lapse of eleven months between filling his bill and breach of the agreement, was precluded from relief upon it:—*Semble*, that the Court will not decree specific performance of a contract for delivery of a chattel by instalments where mutual duties of a complicated nature are imposed upon the parties. Mere vicinity and convenience of situation will not induce the Court to decree specific performance of a contract for supply of goods. Observations upon *Buxton* v. *Lister* (3 Atk. 383). *Pollard* v. *Clayton*, 3 W. R. 349; 1 Kay & J. 462; 1 Jur., N. S., 342.

8. Two contracts, each for the sale of 300 tons of rice, were made in London. The first contract (which the second exactly followed) was for 300 tons "of Madras rice, to be shipped at Madras, or coast, for this port, during the months of March $\frac{\text{and}}{\text{or}}$ April 1874, per *Rajah of Cochin*." The 600 tons filled 8,200 bags. The vessel arrived at Madras in February, and on the 23rd of that month 1,780 bags were put on board, and on the 24th of February a like number; on the 28th of February 3,560 bags were put on board, and bills of lading were given for those amounts on the days men-

tioned. A bill of lading for the remaining 1,080 bags was given on the 3rd of March, but all, except fifty bags, had been put on board before that day. In an action for refusing to accept the rice, the defence was that it had not been shipped during the months of March and April:—Held, that the contract had not been complied with; that its words must be construed in their plain and ordinary sense; that evidence of any usage in the particular trade must, to affect their meaning, be very clear and consistent, and such evidence not having been given in this case, the vendors could not recover on the contract. *Bowes* v. *Shand*, 2 L. R., App. Cas., 455; 46 L. J., Q. B., 561; 25 W. R. 730; 36 L. T., N. S., 857. Reversing 2 L. R., Q. B. D., 112; 46 L. J., Q. B., 201; 36 L. T., N. S., 161; 25 W. R. 291; and affirming 1 L. R., Q. B. D., 470; 24 W. R. 734; 45 L. J., Q. B., 507; 34 L. T., N. S., 795.

1. Under a contract for the sale of merchandize, a certain quantity of the goods was to be delivered in each of eleven months, payment to be by cash fourteen days after delivery:—Held, that the true meaning of the contract was that the vendor might cease delivering in any month if the purchaser neglected to pay for the previous month's delivery. *Exp. Chalmers, Re Edwards*, 42 L. J., Bky., 2. Affirmed 42 L. J., Bky., 37; 8 L. R., Ch., 289; 28 L. T., N. S., 325; 21 W. R. 349.

Delivery went on under the contract for ten months, and all the lots but the tenth were paid for. On the 22nd of December, the last month of the contract, a meeting of the purchaser's creditors was held and he was then insolvent. On the 23rd, the vendors wrote that they refused to deliver any more goods, giving no reasons. The goods had greatly risen in value, and in January the purchaser claimed the difference in price on the December lot. In February he was adjudicated bankrupt on a declaration of insolvency. On a claim by the trustee for the difference on the December lot on account of the refusal:—Held, that the refusal was justified by the non-payment, and that the case was strengthened by the fact that the purchaser could not, at the time, make a valid payment. *Ib.*

See next Subdivision.

8. Rescission.

2. By a contract dated the 27th October 1874, the C. Company contracted to sell to the P. Company 2,500 tons of pig iron, to be delivered over the next ten months in about equal monthly quantities. Payment by four months' bill net, or cash less 2½ per cent. discount, on the 10th of the month next following each delivery. In performance of this contract the C. Company, in November and December 1874, and in January and February 1875, made deliveries amounting to 852 tons. On the 24th February the P. Company, requiring further capital to carry on its business, called a meeting of its principal creditors, with a view to an arrangement being made for an extension of credit, and laid a statement of affairs before them, showing that out of a nominal capital of 100,000*l.*, of which 80,000*l.* was paid up, the company had sustained losses to the extent of 40,000*l.* The creditors did not accept the propositions submitted to them, and the C. Company, considering the statement to be a declaration of insolvency, declined to make any further deliveries except for cash, and thereupon the P. Company cancelled the contract. Three months afterwards the P. Company was ordered to be wound up. Upon a claim by the C. Company for damages in respect of breach of the contract:—Held, that the statement of affairs laid before the creditors on the 24th February did not amount to a declaration of insolvency which justified the C. Company in refusing to deliver without cash payments, and the claim was disallowed. *Exp. Carnforth Hæmatite Iron Co., Re Phœnix Bessemer Steel Co.*, 46 L. J., Ch., 115; 4 L. R., Ch. D., 108; 35 L. T. 776; 25 W. R. 187.

The rule laid down in *Exp. Chalmers, Re Edwards* (42 L. J., Bky., 2), only applies where there is something amounting to a declaration on the part of the purchasers that they will be unable to meet their engagements. *Ib.*

See preceding Subdivision.

See also CONTRACT, VIII.

9. Breach of, Damages for.

3. The damages for the breach of a forward contract to accept goods for which there is no market, are the full amount of the damage actually sustained, the person who broke the contract not being put to additional cost by reason of the other party not doing what he ought to do, as a reasonable man, and he, on the other hand, not being bound to do otherwise than is the ordinary course of his business. The plaintiffs contracted to sell to the defendant 15,000 tons of cannel coal in weekly quantities, the deliveries not to commence before June, at 26*s.* per ton, payable by monthly instalments, the defendant not to sell in certain specified places. The defendant repudiated the contract in July, but the plaintiffs attempted to come to terms with him, and did not treat it as broken until September, when, there being no regular market for cannel coal, they tried without advertising to find another purchaser according to the ordinary course of their own business. After several failures, the coal was sold at 19*s.* per ton:—Held, that the plaintiffs were entitled to the full amount of the difference between the contract price and that which they obtained. *Lever* v. *Dunkirk Colliery Co.*, 43 L. T. 706. Affirming, with variation, S. C. *sub nom.*, *Dunkirk Hall Colliery Co.* v. *Lever*, 41 L. T. 633; 9 L. R., Ch. D., 20; 39 L. T., N. S., 239; 26 W. R. 841.

4. When the purchaser of goods sold on credit becomes bankrupt before the vendor has parted with the possession of the goods, the trustee in the bankruptcy has a right to elect to complete the contract by paying the agreed price in cash within a reasonable time. But, if he does not do so, the vendor is entitled to treat the contract as broken, and to resell the goods, without first tendering them to the trustee. And the vendor is entitled to prove in the bankruptcy for damages for the breach of contract, the measure of damages, if the market is falling, being the difference between the contract price and the price obtained on the resale. *Exp. Stapleton, Re Nathan*, 10 L. R., Ch. D., 586; 40 L. T. 14; 27 W. R. 327.

II. INJUNCTION AGAINST.

1. Application to stay disposal of personals must show specific right to property, and danger of same being lost. *Ximenes* v. *France*, Dick. 149.

2. A., the owner of certain chattels, pledged them to B., who was a broker, to secure advances made on his behalf by B.; and B. afterwards, in his own name, and unknown to A., re-pledged the same chattels to C. to secure advances made by C. to B., but of which, unknown to C., A. was to have the benefit. C. having subsequently applied in vain to B. for payment of his advances, threatened to realise his security by a sale, which, however, he was from time to time induced to postpone by the solicitations of B. and his assurances of speedy payment; and this was communicated by B. to A., his principal. In a suit by A. against B. and C., praying to redeem the property in pledge on payment of any balance found due on the account between himself and B., it was held that A. had no equity to restrain C. from proceeding to an immediate sale. *Nicholson* v. *Hooper*, 4 Myl. & C. 179. Reversing 2 Jur. 9.

Quære, whether under the circumstances above mentioned, C. could make a good title to a purchaser. *Ib.*

3. Specific chattels deposited by the plaintiff with A., his agent, which A. fraudulently contracted to assign to B., and B. advertised to be sold. Bill for an injunction to restrain the sale by B., and to restrain A. and B. from parting with the goods, the goods being still in the possession of A. the agent. Demurrer by B. overruled. *Wood* v. *Rowcliffe*, 3 Hare 304; 13 L. J., N. S., Ch., 293; 8 Jur. 771.

4. Pending an appeal, the Court will sometimes stay the sale of property which the decree has directed to be sold; but if the property consists of personal chattels remaining in the possession of the appellant, he must give ample security for their value. *Nerot* v. *Burnand*, 2 Russ. 56.

5. Defendant, before he had prayed time to answer, or was in contempt, restrained from selling diamonds. *Tonnins* v. *Prout*, Dick. 387.

6. H. contracted for the purchase of shares in a vessel, and paid part of the purchase money to P., and obtained possession of the vessel, but no bill of sale was executed. The registered owners alleged that P. was not their agent to receive the money, and arrested the vessel in the Admiralty Court, and threatened to sell the shares. They were restrained from selling or proceeding in the Admiralty Court. *Hughes* v. *Morris*, 13 Jur. 1065.

7. Where a vessel has become unable to proceed on her voyage without repairs, the owners of goods shipped on board the vessel may obtain the assistance of the Court to restrain the captain from selling the cargo. But before the Court will grant such assistance, the plaintiffs must show their title to the goods, and must settle with the captain for what is due to him, and must exonerate the captain from his contract to deliver the goods at their place of destination, and from all liability on the bills of lading. *Rayne* v. *Benedict*, 10 L. J., N. S., Ch., 297; 5 Jur. 598.

8. A company will be restrained by injunction from selling plant belonging to a contractor who has made default, where it has power in that case to take possession of the plant at a valuation, and to allow it in account with the contractor, and has also power to use it in the construction of the line, unless it appears that there is a balance of account actually due from the contractor. *Garrett* v. *Salisbury & Dorset Junction Railway Co.*, 2 L. R., Eq., 358; 14 W. R. 816.

9. When the owners of a public building have contracted with the plaintiff, that he, renting a stall from them, shall have the exclusive right to exhibit and sell certain specified classes of goods, an injunction will lie against them for permitting the exhibition and sale by other renters of stalls within the building of goods so specified. *Altman* v. *Royal Aquarium Society*, 3 L. R., Ch. D., 228.

10. A. entered into a contract with B. by which B. agreed to sell to him the whole of the get of coal of a specified seam in a colliery belonging to B. during a period of five years at a certain price. On a bill by A. to restrain B. from selling the coal to other parties:—Held, that he was not entitled to any relief in equity. *Fothergill* v. *Rowland*, 17 L. R., Eq., 132; 43 L. J., Ch., 252; 29 L. T. 414; 22 W. R. 42.

11. Where the requisitions of the composition clause had not been complied with, the Court of Review refused, on the petition of the bankrupt, to restrain a sale by the assignees, though an agreement had been entered into between the bankrupt and his surety, and the assignees, for annulling the fiat, and payment of the debts in full. *Exp. Nainby*, 3 Dea. 587.

12. On separate commission against one partner, the assignees took possession of partnership property, and were about to sell it. Injunction, on filing bill and affidavit, granted to restrain sale. *Allen* v. *Kilbre*, 4 Madd. 464.

13. The mortgagee of a ship by bill of sale, who has omitted to procure an indorsement thereof on the certificate of registry, within thirty days after the return of the ship to port, as required by the Registry Act, the registered owner having after that time become bankrupt, has no equity, distinct from his legal rights, to restrain the sale of the ship by the assignees; the title to the ship, after the bankruptcy, depending upon the application of the rule of law with regard to order and disposition. *Campbell* v. *Thompson*, 2 Hare 140; 7 Jur. 59.

14. A contract for the sale of chattels to the plaintiff contained an express negative stipulation not to sell to any other manufacturer. The Court granted an injunction to restrain the breach of the negative stipulation, although the contract was one of which specific performance would not have been granted. *Wolverhampton & Walsall Railway Co.* v. *London & North-Western Railway Co.* (16 L. R., Eq., 433) considered. *Donnell* v. *Bennett*, 22 L. R., Ch. D., 835; 52 L. J., Ch., 414; 48 L. T. 68; 31 W. R. 316.

See also BANKRUPTCY, XVII. xliii. 1—SPECIFIC PERFORMANCE.

III. RIGHTS OF UNPAID VENDOR.

1. *Lien*, 6117.
2. *Stoppage in Transitu.* See STOPPAGE IN TRANSITU.

1. Lien.

1. A quantity of tea is sold at a price which is to be paid at a future day. After the day has elapsed, the purchaser pays a sum on account, and writes to the vendors, who have retained the warrants in their possession, requesting them to wait the arrival of the overland mail, and on its receipt to dispose of the tea. He afterwards becomes bankrupt:—Held, that the vendors have a lien on the tea for the unpaid purchase money. *Exp. Twining, Re Coles*, 1 M. D. & De G. 691; 10 L. J., N. S., Bky., 60.; 5 Jur. 536.

2. The lien at law upon a chattel for a portion of the price unpaid confers no right of sale upon the person having such lien, although the retention of the chattel may be attended with expense. *Thames Ironworks Co.* v. *Patent Derrick Co.*, 1 John. & H. 93; 6 Jur., N. S., 1013; 29 L. J., Ch., 714.

Pursuant to an agreement, A. built a vessel for B., but had not delivered up possession, as a balance remained due from B. An action was brought to recover this balance, and a judge's order was made by consent, staying all further proceedings; A. being at liberty to sign judgment for the amount claimed, but not to issue execution unless B. should make default in paying the debt by instalments. In case of default, A. to be at liberty to issue execution; the order not to prejudice his lien as builder. Default was made in payment of a first instalment. A. filed a bill, alleging that his possession of the vessel was attended with great expense, and seeking to enforce his lien by a sale, and satisfy the debt out of the proceeds:—Held, that the lien of A. gave no right of sale, and that the Court would not assume jurisdiction to grant the relief prayed, either by directing a sale or specific performance of the order of a court of competent jurisdiction. *Ib.*

3. B. & Co. sold some iron rails to a company by a written contract, stipulating that payment should be made by buyers' acceptances of sellers' drafts against inspector's certificate of approval and wharfinger's certificate of each 500 tons being stacked ready for shipment. As the wharfinger's certificates were delivered the company accepted the drafts of B. & Co., according to the contract, which B. & Co. negotiated; but the rails remained in B. & Co.'s possession. The plaintiff advanced money to the company on the security of some of the wharfinger's certificates which were handed over to him with a written memorandum. The company became insolvent, and their acceptances were consequently not paid. The plaintiff filed a bill against B. & Co. and the receiver of the estate of the company, claiming a lien on the rails in the hands of B. & Co. in priority to their lien as vendors. The bill alleged that according to the custom of the iron trade the wharfinger's certificates were in fact warrants. The plaintiff having moved for an injunction to restrain B. & Co. from parting with the rails or with the money which they might receive in respect of them, the Vice-Chancellor ordered B. & Co. to pay the value of the rails into court, to be kept *in medio* till the decision of the case:—Held, first, that the giving of the acceptances in pursuance of the contract was not an absolute payment, but conditional on the acceptances being met; that upon the insolvency of the acceptors the vendors' lien on the goods revived; and that the fact of the vendors having negotiated the bills made no difference. *Gunn* v. *Bolckow, Vaughan, & Co.*, 10 L. R., Ch., 491; 44 L. J., Ch., 732; 32 L. T., N. S., 781; 23 W. R. 739.

Held, secondly, that the wharfinger's certificates were not documents of title, and their delivery passed no right to the goods; and that no custom of trade could give them the effect of warrants or documents of title as against the vendors. *Ib.*

4. By the usage of the iron trade warrants for goods "deliverable (f. o. b.) to A. B., or their assigns, by indorsement hereon," are considered to pass to the holders for value free from any vendor's lien. *Merchant Banking Company of London* v. *Phœnix Bessemer Steel Co.*, 5 L. R., Ch. D., 205; 46 L. J., Ch., 418; 25 W. R. 457; 36 L. T., N. S., 395.

A company, being manufacturers of steel rails, contracted with S. & Co., iron merchants, for the sale of a quantity of rails to be rolled at their works, and to be delivered at intervals, payment to be made as to three-fifths at three days' sight, and as to two-fifths by buyers' acceptances at four months. On the completion of each portion of goods a warrant for the same in the above form was sent to S. & Co., with an invoice and drafts for the purchase money, and the goods referred to in the warrants were stacked at the works. In the meantime S. & Co. pledged the several warrants, and indorsed the same to the plaintiffs. Before the contract was completed, when only part of the goods was paid for, S. & Co. became bankrupt, and their acceptances were dishonoured. At that time part of the goods had been dispatched in waggons sent by order of S. & Co., and was stored in a railway company's warehouse, addressed to the agents of S. & Co., and part remained stacked at the works:—Held, that, by the usage of the iron trade, as well as by the intention of the parties as shown by their course of dealing, the plaintiffs, as holders for value of the warrants, were entitled to the goods free from any vendor's lien. *Ib.*

Held, also, that even had the vendors been able to claim a lien on the undelivered goods, the transit was at an end as regarded those stored in the warehouse, and their right was gone. *Ib.*

Held, also, that the contract was apportionable, and that the vendors could not in any event have claimed any lien on that portion of the goods which had been fully paid for. *Ib.*

5. On the 3rd March goods belonging to C., lying at the St. Katharine Dock, in the custody of the Docks Company, were bought by D., as broker for buyers and sellers, for B. & Co., without disclosing the names of his principals, and D. indorsed to them the delivery order he had obtained from the sellers, on the representation of B. & Co. that the goods were wanted for immediate shipment. They, however, pledged their interest in the goods to the

plaintiffs, and indorsed the order to them. On the prompt day, the 18th of March, the plaintiffs' clerk lodged the order at the London office of the Docks Company, with this memorandum, "Hold within to our order, and have warrants made out as soon as possible." He was told that the warrants would be ready with the goods on the 20th March. Three hours later a messenger from the office reached the warrant office at the Dock House with a notice that the order had been lodged. Meanwhile B. & Co. had stopped payment, and D. being so informed, and having no notice of the plaintiffs' title, on the same day paid C. for the goods, and through a clerk, who reached the Dock House before the messenger had arrived, obtained at the warrant office a warrant for the goods in the name of C., who indorsed the same to D., and gave him a second delivery order. The first delivery order was returned to the plaintiffs by the Docks Company, who refused to act upon it. In an action by the plaintiffs, claiming, as against the Docks Company, C., and D., to be entitled to the goods:—Held, that D. was the surety and B. & Co. the principal debtors; that, in the circumstances of the case, the unpaid vendors' lien had passed to D.; that the title to the goods was in D. *Imperial Bank* v. *London and St. Katharine Docks Co.*, 5 L. R., Ch. D., 195; 36 L. T., N. S., 233.

1. Unless actual possession of goods sold has been delivered to the purchaser, the vendor is not deprived of his right of lien as against the assignees of the purchaser, in the event of his insolvency. *Grice* v. *Richardson*, 3 L. R., App. Cas., 319; 47 L. J., P. C., 48; 26 W. R. 358; 37 L. T., N. S., 677.

An indorsement on warehouse certificates by the vendor's clerk, making the goods deliverable to the purchaser's order, and entered in the transfer book, is not such a constructive delivery as would defeat the vendor's right. *Ib.*

When the vendors were also warehousemen of the goods sold, under an arrangement with the purchasers to pay warehouse rent:—Held, that, as the goods remained in the possession of the vendors and no actual delivery had been made to the purchasers, the vendors' lien revived upon the insolvency of the vendees. *Ib.*

SALES BY THE COURT.

See BANKRUPTCY—EXECUTOR AND ADMINISTRATOR, XXIII.—MORTGAGE, XV.—VENDOR AND PURCHASER.

SALMON.

See FISH AND FISHERY, II.

SALVAGE.

See SHIPPING.

SATISFACTION AND PERFORMANCE.

— *Of Contracts by Payment of Penalty.* See PENALTY, III.
— *Of Covenants to Settle.* See SETTLEMENT, VI.
— *Satisfaction of Portion by Legacy, and Ademption of Legacy by Portion.* See PORTION, XI.
— *Satisfaction of Debt by Legacy to Creditor.* See LEGACY, V.
— *Set-off of Legacy to Debtor.* See LEGACY, VI.
— *Advances and Debts between Parent and Child.* See PARENT AND CHILD.
— *Annuities or Legacies, whether Cumulative or Substitutional.* See ANNUITY, X. 2—LEGACY, IV.
— *Dower when Barred.* See DOWER, IV.
— *Of Distributive Share.* See DISTRIBUTION OF ESTATE, III. iii.
— *Of Custom of London.* See DISTRIBUTION OF ESTATE, I. vi.
— *Of Judgment.* See JUDGMENT, XIII.
— *By Payment.* See PAYMENT AND OTHER SPECIFIC TITLES.

See also ACCORD AND SATISFACTION.

SATISFIED TERMS.

See TERMS.

SAVINGS BANK.

— *Claims in Bankruptcy.* See BANKRUPTCY, XXV. vii.

Rules.] 2. The certificate of the barrister appointed under the provisions of 9 Geo. 4, c. 92, that the rules of a savings bank are in conformity with the Act, is not conclusive. *Exp. Haynes, Re Clarke*, 3 M. D. & De G. 663; 13 L. J., Bky., 12; 8 Jur. 791.

What is a sufficient compliance with 9 Geo. 4, c. 92, s. 6, providing that no savings bank shall have the benefit of the Act, unless its rules provide that no person, being treasurer, trustee, or manager of such institution, or having any control in the management thereof, shall derive any benefit from the deposits in the bank except as in the Act mentioned. *Ib.*

3. Before the passing of 9 Geo. 4, c. 92, the surplus money in savings banks, after payment of expenses and interests on deposits, was divisible among the depositors. By s. 22 of that Act, it was provided that within six weeks of the 20th November 1828 the trustees should ascertain the amount of the increased fund to that date, and, after retaining enough for future management, should appropriate the surplus in the manner provided by their rules and regulations made before the passing of the Act; or, in the event of no such provision being made, in such manner as the trustees, at a general meeting to be convened according to their rules,

should think proper. The rules of the Arundel Savings Bank provided that no trustee, or any person having any control in the management of the institution, except the actuary, should derive any benefit from any deposit made therein:—Held, that an appropriation of part of such surplus to repairs of a bridge, to which the trustees were liable to be rated, was, by the joint effect of the rules and s. 22 of the Act, illegal. Whether, in the absence of any restriction by the rules, such an appropriation would, in the case of any savings bank established before the 9 Geo. 4, c. 92, be proper, *quære*. *Holmes* v. *Henty*, 10 Bli. N. S. 255; 4 Cl. & F. 99.

Deposits.] 1. A testator, under s. 23 of the Savings Bank Act 9 Geo. 4, c. 92, made deposits in the names of himself and his sisters, but he did not communicate to them the fact of such deposits being made:—Held, that a trust was not thereby created for the benefit of the sisters, the testator's object being, in the opinion of the Court, merely to evade the provisions of the Act. *Field* v. *Lonsdale*, 13 Beav. 78; 19 L. J., Ch., 560; 14 Jur. 995.

2. A depositor in a savings' bank cannot maintain a suit in a court of equity against the trustees; the 9 Geo. 4, c. 92, s. 45, having established arbitration as the only mode of proceeding in disputes between depositors and the institution. *Cooke* v. *Courtown* (*Lord*), 6 Ir. Eq. R. 266.

A suit at law and not in equity would, but for the statute, be the proper remedy. *Ib.*

Debt due from Treasurer.] 3. Under the Act 3 Will. 4, c. 14, s. 28, the Court will, on petition, order payment of a debt due to a savings bank, from the treasurer of such savings bank, out of the first moneys to be received, before any report made, in a suit for the administration of the estate of such treasurer; but the Court will not make any order for the payment of the costs of the petition. *Hatch* v. *Lee*, 10 L. J., N. S., Ch., 223.

Winding up.] 4. A company, called a savings bank, was formed with limited liability and registered under the Act 1856, the objects being to receive deposits, grant loans on security, and to conduct emigration agencies, with a capital divided in shares of 1*l.* each. An order to wind up was made in bankruptcy, and afterwards a petition to wind up in chancery was presented, on the ground that the company was not a banking company, and therefore that there was no jurisdiction to wind up in bankruptcy; and it being proved that the company was not registered under either of the Banking Acts 1857 and 1858; that money could not be withdrawn except upon a stated period of notice; that cheques could not be drawn in the ordinary form; and that the company itself kept an account with a banking house:—Held, before the passing of the 25 & 26 Vict., c. 89, that the company was not a banking company, and that being a company of limited liability registered under the Act of 1856, it must be wound up as directed by that statute in the Court of Bankruptcy. *Exp. Coe, Re District Savings Bank*, 31 L. J., Bky., 8; 5 L. T., N. S., 566; 10 W. R. 138; 3 De G. F. & J. 335.

SCANDAL.

See PRACTICE (SCANDAL, PROLIXITY, AND IMPERTINENCE).

SCHEDULE.

— *Of Creditors.* See BANKRUPTCY—CREDITOR'S TRUST DEEDS.
— *Of Documents.* See PRACTICE (ANSWER)—PRACTICE (DISCOVERY, PRODUCTION, AND INSPECTION).

SCHEME.

See CHARITY.

SCHOOL.

— *Election and Dismissal of Schoolmaster.* See CHARITY, IX. 1. 4.
— *Endowed Schools.* See CHARITY, IX. 1. 9.
See also CHARITY, IX.

SCHOOL BOARD.

See LANDS CLAUSES ACT, VI. 11.

Returning Officer at Election of School Boards.] 5. Though it is not necessary that the person employed as returning officer at the first election of a school board should be a solicitor, nevertheless if he is so, the board, which is directed to pay his expenses, may have his bill taxed. *Re Jones*, 41 L. J., Ch., 367; 13 L. R., Eq., 336; 20 W. R. 395.

Power of School Board to take Lands.] 6. A school board taking lands under the Elementary Education Act 1870, need not give notice to treat to the owners of easements over the land taken; but compensation in respect of such easements is to be given as for lands injuriously affected. *Clark* v. *London School Board*, 9 L. R., Ch., 120; 43 L. J., Ch., 421; 22 W. R. 354; 29 L. T., N. S., 903.

The School Board for London, under the compulsory powers conferred on it by the Elementary Education Act 1870 (33 & 34 Vict., c. 75), having acquired the freehold interest in a piece of land, was proceeding to build a school upon it. The plaintiff was lessee of some adjoining houses, the windows of which were ancient lights, and the board had not acquired his interest in the houses:—Held, that his remedy was not for compensation alone, under the Lands Clauses Act 1845, and an injunction was granted, restraining the Board from continuing the building until it had acquired the plaintiff's interest in the houses. S. C. 21 W. R. 723.

1. A school board served on R. the customary notice to treat for land belonging to him, all the requisite preliminaries required by the Elementary Education Act 1870 having previously been complied with. Prior, however, to the service of such notice to treat and to the passing of the Confirmation Act as required by the above Act, the board had entertained and adopted, subject to the sanction of the Education Department, a proposal from one B., a neighbouring landowner, for exchanging a portion of the land to be acquired by the board from R. for a piece of B.'s land, he undertaking to form the land so to be conveyed to him by the board into a public road. There was evidence to show that such road, when made, would be advantageous to the school intended to be erected:—Held, on motion by R. for an injunction to restrain the board from putting in force their statutory powers with respect to so much of the land comprised in the notice to treat as they proposed to convey to B., that the board were justified in the course they had taken, and could, if they obtained the sanction of the Education Department, carry out the proposal. *Rolls* v. *London School Board*, 27 L. R., Ch. D., 639; 51 L. T. 567; 33 W. R. 129.

Transfer of Schools to School Board.] 2. By two deeds, made in 1838 and 1849, the two joint rectors of a parish were appointed trustees of a Church of England school. In 1871, it having become necessary to appoint a new master, the rectors could not concur in any appointment, and the school was closed. A school board having been elected in the district, it was then proposed that the school should be transferred to the board under the Education Act of 1870, s. 23, which requires a majority of two-thirds of the trustees to effect such a transfer. With this view a memorial was presented to the charity commissioners, asking them to appoint three additional trustees, so that the requisite majority might be obtained. This course was opposed by one and supported by the other of the two joint rectors. The commissioners, however, made an order appointing three additional trustees, all of whom were churchmen, one of them being chairman of the school board. On a petition by the opposing rector, by way of appeal from the order, praying for the discharge of the order:—Held, that it is no objection to such an order, notwithstanding the Charitable Trusts Act 1860, s. 5, that the commissioners have made it on an application of a contentious character. *Exp. Bates, Re Burnham National Schools*, 29 L. T., N. S., 495; 17 L. R., Eq., 241; 43 L. J., Ch., 340; 22 W. R. 198.

The Charitable Trusts Act 1853, ss. 28, 32, gives the jurisdiction to appoint trustees to the Master of the Rolls and the Vice-Chancellors in cases in which it was previously necessary to file an information, bill, or petition, and by the Act of 1860 this jurisdiction is transferred to the charity commission:—Held, that the power to appoint additional trustees is clear under the ordinary jurisdiction of the Court of Chancery; that s. 32 of the Trustee Act 1850 gives a statutory power for that purpose, and therefore that such a power is vested in the commissioners. *Ib.*

The majority of two-thirds of the school trustees required by the Education Act anticipates any objection to the transfer of a school whose trustees are required to be churchmen. *Ib.*

The Court will not, upon appeal, interfere with the exercise of discretion by the commissioners, except in a very strong case of miscarriage of justice, and such discretion is properly exercised in a case where, in consequence of differences between the existing trustees, the school is closed, and education denied to the children of the district. *Ib.*

3. In the case of a school established by and united with the National Society, on the express condition that the children attending it were to be instructed in the Holy Scriptures, and in the Liturgy and Catechism of the Church of England, the instrument declaring the trusts of the school, providing that the school was to be always in union with, and conducted according to the principles of, and in furtherance of the ends and designs of, the National Society, but containing no provision whatever for its alienation. The managers of the school having, under the Elementary Education Act 1870, s. 23, entered into arrangements for the transfer of the school to a school board, the society appeared before the Education Department under the provisions of that section, and objected to the transfer on the ground that if it were effected, the children, under s. 14, could not be educated in the principles of the society. The department, however, overruled the objection, and the transfer was executed. Upon a bill filed by the society to set aside the transfer:—Held, that the consent of the National Society was not required to a transfer of the school to a school board, under the Elementary Education Act 1870, s. 23; and that the proper mode for the society to give effect to any objections to a transfer was by appealing before the Education Department; and that, having appeared before the Education Department and urged their objections to the transfer, the society had no further power of opposing it. *National Society* v. *School Board for London, Att.-Gen.* v. *English*, 44 L. J., Ch., 229; 18 L. R., Eq., 608; 23 W. R. 2; 31 L. T., N. S., 22.

4. *Semble*, in settling a scheme for the regulation of the funds of a charity school on its transfer to a school board, care should be taken to provide that the funds shall be applied for the advancement of learning in the school, as, for instance, by establishing exhibitions or scholarships, and not for the general purposes of the school, which would have the effect of a grant in aid of the local rates. *Re Poplar and Blackwall Free School*, 8 L. R., Ch. D., 553; 39 L. T., N. S., 88; 26 W. R. 827.

5. By the terms of a scheme, approved in 1852, for appropriation of the increased revenues of a charity estate originally applicable to the relief of the poor, it was provided that a sum of 90*l.* should be paid by the charity trustees to the treasurer of a school association in aid of the expenses of a school in Flint Street, Walworth, "or any other school that may be established in its stead," provided that no sum should be paid to any denominational school; and that if such school should "become materially altered in discipline, number of children, or other circumstance," then the

90*l.* should, in the discretion of the trustees, be applied for educational purposes amongst other schools of a similar character in the parish. A transfer of the Flint Street school and its endowment having been made by the managers to the School Board for London:—Held, that the Flint Street school had not by the fact of such transfer become "materially altered in discipline, number of children, or other circumstance"; and that the trustees were bound to pay the endowment of 90*l.* a year to the School Board. *London School Board* v. *Faulconer*, 8 L. R., Ch. D., 571; 38 L. T., N. S., 636; 26 W. R. 652; 48 L. J., Ch., 41.

SCIRE FACIAS.

— *Against Shareholder of a Company.* See COMPANY, XV. XI.

— *To Repeal Letters Patent.* See PATENT.

See also JUDGMENT—PRACTICE (SCIRE FACIAS)—RECOGNISANCE.

SCOTLAND.

— *Private International Law and Conflict of Laws.* See FOREIGNER AND FOREIGN LAW, V.

— *Restraining Proceedings in Scotch Courts.* See FOREIGNER AND FOREIGN LAW, II. 11.

— *Service of Process in.* See PRACTICE (SERVICE).

— *Salmon Fishery in.* See FISH AND FISHERY, II.

— *Acquisition of Land in, for Charitable Purposes.* See CHARITY, V. X. 5.

— *Validity of Gifts for Charity in.* See CHARITY, IV. V. 3.

— *Scotch Marriage, Validity of.* See FOREIGNER AND FOREIGN LAW, V. II. 1.

— *Bankruptcy in.* See BANKRUPTCY, XXXVIII.

— *Ascertainment of Law of Scotland.* See PRACTICE (EVIDENCE).

See also JURISDICTION—LAKE—SEA AND SEASHORE.

I. JURISDICTION OF ENGLISH COURTS, 6121.
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I. JURISDICTION OF ENGLISH COURTS.

1. Scotland out of jurisdiction of Court. *Stevenson* v. *Anderson*, 2 Ves. & B. 407.

2. Scotland is out of jurisdiction of Court, and therefore witness going there may be examined *de bene esse*. *Botts* v. *Verelst*, Dick 454.

3. Though England and Scotland be now one kingdom, yet the writ of *ne exeat regno* has not been altered since the union. It was originally a state writ. *Quære*, whether in the common form, and security given thereupon, it can restrain the party from going into Scotland. *Hunter* v. *Macoray*, Forrest 196. See also *Anon.*, 2 Salk. 702; 1 P. W. 263.

See also FOREIGNER AND FOREIGN LAW—PRACTICE (SERVICE).

II. COURTS AND PROCEDURE.

Jurisdiction.] 4. The Court of Session is a court of law and equity. *Kennedy* v. *Cassilis* (*Earl*), 2 Swan. 321.

5. The Court of Session has no power to alter, vary, or discharge any order of the Court of Chancery made under the jurisdiction of the Great Seal, which is as much the Great Seal of Scotland as of England. *Bute* (*Marquis*) v. *Stuart*, 2 Giff. 582. Affirmed 4 Macq. H. L. Ca. 1; 7 Jur., N. S., 1129; 9 W. R. 722; 4 L. T., N. S., 182.

6. If a justice has jurisdiction under 7 & 8 Geo. 4, c. 53, s. 79, the Court of Session cannot issue a suspension; but if the justice has not jurisdiction, the Court of Session may interpose. *Evans* v. *M'Loughlan*, 4 Macq. H. L. Ca. 89; 7 Jur., N. S., 1253.

Over Non-Residents.] 7. When a foreigner is actually out of Scotland, having at the time no property in that country, a Scotch creditor must proceed against him in the foreign jurisdiction, according to the universal maxim, *actor sequitur forum rei*. *London & North Western Railway Co.* v. *Lindsay*, 3 Macq. H. L. Ca. 99; 4 Jur., N. S., 343; 6 W. R. 396.

But if the foreigner is the owner of land or heritable property in Scotland, the Scotch Court will entertain jurisdiction over him in respect of that land. Or if the foreigner has even movable or personal effects in Scotland; or if there is a debt owing to him in Scotland, an arrestment may be *ad fundandam jurisdictionem*, upon which the Scotch Court will proceed against such foreigner, though absent. *Ib.*

A., who was domiciled in Scotland, having a cause of action, which arose in England, against an English railway company, for the purpose of having the question tried in Scotland, arrested or attached the debts belonging to the company, *jurisdictionis fundandæ causa*:—Held, that the courts of Scotland had jurisdiction to try the action. *Ib.*

8. A Scotchman, by a testamentary instrument in the Scotch form, bequeathed all his personal estate to trustees in trust to pay legacies and annuities, and the income of the surplus to A. for life, and on A.'s death to invest the capital in the purchase of lands in Scotland. The trustees named in the will having disclaimed, the Court of Sessions appointed new trustees, who, as well as A. and several of the legatees and annuitants, were resident in Scotland. A. administered to the testator's estate in England, and filed a bill in Chancery against the trustees for the usua

accounts of the testator's estate possessed by them, and to have the residue ascertained and secured. The trustees filed a cross bill for an account of the testator's estate in England possessed by A., and to have the residue ascertained and paid over to them upon the trusts of the will. The Court refused to relinquish its jurisdiction over the fund in A.'s hands, and directed it to be paid into court and to be invested in consols, and the dividends to be paid to A. for life. *Preston* v. *Melville*, 15 Sim. 35.

Quære, whether the Court of Sessions has the power of appointing trustees where the trustees appointed by the author of the trust disposition decline to act. S. C. 8 Cl. & F. 16.

Interdict.] 1. The register of protests for non-acceptance and non-payment of bills of exchange and promissory notes, established by the Scotch Acts of 1681 and 1696, and the 12 Geo. 3, c. 72, and 23 Geo. 3, c. 18, is a public document, to which everybody has a right of access, and the publication of which in a printed paper does not constitute a libellous publication. A person, whose name was upon this register, applied to the Court of Session for an interim interdict to prevent, so far as his own name was concerned, the publication of a copy of the register. The Court decreed for the application:—Held, by the Lords, reversing that decree, that the interdict ought not to have been granted, and also that the costs in the Court below should be given. An interdict, though in form *ad interim* only, must be treated as a final judgment, and may be the subject of appeal to this house. *Fleming* v. *Newton*, 1 H. L. Ca. 363.

2. A superior court, having equitable jurisdiction, has a discretion in exceptional cases to withhold from parties applying for it that remedy to which, in ordinary circumstances, they would be entitled as a matter of course. But to justify the exercise of such a discresionary power, there must be some very cogent reason. A. suing, not as owner of the soil, nor as the proprietor of a dominant tenement, but as one of the community, applied for suspension and interdict on the 4th May 1878, against magistrates of a burgh, who were also police commissioners, building municipal stables on a piece of ground vested in them for the common use and enjoyment of the community. No interim interdict was granted, and the magistrates, who had accepted contracts for the work, went on building, and before the interdict sought was granted, on the 19th June 1879, the stables were completed at a cost to the community of about 1,900*l*. Thereupon in March 1880 A. raised this action, concluding for, *inter alia*, a declaration that the ground in question was vested in the magistrates in perpetuity for the use and enjoyment of the inhabitants, and that they had no right as police commissioners to build thereon; and that they ought to be ordered to remove the stables. The magistrates offered to dedicate to the use of the inhabitants in lieu of the site of the stables another piece of ground which they had acquired by feu charter dated December 1880:—Held, that in the peculiar circumstances of this case, and on the considerations (1) that the community of the burgh had an interest on both sides of the present litigation; and (2) that the tender of a substituted piece of ground was *res novitor*, affecting the relations of the parties which had emerged since the date of the final judgment of interdict, it was not too late for the Court to exercise its discretionary power, and to refuse the remedy which A. asked, so far as the removal of the stables was demanded. *Grahame* v. *Swan*, 7 L. R., App. Cas. (Sc.), 547.

Held, also, that A. was entitled to a declaratory decree affirming the right of the community in the ground in question; to the action being kept in court until the substituted ground had been dedicated in perpetuity to the uses of the inhabitants; and his action being necessary for the vindication of the community's rights, he was entitled to his whole expenses in the Court below and in this house. *Ib.*

Semble, were A. seeking to enforce the decree which he holds in his own private right and interest, the considerations of inconvenience and pecuniary loss, arising from the position in which the magistrates have placed themselves by their own acts, would not afford a relevant answer to his demand in the present action. *Macnair* v. *Cathcart* (Morr. Dic. 12,832), *Sanderson* v. *Geddes* (1 Court Sess. Car. 4th Series, 1198), *Begg* v. *Jack* (3 Court Sess. Cas. 4th Series, 35), approved, as authorities in favour of the equitable jurisdiction of the Court; but see Lord Watson as to his disapproval of the result at which the Court arrived in *Begg* v. *Jack*. *Ib.*

Interpleader.] 3. Where conflicting claims to a fund in medio have been settled by a decree of preference, a new claimant was only allowed to intervene upon payment of half the costs incurred by the parties declared by the decree to be entitled to the fund. *Geikie* v. *Morris*, 4 Jur., N. S., 1157; 6 W. R. 723.

A claimant may, however, intervene at any time while the fund is in medio, and before the decree of preference is pronounced. *Ib.*

A fund is in medio in a suit while there are conflicting claims against it. *Ib.*

The English analogy of a new claimant seeking to come in after a decree to distribute property has been made in an interpleader suit, stated and applied. *Ib.*

Evidence.] 4. In an action by a customer against his banker for a balance appearing by the pass-book, evidence *prout de jure*, showing error or mistake, is admissible *ope exceptionis* as a defence. *Commercial Bank of Scotland* v. *Rhind*, 3 Macq. H. L. Ca. 643.

A banker's pass-book is not within the category of probative writs under the Act 1681, s. 650. *Ib.*

5. Under the 1 Geo. 4, c. 120, s. 40, the judges of the Court of Sessions, in reviewing decisions of inferior courts, upon proof are not required to do more than to specify the facts which they find to be established, and to express how far their judgment goes on those facts, or on matters of law. *Anderson* v. *Gill*, 3 Macq. H. L. Ca. 180.

Where a document is, during the entire course of the proceedings, in the possession of a party, or of his agent, he must found upon

it before the proof has been completed; otherwise he cannot afterwards make use of it, except on special leave obtained from the Court. *Ib.*

Where *res noviter veniens ad notitiam* arises after the proof has been completed, the Court should be applied to for leave to establish the new matter by proof. If such leave is not applied for and obtained, the *res noviter veniens* will be excluded. *Ib.*

Privileged Documents.] 1. The rule as to privileged communications between an English solicitor and his client, applies equally to a Scotch solicitor resident in England, not being admitted in England, and his client in Scotland. *Lawrence* v. *Campbell*, 4 Drew. 485; 5 Jur., N. S., 1071; 28 L. J., Ch., 780.

2. Circumstances under which documents which had been prepared with a view to an action were deemed to be of a confidential nature, and so not liable to production at the requisition of the other party, and this confidentiality held to protect not only the writer to the signet who had conducted the legal proceedings, but also a mining engineer employed in the business. *Bargaddie Coal Co.* v. *Wark*, 3 Macq. H. L. Ca. 467.

These documents clearly may be privileged as having been written with a view to the information of the defendant under instructions of counsel previously to raising an action, just in the same way as a brief prepared for a trial or a case for counsel's opinion would be privileged. *Ib.*

Parties.] 3. Persons who have no title in their own persons to raise and insist in an action, cannot have the right to sue, where nil, validated by the consent and concurrence of the party to whom alone such right or title of action belongs. B. and C., owners of an adjoining feu, raised an action with "consent and concurrence" of the common superior to enforce building restrictions contained in A.'s feu contract:—Held, that B. and C. were strangers to the action, and therefore had no title to sue. *Hislop* v. *Leckie*, 6 L. R., App. Cas. (Sc.), 560.

See remarks of Lord Watson as to the question of the importation of new parties into the suit under s. 29 of the Court of Session Act 1868 (31 & 32 Vict. c. 100). *Ib.*

4. Upon a decree of p'eference in a multiplepoinding parties seeking subsequently to intervene as new claimants in the suit may be put on terms, and subjected to the condition of paying a reasonable proportion of the prior costs. *Geikie* v. *Morris*, 3 Macq. H. L. Ca. 347.

Pleading.] 5. A sheriff substitute ordered a passage in certain pleadings drawn by a practitioner in his court to be struck out. He refused. The sheriff substitute suspended him for a month. The practitioner's action for damages held to be unsustainable. *Hamilton* v. *Anderson*, 3 Macq. H. L. Ca. 363.

To support an action under such circumstances against a judge, express malice must be alleged, not malice involved in the act, or to be inferred from it. *Ib.*

The dignity of the judicial office is not promoted by a too captious exercise of judicial power. Thus, a judge may well abstain from severity, when a practitioner improperly avers in his pleading that an interdict has been granted "without hearing the other side." *Ib.*

The judge may order the pleading to be reformed under 16 & 17 Vict., c. 80, s. 1, and if his order is not obeyed, the judge may himself expunge the offensive passage, for he is authorised "to strike out of the record any matter which he may deem irrelevant or unnecessary." *Ib.*

6. What is stated in a summons is the basis of the action, and what is averred subsequently is but matter of illustration, unless on a special application leave is given by the Court to vary the substance of the allegations. *M'Ewen* v. *Campbell*, 2 Macq. H. L. Ca. 499.

The condescendence and pleas in law are, under the 13 & 14 Vict., c. 36, held to constitute part of the summons. *Ib.*

Appeal and New Trial.] 7. Competency of appeal under 48 Geo. 3, c. 151, s. 15, and 55 Geo. 3, c. 42, s. 4. *Scots Mines Co.* v. *Leadhills Mining Co.*, 3 Macq. H. L. Ca. 743.

8. Under a remit, the second division of the Court of Session having attempted to amend a verdict so as to render it unambiguous, the House of Lords:—Held, that the amendment was *ultra vires* of the Court; that even if the amendment had been *ultra vires*, it was ineffectual; and that there must be a new trial. *Morgan* v. *Morris*, 3 Macq. H. L. Ca. 323.

9. The 40th section of the Judicature Act of Scotland 1825 enacts, *inter alia*, that the judgment in cases commenced in the sheriff's court shall be subject to appeal to the House of Lords only, so far as the same depends on, or is affected by, matters of law; but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor. In appeals falling within the scope of this section, the House of Lords has no concern with the proof which has been led in the sheriff's court. When it can be shown that the Court of Session has not exhausted the issue before it, and that there are material questions of fact left undetermined, a remit will be made to the Court below to pronounce findings upon these questions, but that can only be shown by a reference to the record, and not to the proof. And if the questions are not raised by the record, no remit will be made. *Mackay* v. *Dick*, 6 L. R., App. Cas. (Sc.), 251.

10. On an appeal from several interlocutors of the Court of Session, the appeal against two being technically incompetent, but a final interlocutor pronouncing a judgment in point of law within the provisions of the 9th section of 55 Geo. 3, c. 42:—Held, that the validity of the appeal in the final interlocutor opened up the whole case. *Bartonshill Coal Co.* v. *Stewart* or *McGuire*, 6 W. R. 697. See also *Bartonshill Coal Co.* v. *Clark* or *Reid*, 6 W. R. 664.

11. The 40th section of 6 Geo. 4, c. 120, provides, "When in causes commenced in any of the courts of the sheriffs, or of the magistrates of burghs, or other inferior courts, matters of fact shall be disputed, and a proof shall be

allowed and taken according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matters of fact so found, or on matter of law, and the several points of law which they mean to decide; and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords, in so far only as the same depends on or is affected by matter of law." A. raised an action in the sheriff's court against B. for 50*l*., the sum payable by him as underwriter on a policy of insurance on A.'s vessel, the *Krishna*. On the 23rd May the vessel was driven on a sandy beach on the West coast of India, during a violent storm. Soon afterwards the usual monsoon commenced, and lasted till October. On the 7th June A., on hearing from the master that it was impossible to save the ship, gave notice of abandonment to the underwriters; which they refused to accept. On the 1st October A. raised this action, averring that the vessel had become a wreck; and in his amended pleadings he set out that the underwriters had taken possession of the vessel on the 15th October, had floated her on the 16th November, and taken her to Bombay, and had docked her and executed certain repairs, and that thus the underwriters had accepted the abandonment. The underwriters alleged that they only took possession of the vessel as salvors, that no repairs were done except for the safety of the ship, and that A. was informed of all they were doing, and to the last it was intimated to A. that the vessel was lying at Bombay at his risk. The Court of Session found, *inter alia*, "that the underwriters had not accepted the abandonment; that there was on the 7th June and continued thereafter to be a reasonable prospect of the ship being got off the sandy shore on which she lay without greater expense than a prudent uninsured owner would reasonably incur;" therefore, that there was not at that date a constructive total loss of the ship. A. contended on the question of the competency of his appeal, (1) that the finding that the underwriters did not accept the abandonment was a matter of mixed law and fact; (2) that the findings of fact were incomplete, and ought to be rectified on remit:—Held, apply the rule of *Mackay* v. [*Dick* 6 L. R., App. Cas. (Sc.), 251], that the Court had decided the issue submitted to them, an issue of fact and not of law; namely, that the underwriters did not accept the abandonment, and accordingly their finding was not open to impeachment under s. 40 of 6 Geo. 4, c. 120; and (2), that looking at the controversy raised by the record, the findings in fact were reasonably complete. *Shepherd* v. *Henderson*, 7 L. R., App. Cas. (Sc.), 49.

III. CONTRACTS.

1. By the law of Scotland, a written agreement cannot be waived or varied by words only. *Bargaddie Coal Co.* v. *Wark*, 3 Macq. H. L. Ca. 467.

But if a parol agreement there occurs, what the law calls *rei interventus*, that is, if acts and circumstances follow upon the agreement in performance of it, the agreement will in that case be as binding as if it had been originally in writing. *Ib.*

2. Tenants of quarries situated about three miles from their works, who were accustomed to convey the stones from the quarries to the works by carts, entered into an agreement with their landlord to construct a tramway from the quarry to the works, to run, *inter alia*, "by the end of the policy" of the landlord: and they further agreed to compensate the farm tenants along the line for any damage done to their farms during the currency of their leases. The landlord agreed, *inter alia*, to give gratuitously the land required for the tramway. Outside the policy ground there was a private road, the property of the landlord, which, before it reached the tenants works, ran through another tenant's stone-pavement yard. This was the only practical route outside the policy for the tramway; and it was alleged that the only obstacle to laying it along that road was, that the other tenant might refuse to allow it being laid on that part passing through his yard, but for this there were no *termini habiles*. The tenants claimed that the landlord was bound to give them the use and possession of land for the purpose of the tramway, and that either (1) "within and by the end of the policy," or (2) "in any other place as suitable and convenient for them in every respect":—Held, that under the agreement the stipulation was that the tramway should pass outside the walls which enclose the policy of the landlord; and that, by agreeing to give gratuitously the lands required, the landlord merely undertook to give the tenants such rights as were vested in him, leaving them (with the power to use his name) to settle with any persons who might have a right or interest entitling them to object to the formation of the tramway. *Sinclair* v. *Caithness Flagstone Quarrying Co.*, 6 L. R., App. Cas. (Sc.), 340.

A landlord entered into an agreement with a tenant, the terms of which were dictated by the landlord to a person who acted as his factor. The agreement was then handed unsigned to the tenant, who was present. The factor's name did not appear in the agreement, nor had he any authority to make the agreement for the landlord. Subsequently, the tenant resiled from the agreement:—Held, that the writing was not a valid holograph writ, and therefore the tenant could resile from it. *Ib.*

Quære, whether the document would be valid, even if the factor had been the sole negotiator acting in the landlord's absence, and by his instructions. *Ib.*

3. According to the law of Scotland the execution of a formal conveyance, even when it expressly bears to be an implement of a previous contract, supersedes that contract *in toto*, and the conveyance thenceforth becomes the sole measure of the rights and liabilities of the contracting parties; and a reference to an antecedent agreement is not warranted either by the fact that the subjects conveyed are described in general terms in the dispositive clause of the deed, or by the fact

that, in the narrative of the deed, the parties are represented as having agreed upon certain points, which were presumably matters of stipulation, in any written agreement which preceded its execution. *Lee* v. *Alexander*, 8 L. R., App. Cas. (Sc.), 853.

Although subsidiary clauses of a deed may be legitimately referred to for the purpose of solving any ambiguity which is raised by the terms of the dispositive clause, yet if the terms of the dispositive clause are *per se* sufficient to give a right, they cannot be controlled by a reference to the other clauses of the disposition. *Ib.*

Where one of a set of heads in the dispositive clause of a disposition is expressed in general terms and concludes a specific enumeration and description of separate subjects, *primâ facie*, and unless the contrary appear, it must be presumed that it was merely intended to carry rights *ejusdem generis* with those previously described and disponed. *Ib.*

A completed disposition, dated 1879, and made *inter alia* by A. in favour of B. of certain superiorities, proceeded on the narrative that it was granted in consideration of an agreement between the parties. It conveyed to B. the *dominium directum* of separate parcels of land by five clauses. Of the land described in four the *dominium utile* had been conveyed by A. and his predecessors at various dates before 1873 out and out to the G. & S.W. Railway Company. None of these conveyances was of the nature of a feu right and no mid-superiority was thereby created, and consequently the railway company held the lands thereby disponed (s. 126, Lands Clauses Consolidation (Scotland) Act 1845), under those who were the immediate superiors at the dates of the several conveyances in their favour. The 5th clause was, *inter alia*, in these terms: "And all other lands and others in the county of Ayr, parts of the said estates of Ballochmyle, . . . and have been disponed by me," etc., to the said G. & S.W. Railway Company. In 1878 A. had disponed an acre of land to the same railway for a reservoir, together with the servitude right of conveying water from it by means of pipes through his intervening lands to the railway station. That deed declared that the said acre of land and servitude were to be holden of the disponer in feu farm fee and heritage for ever; and the lands thus feued were described as parts of "all and whole the lands and tenandry of Ballochmyle and others, being the lands and others particularly described in a writ of *clare constat* granted by A. in favour of himself in 1864." In 1863 A. had completed his title as superior under the Crown of "all and whole the lands and tenandry of Ballochmyle." In 1864 he made up a feudal title to the *dominium utile* of these lands by obtaining from himself, as his own immediate superior, the writ of clare referred to. These several estates of superiority and fee remained vested in A. under separate titles. The effect, therefore, of the feu-disposition of 1878 was to split the *dominium utile* of the acre of ground and its accompanying servitude rights, as vested in A. by the writ of 1864, into two estates; one an estate of fee belonging to the railway company, and the other a subordinate (yet independent) estate of superiority, belonging to A., interposed between his vassal's estate of fee and his own estate of superiority under the Crown. B., under the above 5th clause, claimed the mid-superiority of the acre of ground feued in 1878 to the railway company. A. adduced proof to show that the land in question was misdescribed in the deed of 1878, that it did not "belong to the lands and tenandry of Ballochmyle," but was part and parcel of other lands; he also sought to refer to previous letters to show what the contract was:—Held, that the evidence was not sufficient to discredit the description of the lands, the *onus probandi* being on A.; that there was not in the dispositive clause any ambiguity of expression such as to necessitate or justify a reference to the other clauses of the deed or to the previous letters for aid in its interpretation; but the terms of that clause did not sustain the claim made by B. *Ib.*

Insurance.] 1. Consideration of the question whether in Scotland constructive total loss is to be taken from the date of notice of abandonment, or from the date of commencement of action. *Shepherd* v. *Henderson*, 7 L. R., App. Cas. (Sc.), 49.

IV. ECCLESIASTICAL PROPERTY.

2. Where a congregation of seceders had, by a formal vote, united themselves to the Free Church of Scotland; and where, in pursuance of that vote, a Free Church minister had been solemnly inducted, without any objection or dissent on the part of a small minority of four persons, who had complete knowledge of all the proceedings:—Held, that an action brought by them to have certain property, which had passed by the amalgamation, restored, "was an action instituted by them in respect of their own individual interests; and that in respect of those interests, they were precluded by their own conduct from maintaining the action." *Cairncross* v. *Lorimer*, 6 Macq. H. L. Ca. 827; 7 Jur., N. S., 149.

3. As to jurisdiction of English or Scotch Courts over and interference with the General Synod of the Scotch Church. See *Forbes* v. *Eden*, 1 L. R., H. L. (Sc.), 569.

4. The minister of the parish of B., Scotland, in 1875 raised an action of augmentation, modification, and locality against the heritors. A scheme of locality was prepared, D. lodged objections to the scheme, in so far as it localled minister's stipend on eighty-one acres of his land, alleging that these eighty-one acres were held under titles *cum decimis inclusis et nunquam antea separatis*, and that in respect of certain judicial proceedings in 1795 and 1807 it was *res judicata* that these lands were so held. The proceedings relied on were as follows: In 1795 the then minister of B. raised an action of augmentation, etc., and produced a rental of the whole lands in the parish, in which he included the eighty-one acres in question as liable for teinds. The ancestor of D. "and the other heritors" lodged a minute stating, *inter alia*, that these eighty-one acres were held *cum decimis inclusis*, and craving that they might be struck out of the rental. On the 2nd December 1795 the teind Court pronounced an interlocutor ordering

them to be struck out. Rectified schemes of locality were prepared, and objections lodged by other heritors, but the proceedings were not carried out to a final decree. In 1807 the same minister raised a new action of augmentation, etc., which, after certain objections were disposed of, proceeded to a final decree. In none of the schemes of locality since 1795 were the eighty-one acres included:—Held, that the plea of *res judicata* was well founded. *Dundas* v. *Waddell*, 5 L. R., App. Cas. (Sc.), 249.

V. FAMILY RELATIONS.

Curator.] 1. Four persons domiciled and resident in Scotland had accepted the trusts of a Scotch deed, attested by two witnesses, by which they were duly appointed tutors and curators to a Scotch orphan child, whose only property consisted of real estates situated in Scotland. The child having come to reside in England for the sake of its health, and a suit having been instituted by other parties in its name, for the purpose of making it a ward in this Court:—Held, on the construction of the deed, that it appeared to be made in contemplation of the child continuing to reside in Scotland, and with reference solely to her so doing; and the care and custody of the child being considered to be therefore unprovided for, and the curators who under the deed had the management of the property being parties, and having appeared to the suit, the Lord Chancellor referred to the Master to approve of a scheme for the residence of the child, and to appoint guardians. *Beattie* v. *Johnstone*, 1 Ph. 17; 10 L. J., N. S., Ch., 300; 5 Jur. 671. Affirmed *sub nom. Johnstone* v. *Beattie*, 10 Cl. & F. 42.

2. A curator *bonis* and *factor loco tutoris* of Scotch infants is not bound to pay into the Court of Chancery assets belonging to the infants receivable under an English will of which the curator is administrator, and which is in course of administration by the Court. *Mackie* v. *Darling*, 12 L. R., Eq., 319; 19 W. R. 796.

Legitim.] 3. According to the Scotch law the younger children are entitled to share, under the name of *legitim*, a third of the personal estate of which their father may die possessed, unless they be excluded from it, either by the marriage contract of their parents, or by express renunciation by themselves. It is usual in Scotch settlements, made on the marriage of younger children, to insert such a clause of renunciation. *Breadalbane* (*Marquis*) v. *Chandos* (*Marquis*), 2 Myl. & C. 711; 7 L. J., N. S., Ch., 28.

Previously to the marriage of the son of an Englishman with the daughter of a Scotchman, proposals for a settlement were agreed upon between the fathers of the intended husband and wife, which proposals, after providing for all the purposes usual in settlements of that description, stipulated that the settlement should contain all "usual and necessary clauses." A settlement was afterwards executed in the English form, all the parties being then in England, and related to estates of the husband's family in England, Ireland, and Jamaica, and to the money portion of the wife. No clause was introduced relating to any claim which the intended wife might have, under the law of Scotland, to any part of her father's property. The wife having become entitled, by the law of Scotland, on the death of her father, to a share of his personal estate, by way of *legitim*, the Court (discharging an order of the Court below) refused an injunction to prevent the payment of the wife's *legitim*, which injunction was applied for on the ground that, under the stipulation for the insertion in the settlement of "usual and necessary clauses," a clause to bar *legitim* ought to have been introduced. The Lord Chancellor dissolved the injunction on the grounds—first, that the proviso was to be construed with reference to the subject matter and objects of the settlement, which was in the English form, and applied exclusively to English subject matter; and that a clause barring *legitim*, therefore, could not be considered as comprehended under it: secondly, that whereas the claim to *legitim* could only be barred by an express contract between the father and the daughter to that effect, the father, in approving of the proposals, was acting on behalf of his daughter, and not as a party dealing adversely with her, for the purchase or renunciation of her rights: and thirdly, that there was no sufficient evidence to show that the proposals constituted the final contract of the parties, and had not been varied by some subsequent agreement prior to the execution of the settlement. *Ib.*

An advance of a marriage portion to a daughter, does not even *pro tanto* of itself, by the law of Scotland, bar her claim to *legitim*. Such a claim cannot be barred by implication. A marriage contract, in which the father of the lady agreed to pay a certain sum of money, as the portion or fortune of his daughter, and which then went on to describe how the sum should be paid partly in his lifetime, and partly out of his estate after his death, was held not to be capable, without more, of barring her claim to *legitim*. S. C. 4 Cl. & F. 43. Affirming 2 Myl. & C. 711; 7 L. J., N. S., Ch., 28.

Double Portions.] 4. The presumption established in England against double portions does not exist as a canon of construction in the law of Scotland. *Kippen* v. *Darley*, 3 Macq. H. L. Ca. 203.

In the law of Scotland it does not appear that any general antecedent presumption exists against double portions. *Ib.*

Father's Right of Administration.] 5. A father is entitled, as his child's administrator, to demand his child's trust money. *Dumbreck* v. *Stevenson*, 4 Macq. H. L. Ca. 86.

Husband and Wife.] 6. The 6th section of the Married Women's Property (Scotland) Act 1881 enacts, "After the passing of this Act the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her movable estate which is taken by a widow in her deceased husband's movable estate according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such

share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be." A woman, married before the passing of the above-cited Act, succeeded to movable property, some before and some after the date of the Act, which was settled upon her for her personal use, and free from the *jus mariti* of her husband. She died, without issue, intestate, and domiciled in Scotland. In a claim by A., her husband, against her executrix:—Held, that s. 6 of the Married Women's Property (Scotland) Act 1881 applies to marriages entered into before the passing of that Act as well as to those contracted after that date; and that, therefore, B. was entitled in accordance with that section to half his wife's personal estate. Also that sub-s. 2 of s. 3 applies only to the preceding sections. *Paterson* v. *Poe*, 8 L. R., App. Cas. (Sc.), 678.

VI. HIGHWAYS.

1. The trustees of the W. S. bridge, which spans the River Dee and connects the counties of Kincardine and Aberdeen, sought to have it found that the local Acts 10 Geo. 4, c. 43, and 23 Vict., c. 26, being the W. S. Bridge and Roads Acts—had ceased to be of force and effect within the county of Kincardine (that county having adopted the Roads and Bridges Act 1878): That the trustees have ceased to be under any obligation as regards the management or maintenance of the bridge or road, and that the defenders, the county road trustees of Kincardine, and the commissioners of supply of the county of Aberdeen, are bound to maintain and keep in proper repair the bridge and road: and further, that the trustees have ceased to be liable for the debts incurred by them as trustees. By the local Act of 1865 tolls were abolished in the county of Aberdeen; but from its provisions the burgh was excluded. The Aberdeenshire portion of the road and part of the bridge are within the burgh boundary. The county of Aberdeen has not adopted the Act of 1878, and the commissioners of supply of that county deny any liability in respect to the maintenance, etc., of the bridge and road:—Held, that the true effect of the Roads and Bridges Act 1878, in the true circumstances, was to continue in force the local Acts so far as the powers and duties thereby imposed on the trustees for the management, etc., of that part of the bridge and road which is within the county and parliamentary burgh of Aberdeen, together with the powers of demanding and taking tolls within the county and burgh conferred by such Acts as long as the Roads and Bridges Act 1878 shall not be in force therein: that the liability of the trustees to the debts incurred under the local Acts had now ceased and fallen severally upon the defenders: that the commissioners of supply are entitled to receive from the W. S. bridge and road trustees all surplus of income accruing to them from tolls exacted on the bridge and road within the county and parliamentary burgh of Aberdeen, after providing for the expenses of management, etc., and, doing so, are entitled to be relieved by them from the proportion of the debts belonging under the Roads and Bridges Act 1878 to the county and parliamentary burgh of Aberdeen, and that as regards that part of the bridge and roads within the county of Kincardine, the local Acts had ceased to be in force; and the road trustees of that county are bound to maintain and keep in repair that part of the bridge and road. *Aberdeen Commissioners of Supply* v. *Morice*, 6 L. R., App. Cas. (Sc.), 881.

2. Magistrates for a burgh held the links from time immemorial for behoof of the inhabitants, and, *inter alia*, subject to the obligation of preserving the same for the purposes of the game of golf and for the recreation and amusement of the inhabitants. They had from time to time exercised powers of administration and management over the links, such as the letting of the pasturage, the regulation of bleaching clothes on the links, the construction of a sloping walk, and the levelling and filling up other portions of the ground. The magistrates proposed to make a macadamised road along the outside boundary of the links, where that boundary adjoins certain feus let off by them in 1820, which feus are no longer, in point of law, part of the links. P., an inhabitant of the burgh and member of the principal golfing club there, and others, the appellants, sought by note of suspension and interdict to restrain the magistrates either from making the road or from permitting any road to be used in that place for wheel traffic:—Held, substantially affirming the decision of the judges of the Court below, but altering their interlocutor, that the evidence proved that the proposed road would have no substantial interference with the obligation of golfing, etc., and that the road might be reconciled with its due observance: but that it was inconsistent with that obligation for the magistrates to alienate any part of the solum of the ground in question, or to abdicate their existing powers of administration either by granting private easements to particular individuals, or having made the road to create a public easement by dedicating it to the public. *Paterson* v. *St. Andrew's* (*Provost*), 6 L. R., App. Cas. (Sc.), 833.

VII. NUISANCE.

3. The Shotts Iron Company possess valuable mining leases of the iron ore under the estate of, *inter alia*, Penicuik, under the condition, not to calcine within a certain area. They calcined beyond this area, but near to the boundary of the lands of Glencorse. The calcining was carried on in open bings eight feet high. The proprietor of Glencorse on the ground, *inter alia*, that his ornamental plantations were being destroyed by the fumes from the bings, raised an action concluding for interdict against the company calcining within two miles of his estate:—Held, altering the terms of the interlocutor pronounced—that the Glencorse plantations had been injured by the calcining, and that the pursuer was entitled to interdict to prevent the company from carrying on their calcining within one mile of his lands, in the same manner hitherto pursued by them, or in any other manner whereby noxious vapours may be caused to pass over the pursuer's lands, or any part thereof, to the damage or injury of his plantations or estate,

Shotts Iron Co. v. *Inglis*, 7 L. R., App. Cas. (Sc.), 518.

1. By the 43rd section of the Kirkcaldy and Dysart Waterworks Act 1867 it was provided that the commissioners under the Act "should be bound to make good to the Countess of Rothes and her heirs, etc., all damages which may be occasioned to her or them, by reason of or in consequence of any bursting, or flow, or escape of water from any reservoir, or aqueduct, or pipe, or other work connected therewith" which may be constructed by the commissioners. The countess is proprietrix of lands situated below the site of one of the reservoirs, and during an extraordinary rainfall a great quantity of water was continuously discharged from the reservoir, through a waste weir, into the watercourse of a burn, and did much damage to the countess's lands. She claimed compensation. There was no failure or insufficiency of the works and no negligence: —Held, that on the construction of the above clause the countess was entitled to compensation for damage by flood waters from the reservoir, no matter how caused. *Rothes (Countess)* v. *Kirkcaldy Waterworks Commissioners*, 7 L. R., App. Cas. (Sc.), 694.

Semble, statutory provisions, such as here, in a local and personal Act must be regarded as a contract between the parties, whether made by their mutual agreement, or forced on them by the legislature. *Ib.*

VIII. REAL ESTATE.

Entails.] 2. An heir of entail being also heir of the line, is bound by the law of Scotland to collate or bring into account the value of the real estate to which he has succeeded, before being entitled to claim the share of the personalty of the deceased. *Anstruther* v. *Anstruther*, 4 Cl. & F. 33. S. P. *Breadalbane (Marquis)* v. *Chandos (Marquis) id.* 43. And see *Id.* 56. n.; 2 Myl. & C. 711; 7 L. J., N. S., Ch., 28.

3. In a suit by the heir of entail in possession, entitled under a Scotch entail to a portion of the rents of the entailed estates, the other portion of such rents being directed to be accumulated during pupillarity, and invested in lands to be conveyed to the persons taking in succession under the same entail, the substituted heirs of entail are necessary parties. *Beattie* v. *Johnstone*, 8 Hare 169.

4. The rule which allows the first tenant in tail to represent the fee in suits affecting the estate, does not apply to heirs of entail under a Scotch deed of tailsie; and, therefore, a decree made in a suit framed upon that principle for the administration of a fund, which in a certain event was liable to be invested in the purchase of land in Scotland, to the uses of a Scotch deed of tailsie, was opened at the instance of a subsequent heir of entail under that deed. *Fordyce* v. *Brydges*, 2 Ph. 497; 2 Coop. C. C. 326; 17 L. J., N. S., Ch., 135; 16 *id.* 81; 10 Beav. 90; 10 Jur. 1028.

5. An entail defective in any one of its prohibitions is bad in all. The rule is the same although the question may be *inter hæredes*. *Dempster* v. *Dempster*, 3 Macq. H. L. Ca. 62.

The consequence may be that an entail cannot be made otherwise than under the Act of 1685. But this consequence is not mischievous, because the policy of the law is not to encourage, but to discourage, entails. *Ib.*

6. A charter of resignation having the provisions and restrictions of an entail at length, but proceeding on a procuratory which contained them only by reference, does not constitute a binding entail. *Cochrane* v. *Baillie*, 2 Macq. H. L. Ca. 529.

An obligation to make an entail, followed in the same instrument by a procuratory defective in itself as an entail, though meant to constitute one, affords no ground for an action to have a valid entail executed. *Ib.*

A disposition of lands taken to the heirs, and under the restrictions of an entail of other lands, but not setting forth the restrictions at length, affords no ground for an action to have a valid entail executed. *Ib.*

An entail good *inter hæredes*, but bad against creditors, is a bar to the execution by the heir in possession under it of a new deed of strict entail. *Ib.*

An entail good *inter hæredes*, but bad against third parties, is made void to all intents and purposes by the 11 & 12 Vict., c. 36. *Ib.*

Semble, that an action of declarator of nullity under the 11 & 12 Vict., c. 36, in such a case is unnecessary. *Ib.*

7. Circumstances under which it was held, first, that the words "so often as apparent or presumptive heirs are females," did not exclusively mean daughters of the person executing a power, but might mean daughters of any one to whom the succession opened under the destination. *Martin* v. *Kelso*, 2 Macq. H. L. Ca. 556.

Secondly, that the power given to the heir of entail in possession of selecting one of the heirs portioners to the exclusion of other, was a power of substituting the younger for the elder, not to the effect of giving her a life rent, but so that the right of succession might go to the heirs of her body under the entail. *Ib.*

Thirdly, that a deed *inter vivos* was not an improper form of executing the power. *Ib.*

And, fourthly, that the power might be executed by the heir of entail in possession, precisely as if he were a proprietor in fee simple, and that no subsequent alteration of circumstances could defeat the execution. *Ib.*

8. The heir in possession of an entailed estate in Scotland petitioned under the statutes for disentail. The first heir substitute gave his consent, but the second and third refused. In valuing the interest of the second and third heirs substitute, under the 5th section of the Entailed Amendment (Scotland) Act 1875, the question arose (1) whether the probable duration of the life of the first heir substitute should be taken from the tables on the basis of his actual age, or whether his actual state of health should be ascertained by inquiry; he refusing to be medically examined, and the second and third heirs alleging that he had suffered from ailments which tended to reduce the probable duration of his life greatly below the average of persons of his age. And (2) whether, there being only one other heir in the entail existing, the second and third heirs' chance of succeeding to the fee simple by surviving all the other heirs of entail should be taken into account:—Held, reversing the de-

vision of the Court below, (1) that all the facts tending to reduce the first heir's life below the average were relevant and should be taken into consideration; and (2) that the chance of succeeding to the fee simple ought to be valued. *M'Donald* v. *M'Donald*, 5 L. R., App. Cas. (Sc.), 519.

1. A., in his final general settlement dated 1853, revoking all prior deeds so far as inconsistent therewith, conveyed his whole estates to trustees with directions to execute a deed of strict entail of his lands "to and in favour of B. and his heirs whatsoever, whom failing to and in favour of C. and his heirs whatsoever," whom failing to persons thereafter to be nominated by him (the truster), always excluding heirs portioners, and failing such nomination, then to "my own heirs whatsoever and their assignees;" but declaring that any member of a family in possession of the entailed estate of M. should be excluded; and also the descendants of the body of his sister Charlotte. B. and C. were A.'s natural sons. C. predeceased A., unmarried. A. died without executing any deed of nomination of fresh heirs. His trustees executed in 1859 a deed in the form of an entail conveying the estates to B., exactly in terms of the destination in A.'s deed, leaving out C. B. treated the estates as fee simple, and left them in certain directions on his death without issue. Thereupon the heir-at-law of A. (his brother's son) raised an action against A.'s trustees and others concluding for reduction of the deed of 1859, and all subsequent writs, on the ground, *inter alia*, that the directions as to entailing the estates contained in his uncle's settlements had not been carried out by the trustees, in respect that the said deed was not a valid entail under the Act of 1685; and for a declaration that the trustees are bound to execute a new deed of entail in favour of himself as institute and of several other descendants of A.'s brother and sisters as substitute heirs of entail, or alternatively, assuming the deed of 1859 was executed in terms of the truster's intentions, to have it found that it was an effectual entail, and that he was entitled to succeed as heir of entail next in succession to B. He relied on the various prior deeds and settlements, which he contended should be read along with the deed of 1853, which, if done, made it clear that A.'s intention was to limit the class of heirs whatsoever of B. to heirs of the body, and also by the term "my own heirs whatsoever," he intended to designate his nearest heir of line and the heirs of the body of such heir, whom failing his own heirs whatsoever: —Held, that the deed of entail of 1859 had been executed in conformity with the terms of A.'s final trust, the terms of which were clear and unambiguous. That the pursuer had failed to establish that he either possessed or was entitled to claim the character of an heir of provision and tailzie under the entail directed by the trust deed of 1853; that the only ulterior destination being to the truster's own "heirs whatsoever and assignees" the entail came to an end in the person of B., and he could dispose of the estates as he pleased. That it was competent to read all the prior deeds to see how far any of them were to receive effect, along with his final trust settlement—but not competent to use them to put a construction on words bearing a clear and well-understood technical meaning, and which they do not bear if the deed be construed by itself. *Gordon* v. *Gordon*, 7 L. R., App. Cas. (Sc.), 713.

2. In the law of Scotland general words of disposition in a *mortis causâ* deed are, in the absence of any proof of a contrary intention (and the law of Scotland allows such contrary intention to be proved by evidence of a kind which in England would not be admissible for that purpose), sufficient to pass heritable property vested at the date of the deed in the disponer with a special destination to heirs substitute. A. was fee simple proprietor of the estates of Kintarbert and Crossaig in Scotland. He died leaving a disposition and settlement, without prohibitory clauses, disponing these lands to B. and his heirs male, whom failing to C. and his heirs male, whom failing, to certain cousins and their respective heirs male. B., who owned other estates, took possession, and died leaving a *mortis causâ* deed, giving, in language entirely general, all his heritable and movable property to C. and his heirs, whom failing, to his sister D. C. entered into possession of all B.'s estates, and soon afterwards died intestate and without issue. The sister, D., then, as heiress of provision under B.'s general *mortis causâ* deed, claimed the estate of Kintarbert ard Crossaig as well as the other lands of B. E. disputed D.'s right, claiming these estates as heir of provision under A.'s settlement; contending that the general term of B.'s deed could not be held to include Kintarbert and Crossaig, lands already settled upon a destination of heirs; nor was this B.'s intention:—Held, that D. was entitled, because B. was absolute fiar, being the heir in possession under a settlement or entail without fetters, and therefore a general disposition by him passed these lands as part of the *universitas* of his estate, there being nothing in the mere nature of such a special destination, as here, to prevent it; and no proof of any contrary intention to limit the operation of such general words. *Campbell* v. *Campbell*, 5 L. R., App. Cas. (Sc.), 787.

Heritable Bonds.] 3. Heritable bonds, together with English securities, were given on loan of money to a domiciled Englishman: —Held, that will disposing of money due on such securities was effectual, and that heir-at-law had no claim in respect of such bonds. *Buccleugh* v. *Hoare*, 4 Madd. 467.

4. A Scotch heritable bond, though containing a personal obligation, carries with it in the personal right, as being *jus nobilius*, and descends to the heir, and will not pass by an English will. *Jerningham* v. *Herbert*, Taml. 103.

Lord's Fine.] 5. The Conveyancing (Scotland) Act 1874 (37 & 38 Vict., c. 94), s. 4, enacts that every proprietor who at the commencement of the Act shall be duly infeft in any lands which have been feued, shall be deemed and held to be as at the date of the registration of such infeftment in the appropriate register of sasines, duly entered with the nearest superior—to the same effect as

if such superior had granted a writ of confirmation according to the existing law and practice. A testator, who died on the 5th March 1873, conveyed to trustees by trust disposition his whole heritable estate. The trustees were *inter alia* to pay certain legacies and gradually extinguish the testator's debts; after which they were to entail the lands upon P. R., the heir-at-law of the testator, if then alive and of the age of twenty-five, and his heirs male, whom failing certain other persons. Heirs female were to be excluded, and the trustees were given power to sell or excamble any part of the lands. The trustees became infeft in the estate by recording a notarial deed in the register of sasines in March 1874. In part of the lands the testator had been the last entered vassal; and the superior of those lands demanded from the trustees a casualty of composition of a year's rent on the ground that they were singular successors. The trustees contended that they were not liable for any casualty whatever, the heir P. R. being willing to enter with the superior and pay a casualty of relief—a duplicant of the feu duty—but that, in any event, they were only liable for a casualty payable by an heir:—Held, that the trustees being impliedly entered with the superior, and being singular successors of the last vassal, were liable in a casualty amounting to a year's rent; and that the heir of the last entered vassal could not now be tendered to the superior for entry, and so relieve the trustees of payment of the higher casualty. *Rankin* v. *Lamont*, 5 L. R., App. Cas. (Sc.), 44.

Rents.] 1. The Act 4 & 5 Will. 4, c. 22, for the apportionment of rents, annuities, and other periodical payments:—Held, to extend to Scotland. *Fordyce* v. *Bridges*, 1 H. L. Ca. 1.

2. A testator directed his trustees to pay to his wife "the whole annual produce and rents of the residue of his estates both heritable and movable." Coal and iron mines were leased by the testator before his death. His trustees afterwards leased others. In a question whether the wife was entitled to the rents of those opened after the testator's death:—Held, that in law she was not entitled; and that there was nothing in the trust deed which showed that she was to have such a benefit. *Campbell* v. *Wardlaw*, 8 L. R., App. Cas. (Sc.), 641.

Held, also, that the Trusts (Scotland) Act of 1867 was merely an Act to facilitate administration without disturbing the interests of the beneficiaries under the trust, *i.e.*, it enables trustees who also have the testator's authority to let minerals, to let them for the customary period instead of a lease for an uncertain period, namely, a tenancy for life. Whether the power to let minerals on long leases under sub-s. 3, s. 2, of the Act includes a power to open up and let new mineral fields not decided. *Ib.*

Warranty on Sale.] 3. Articles of roup of certain lands expressly stipulated that the purchaser was to take the property with all risks of error in the particulars. A. agreed by missives attached to the articles of roup to buy the estate, and a conveyance was executed containing a clause of warrandice in the usual general terms. Neither the disposition nor the articles of roup contained any information as to the tenure of the lands. The particulars of sale contained this statement: "The lands hold of the Crown," and in answer to an inquiry made before the sale on behalf of A. as to the nature of the holding, the seller's agents referred A. to the note of particulars, adding: "The proprietors" (B. and C.) "are not entered with the Crown, but you are aware the Crown never asks for an entry." The foundation for the belief that the lands were held direct of the Crown rested on a decree of tinsel, dated 1813, directed against the heir of line of the last superior, and a decree of forfeiture of the mid-superiority, dated 1849, followed by a Crown charter. From 1813 there had been no assertion of a contrary right. Immediately before the sale the agents for D., the disponee of the last superior, wrote to B. and C.'s agents claiming the right of mid-superiority, but this claim, on its being disputed and not further persevered with, B. and C.'s agents did not intimate to A. Two years later B.'s agents renewed the claim, and ultimately raised an action against A., claiming a year's rent as composition on his entry. A. was found liable, and the decree of forfeiture was reduced. A. thereupon raised this action against B. and C. for repetition of the sum paid, the expenses of the litigation, and a sum equal to one and a half times the casualty of composition, on the ground (1), of warrandice, and (2), misrepresentation and concealment on the part of B.'s agents:—Held, that there had been no breach of warrandice; and that the representation was perfectly true according to the knowledge and belief of those who made it, and, that being so, any error therein was covered by the express contract of the purchaser to take the property with the risks of errors in the particulars. *Brownlie* v. *Campbell*, 5 L. R., App. Cas. (Sc.), 925.

Restrictive Covenants.] 4. A restriction in a feu charter, purporting to bind not only the original contracting feuar and his heirs, but also his assignee or any tenant or possessor of the houses to be erected on the feu, and power to enforce or dispense with it, is given not to the disponer or his heirs, but to the superior for the time being; the restriction, unless repugnant to the nature of the estate taken by the feuar or to public policy, is a condition of the feu, and runs with the land against singular successors. In all cases of restrictive conditions in a feu charter, the superior must have power to enforce them, or to dispense with them according to his own will or not, whether the charter is so expressed or not, unless the benefit of them and the right to enforce them are communicated to other feuars. A restraint against carrying on the trade of a publican is as good in law, and as capable of running with the land, as a restraint against carrying on any other business; and the fact that restrictions are placed by statute upon the freedom of that particular trade constitutes no reason why a private contract to prevent it from being carried on, without the consent of the superior, should be held invalid or contrary to law. Feu rights of land in Grangemouth, a town of 5,000 inhabitants, contained re-

strictions against retailing malt or spirituous liquors, or allowing the same to be sold or retailed within the buildings erected on the feus without the superior's permission. The superior sought an interdict to prohibit the defenders, the feuars, from continuing to sell any kind of malt or spirituous liquors, etc., alleging that the whole of the town was built on ground held of him as superior; that he was proprietor of certain houses in the heart of the town at a rental of 750*l.*; that he had still a large extent of ground in and adjacent to the town available for feuing, and that his mansion-house was within half a mile of the town: and that these properties were damaged by the existence of so many public-houses. The defenders pleaded no interest to sue the action, acquiescence, and prescriptive use. On the question of relevancy:—Held, first, that the restrictions sought to be imposed were not personal, or inconsistent with public policy, nor repugnant to the pursuer's estate, they relating to the use and employment of buildings erected on the land; secondly, that the interest to sue the action was connected with patrimonial rights, and that the superior's case, as shown on the record, was sufficient to entitle him to the relief which he prayed. *Tailors of Aberdeen* v. *Coutts* (1 Rob. App. Cas. 296) followed. *Zetland* (*Earl*) v. *Hislop*, 7 L. R., App. Cas. (Sc.), 427.

Held, also, that it was the plain intention of the contracting parties that the superior should determine, whether there are to be public-houses upon any of the feus, and if so, their number and position, and accordingly the superior in granting his licence to certain feuars to sell liquor was in no sense departing from or waiving the prohibition. But it was a different question in all or some of the cases, whether the pursuer might not be seeking to enforce the restrictions under circumstances, or in a manner, which ought to deprive him of the assistance of the Court, there being facts averred, from which, if proved or admitted, it might be legally inferred that successive superiors had so acquiesced in the feuar's use of their premises for the sale of liquor that the prohibition must be held to have been unconditionally discharged. But the record leaving it open to the superior to adduce evidence which might give a different colour to these facts, the parties must proceed to proof before the questions of acquiescence and waiver, and prescriptive use, could be decided. *Ib.*

Semble, though *Tailors of Aberdeen* v. *Coutts* (1 Rob. App. Cas. 296) does determine, that the superior cannot enforce a restriction on property, unless he has some legitimate interest; that case does not lay down the doctrine, that an action at the superior's instance, which merely sets forth the condition of his feu right and its violation by the vassal must be dismissed as irrelevant, because the pursuer has failed to allege interest. The vassal in consenting to be bound by the restriction concedes the interest of the superior, and therefore the onus is upon the vassal, who is pleading a release from his contract to prove that any legitimate interest which the pursuer may originally have had in maintaining the restriction has ceased to exist. *Ib.*

1. It is settled by a series of decisions in the law of Scotland that where it appears that the restrictions in a feu contract are entered into for the benefit of other feus, either already existing, or to be created by the superior thereafter, the restrictions may be enforced by each co-feuar as far as his interest is concerned. But the fact of several feuars of neighbouring plots of building land in the same street holding from a common superior does not, by itself, entitle one of those feuars to claim the benefit of restrictions contained in the feu contract of another, unless some mutuality and community of rights and obligations is otherwise established between them, which can only be done by express stipulations in their respective contracts with the superior, or by reasonable implication from reference in both contracts to a common plan or scheme of building, or by mutual agreement between the feuars themselves. A.'s author was a party to a feu contract of a piece of land upon which a house was already built, and he was taken bound not to build any other buildings on the said piece of land except offices. The adjoining pieces of land were feued off, some being taken not to build and others having that right. It was not indicated in A.'s feu that the restrictions were imposed for the benefit of the co-feurs, beyond the facts that the feus were all given out nearly at the same time; that some of the conditions inserted in the feus are similar to each other; and that the houses being built in a square, produce a considerable degree of uniformity. B. and C., proprietors of a neighbouring feu, sought to prevent A. building a carriage show-room on the ground intervening between his house and the street of the square, and raised an interdict with the "consent and concurrence" of the superior; there was no condescendence or pleas in law for the superior:—Held (1), that the restrictive conditions as to building in A.'s feu contract was not in any sense *jus quæsitum tertio*; and (2), that the superior was not a party complainant in the action for own separate interest; and therefore B. and C. being strangers to A.'s contract, A. ought to have been assoilsied from the action. *Hislop* v. *Leckie*, 6 L. R., App. Cas. (Sc.), 560.

IX. SEA AND FORESHORE.

2. The officers of state in Scotland obtained a judgment or interdict against an individual who had, by erecting a wall, encroached on the seashore, the suit being instituted by them solely to protect the public right. The judgment of the Court below was appealed against and affirmed, but was affirmed without costs. *Smith* v. *Stair* (*Earl*), 2 H. L. Ca. 807; 13 Jur. 713.

3. Held, that the Clyde Navigation Trustees, being empowered by sects. 76 and 84 of 21 & 22 Vict., c. 149, to dredge the bed of the River Clyde to a deep of seventeen feet, cannot be interdicted from dredging ground which has been declared the property of the riparian owner, subject to any right which the public may have over it, and subject also to any rights conferred on the trustees by their Acts of Parliament: but so held without prejudice to the question of their liability to subsequent

compensation for damage. *Blantyre* (*Lord*) v. *Clyde Navigation Trustees*, 6 L. R., App. Cas. (Sc.), 273.

X. WILLS.

1. The mere fact of proving a testamentary instrument to be a holograph, does not shift the onus of proving the handwriting of the testator from the party propounding the instrument. *Anderson* v. *Anderson*, 6 W. R. 526.

2. Alterations *in substantialibus*, in an instrument written *manu alienâ*, are presumed to have been made after its execution, but not so in holograph writings. The rules which have been laid down as to erasures, etc., in the former do not generally apply to the latter. Distinction between interlineation and obliteration: the former must be intentional, the latter may not. *Semble*, in holographs, erased words may be regarded, to discover the meaning of words not erased. When the subject of a bequest is an indefinite quantity of money, or anything else, the gift is void. But where a bequest was for the establishment of an hospital (school) for one hundred boys:—Held, that it was a gift of such a sum as would reasonably be sufficient to erect a suitable building, to maintain and educate one hundred boys, and to pay officers, etc. *Semble*, there is no material (if any) difference between the law of England and Scotland in regard to charities except as to mortmain; the statute 9 Geo. 2, c. 36, not applying to Scotland. *Erwan* (*Provost of Dundee*) v. *Morris*, 6 W. R. 556.

3. In the repositories of the deceased, who left no other testamentary instrument, was found a holograph writing, signed and dated and complete in its testamentary provisions; but headed "notes of intended settlement by" the deceased. The proof allowed threw no light on the intentions of the deceased:—Held, that the document was the last will and settlement of the deceased. *Whyte* v. *Pollok*, 7 L. R., App. Cas. (Sc.), 400; 47 L. T. 356.

Semble, a mere ambiguity occurring in the descriptive title written by the testator cannot qualify the terms or destroy the validity of the document which it professes to describe, when the legal character and effect of the document taken by itself are not doubtful. Such an ambiguity will justify inquiry; but should the parties lead no proof, or should the proof adduced by them be inconclusive, the document must receive effect according to its tenor and substance. *Ib.*

4. Case in which the House of Lords held that certain documents, though in several places erased and obliterated, were nevertheless not only probative and testamentary, but contained a good and an effectual expression of an intention to establish in Dundee an hospital to accommodate one hundred boys. *Dundee* (*Magistrates*) v. *Morris*, 3 Macq. H. L. Ca. 134.

The genuineness and authenticity of a document tendered for confirmation as the last will of a deceased person lies on the party who propounds it. As it purports to deprive the next of kin of a right which would otherwise belong to them, the tenderer or propounder of the document must show, not only that it is genuine and authentic, but that it constitutes the last will of a free and capable testator. *Anderson* v. *Gill*, 3 Macq. H. L. Ca. 180.

To shift the *onus probandi*, and cast it on those who dispute the genuineness and authenticity of the document, it is not enough simply to show that it is a holograph instrument, meaning thereby an instrument all in one hand. *Ib.*

It must be proved that the document is holograph of the deceased. *Ib.*

5. Where a testator, in a foreign will, expresses himself in technical language of the place where made and where he is domiciled, to obtain the intention the technical terms must be interpreted by the meaning put on them in the system of law from which they are borrowed. By the common law of Scotland the actual intention of the maker of any validly executed settlement of movables received effect when duly ascertained; and now by the Titles to Land Consolidation (Scotland) Act 1868, the Scotch law—which would previously have rejected as inoperative a foreign will dealing with Scotch lands not executed with all the required formalities; and not expressed in appropriate terms of *de presenti* conveyance—must, so far as may be practicable with the principles of that law, give effect to the intention as expressed in the will, just the same as if it dealt with movables and not heritage. The technical rule of Scotch law applicable to movable and immovable property, that a gift or devise to a parent in life rent, and after his death to his unborn or unnamed children in fee, confers a fee on the parent and a *spes successionis* only on the children—(*Frog's Creditors*, Mor. 4262)—is excluded by anything in the gift itself, showing beyond doubt that the intention was to give nothing more than a life interest to the parent. *Studd* v. *Cook*, 8 L. R., App. Cas. (Sc.), 577.

A testator domiciled in England, who died possessed of lands in England and Scotland, left a will executed according to the forms of English law, by which he devised all his lands as consisted of "freehold of inheritance" to the use of his eldest son, E. F. S., and his assigns for his life "without impeachment of waste," and after the death of E. F. S. to the use of the first and every other son of E. F. S. successively according to their respective seniorities in tail male, with remainders over. Under a subsequent clause E. F. S. took as residuary legatee all property not otherwise disposed of. Subsequent to the date of the will children were born to E. F. S. He claimed the Scotch estate as vested in him absolutely, or alternatively, that the estate belonged to him as residuary legatee, or as heir-at-law. This claim was opposed on behalf of his infant children:—Held, that under the statute of 1868, the law of Scotland must, so far as practicable, give effect to the intention of the testator, as gathered from the whole context interpreted by English law; and (2) that undoubtedly the intention of the testator was that E. F. S. should take a life interest only; and that the fee of the Scotch estates should go to the eldest son of E. F. S., and the others nominated; (3) that that intention, so far as the separate destination of the life rent and fee of the estate, could be carried out substantially without inconsistency

with the practice or policy of the law of Scotland, the rule being *valeat quantum valere potest;* (4) that a registrable title fell to be made up in accordance with such intention; but that the technical way in which effect might be given to the intention by the Scotch law was immaterial. *Ib.*

XI. OTHER MATTERS.

1. By the law of Scotland, if there is a pecuniary loss occasioned by a fraudulent misrepresentation, and the party guilty of it dies, an action can be maintained against his executor if he is lucratus—that is, possessed of assets. *Davidson* v. *Tullock*, 6 Jur., N. S., 543; 8 W. R. 309.

2. Although the law of companies in Scotland does not provide for winding up a dissolved company, it gives special opportunities to the shareholders for obtaining their rights out of court. *Orr* v. *Glasgow, Airdrie, & Monklands Railway Co.*, 6 Jur., N. S., 877; 8 W. R. 643.

A shareholder in a Scotch railway company instituted a suit against the directors and the company itself for repayment of two calls, on the ground that the directors had made them for personal and corrupt purposes, and that they were unnecessary for any of the statutory purposes of the company, no part of the railway having been made, and the company's powers having expired prior to the commencement of the suit:—Held, that the calls having been originally valid, such a suit would not lie either for an account or for damages. *Ib.*

3. *Quære*, how far the principle of English law, that a trustee cannot hold an office of profit under the trust (except with the express sanction of the Court), has been established in Scotland. *Quære*, also, as to the soundness of the principle. *Home* v. *Pringle*, 8 Cl. & F. 264.

4. An affidavit made by a defendant in a suit in the Exchequer, and sworn before a magistrate in Scotland, was permitted to be read. *Ellis* v. *Sinclair*, 3 Y. & J. 273.

5. A. assigned a policy on his own life, effected in an insurance office having offices both in England and Scotland, to B. as a security for moneys advanced; and notice was given to the office of the assignment. A. and B. were both resident and carried on business in London; but the former had also a place of business in Scotland, where his estate became sequestered, and C. was appointed trustee for his creditors. On the death of A. proceedings were instituted in Scotland by C. against B. for an account; and he also sued out a writ of arrestment *jurisdictionis fundandæ causâ* to attach the moneys secured by the policy in the hands of the company. B. appeared in this suit, but, before putting in any answer, commenced proceedings in Chancery in England against C. and the company. An order was made in the suit, in which C., the trustee, appeared, that the money should be paid into court, but without prejudice to the Scotch proceedings. On motion for a decree, however, B. was declared entitled to a lien on the policy, and an account was directed to be taken of what was due to him under his assignment. The parties attended before the chief clerk, who, by his certificate, found that the sum due to B. exceeded the amount payable under the policy; and upon this certificate, Wood, V.-C., ordered the fund in court to be paid to him. On appeal, orders appealed from were affirmed. *Venning* v. *Lloyd*, 6 Jur., N. S., 81; 29 L. J., Ch., 152.

The decree directing the inquiry was erroneous; the proceedings in Chancery should have been restrained until the Scotch suit had been determined; but as C. had been guilty of laches in prosecuting his appeal, and had somewhat acquiesced in the proceedings by going before the chief clerk upon the inquiry, the appeal must be dismissed. *Ib.*

Rule in Exp. Waring.] 6. The rule of the English bankruptcy system fixed by *Exp. Waring* (19 Ves. 345; 2 Rose 182), and as extended in subsequent cases, has not been adopted in Scotland, and is inconsistent with Scotch bankruptcy law. *Royal Bank of Scotland* v. *Commercial Bank of Scotland*, 7 L. R., App. Cas. (Sc.), 366; 47 L. T. 360; 31 W. R. 49.

In Scotch practice where B. accepts bills drawn by A. against goods left in B.'s hands as security, if both become bankrupt, the billholder can rank on the estate of each for the amount of the bills to the effect of recovering full payment; but B.'s estate is entitled to be indemnified for any dividends which his estate may be required to pay in respect of the bills, A.'s estate having a right to the balance of the proceeds of the goods after such indemnity has been given. By agreement between A. and B., the latter undertook to employ his works in heckling and spinning yarns at a specific rate. By the 8th article of the agreement, it was provided that all material and yarn at B.'s works should continue to be the sole property of A., subject only to the lien of B. for the cost and manufacture and for advances made by him, or other debts due to him by A. By the 9th article B. became bound to give his acceptances for a sum not exceeding three-fourths of the value of the raw material and yarn held by him on A.'s account, and should be entitled to "a right of lien or retention of goods to a value sufficient to cover such acceptances." Both A. and B. became bankrupt. At the date of the bankruptcy D. was liable as acceptor on bills drawn by A. to the amount of 16,000*l.*, and he held goods belonging to A. (since sold for 4,025*l.* 14*s.* 2*d.*) on which he had a right of lien or retention to indemnify him from that liability. The holders of the bills claimed to have the whole proceeds applied, in the first place, in payment of the bills, as far as they would extend, so as to reduce their amount of proof against the two estates to about 12,000*l.* instead of 16,000*l.*, relying upon the English case of *Exp. Waring* (19 Ves. 345; 2 Rose 182). B.'s trustees maintained that the billholders must continue to rank on both bankrupt estates for the full amount of the bills, and claimed that all dividends paid by them to the billholders out of B.'s estate should be repaid to them from the fund in medio:—Held, that in view of the agreement, and in accordance with the principles on which the bankruptcy laws have hitherto been administered by the courts

of Scotland, B.'s trustees were entitled to the fund in medio, in order that they might apply it towards their relief from the payments which they were liable to make in the shape of dividends to the holders of the bills; (2) that the balance of the fund, if any, was payable to A.'s trustee. *Ib.*

Held, also, if the security were sufficient to cover the whole amount of the acceptances, the rule of *Exp. Waring* might be the most convenient practicable way of giving effect to the contract between the drawers and acceptors, but where the securities are insufficient, the rule confers a benefit on the billholders to which they are not entitled, at the expense of the acceptors, which was inequitable, nor could it be reconciled with the reasons of Lord Eldon's judgment in *Exp. Waring*. *Ib.*

Semble, assuming that the positive rule of administration which has been accepted as the law in England since the rule *Exp. Waring* was made, must be understood in accordance with the determination in *Powles* v. *Hargreaves* (3 De M. & G. 453), still so far as it is a positive rule, and not the necessary result of equitable principles, it cannot be held to be of force in Scotland, merely because it is so in England. *Ib.*

The reasons assigned by Lord Cranworth in *Powles* v. *Hargreaves* (3 De M. & G. 453), to justify the extension of *Exp. Waring* to the case of a deficient security are unsatisfactory if applied to such a contract as this, and appear to overlook the fact that, when the whole benefit of a deficient security is given to the billholder, the estate of the bankrupt acceptor may lose some part of the indemnity to which, by the contract, he is entitled. *Ib.*

SCRIP.

See COMPANY.

SCRIVENER.

See BANKRUPTCY, VII. XXXI.—SOLICITOR.

SEA AND SEASHORE.

— *Rights of Fishing.* See FISH AND FISHERY.

I. RIGHTS OF CROWN AND PUBLIC.
1. *In General*, 6134.
2. *Crown Grant*, 6134.
3. *Alluvial Lands and Encroachments*, 6135.
4. *Injuries by Removal of Shingle*, 6136.
5. *Right to Seaweed*, 6136.

II. SEA WALLS, 6137.

III. DROITS OF ADMIRALTY, 6137.

I. RIGHTS OF CROWN AND PUBLIC.

1. *In General*, 6134.
2. *Crown Grant*, 6134.
3. *Alluvial Lands and Encroachments*, 6135.
4. *Injuries by Removal of Shingle*, 6136.
5. *Right to Seaweed*, 6136.

1. In General.

1. A proprietor of a feu, described in the feu-charter as bounded by the seashore, enclosed a portion of the sands, which it was proved the public had immemorially used for purposes of enjoyment and otherwise:—Held, dismissing an appeal against an interlocutor of perpetual interest, that, the feuar being a wrongdoer, the officers of State on behalf of the Crown, irrespective of the question as to the right of property, were entitled to the interdict. *Smith* v. *Her Majesty's Officers of State for Scotland*, 13 Jur. 713. S. C. *nom. Smith* v. *Stair* (*Earl*), 2 H. L. Ca. 807.

Quære, does the *jus coronæ* in the seashore extend to high-water mark at ordinary spring tides. Lord Hale's authority, Hargreave's tracts, "De Jure Maris." *Ib.*

2. In the absence of all evidence of particular usage, the extent of the right of the Crown to the seashore landwards is *primâ facie* limited by the line of the medium high tide between the springs and the neaps. *Att.-Gen.* v. *Chambers*, 4 De G. M. & G. 206; 18 Jur. 779; 23 L. J., Ch., 662; 2 Eq. Rep. 1195; 2 W. R. 636.

3. The foreshore below high-water mark may be parcel of the adjoining manor, and where, by an ancient grant of the manor, its limits are not sufficiently defined, acts of ownership are admissible as evidence that such foreshore is parcel of the manor. *Exp. Tomline*, *Re Walton-cum-Trimley Manor*, 28 L. T., N. S., 12; 21 W. R. 475.

2. Crown Grant.

4. The Crown may grant by letters patent to a corporation, a town and borough, being *caput portûs* as Portsmouth, all the land between the high- and low-water marks; but this subject matter of grant, as being *jus privatum* in the king, must be subject to the *jus publicum* or public right of the king and people to the easement of passing and repassing both over the water and the land. *Att.-Gen.* v. *Burridge*, 10 Price 350.

5. Where a part of the sea coast or shore, being the property of the Crown, and giving *jus privatum* to the king, is granted to a subject for uses, or to be enjoyed so as to be detrimental to the *jus publicum* therein, such grant is void as to such parts as are open to such objection, if acted upon so as to effect a nuisance by working injury to the public right; or it is a grant which does not divest the Crown, or invest the grantee. *Att.-Gen.* v. *Parmeter*, 10 Price 378.

6. The Crown, by letters patent, granted all the regions, countries, or territories of C., and also all other manors, lands, etc., lying and being in and within the limits, meres, and

bounds of the said territory; and stated, in describing the boundaries, that the river of L. on the west and north-west, "and the seashore towards the east, and the bank of the bay of K. towards the north, is held to be the most noted mere and boundary of the territory aforesaid," and excepted from the grant all weirs and fisheries in the river:—Held, first, that the description did not necessarily exclude from the grant the shore of the bay between high- and low-water mark. *Exp. Ranfurly (Earl)*, 1 Ir. R., Eq., 128.

Held, secondly, that continuous acts of ownership by the grantees on the shore of the bay were admissible to show that the foreshore constituted part of the premises granted. *Ib.*

1. Upon the evidence furnished by ancient documents and modern acts of ownership which have passed unquestioned by the Crown, a title to a portion of the soil lying between high- and low-water mark of the Thames, as forming part of the adjoining manor, may be sustained as against the Crown, although no grant from the Crown of the land in question can be produced. *Re Alston's Estate*, 5 W. R. 189.

2. A grant by the Crown of "all coals under the commons, waste grounds, or marshes" of a certain manor, held to pass coal lying under the space between high- and low-water mark on the shore of such manor. *Att.-Gen.* v. *Hanmer*, 6 W. R. 804.

3. The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is vested in the Crown, but subject to the right of navigation which belongs by law to the subjects of the realm, and of which the right to anchor forms a part; and every grant made by the Crown of the bed or soil of an estuary or a navigable river must be subject to such public right of navigation. *Gann* v. *Free Fishers of Whitstable Co.*, 11 H. L. Ca. 192; 35 L. J., C. P., 29; 13 W. R. 589; 12 L. T., N. S., 150.

If a payment is claimed from ships by the owner of the soil of an estuary or a navigable river as an anchorage due, some facts must be shown which either prove, or from which it can be inferred, that the soil of such estuary or river was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered to the public in respect of which the grant of soil was made. *Ib.*

Such a claim cannot be supported on the ground of its having been immemorially made and submitted to. *Ib.*

4. A possessory title sufficient against a trespasser may be established by persons claiming foreshore, without producing evidence sufficient to displace the title of the Crown. *Hastings (Corporation)* v. *Ivall*, 19 L. R., Eq., 558; 22 W. R. 724.

In a suit against a trespasser by persons claiming title to foreshore and giving evidence of acts of ownership in support of their title, it is not open to the defendant to prove any acts of ownership by the Crown except such as can be shown to have been done with the knowledge of the plaintiffs. *Ib.*

Queen Elizabeth, by royal letters patent, granted to the corporation of Hastings lands in and about Hastings, which were liable to forfeiture, as being affected by superstitious uses, and had been previously concealed, all "that her parcel of land and her hereditaments called the Stone Beache, with the appurtenances in Hastings aforesaid, in her county of Sussex, and all messuages, houses, edifices, and buildings whatsoever, with their appurtenances, in and upon the aforesaid parcel of land called the Stone Beache":—Held, first, that there was no presumption from the language of the grant against the extension of the grant to the part of the beach below high-water mark. *Ib.*

Held, secondly, that inasmuch as it appeared that the expression "Stone Beach" was now applied to the entire part of the beach covered with shingle, which extended below as well as above high-water mark, and that the inferior boundary, called the "Stone's Foot," was liable to vary according to the state of the wind and tide, the whole present foreshore, whether now shingle or sand, must, as against a person not claiming any title in himself, be presumed to be included in the grant, and injunction granted accordingly to restrain the deposit of earth on the sand below the Stone's Foot. *Ib.*

3. Alluvial Lands and Encroachments.

5. Lands formed by alluvion—that is, by gradual and imperceptible deposit on the shore of the sea—belong to the owners of the adjoining demesne lands, and not to the king *jure coronæ*. *Rex* v. *Yarborough (Lord)*, 2 Bli., N. S., 147; 1 Dow & Cl. 178; 5 Bing. 163; 7 D. & R. 790; 3 B. & C. 91.

6. Land formed by gradual accretion belongs to the owner of the adjacent soil. *Doe* d. *Seebkrists* v. *East India Co.*, 10 Moo. P. C. 140; 6 Moo. Ind App. 267.

7. The officers of State in Scotland obtained a judgment on interdict against an individual who had, by erecting a wall, encroached on the seashore, the suit being instituted by them solely to protect the public right. The judgment of the Court below was appealed against and affirmed, but was affirmed without costs. *Smith* v. *Stair (Earl)*, 2 H. L. Ca. 807. S. C. *nom.* *Smith* v. *Her Majesty's Officers of State for Scotland*, 13 Jur. 713.

8. On an information an issue was raised as to the right of the Crown to alluvion produced by artificial causes, the Crown claiming to have the boundary of the rights of the Crown defined as it would have existed but for such artificial causes. *Att.-Gen.* v. *Chambers*, *Att.-Gen.* v. *Lewis*, *Att.-Gen.* v. *Rees*, 5 Jur., N. S., 745; 4 De G. & J. 55; 2 Eq. Rep. 1195; 2 W. R. 636.

An information for the purpose of having the title of the Crown to alluvium gained from the sea declared and established is analogous to a bill to ascertain boundaries, and requires in support of it admissions or evidence showing a title in the Crown to some lands in the possession of the defendants. *Ib.*

But where the witness in support of the information deposed that the alluvium had been added to the mainland, not gradually and imperceptibly, but rapidly:—Held, that a sufficient case had been made for directing issues. *Ib.*

Where there is a gradual accretion of land, which is the result of artificial causes produced by the lawful use of the land by the owner, such accretion does not belong to the Crown. *Ib.*

Where the accretions are of gradual and imperceptible progress, there is no distinction between accretions produced by natural and artificial causes. *Ib.*

If, however, the artificial causes can be shown to have been intended to produce the accretion, the Crown would be entitled. *Ib.*

Turning cattle upon alluvium by the proprietor of land not separated from it by any boundary, although without interruption, is not an assertion of right so acquiesced in as to raise a presumption of title. *Ib.*

A. claimed the seashore in front of his land, upon the ground of uninterrupted enjoyment for sixty years, evidence of user being that his cattle had been allowed to stray over the invisible line of boundary separating his land from the seashore:—Held, that where property is of a nature that it cannot be easily protected against intrusion, and if it could it would not be worth the trouble of preventing it, mere user is not sufficient to establish a right. *Ib.*

1. Where the Crown seeks to recover land alleged to have been reclaimed from the sea by encroachment or purpresture, if the defendant disputes the Crown's title to the soil between the present high- and low-water mark, the Court will direct issues to try that right before inquiring how far, in former times, the ancient high-water mark extended in land; and this course will be adhered to notwithstanding the hardship it may impose upon the defendant, who by admitting the soil on which he has done acts of ownership to be part of the foreshore, will, in effect, have proved the case of the Crown, in the event of his failing to satisfy a jury that a grant must be presumed. *Att.-Gen.* v. *Chamberlaine*, 4 Kay & J. 292.

But if in a case like the above, the defendant admits the Crown's title to the soil between present high- and low-water mark, then, upon an inquiry what is the boundary of the foreshore, the onus would be thrown upon the Crown of showing that the high-water mark in former times extended further inland than at present. *Ib.*

Form of issue directed in a suit to establish the right of the Crown to a part of the foreshore of the Mersey, the defendants asserting a right to the whole of the foreshore, and not merely to that lying between the ancient high- and low-water mark. *Ib.*

4. Injuries by Removal of Shingle.

2. It is the duty of the Crown to protect the realm from the inroads of the sea by maintaining the natural barriers, or by raising artificial barriers; and therefore no subject is entitled to destroy a natural barrier against the sea. And if the destruction of such natural barrier would cause an injury to a neighbouring landowner, he is entitled to an injunction to restrain it. Accordingly, in an action by the attorney-general, on behalf of the Crown as owner of a piece of land adjoining the foreshore, an injunction was granted to restrain the defendant, the owner of the foreshore, from removing shingle therefrom so as to endanger the Crown land or expose it to the inroads of the sea. *Att-Gen.* v. *Tomline*, 12 L. R., Ch. D., 214; 48 L. J., Ch., 593; 40 L. T. 775. Affirmed 14 L. R., Ch. D., 58; 49 L. J., Ch., 377; 42 L. T. 380; 28 W. R. 870.

3. A highway board is not entitled, under 5 & 6 Will. 4, c. 50, ss. 51, 52, to remove shingle for the repair of the highways from below high-water mark, so as to cause increased danger of encroachment by the sea. *Pitts* v. *Kingsbridge Highway Board*, 19 W. R. 884; 25 L. T., N. S., 195.

A special custom to take shingle from the beach above high-water mark for the repairing of the highways of the parish is bad as to such portion of the beach as is private property, being a custom of a profit *à prendre* in another man's land. *Ib.*

4. The plaintiff, by virtue of a grant from the Crown, made 36 Hen. 8., claimed, as lord of the manor of C., to be entitled to the beach or shore of the sea between high- and low-water mark. The defendants, the surveyors of highways, took the stones to mend the highway of the parish. Upon a bill filed by the plaintiff against them, the defendants put in their answer, denying the right claimed by the plaintiff, and insisting upon their right to take the stones by custom, and also by prescription, and also under the Highways Act 5 & 6 Will. 4, c. 50; and upon a motion to dissolve the injunction obtained by the plaintiff:—Held, that the rights claimed by the plaintiff were legal, and must be decided by an action; that the Court must consider which of the two parties were likely to sustain most injury; that, notwithstanding the want of distinct evidence respecting injury, the Court, to prevent a possible mischief, would grant an injunction, and give the plaintiff leave to bring an action, but it refused to say that he must do so. *Clowes* v. *Beck*, 20 L. J., N. S., Ch., 505.

5. Right to Seaweed.

5. In 1861 the trustees for sale under the will of A. (executed in 1854) purported to convey to M. the foreshore of a townland, and in 1865 he obtained a verdict against P. K., a tenant of adjoining lands, for trespassing on the foreshore and taking seaweed therefrom. In that action, proof was given of exclusive acts of ownership over the foreshore by M. and his predecessors in title for above sixty years, but there was no positive evidence of a grant of it from the Crown. In 1873 T. K. and others, who were also adjacent tenants, proceeded to carry off the seaweed in assertion of an alleged public right, whereupon M.'s successors in title having filed a bill against them praying that the plaintiffs might be declared entitled to the foreshore and seaweed, and be quieted in the exclusive possession and enjoyment thereof, and for the usual injunction:—Held, that upon the facts the plaintiffs were entitled to the relief sought; and that as the defendants and P. K. were members of the same local class, asserting an adverse public right, the record and judgment in the action of 1865 were properly receivable in evidence. *Mulholland* v. *Killen*, 9 Ir. R., Eq., 471.

6. A. was owner of an estate, of which the estate of N. M. formed part. A portion of the land was let on lease to a "tenant, with liberty to take the sea-ware, along with the other tenants, for manuring the land." In 1814 part of the

estate known as N. M. was sold to F., and the lands were described in the conveyance as "the same is presently possessed by the tenant." The conveyance contained no express grant of the right to take the sea-ware, but it contained the words, "together with all the appurtenances":—Held, that there was no easement created by prescription, and that the words "together with the appurtenances" did not of themselves pass an easement to F. to go and collect the sea-ware adjoining A.'s estate to manure his lands. *Baird* v. *Fortune*, 7 Jur., N. S., 926; 10 W. R. 2; 5 L. T., N. S., 2.

1. The lord of a manor cannot establish a claim to the exclusive right of cutting sea-weed on rocks, situate below low-water mark, except by a grant from the Crown, or by such long and undisturbed enjoyment of it as to give him a title by prescription. *Benest* v. *Pipon*, 1 Knapp 60.

II. SEA WALLS.

2. The purchaser of lands situate below the level of the sea is bound to inquire how all walls necessary for the protection of his property against the encroachments of the sea are maintained. *Morland* v. *Cook*, 6 L. R., Eq., 252; 37 L. J., Ch., 825; 18 L. T., N. S., 496; 16 W. R. 777.

III. DROITS OF ADMIRALTY.

3. A log of wood found floating in the sea near the shore was drawn on a rock by a person wading into the water; another log having been cast upon the beach, and by the next tide swept out to the sea, and then taken while floating:—Held, both are droits of Admiralty, and do not belong to the grantee by patent of wreck on the coast. *Stackpole* v. *Reg.*, 9 Ir. R., Eq., 619.

The log cast on the beach having been marked by a knife, with the design of claiming property in it for the grantee of wreck before it was swept back to sea, does not prevent its becoming a droit of Admiralty when afterwards found floating *Ib.*

SEAL AND SEAL-DAY.

See PRACTICE (SEAL AND SEAL-DAY).

SEALING.

— *Fiat or Commission.* See BANKRUPTCY.
— *Writ.* See PRACTICE (WRIT)—PRACTICE (SUBPŒNA).

SEAMAN.

See SHIPPING.

SECOND COMMISSION OR FIAT.

See BANKRUPTCY, XII. xi.—XIII. vii.

SECRETARY OF STATE.

4. A secretary of state, made a defendant in a suit in equity, cannot refuse to appear on the ground that the Court has no jurisdiction over him, and that he could only be proceeded against on a petition of right. *Felkin* v. *Herbert*, 1 Dr. & Sm. 608; 8 Jur., N. S., 90.

5. The funds voted by parliament for the public service are not trust funds in the hands of the secretaries of state who receive them from the treasury; and the Court of Chancery has no jurisdiction to take any account of the application of such funds. *Grenville-Murray* v. *Clarendon (Earl)*, 9 L. R., Eq., 11; 39 L. J., Ch., 221.

A general allegation that a defendant holds a fund upon trust for the plaintiff will not protect a bill from demurrer for want of equity. For that purpose the bill must allege facts showing that the relation of trustee and *cestui que trust* exists between the plaintiff and the defendant. *Ib.*

See also PETITION OF RIGHT—PRIZE.

SECURED CREDITOR.

See BANKRUPTCY, XXVII. —LIEN — MORTGAGE.

SECURITY.

— *For Costs.* See PRACTICE (COSTS).
— *By Receiver.* See PRACTICE (RECEIVER).
— *Priority of.* See MORTGAGE, VII.
— *Delivery up for Cancellation.* See RECTIFICATION AND CANCELLATION, I.

See also LIEN.

SEISIN.

See also DISSEISIN—ENTRY—VENDOR AND PURCHASER.

6. Livery of seisin not having been made according to the terms of a joint power contained in a feoffment, and one of the parties to whom the power was given to deliver seisin having refused to execute it, the Court doubted whether authority could be given to deliver seisin, as to part only. *Att.-Gen.* v. *Pearson*, 3 Meriv. 416.

7. To a plea in bar of a fine, a direct positive averment of seisin is necessary. *Dobson* v. *Leadbeater*, 13 Ves. 230.

1. Possession of a house by delivery of the keys. *Guest* v. *Homfray*, 5 Ves. 818.

2. The entry of the widow as guardian to the son does not prevent his having such a seisin as to convey title to his customary heir. *Forder* v. *Wade*, 4 Bro. C. C. 521.

3. Mother receiving profits and continuing in possession as guardian in socage is sufficient seisin; but ejectment without confession of lease, entry, and ouster would not be sufficient. *Sterling* v. *Penlington*, 9 Mod. 247.

4. A deed of lands in two different counties was made by way of feoffment, and livery and seisin of the lands in one county was indorsed. The deed was made in 1657:—Decreed, that though no livery appeared of the other lands, yet, by reason of the possession and great length of time, equity will suppose and supply it; yet it had been much stronger, if livery had been indorsed of lands of one county, in the name of both, for then it would have been an implication that it was designed for both. *Jackson* v. *Jackson*, Sel. Ch. Ca. 81; Fitzg. 146.

5. After twenty-five years' enjoyment of an estate, livery shall be presumed, if livery and seisin cannot be proved. *Byden* v. *Loveden*, Toth. 54; 1 Vern. 196.

6. The want of seisin of rent seck, not assisted in equity. *Anon.*, Cary 5.

7. Lands sold in two counties, and livery only in one, vendor bound to make another livery. *Anon*, Cary 17.

8. Advowson does not pass by livery in view of church, without deed, there being an incumbent. *Pannell* v. *Hodgson*, Cary 52.

9. R., being seised of freehold houses, died intestate in 1864, leaving A. his sole heiress-at-law. Upon R.'s death his widow wrongfully entered into possession, and retained possession till her death in 1869, when her devisees entered. A. died in 1871, without ever having entered into possession, having devised to L. "all real estate (if any) of which she might die seised." An action having been brought by L. against the widow's devisees for recovery of possession, the devisees demurred to the statement of claim on the ground that A.'s devise did not pass the property or any right of entry therein to L.:—Held, that "seised" being a purely technical word must be construed according to its technical meaning; and that as the seisin in law which A. had on R.'s death had been destroyed, and she had not at her death any seisin either in law or in fact, the property did not pass under her devise. *Leach* v. *Jay*, 6 L. R., Ch. D., 496; 46 L. J., Ch., 499; 25 W. R. 574. Affirmed 27 W. R. 99; 39 L. T., N. S., 242; 9 L. R., Ch. D., 42; 47 L. J., Ch., 876.

10. A father, who died in 1760, made a general devise of freeholds and copyholds to his daughter in tail. His grandson was in 1783 admitted to the copyholds as tenant in tail, and was proved to have been in 1833 in possession of the copyholds and of certain freeholds then held therewith. He made a will purporting to devise these freeholds and the copyholds, and died in 1840. His brother and heir in 1841 executed a deed purporting to be for the purpose of barring any estates tail in the freeholds, whereby he conveyed the freeholds to the devisee under the will, and covenanted to surrender the copyholds. This deed was not inrolled, but the devisee was admitted to the copyholds. The devisee died intestate, and his brother succeeded him as his heir, and made a will purporting to devise the freeholds and the copyholds in fifths, the plaintiff taking one-fifth and the defendant another fifth. The defendant afterwards agreed to buy the plaintiff's one-fifth, and a conveyance was made by her conveying to the defendant her one-fifth and all her estates and shares in the land, neither of them being aware of the earlier title. Four years afterwards the deed purporting to bar the estate tail was found, and thereupon the defendant requested the plaintiff, who was heir in tail of the original testator, to confirm the sale, and sent to her the draft of a deed reciting that the original testator was seised in fee of the freeholds and devised them, and that she was tenant in tail. She then filed a bill to have her conveyance set aside and to be declared tenant in tail of the freeholds:—Held, that the conveyance by the plaintiff of the fee in the whole when she had intended to convey one-fifth only might embarrass her in proceeding at law, and that the Court must determine the question; but that the plaintiff was bound to show that the original testator was seised in fee of the freeholds claimed by her, and that as she had not done so, her bill must be dismissed; and that, under the circumstances, the sending by the defendant of the draft deed stating that the original testator was seised in fee was not an admission by the defendant of the fact. The defendant had conveyed his estate to mortgagees, and that they, as purchasers for valuable consideration without notice, could not be interfered with. *Bulley* v. *Bulley*, 9 L. R., Ch., 739; 22 W. R. 779; 30 L. T., N. S., 848; 44 L. J., Ch., 79.

SEPARATE ANSWERS.

See PRACTICE (ANSWER).

SEPARATE CREDITORS, LIABILITY OF PARTNERSHIP ASSETS TO.

See BANKRUPTCY, XXIV. iii. 23—XXIV. xxviii.—PARTNERSHIP, X. VIII., IX., and XIII.

SEPARATE ESTATE.

— *Of Married Woman.* See HUSBAND AND WIFE, XI.
— *Of Partners.* See BANKRUPTCY, XVII. xxvi.—PARTNERSHIP, VI.

SEPARATE OR JOINT DEBT.

See BANKRUPTCY, XXIV. iii. 23—XXIV. xxviii.—PARTNERSHIP, X. VIII., IX., XII., and XIII.—SET-OFF, III.

SEPARATE OR JOINT FIAT.

See BANKRUPTCY.

SEPARATE REPORT.

[See PRACTICE (MASTER, REPORT OR CERTIFICATE).

SEPARATION.

See CONDITION, VIII. IV.—HUSBAND AND WIFE, III.

SEQUESTRATION.

— *Generally.* See PRACTICE (SEQUESTRATION).
— *Scotch.* See BANKRUPTCY, XXXVIII.

SERJEANT AT ARMS.

See PRACTICE (ATTACHMENT AND PROCESS OF CONTEMPT).

SERVANT.

— *Gifts to by Will.* See WILL.
— *Undue Advantage by, or Purchases by.* See FRAUD, II. VI.
See also MASTER AND SERVANT.

SERVICE.

— *Generally.* See PRACTICE (SERVICE).
— *Of Bankrupt Petitions and Other Proceedings in Bankruptcy.* See BANKRUPTCY.
— *Of Decree on Interested Parties.* See PRACTICE (JUDGMENTS, DECREES, AND ORDERS).
— *Of Injunction.* See INJUNCTION, VI. AND X.
See also PRACTICE (SPECIFIC TITLES).

SET-OFF.

— *Set-Off and Mutual Credit.* See BANKRUPTCY, XXVI.
— *Set-Off of Calls and in Winding-up of Company.* See COMPANY, XVI. VI.—XVII. XVIII. 15.
— *By or Against Executors Generally.* See EXECUTOR AND ADMINISTRATOR, XXVIII.
— *Of Legacy to Debtor.* See LEGACY, VI.
— *Of Advances by Parent to Child.* See PARENT AND CHILD, II.
— *Set-Off between Principal and Agent or Factor.* See PRINCIPAL AND AGENT, XIII. 5.
— *Set-Off and Contribution for Costs.* See PRACTICE (COSTS)—EXECUTOR AND ADMINISTRATOR, XXXIV. XX.
— *Set-Off between Debts or Damages and Costs.* See PRACTICE (COSTS).
See also PRACTICE (CROSS BILL OR CAUSE)—PRACTICE (COUNTERCLAIM).

I. GENERAL PRINCIPLES, 6139.
II. CROSS DEMANDS IN AUTRE DROIT, 6140.
III. JOINT AND SEPARATE DEMANDS, 6141.
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IX. SURETYSHIP, 6147.
X. OTHER DEBTS AND DEMANDS, 6147.

I. GENERAL PRINCIPLES.

1. The equitable right of set-off is not derived from, or dependent upon, any statutory right, but is founded on the Roman law, *semble*. *Freeman* v. *Lomas*, 9 Hare 113; 20 L. J., N. S., Ch., 564; Jur. 648.

Where one demand is equitable and the other is legal, there may be set-off in equity, if there would be set-off at law had both the demands been legal. S. C. 9 Hare 116.

The Court has, on slight circumstances, presumed the existence of an agreement to set off one against another cross demand, although existing in different rights; but such an agreement will not be presumed without some circumstances from which it might be inferred, *semble*. S. C. 9 Hare 114.

2. Where both debts are legal, there can be no set-off allowed in equity, without special circumstances. *Harvey* v. *Wood*, 5 Madd. 459.

3. If a party neglect to plead a legal set-off to an action, he is not entitled to the assistance of a court of equity to give him the benefit of the set-off. *Exp. Ross*, Buck 125.

4. Where set-off may be made at law, no bill for injunction will lie to stay proceedings at law. *Hirst* v. *Peirse*, 4 Price 339.

5. Equitable set-off upon mutual credit; though no mutual debts upon which a set-off could be sustained at law. *James* v. *Kynnier*, 5 Ves. 106.

6. Where there are cross demands between two parties of such a nature that if both were recoverable at law they would be the subject of legal set-off, then if either of the demands is matter of equitable jurisdiction the set-off will be enforced in equity. *Clark* v. *Cort*, Cr. & Ph. 154; 10 L. J., N. S., 113.

7. The mere existence of cross demands is not a sufficient ground for the interference of equity to set off one against the other; there must be some equity attaching to the demand which is sought to be enforced at law (and not merely arising out of the same subject matter), as that it is an item of a complicated account which can only be taken in equity, or

that there has been a breach of contract by plaintiff at law, relating to the subject matter on his action. In this case, where an action was brought at law for non-acceptance of bills of exchange at stated times, being the mode of payment agreed upon between the parties in a course of dealing between them, the defendant at law was not allowed to set off in equity what appeared to the Court an uncertain balance alleged to be due upon a complicated state of accounts. *Rawson* v. *Samuel*, Cr. & Ph. 161; 10 L. J., N. S., Ch., 214; 3 Jur. 947.

1. Cross demands are not alone a sufficient foundation for equitable set-off; and, *quære*, whether equitable set-off is not confined to cases in which the equity of the bill impeaches the title of the legal demand. *Fisher* v. *Baldwin*, 11 Hare 352.

2. The right of set-off can only arise out of some contract, express or implied, between the parties, to pay and receive money, or other persons standing in their shoes. *Smee* v. *Baines*, 7 Jur., N. S., 902; 9 W. R. 802; 4 L. T., N. S., 573.

3. Stoppage no payment at law or in equity, unless under special circumstances, and in case of special demands where the balance only is the debt. *Jeffs* v. *Wood*, 2 P. W. 128.

4. Where the answer to a bill for an account sets up a counterclaim, as to which it is doubtful whether it would or would not be available to the defendant as an item of discharge under the general account directed by the decree, the Court, as the safer course, will make it the subject of a special inquiry. *Lord* v. *Wightwick*, 2 Ph. 110.

5. If a party, knowing all the circumstances, makes a payment without taking advantage of his right to make certain deductions at the time, he cannot afterwards claim a set-off as between himself and his creditor for such omissions. *Exp. Turner*, 13 W. R. 104; 11 L. T., N. S., 352.

II. CROSS DEMANDS IN AUTRE DROIT.

6. A debt cannot be set off against another, if they are in different rights. *Whitaker* v. *Rush*, Ambl. 407.

7. No set-off allowed where the demand is *in autre droit*. *Medlicot* v. *Bowes*, 1 Ves. 207.

8. B., a residuary legatee, and surviving executrix of her husband, to whom C. and O. had given a joint bond; C. died, and the plaintiff was indebted on her own private account to O., who was a bankrupt; the bill brought against his assignees for an injunction, and to set off what was become due to her as executrix against the debt from herself to the bankrupt. Injunction denied: for as such a set-off could not be done at law, there is no instance of its being allowed here; for the debts are due in different rights, and 2 Geo. 2 does not comprehend it. *Bishop* v. *Church*, 3 Atk. 691; 2 Ves. 100, 371.

9. A., being indebted to B. in a sum of 1,000*l*., executed a bond to him for securing that amount, and interest. B. subsequently died, having by his will appointed C. and D. his executors and residuary legatees. An apportionment of B.'s residuary estate being made, the bond is allotted to C. as part of his share; C. being the steward of A., and having a running account with him, enters the bond in that account. C. dies intestate, leaving a widow who takes out administration to his estate, and also administration *de bonis non* to B.; and as such administratrix, *de bonis non*, she files a bill as a specialty creditor against the representatives of A.:—Held, that in this suit the representatives of A. could not make a set-off against the demand in respect of sums which they alleged to have been omitted or improperly charged in the account of C.; but must file a cross bill. There can be no set-off either at law or equity, where either of the debts is a debt *in autre droit*. *Gale* v. *Luttrell*, 1 Y. & J. 180.

10. Cross demands existing in separate rights cannot be set off one against the other, except under special circumstances. *Stammers* v. *Elliott*, 37 L. J., Ch., 353; 18 L. T., N. S., 1; 16 W. R. 489; 3 L. R., Ch., 195. And see S. C. 16 L. T., N. S., 200; 4 L. R., Eq., 675; 15 W. R. 618.

11. One of several trustees of a real estate, having become mortgagee of the trust estate, partly by taking an assignment of a mortgage prior to the trust, partly by taking an assignment of a mortgage created under the trust, and partly for money which he had lent to the *cestui que trust*, filed his bill for foreclosure simply. The *cestui que trust* of the equity of redemption filed his bill for an account of the trust and of the mortgages, and that the mortgage securities might stand only for the balance due on both accounts; and the plaintiff obtained an order for hearing both causes together:—Held, that the Court might make one decree in both causes, so as to give the mortgagor any set-off he might be entitled to, or make a decree of foreclosure in the former suit, and a separate decree for an account against the trustee personally in the latter, according to the circumstances and justice of the case. *Dodd* v. *Lydall*, 1 Hare 333.

12. When a plaintiff is suing merely as trustee, and the defendant has a claim against the *cestui que trust*, which, but for the intervention of the trust, would have been a legal set-off, such claim can be set off in equity, and, therefore, in an action can be set off by an equitable plea. *Thornton* v. *Maynard*, 44 L. J., C. P., 382; 10 L. R., C. P., 695; 33 L. T., N. S., 433.

13. T. improperly allowed part of the trust fund to be received by B., the tenant for life. S., one of the reversioners, borrowed money from C., and mortgaged to him her share in the trust funds. B. at the same time gave C. a bond and a mortgage of other property for the same debt, B. being a surety for S. in this transaction. The defendant having been paid out of B.'s estate:—Held, that T.'s representative could not claim to have this payment set off against the claim of S. in respect of the misapplied part of the trust fund. *Life Association of Scotland* v. *Siddal*, 3 De G. F. & J. 58; 7 Jur., N. S., 785; 9 W. R. 541; 4 L. T., N. S., 311.

14. I., a consignee of a West India estate, was appointed trustee thereof by B., the tenant for life, for the purpose of keeping down incumbrances. I. was also private agent and banker for B., with the understanding

that B. was not, nor were his funds, to be liable for advances made by I. for the estate. I. becoming embarrassed, was declared bankrupt, and assignees were appointed:—Held, by the Lords, reversing orders of the Court of Chancery, on a bill filed by B. and the other owners of the estate, to remove I. from the possession and management, that a sum found due from I. to B., on their private dealings, might be set off against a sum found due to I. in respect of his advances and payments for the estate. *Baillie* v. *Edwards*, 2 H. L. Ca. 74. Reversing S. C. *nom.* *Baillie* v. *Innes*, 14 L. J., N. S., Ch., 341.

1. A person advancing to a married woman, deserted by her husband, and left wholly without provision, sums of money which have been actually laid out in the purchase of necessaries for her, is, in a court of equity, entitled to stand in the place of the tradespeople supplying those necessaries, and the sums so advanced and so laid out, constitute an equitable set-off against a legal debt due to the husband from the person making those advances. *Jenner* v. *Morris*, 1 Dr. & Sm. 218. Affirmed 7 Jur., N. S., 375; 30 L. J., Ch., 361; 9 W. R. 391; 3 L. T., N. S., 871.

Therefore, in a suit instituted by a person who had deserted his wife, to enforce against the defendant's life interest in real estate a judgment recovered by the plaintiff against him in an action, a set-off in respect of such advances to her for necessaries was allowed to the defendant, although he could not have recovered them at law. *Ib.*

2. A. and his wife and children were entitled under a settlement to 1,500*l.* charged on real estate of which B. was tenant for life; the 1,500*l.* was the wife's property vested in trustees for the husband for life, with usual remainders. A. was indebted to B. for money advanced for the wife:—Held, that on raising the charge, B. could not set off his claim against A.'s life interest. *Jenner* v. *Morris*, 1 Dr. & Sm. 334; 9 W. R. 29; 2 N. R. 479.

3. A mercantile firm, being indebted to the plaintiffs, assigned their property and business to trustees by a deed containing a proviso that, if the firm became bankrupt before a certain day, the deed should be void. The trustees carried on the business, and the plaintiffs became indebted to them in the course of trade. Before the day specified in the deed the firm became bankrupt, and afterwards the trustees brought an action against the plaintiffs for the debt due to them:—Held, in a suit by the plaintiffs to establish an equitable set-off, that the plaintiffs could not set off the debt due to them from the firm against the debt due from them to the trustees. *Hunt* v. *Jessell*, 2 W. R. 219; 18 Beav. 100.

4. A demand, in the character of trustee or executor, cannot be set off against a debt due from the trustee or executor personally, although the executor gives evidence to show that he is, in fact, personally beneficially entitled to the amount which is due to him in the character of executor. *Middleton* v. *Pollock*, *Exp. Nugee*, 44 L. J., Ch., 584; 20 L. R., Eq., 29; 23 W. R. 766; 33 L. T., N. S., 240.

The only cases in which such a set-off of claims arising in different rights can be allowed are those where the person claiming the benefit of it can show some equitable ground (other than the mere claim of set-off) for being protected against the legal demand. *Ib.*

A. was an executor and trustee of a fund to which as to one moiety he was entitled beneficially. The fund was in the hands of P., who died insolvent; at the time of P.'s death A. was indebted to P.:—Held, that A. could not set off the debt to the trust against his debt due to P. *Ib.*

5. Cross demands, existing in separate rights, are not, in equity (except under special circumstances), allowed to be set off one against the other; and therefore an executor and trustee of a legacy, who was also the residuary legatee, and had become a creditor of the husband and administrator of a deceased legatee, was not, in the absence of any special agreement, allowed to set off his debt against the legacy to which the husband (having survived his wife the legatee) was, as such administrator, entitled. *Freeman* v. *Lomas*, 9 Hare 109; 15 Jur. 648; 20 L. J., Ch., 564.

6. A debt from a bankrupt to a married woman *dum sola*, cannot be set off against a debt from her husband to the bankrupt. *Exp. Blagden*, 19 Ves. 465; 2 Rose 249.

7. Upon the bill of a married woman entitled to a share of the personal estate as one of the next of kin of the intestate against her husband and administrator, the latter claiming to retain toward satisfaction of a debt by bond from the husband to him, it was declared he was not entitled to retain, but that the plaintiff's share was subject to a further provision in favour of her and her children, the settlement on her marriage being inadequate to the fortune she then possessed; and it was referred to the Master to see a proper settlement made on her and her children; regard being had to the extent of her fortune, and the settlement already made upon him. *Elibank* (*Lady*) v. *Montolieu*, 5 Ves. 737.

See also EXECUTOR AND ADMINISTRATOR, XXVIII.

III. JOINT AND SEPARATE DEMANDS.

1. *In General*, 6141.
2. *Partnership*, 6142.

1. In General.

8. Joint and separate debts cannot be set off against each other at law. *Exp. Twogood*, 11 Ves. 519.

9. B. and M. had various transactions in negotiating bills, and M. had paid for B. 3,000*l.* During these transactions M. committed a secret act of bankruptcy. The assignees recovered a verdict for 3,000*l.* against B., who insisted on being allowed 712*l.* which he paid for the bankrupt. Lord Chancellor thought B. not concluded by the verdict, but entitled to the allowance which might be sued for in equity as a matter of contract and account. *Billon* v. *Hyde*, 1 Atk. 126; 1 Ves. 326.

An equitable set-off was allowed under circumstances, as there could be none at law. *Ib.*

1. A. has a joint demand against B. and C., who are also creditors of A. B., by letter, having made himself separately liable to A. on account of the demand originally joint, cannot, either at law or in equity, set off the joint debt due from A. to himself and C. *Exp. Ross*, Buck 125.

2. There is no rule that a debt due to joint creditors, which has been contracted by fraud, can be set off against a separate debt due from one of the joint creditors. *Middleton* v. *Pollock, Exp. Knight and Raymond*, 20 L. R., Eq., 515; 44 L. J., Ch., 618.

P., the solicitor of K. and R. (who were trustees of a marriage settlement), received on their behalf 4,000*l.*, and represented that he had invested the whole of it on mortgage. He did invest on mortgage two sums of 2,200*l.* and 850*l.*, part thereof; but he never invested the balance of 950*l.* The debt of 2,200*l.* was (with the knowledge of K. and R.) paid off and received by P., and retained by him for reinvestment; but no reinvestment was ever made. P. died insolvent:—Held, that neither of the sums of 2,200*l.* and 950*l.* due from his estate could be set off against a separate debt due to the estate from K. *Ib.*

2. Partnership.

3. Where two partners were creditors of a bankrupt, and one of them was separately his debtor:—Held, the joint debt cannot be set off against the separate demand. *Exp. Riley*, W. Kel. 24.

4. Debtor by bond to the separate estate of a deceased partner, not allowed in equity to set off his bond debt, in respect of acceptances for which he had become liable to the partnership estate, and which were proved by him under a joint commission of bankruptcy. *Addis* v. *Knight*, 2 Meriv. 117.

5. Set-off in bankruptcy of a debt of the bankrupt's to one partner separately, against a joint debt of him and his partner, on their bond to secure the separate debt of the former. *Exp. Hanson*, 18 Ves. 232; 1 Rose 156. And see, confirmatory of this doctrine, *Vulliamy* v. *Noble*, 3 Meriv. 593.

A., entering into partnership with B., applies to his bankers for a loan to constitute his capital. They consent upon condition that B. shall join in a security for the repayment of the loan, which is complied with. The partnership open an account with the bankers, who also continue the private bankers of A. On the bankruptcy of the bankers the balance on the joint account arising from this loan is against A. & B., but A.'s private account is in his favour. A. & B. were allowed to set off this private balance against the joint debt, it being but a security for the separate debt. A. & B. soon after the partnership commenced took in another partner, but it was understood that the account with the bankers was to continue as before. This partner drew cheques in the partnership name, and paid them into his private accounts. The assignees were held not entitled to charge the cheques so transferred against the partnership account. *Ib.*

6. A. and B. entered into partnership as brewers, A. bringing in, as his share of the capital, a brewhouse and other premises, which were subject to mortgages for debts due by him. A. retired from the business, which was continued by B. alone, who agreed to take the brewhouse, etc., at a valuation, but the amount was not to be paid till the mortgages were satisfied. B. becomes bankrupt, and the mortgage debts remaining unpaid, his assignees, before any proof made in respect of A.'s debt, paid off the mortgages:—Held, that the assignees were entitled to deduct the sums paid by them from the dividends on the sum which was due to A. from B. at the time of his bankruptcy. *Rowe* v. *Anderson*, 4 Sim. 267.

7. A. and B., partners, gave a joint and several bond to C., who afterwards becomes indebted to A. B. becomes bankrupt. C. proves the bond under the commission, and then brings a joint action against A. and B., to which B. pleads his certificate. A. being by this form of action precluded from setting off his separate debt, applies for and obtains injunction against C.'s proceeding in the joint action. *Bradley* v. *Millar*, 1 Rose 273.

8. Joint simple contract creditor may proceed against a clear residue of assets of deceased partner, the survivor being insolvent; and may set off, against a debt to the deceased from the survivor and himself as his surety, a debt to the survivor from deceased, which was agreed to be applied in liquidation of debt secured. *Cheetham* v. *Crook*, M'Clel. & Y. 307.

9. If a customer borrows money from his banker's and gives a bond to secure it, and afterwards on his general banking account a balance is due to the customer from the same bankers, who are the obligees of the bond, a right to set-off the balance against the money due on the bond exists both at law and in equity. *Cavendish* v. *Geaves*, 24 Beav. 163; 3 Jur., N.S., 1086; 27 L.J., Ch., 314; 5 W. R. 615.

If the firm were altered, and the bond assigned by the original obligees to the new firm, and notice of that assignment given to the debtor, and if, after this, a balance were due to him from the new firm (the assignees of the bond), then no right of set-off would exist at law, because the assignment of the chose in action would be inoperative at law, and the obligees of the bond and the debtor in the general account would be different persons; but as, in equity, the persons entitled to the bond and the debtors on the general account would be the same person, a right of set-off would exist, and the customer would in equity be entitled to set-off the balance due to him against the bond debt due from him. *Ib.*

10. P. and D., in the year 1814, commenced a partnership as solicitors. W. was a client of the firm, and employed D. as his private agent to receive his rents. The partnership was dissolved in 1817, when W. was indebted to the firm for a bill of costs, in a sum of 867*l.*, and D., upon a settlement of the partnership between him and P., was found indebted to P. in a sum of 750*l.*, for which he gave security, and agreed to assign to P. the outstanding partnership debts. Of this settlement, debt, and agreement, notice was given to W. in 1821. During the partnership, and afterwards, D. had received moneys on account of W. beyond the amount of the bill of costs; there was no evidence of any direction given by W. to D., to apply the moneys received by D. on his account to the payment of the bill of costs, nor of any settlement of accounts

between W. and D.; but it was in evidence, that, upon one occasion, W. said to D., that he had better keep some money of W.'s which he had in his hands, as he might want it. A bill in equity, filed by P., stating these facts, and that D. had possession of the partnership books, to which P. had not access; that D. had refused to concur with him in suing W. at law, or to permit the use of his name for that purpose; and that by collusion between W. and D. the moneys of W. received by D. had, as they pretended, been applied to payment of the partnership debt, and praying an account and payment of the debt, was dismissed by the Master of the Rolls; but on appeal to the Lord Chancellor this order was reversed, and a decree for account and payment made against the executors of W., and this decree was affirmed on appeal. *Nottidge* v. *Pritchard*, 8 Bli. N. S. 493; 2 Cl. & F. 379.

1. By articles of partnership, entered into in May 1843, between A. and B., as solicitors, it was agreed, that on the death of either the surviving partner should during the joint lives of himself and the widow of the deceased partner pay to the appointee of the deceased partner an annuity of 200*l.*, or one-fourth part of the profits of the business according as the surviving partner should elect. In August 1843 A., on his marriage with the petitioner, made an appointment in her favour of an annuity of 200*l.*, or at B.'s election, of one-fourth of the part of the profits of B. in the business. The partnership between A. and B. continued until A.'s death, in September 1851. B. then conducted the business alone until his bankruptcy in 1856; but he did not in the interval between the death of A. and his own bankruptcy make any payment, either in respect of the annuity of 200*l.* or of one-fourth part of the profits of his business, nor did he make any election between the two; his assignees in bankruptcy, however, elected, if obliged to elect, to pay to the petitioner one-fourth part of the profits. At the death of A. the partnership was indebted to different persons to an amount exceeding such one-fourth part of the profits, and those debts had been paid off by B. prior to his bankruptcy:—Held, that the assignees were entitled to set-off against the profits of the business payable to the petitioner the amount of the debts due from the partnership at A.'s death. *Exp. Harper*, 1 De G. & J. 180; 3 Jur., N. S., 724; 26 L. J., Bky., 74.

2. A. and B., traders, had a joint account at their bankers, and A. had also a separate account at the same bank. The bankers suspended payment; at that time the joint account of A. and B. was indebted to the bankers, but the bankers were indebted to A. upon his separate account. A. and B., in pursuance of an arrangement between themselves, gave a notice to the bankers, desiring them to transfer the money standing to the separate account of A. to the joint account of A. and B. The bankers omitted to comply with this order, and afterwards became bankrupts, and their assignees brought an action against A. and B. for the balance due to the bankers upon their joint account. A. and B. filed this bill to restrain the proceedings at law:—Held, that the bankers after a suspension of payment could not transfer or set off one account against another; that they had no lien upon the separate balance in their hands for the money due to them upon the joint account; and that A. and B. had no right to be relieved from the proceedings at law, and the bill was dismissed with costs. *Watts* v. *Christie*, 11 Beav. 246; 18 L. J., N. S., Ch., 173; 13 Jur. 244, 845.

3. As to the equity of set-off for partnership debts paid by a continuing partner, against a legal debt due from him to a retired partner, upon a bond for a private loan. *Lee* v. *Flood*, 2 Sm. & G. 250.

One of two partners as bankers lent to his partner a sum of money on the joint and several bond and covenant of the borrower and another person in 1821, and died in 1833; the obligor continued to pay interest till 1843, when he died, and his executor paid interest up to 1847. On the death of the obligee in 1833, some settlement of the banking affairs was come to between his executor and the surviving partner and another subsequently admitted, which the executor alleged was final, but which was disputed. The executor of the obligee then became a partner, and other changes subsequently took place in the firm, each new firm taking on itself all the former liabilities and assets. In 1847 the firm in which the executor had continued a partner became bankrupt. In a suit for the administration of the estate of the obligor, certain creditors of the firm, on promissory notes given prior to 1833, whose debts had been adopted by the successive firms, were admitted as separate creditors of the estate. The executor of the obligee was admitted as a creditor for the loan, and no equitable set-off for contribution was allowed, none having been established in respect of the said estate of the obligee being separately liable to the creditors, although it was probable that in winding up the partnership affairs, some claim by the obligor's estate against the estate of the obligee might be established. *Ib.*

4. Assignees of a chose in action are liable to all the equities which attach to the thing assigned as against the assignor. *Smith* v. *Parkes*, 16 Beav. 115.

A retiring partner received security from the continuing partners for his share, and which he assigned to third parties:—Held, that the assignees took subject to the right of equitable set-off of the continuing against the retiring partner. Held also that the assignees having assented to a substituted security in 1846, in lieu of a prior one in 1845, were subject to all the equities existing at the date of the second security. *Ib.*

5. A testator, who had advanced money to his son, and paid large sums on his account, bequeathed him a legacy without making mention of the debt:—Held, that the loan and unascertained balance must be set off against the legacy. *Smith* v. *Smith*, 3 Giff. 263; 7 Jur., N. S., 1140; 5 L. T., N. S., 302.

Upon the same principle, the Court held that the assignees of a firm indebted to the testator were not entitled to receive a legacy bequeathed by the testator to a member of the firm. *Ib.*

6. The account of a customer of a firm consisted of debits and credits arising from the purchase and sale of goods. The partner-

1. A. has a joint demand against B. and C., who are also creditors of A. B., by letter, having made himself separately liable to A. on account of the demand originally joint, cannot, either at law or in equity, set off the joint debt due from A. to himself and C. *Exp. Ross*, Buck 125.

2. There is no rule that a debt due to joint creditors, which has been contracted by fraud, can be set off against a separate debt due from one of the joint creditors. *Middleton* v. *Pollock, Exp. Knight and Raymond*, 20 L. R., Eq., 515; 44 L. J., Ch., 618.

P., the solicitor of K. and R. (who were trustees of a marriage settlement), received on their behalf 4,000*l.*, and represented that he had invested the whole of it on mortgage. He did invest on mortgage two sums of 2,200*l.* and 850*l.*, part thereof; but he never invested the balance of 950*l.* The debt of 2,200*l.* was (with the knowledge of K. and R.) paid off and received by P., and retained by him for reinvestment; but no reinvestment was ever made. P. died insolvent:—Held, that neither of the sums of 2,200*l.* and 950*l.* due from his estate could be set off against a separate debt due to the estate from K. *Ib.*

2. Partnership.

3. Where two partners were creditors of a bankrupt, and one of them was separately his debtor:—Held, the joint debt cannot be set off against the separate demand. *Exp. Riley*, W. Kel. 24.

4. Debtor by bond to the separate estate of a deceased partner, not allowed in equity to set off his bond debt, in respect of acceptances for which he had become liable to the partnership estate, and which were proved by him under a joint commission of bankruptcy. *Addis* v. *Knight*, 2 Meriv. 117.

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9. If a customer borrows money from his banker's and gives a bond to secure it, and afterwards on his general banking account a balance is due to the customer from the same bankers, who are the obligees of the bond, a right to set-off the balance against the money due on the bond exists both at law and in equity. *Cavendish* v. *Geaves*, 24 Beav. 163; 3 Jur., N.S., 1086; 27 L. J., Ch., 314; 5 W. R. 615.

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between W. and D.; but it was in evidence, that, upon one occasion, W. said to D., that he had better keep some money of W.'s which he had in his hands, as he might want it. A bill in equity, filed by P., stating these facts, and that D. had possession of the partnership books, to which P. had not access; that D. had refused to concur with him in suing W. at law, or to permit the use of his name for that purpose; and that by collusion between W. and D. the moneys of W. received by D. had, as they pretended, been applied to payment of the partnership debt, and praying an account and payment of the debt, was dismissed by the Master of the Rolls; but on appeal to the Lord Chancellor this order was reversed, and a decree for account and payment made against the executors of W., and this decree was affirmed on appeal. *Nottidge* v. *Pritchard*, 8 Bli. N. S. 493; 2 Cl. & F. 379.

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3. As to the equity of set-off for partnership debts paid by a continuing partner, against a legal debt due from him to a retired partner, upon a bond for a private loan. *Lee* v. *Flood*, 2 Sm. & G. 250.

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4. Assignees of a chose in action are liable to all the equities which attach to the thing assigned as against the assignor. *Smith* v. *Parkes*, 16 Beav. 115.

A retiring partner received security from the continuing partners for his share, and which he assigned to third parties:—Held, that the assignees took subject to the right of equitable set-off of the continuing against the retiring partner. Held also that the assignees having assented to a substituted security in 1846, in lieu of a prior one in 1845, were subject to all the equities existing at the date of the second security. *Ib.*

5. A testator, who had advanced money to his son, and paid large sums on his account, bequeathed him a legacy without making mention of the debt:—Held, that the loan and unascertained balance must be set off against the legacy. *Smith* v. *Smith*, 3 Giff. 263; 7 Jur., N. S., 1140; 5 L. T., N. S., 302.

Upon the same principle, the Court held that the assignees of a firm indebted to the testator were not entitled to receive a legacy bequeathed by the testator to a member of the firm. *Ib.*

6. The account of a customer of a firm consisted of debits and credits arising from the purchase and sale of goods. The partner-

ship was dissolved, the customer being greatly indebted to it, but the account was continued in the same mode by the succeeding firm:—Held, that the doctrine of appropriation of payments applied to the debtor's account. *Laing* v. *Campbell*, 36 Beav. 3.

1. A. and B. were partners in a firm. A. allowed a debtor to the partnership to set off a separate debt of his own against money due to the firm, the debtor knowing the interest which B. had in the debt. B. filed a bill against the debtor and against A., to have it declared that the debtor had no right to retain his share in the debt towards payment of the separate debt of A.:—Held, that, although one partner could bind another in the receipt and payment of partnership debts, he could not set off his separate debts against the debts due to the firm; and the debtor's knowledge of the co-partner's interest rendered the bill sustainable as against him. *Piercy* v. *Fynney*, 12 L. R., Eq., 69; 40 L. J., Ch., 404; 19 W. R. 710.

Held, also, that this was a proper subject for a suit in equity, since one partner must sue in an action in the name of himself and his co-partner. *Ib.*

IV. BANKER AND CUSTOMER.

2. If a customer borrows money from his bankers, and gives a bond to secure its repayment, and the balance upon the general banking account is afterwards in favour of the customer, a right to set off such balance against the amount due on the bond exists both at law and in equity. *Cavendish* v. *Geaves*, 3 Jur., N. S., 1086; 5 W. R. 615; 24 Beav. 163; 27 L. J., Ch., 314.

But if the firm is altered, and the bond is assigned by the obligees to the new firm, with notice of the assignment to the obligor, and the balance upon the general banking account is afterwards in favour of the customer, no right of set-off exists at law; but in equity the customer is entitled to set off the balance due on the banking account against the amount due on the bond. *Ib.*

If after the bond had been given it had been assigned to strangers, and no notice of that assignment given to the original debtor (the obligor of the bond), then his rights would remain the same. Thus if the assignment had been made to the stranger before any alteration of the firm, then the right off set-off would remain at law, where the obligees of the bond and the debtors on the general account would be the same persons; and in equity also, if the matter of account were brought there, as the chose in action would be bound by the equities affecting their assignors. *Ib.*

But if notice of that assignment had been given to the original debtor, no right of set-off would exist for the balance subsequently due from the bankers to the obligor, because the persons entitled to the bond would, as the obligor knew, be different persons from the debtors to him on the general account, with whom he had continued to deal. *Ib.*

If the assignment of the bond had been made to the new firm, with notice to the obligor, they would, if debtors on the general account, be liable to the same rights of set-off in equity as if they had been the obligees. *Ib.*

If, after the alteration of the firm, and after the assignment of the bond to the new firm, with notice to the debtor or obligor of that assignment, an assignment had been made of the bond to strangers, and no notice of such second assignment given to the obligor, then the rights of set-off would still remain to him in equity, as against the first assignees, of whose assignment he had notice; and the second assignees would, in equity, be bound by it, because the assignees of the bond take it subject to all the equities which affect the assignors. *Ib.*

Bankers, to whom a customer had given a bond, assigned it over to third parties, who gave no notice to the obligor:—Held, that notwithstanding the assignment, the customer's right continued of setting off moneys due to him from his bankers against the bond. *Ib.*

3. Where bankers were directed to lay out money in navy annuities, but did not do so, but represented that they made entries, and accounted for dividends accordingly, and took promissory note from party under that supposition, from the party and her brother to receive debt from him to them; upon which the assignees under their bankruptcy sued him alone; an order was made for proof only of balance, setting off the debt upon the note, and an injunction and delivery of the note. *Exp. Stephens*, 11 Ves. 24.

4. H., who had an account with bankers, drew bills, which were accepted by his customers, and discounted by his bankers. Before the bills were at maturity, the bankers, on the ground of H.'s liabilities on the bills, and of some of the acceptors having stopped payment, refused to honour H.'s cheques. H. brought an action for the balance in his banker's hands and for damages. Before the trial one of the bills became due, and was dishonoured by the acceptor, and was not paid by H. The bankers filed a bill, and obtained an injunction to restrain all further proceedings in the action. *Agra and Masterman's Bank* (*Limited*) v. *Hoffman*, 11 Jur., N. S., 335; 34 L. J., Ch., 285; 11 L. T., N. S., 701; 5 N. R. 214.

5. A testator directed that his debts and legacies (other than charitable legacies) should be paid by his executors out of his impure personalty, and his charitable legacies out of his pure personalty. The pure personalty was insufficient to pay all the charitable legacies in full. In December 1871 he borrowed 8,000*l.* of his bankers, to be repaid in March 1872. This sum was placed to his credit on a loan account. He died in February 1872, having, at the day of his death, 629*l.* standing to his credit on his general drawing account:—Held, that the executors were not bound to pay out of the impure personalty the whole amount of the debt due on the loan account at the day of the death, but only the difference between that amount and the amount then standing to the testator's credit on his general drawing account. *Thomas* v. *Howell*, 18 L. R., Eq., 198; 43 L. J., Ch., 799; 30 L. T. 244; 22 W. R. 676.

V. JUDGMENTS.

6. Bill by insurance broker for discovery and account of money paid and received by him in

that capacity on account of defendant, and money due to him for commission, etc., and for promissory notes indorsed to him, and to restrain action as brought contrary to universal custom of business. Demurrer allowed, the subject being matter of set-off at law. *Dinwiddie* v. *Bailey*, 6 Ves. 136.

1. Demurrer to a bill for a general account to be taken of all dealings and transactions between the parties, and for an injunction to restrain the defendant from taking out execution on a judgment recovered by him in an action at law, allowed on the grounds, that the statement in the bill did not furnish such a case of matter of account between the parties, as to entitle the plaintiff to interference of the Court on the principles of equity, in that it was nothing more than matter of set-off, or other defence at law; and if it had been a stronger case the plaintiff, after having suffered the action at law to be tried and determined at *nisi prius*, had come too late to ask the interference of the Court. *Cooper* v. *Hatton*, 12 Price 502.

2. Motion refused to dissolve an injunction (granted on affidavit and certificate) to restrain execution on a judgment obtained by the defendant against the plaintiff, the latter having obtained a judgment to a greater amount against the former. *Williams* v. *Davies*, 2 Sim. 461.

3. Cross demand acquired after verdict is not ground for injunction here, to stay proceedings under verdict. *Whyte* v. *O'Brien*, 1 Sim. & S. 551.

4. Equitable right of set-off enforced after a judgment at law. *Smith* v. *Parkes*, 16 Beav. 115.

5. Where money, to be set off against a judgment debt, becomes due before the judgment, the judgment is treated in Equity as obtained for the difference only. Where such money becomes due at any time after the judgment, it is to be set off firstly against the interest up to that time, and then in diminution of the capital at the same time. Such set-off is not a charge upon the judgment debt, but a satisfaction of it *pro tanto*. *Fenner* v. *Morris*, *Webster* v. *Morris*, 2 N. R. 479.

A. is a debtor to B. on a judgment, and succeeds in establishing a set-off in equity for moneys advanced to B.'s wife for necessaries. B. has a charge upon estates in which A. has a life interest, such charge, when raised, being payable to the trustees of B.'s settlement. A. cannot claim the same set-off against B. in respect of the charge, because it is not a personal demand on both sides as in the other case. S. C. 9 W. R. 29, 391; 1 Dr. & Sm. 334, 218; 7 Jur., N. S., 375; 30 L. J., Ch., 361; 3 L. T., N. S., 871.

VI. LANDLORD AND TENANT.

6. Injunction to stay proceedings at law for rent by landlord, prayed on ground of agreement constituting a legal set-off, refused. *Townrow* v. *Benson*, 3 Madd. 203.

Quære, whether this Court will relieve by allowing an equitable set-off on demand for rent. *Ib.*

7. Tenant having a claim against his landlord for unliquidated damages, occasioned by cutting timber on the demised premises, in pursuance of a power so to do reserved by the lease, the landlord brought an ejectment for non-payment of rent. On bill filed by tenant, stating his claim and charging that if ascertained and credit given for it there would not be a year's rent in arrear, and on that fact being established, upon an issue, tenant was restored to the possession (which landlord had obtained in the meantime) on paying the balance due by him, and decreed entitled to an account of mesne profits, etc. *Beasley* v. *Darcy*, 2 Sch. & Lef. 403. n.

8. A., as assignee of B., a bankrupt, gave an undertaking to C., who was the mortgagee of one farm, and was under a contract to purchase another farm, both the property of the bankrupt, and who had a distress upon the mortgaged premises, that if the distress were withdrawn he would pay to C. the arrears then due, in respect of the mortgage, out of the effects on the premises. C. withdrew the distress accordingly, and afterwards the bankruptcy was annulled, before A. had obtained possession of any part of the bankrupt's effects, whereupon C. brought an action on the undertaking, and rendered judgment against A. personally:—Held, on a bill filed by A. against C., to which B. was no party, that A. could have no relief in equity against the judgment at law, and that he was not entitled, as against C., to claim repayment of the sum thereby recovered, out of the fine which C. had contracted to pay for the other farm. *Pell* v. *Stephens*, 2 Myl. & K. 334; Coop. *temp.* Brough. 266. And see this case, 4 Tyrw. 6.

9. Where an action for trespass for mesne profits is brought against a party who has a cross claim against the plaintiff at law for money expended on the land, the Court will grant an injunction to restrain the proceedings at law, there being no right of set-off in such an action. *Cawdor* (*Lord*) v. *Lewis*, 1 Y. & Coll. 427.

A tenant had judgment in an action against his landlord for excessive distress for a certain sum. The landlord subsequently had awarded to him for damages, under an arbitration clause in the lease, a larger sum. The tenant took proceedings to enforce payment, and the landlord filed a bill, and moved for an injunction to restrain such proceedings on the ground of set-off. Injunction refused, with costs. *Maw* v. *Ulyatt*, 7 Jur., N. S., 1300; 31 L. J., Ch., 33; 10 W. R. 4; 5 L. T., N. S., 251.

10. The tenant of a farm died indebted to his landlord in a sum of money. His administrator surrendered the farm to the landlord, who took the farm stock at a valuation, and who bought some of the furniture and fixtures at the sale of the intestate's effects:—Held, that the landlord could not set off the amount of the valuation, or of the goods purchased by him, against the debt due from the intestate. *Lambarde* v. *Older*, 2 W. R. 32; 23 L. J., Ch., 18; 17 Jur. 1110.

11. Where a tenant of leaseholds, who had paid certain rents to one of the persons beneficially entitled thereto, filed a bill against the landlord, claiming to set off such payments and a private debt due from the landlord, against the rent due to the landlord as trustee, a demurrer for want of equity was allowed. *Pratt* v. *Keith*, 10 Jur., N. S., 305; 33 L. J., Ch., 528.

1. By a deed of even date with a lease, the lessor covenanted that the lessee should retain part of each year's rent until satisfaction of a debt due from the lessor to the lessee:—Held, that though the covenant might be pleaded at law as a release *pro tanto* of the rent, this was only to avoid circuity of action, and the covenant was not for all purposes a release. *Ledger* v. *Stanton*, 2 John. & H. 687.

Therefore, the lessee having specially bequeathed the premises subject to the rent:—Held, as between the executors and the specific legatees, that specific legatees took subject to the whole rent, and that the benefit of the covenant for reduction of rent went to the executors. *Ib.*

2. Upon the marriage of A., the grandson of W., from whom A. had large expectations, a house and lands were settled upon A., and it was agreed that the grandfather should occupy the house and lands, and also some glebe-lands belonging to A. There was evidence as to the rent that was to be paid, which was about the actual value. A. never enforced the rent during the eight years of his grandfather's occupancy, which ceased with his death, but had received sums in money and goods equal to about half the alleged rent:—Held, that there was either an express contract to pay the rent, or an agreement to occupy as any other tenant, and pay a *quantum meruit*; the sums and goods paid to go towards the rent. *Alington* v. *Booth*, 3 Jur., N. S., 50.

3. The plaintiff, a landlord, was liable to the defendant, his tenant, for the costs of an injunction suit for an alleged breach of covenant, which suit had been dismissed. He had subsequently recovered judgment against the defendant in an action for rent. He then became liable to the defendant for damages which had been assessed in chambers, in respect of the wrongful injunction. He was further entitled to his costs of a summons to vary the certificate for damages taken out by the defendant, which had failed:—Held, that he was entitled to set off the judgment debt against the damages but not against the costs of the suit; and that he was also at liberty to set off his costs of the defendant's summons to vary against the costs of the suit. *Throckmorton* v. *Crowley*, 3 L. R., Eq., 196.

VII. MORTGAGES.

4. Devisee of an equity of redemption is not entitled to have an arrear of interest upon legacy from mortgagee to mortgagor, set off against the interest due upon mortgage. *Pettat* v. *Ellis*, 9 Ves. 563.

5. A mortgagee having inadvertently burnt the mortgage deed and the documents relating to the title to the mortgaged estate, some of which were original, and others attested and office copies, was ordered, in a foreclosure suit, not only to procure fresh attested and office copies, but to make compensation for the damage done to the estate by the destruction of the deeds, the amount to be settled by the Master, and deducted from the mortgage debt. *Hornby* v., *Matcham*, 16 Sim. 325; 17 L. J., N. S., Ch. 471; 12 Jur. 825.

6. On a bill by a mortgagor whose estate had been discharged from the mortgage, and who had taken a reconveyance against the mortgagee for the delivery up of the title deeds, or for an indemnity, it was found that the deeds were lost by the mortgagee or his agent. The Court thereupon refusing to take into consideration the speculative damages which the title or marketable value of the estate might sustain upon any future dealing with it, from the absence of the deeds, yet held that the mortgagor was upon the authorities entitled to relief in respect of the additional expense of producing evidence of his title, and directed a reference (as in *Hornby* v. *Matcham*, 16 Sim. 327) to ascertain what ought to be allowed to him as a sufficient compensation for the damage done to the estate by the loss of the deeds. *Brown* v. *Sewell*, 11 Hare 49; 17 Jur. 708; 22 L. J., Ch., 1063.

VIII. SHIPPING.

7. Charterparty of affreightment between the owners of the ship M., and the Commissioners of Transports, for and on behalf of his Majesty: during continuance in the transport service, the ship makes a capture, which is condemned: and upon petition to the treasury, two-thirds of a moiety of the proceeds arising from the capture ordered, by warrant from the Crown, to be paid to the owners. These proceeds are entirely in the discretion of the Crown; and, upon motion for payment into court of a sum admitted by the Commissioners of Transports to be due for freight under the charter party, which motion was resisted on the ground that the commissioners were entitled to set off the amount of the proceeds received by the owners under the warrant, payment was ordered accordingly, without prejudice to the question of ownership. *Thurgar* v. *Morley*, 3 Meriv. 20.

8. The charterer of a ship in a foreign port, who had notice of a prior mortgage on the ship and its future earnings, agreed with the master, who was also owner, to advance on bottomry such sum as should be necessary to equip the ship for the homeward voyage, and a bottomry bond was accordingly executed, but the amount of the necessary expenses of outfit turned out greater than that for which the bond was given:—Held, that as against the mortgagee, he was not entitled to set off the excess against the sum which became due under the charter party. *Dobson* v. *Lyall*, 2 Ph. 325. n.

9. Certain consignments of oil were made from Colombo to certain persons in England. During the voyage several of the casks leaked and some of the oil escaped and and was lost, but the greater part was collected and sold in one mass by the captain in the course of the voyage for 750*l.*:—Held, first, that a bill in equity was sustainable by the consignees against the shipowner for an account of the oil lost, and the oil sold; secondly, that in action brought by the shipowner against an individual consignee for freight and average, the latter could not set off his share (as ascertained by the agreement) of the moneys arising from the oil sold; consequently, that he could maintain a bill in equity to establish a right of equitable set-off. *Jones* v. *Moore*, 4 Y. & Coll. 351.

IX. SURETYSHIP.

1. The obligor in a bond, becoming surety for advances to the obligee, and being, after the insolvency of the obligee, compelled to pay the debt for which he had become surety, is entitled to set off the sum so paid against the amount due upon the bond. *Jones* v. *Mossop*, 3 Hare 568; 13 L. J., N. S., Ch., 470; 8 Jur. 1064.

2. Joint simple contract creditor may proceed against a clear residue of assets of deceased partner, the survivor being insolvent; and may set off, against a debt to the deceased from the survivor and himself as his surety, a debt to the survivor from deceased, which was agreed to be applied in liquidation of debt secured. *Cheetham* v. *Crook*, M'Clel. & Y. 307.

3. A legacy may be set off against a debt of the legatee to the testators, though such debt is barred by the Statute of Limitations. A. was indebted to R. in two sums of 1,000*l.* each, for one of which S. was surety. B. afterwards obtained from A. a life policy, as a security for both debts. A. subsequently became bankrupt; and B. proved for 1,500*l.* on the two debts, and he received a dividend of 97*l.*, and a sum of 97*l.* 10*s.*, upon the surrender of the policy:—Held, first, that by surrendering the policy the surety was not released; and, secondly, the surety was not liable for half the debt proved, after deducting half the dividends and half the produce of the policy. *Coates* v. *Coates*, 33 Beav. 249; 10 Jur., N. S., 532; 33 L. J., Ch., 448; 12 W. R. 634; 9 L. T., N. S., 795.

4. The money payable on a policy on the life of A. deposited with the insurance company as a security for a loan to B. is to be paid to the surety of B. satisfying the loan, and cannot be set off against a debt due by A. to the company of which B.'s surety had no notice. *Re Jeffery*, 20 W. R. 857.

5. A surety, who, in an action by the creditor, has omitted to plead by way of set off, the the receipt by the creditor of dividends from the debtor's estate, is not precluded from establishing his title to such dividends in equity. *Thornton* v. *McKewan*, 1 N. R. 16; 11 W. R. 140.

A surety gave to a creditor a guarantee to the extent of 5,000*l.* against losses that might arise from advances to be made to his principal. Advances were made to the principal to an amount considerably exceeding 5,000*l.*, and after his death the creditor proved in an administration suit for the whole debt, and received dividends thereon. He afterwards recovered the 5,000*l.*, in an action against the surety. Upon a bill filed by the surety:—Held, that he was entitled to be paid such a proportion of the past and future dividends as was received in respect of the 5,000*l.*, and that he had not lost his equity by not pleading a set-off to the action. S. C. 23 L. J., Ch., 69; 11 W. R. 140; 1 Hem. & M. 525.

6. A. guaranteed to B. & Co. the payment of all goods supplied by them to H. until they received notice from C. of the discontinuance of the guarantee, "but so as A.'s liability under the guarantee should not at any time exceed 250*l.*" H. afterwards became bankrupt, and owed B. & Co. for goods 657*l.*, upon which sum they received a dividend in the bankruptcy. A. paid the 250*l.* under his guarantee:—Held, that A. was entitled to receive from B. & Co. a proportionate part of the dividend. *Hobson* v. *Bass*, 19 W. R. 992.

X. OTHER DEBTS AND DEMANDS.

7. A., a clothier, and B., a dyer, had mutual dealings in the way of their trade, which were carried on several years, without payment of money on either side. B. dies intestate, and indebted to others by specialties, who, as principal creditors, take out administration to him, and sue A. at law. Equity will enjoin the action and order an account, and that A. shall be allowed, by way of discount, what was due to him from B. *Downam* v. *Matthews*, Pre. Ch. 580.

8. A. being bound in a bond to B., the bond is assigned by B. to C., in satisfaction of a debt due from B. to C.: B. becomes a bankrupt, and C., not being able to sue at law in B.'s name, brings a bill against A. to be paid the money due on the bond. Whether A., out of the money due on the bond, shall retain a debt due to himself from B., *quære*. *Peters* v. *Soame*, 2 Vern. 428.

9. Set-off, where a creditor had borrowed from the debtor, under an express promise to repay. *Taylor* v. *Okey*, 13 Ves. 180.

10. Where a balance of account is taken, and a note given as the balance, that must be paid, although there are subsequent accounts upon which the payee may actually be found in arrear. *Preston* v. *Stratton*, 1 Anstr. 50.

11. The defendant, who was a customer of and had an account with a bank, was also employed by the bank to raise money on certain Spanish bonds, which he accordingly did; the money being afterwards recalled by the mortgagees, and not paid, the bonds were sold, and the defendant received the balance and retained it, without the knowledge of the bank. On a bill filed on behalf of the bank for the payment of this balance, and also for a general account:—Held, that, although the defendant, by his answer, said the result of the general account when taken would be in his favour, yet he was not entitled to withhold payment of the balance received by him in respect of the bonds until the general account should be taken, and a decree for payment of that balance and interest was accordingly made, and also the decree for taking the general account. *Gordon* v. *Pym*, 3 Hare 223.

12. Two sons had, as against their father, a lien on his estate, for an outlay made thereon by them; on the other hand, the father had a claim against the sons in respect of a suretyship entered into by him for them:—Held, that these demands might be set off in equity. *Unity Joint Stock Mutual Banking Association* v. *King*, 25 Beav. 72; 4 Jur., N. S., 1257; 27 L. J., Ch., 585; 6 W. R. 264.

13. In taking account, charge for board not allowed as set-off from sum due, unless agreed upon. *Hangate* v. *Fothergil*, 2 Com. 613.

14. Where there is a general trust of money for a society, a particular member cannot set off a private debt against a share he may be entitled to on a contingency. *Lee* v. *Carter*, 2 Atk. 84.

15. An annuitant, whose annuity was charged upon a particular settled estate, which proved deficient:—Held, to have been rightly paid

out of the general estate, against which she had a claim of larger amount in respect of maintenance of infant children. *Colby* v. *Colby*, 1 Jur. 890.

1. In calculating bankrupt's allowance under 6 Geo. 3, c. 16, s. 128, assignees may set off sums due from bankrupt to the estate, but the bankrupt cannot set off against that sums due to him from assignees personally. *Exp. & Re Cooper*, 3 Mont. & A. 137; 2 Dea. 41.

2. P. & Co., having borrowed a large sum of the Bank of Bengal, deposited company's paper with the bank, to a greater amount as a collateral security, accompanied with a written agreement, authorising the bank, in default of repayment of the loan by a given day, "to sell the company's paper for the reimbursement of the bank, rendering to P. & Co. any surplus." Before default was made in the repayment of the loan, P. & Co. were declared insolvents under the Indian Insolvent Act, 9 Geo. 4, c. 73, by the thirty-sixth section of which it was declared, that where there had been mutual credit given by the insolvents and any other person, one debt or demand might be set off against the other, and that all such debts as might be proved under a commission of bankruptcy in England might be proved in the same manner under the Indian Insolvent Act. At the time of the adjudication of insolvency, the bank were also holders of two promissory notes of P. & Co. which they had discounted for them, before the transaction of the loan, and the agreement as to the deposit of the company's paper. The time for repayment of the loan having expired, the bank sold the company's paper, the proceeds of which, after satisfying the principal and interest due on the loan, produced a considerable surplus. In an action by the assignees of P. & Co. against the bank, to recover the amount of the surplus:—Held, that the bank could not set off the amount of the two promissory notes, and that the case did not come within the clause of mutual credit in the Bankrupt Act. *Young* v. *Bengal* (*Bank*), 1 Moo. P. C. 150.

3. A., a firm in Calcutta, having, as such, dealings with B., a firm in London, who acted as their agents, employ them to receive for them the dividends of stock in England, which had been bequeathed to them by their father (whom they succeeded in the firm, and who had also employed B. as his agents), and they request B. to carry the dividends to a separate account in their different names. The dividends were accordingly received by B., one of the partners taking out administration for the purpose, and in their correspondence with A. they treat them as a separate item of account, but it did not appear clearly from the correspondence what was the understanding as to these moneys being or not being applicable to the general account. The house of A., which did not then include all who were beneficially included in the stock, becoming afterwards indebted, assigned all their property to trustees for their creditors:—Held, reversing the judgments of the Vice-Chancellor and Lord Chancellor, that all the interest of the then firm in the stock passed by the assignment, and that B. had no right to retain in payment of a debt to them any part of the dividends received after notice of the assignment. *Colvin* v. *Hartnell*, 5 Cl. & F. 484.

4. A petition presented to L. C. before 11th January 1832, to supersede an action at law, was directed to try validity of commission; costs reserved. Verdict in favour of petitioner. A new petition was thereupon presented to C. R. and granted:—Held, the petitioner was entitled to costs of both petitions, and that C. R. had no jurisdiction in question whether the petitioning creditor could set off the debt really due to him against those costs. *Exp. Thomas*, 1 Dea. & Ch. 443.

5. A. being entitled to a share under a settlement, the funds of which had been lent to B. on this covenant, became executor of B. A suit was instituted to recover the trust funds out of B.'s estate, and generally for administration. After a decree for accounts, A. assigned his share, with notice of the suit, and was subsequently found to be indebted as executor to B.'s estate beyond the amount of his share. By the order, on further directions, A.'s share had been declared liable to make good his debt:—Held, that the creditors of B. were entitled to be paid out of the estate in priority to the assignees of A.'s share. *Irby* v. *Irby*, 6 W. R. 853; 4 Jur., N. S., 989. And see 24 Beav. 525; 3 Jur., N. S., 1314.

6. A grandfather having made a will of his real and personal estate in 1808, cancelled it in 1810, but wrote on the back of the will a letter addressed to his only daughter, stating that she was his heiress-at-law, and charging her to fulfil his wishes at her death, by a disposition of a specified freehold estate to her eldest son, and by an equal disposition of his "property" equally among his grandchildren, her eldest and youngest son and daughter, her three only children. The letter was unattested, and thought to be inoperative as to the grandfather's personal as well as real property. The daughter became his administratrix, and entered into possession of his real estate, and she and her husband received his personal estate in right of the daughter, as sole next of kin. By a settlement, in 1811, between the husband of the daughter, and the daughter and two trustees, and the three children of the daughter, reciting the will, its cancellation, and the letter, and that the testator had died wholly intestate, but that the daughter was desirous of fulfilling the intention of the grandfather, his real estates were settled in accordance with the directions contained in the letter. The daughter died in 1827, and her husband became her administrator, and also administrator *de bonis non* of the grandfather. The husband of the daughter died in 1840, having previously, by will, after reciting his wish to carry into effect the desires of the grandfather, disposed of the grandfather's and his own real and personal property, between the two grandsons and the granddaughter, his children, accordingly. The granddaughter, who had married in 1843, obtained letters of administration to the grandfather with his letter to his daughter, which was then admitted as a will, annexed, and instituted a suit against the personal representative of her father, claiming that the personal estate of the grandfather should be accounted for to her; but the benefits she received under the settlement of 1811 and will of 1837 were greater than those she claimed under the testamentary paper, the letter of the grandfather; and it was con-

tended that she must elect between these benefits:—Held, that the deed of 1811 and will of 1837 were expressed to be founded on the intention of the grandfather in reference to his real estate only, and that, even after an acquiescence since 1811 in the family arrangement, no case of election arose. *Lee* v. *Egremont*, 5 De G. & Sm. 348; 16 Jur. 352.

Under the same circumstances, the granddaughter had received an allowance of 300*l.* a year from the time of her marriage, in 1829, till the death of her father; and her husband was also greatly indebted for advances made to him on several occasions, and became bankrupt, and obtained his certificate, and a disclaimer by the assignees of all interest under the grandfather's will in his favour:—Held, that the allowance must go towards satisfaction of interest on the granddaughter's one-third of the grandfather's personal estate; and that the debt due from the husband of the granddaughter must be set off against the third of his wife, the granddaughter, to be recovered by him in right of his wife against the estate of her father. *Ib.*

1. Bankers stopped payment, being indebted to A. on his separate account, and creditors of A. and B. on the joint account. A. assigned the credit to A. and B., and gave notice to the bankers to transfer it accordingly, which they neglected to do. Afterwards the bankers committed an Act of Bankruptcy, and were declared bankrupts:—Held, that, in equity, A. and B. were not entitled to set off the two debts. *Watts* v. *Christie*, 11 Beav. 546; 18 L. J., N. S., Ch., 173; 13 Jur. 244, 345.

2. A landowner employs an agent to act for him generally in his money matters, draw cheques on his bankers, etc. The person so employed, being directed by his principal to pay a certain debt on the next rent day, gives notice to the creditor that the debt will be paid at the time. *Semble*, that this direction and notice, even with the additional promise by the agent that the debt should be paid out of the rents, give the creditor no specific lien on the rents. *Moore* v. *Jervis*, 2 Colly. 60.

A debtor who, for money advanced, had given to his creditor his promissory note, and, as a collateral security, had deposited with him a policy of assurance, and who had, on the other hand, a right of set-off in respect of goods sold, applied to the creditor to have the policy delivered up, for a purpose unconnected with the debt, and replaced by another security. The policy was accordingly delivered:—Held, that the debtor's right of set-off was not thereby displaced. *Ib.*

T. being under a will trustee of 800*l.* for two persons, in moieties, leaves that sum outstanding on the promissory note of J. The note is payable to T. only, and not to T., or order. In 1839 T. becoming embarrassed, indorses the note to his banker M. (who is also the banker of J), as a security for advances, M. having no notice of the trust; in 1840 T. becomes beneficially entitled to one moiety of the 800*l.*; in 1841 J. becomes a creditor of T. for goods sold and claims set off against the note. On the 7th April 1842 J. has notice through his agent of the indorsement of the note of M. In July 1842 T. becomes bankrupt:—Held, that as to the moiety of the 800*l.* which is held by T. in trust, the trust must prevail against the banker's security; secondly, that as to the other moiety, the set-off of J. must prevail against the banker's security up to the 7th April 1842. *Ib.*

3. A defendant to a bill for specific performance of a clear contract for a specific sum, cannot resist it by way of set-off, on the ground that, on an account between him and the plaintiff in respect of antecedent transactions affecting the subject matter, there would be a balance due to the defendant. *Phipps* v. *Child*, 3 Drew. 709.

4. In an action by the assignees of a bankrupt underwriter against a broker, for premiums due to bankrupt, *semble*, that the broker cannot set off a loss on policy effected by him as agent, without a commission *del credere*, where there has been no adjustment, though the loss take place before the bankruptcy. *Baker* v. *Langhorn*, 2 Mar. 215.

5. The executors of a deceased partner are all, except one, partners in the firm, and leave his estate, or a portion thereof, invested in the business. This portion, to the amount of 19,000*l.*, is entered in the books to the credit of the executors, on an account of a residuary legatee, to whom it belonged when he should attain twenty-five. Moneys were advanced by the firm to this legatee on the credit of this and security of another fund to an amount which, after making the security available, left the sum of 11,000*l.* due. The firm became bankrupt. *Quære*, whether the 11,000*l.* could be recovered by way of set-off:—Held, the residuary legatee was entitled to it. *Fairlie* v. *Hartwell*, 3 Jur. 791.

6. A. and B., executors under a will under which A. was also residuary legatee, kept an executorship account with a bank, at which A. kept also a private separate account. The bankers stopped payment, and filed a liquidation petition, and a trustee was appointed. Previously to the stoppage the executors had paid all the debts, and funeral and testamentary expenses, and set apart securities to answer the annuities bequeathed by the will; but the executors were jointly liable for two small sums for rates and taxes, and their solicitor's bill of costs in relation to the estate. At the date of the stoppage a sum of 1,400*l.* was due from the bank on the executorship account, while a sum of 1,200*l.* was owing by A. on his separate account. A claimed to prove in the liquidation for the difference between the two sums, as having a right to set off as against the debt due from him the money owing from the bank on the executorship account, on the ground that the money on that account constituted in fact a clear net residue in which he was absolutely interested:—Held, that the one account could not be set off against the other, the rules of equitable set-off or mutual credit not applying unless A. was so much the person solely beneficially interested in the balance of the joint account that a court of equity would without any terms or further enquiry have obliged B. to transfer the account into the name of A. alone. *Exp. Morier, Re Willis*, 12 L. R., Ch. D., 491; 49 L. J., Bky., 9; 40 L. T. 792; 28 W. R. 235.

7. A devise of real estate to trustees for a term, upon trust, *inter alia*, to raise 1,000*l.* and to pay the dividends thereof to the

out of the general estate, against which she had a claim of larger amount in respect of maintenance of infant children. *Colby* v. *Colby*, 1 Jur. 890.

1. In calculating bankrupt's allowance under 6 Geo. 3, c. 16, s. 128, assignees may set off sums due from bankrupt to the estate, but the bankrupt cannot set off against that sums due to him from assignees personally. *Exp. & Re Cooper*, 3 Mont. & A. 137; 2 Dea. 41.

2. P. & Co., having borrowed a large sum of the Bank of Bengal, deposited company's paper with the bank, to a greater amount as a collateral security, accompanied with a written agreement, authorising the bank, in default of repayment of the loan by a given day, "to sell the company's paper for the reimbursement of the bank, rendering to P. & Co. any surplus." Before default was made in the repayment of the loan, P. & Co. were declared insolvents under the Indian Insolvent Act, 9 Geo. 4, c. 73, by the thirty-sixth section of which it was declared, that where there had been mutual credit given by the insolvents and any other person, one debt or demand might be set off against the other, and that all such debts as might be proved under a commission of bankruptcy in England might be proved in the same manner under the Indian Insolvent Act. At the time of the adjudication of insolvency, the bank were also holders of two promissory notes of P. & Co. which they had discounted for them, before the transaction of the loan, and the agreement as to the deposit of the company's paper. The time for repayment of the loan having expired, the bank sold the company's paper, the proceeds of which, after satisfying the principal and interest due on the loan, produced a considerable surplus. In an action by the assignees of P. & Co. against the bank, to recover the amount of the surplus:—Held, that the bank could not set off the amount of the two promissory notes, and that the case did not come within the clause of mutual credit in the Bankrupt Act. *Young* v. *Bengal* (*Bank*), 1 Moo. P. C. 150.

3. A., a firm in Calcutta, having, as such, dealings with B., a firm in London, who acted as their agents, employ them to receive for them the dividends of stock in England, which had been bequeathed to them by their father (whom they succeeded in the firm, and who had also employed B. as his agents), and they request B. to carry the dividends to a separate account in their different names. The dividends were accordingly received by B., one of the partners taking out administration for the purpose, and in their correspondence with A. they treat them as a separate item of account, but it did not appear clearly from the correspondence what was the understanding as to these moneys being or not being applicable to the general account. The house of A., which did not then include all who were beneficially included in the stock, becoming afterwards indebted, assigned all their property to trustees for their creditors:—Held, reversing the judgments of the Vice-Chancellor and Lord Chancellor, that all the interest of the then firm in the stock passed by the assignment, and that B. had no right to retain in payment of a debt to them any part of the dividends received after notice of the assignment. *Colvin* v. *Hartnell*, 5 Cl. & F. 484.

4. A petition presented to L. C. before 11th January 1832, to supersede an action at law, was directed to try validity of commission; costs reserved. Verdict in favour of petitioner. A new petition was thereupon presented to C. R. and granted:—Held, the petitioner was entitled to costs of both petitions, and that C. R. had no jurisdiction in question whether the petitioning creditor could set off the debt really due to him against those costs. *Exp. Thomas*, 1 Dea. & Ch. 443.

5. A. being entitled to a share under a settlement, the funds of which had been lent to B. on this covenant, became executor of B. A suit was instituted to recover the trust funds out of B.'s estate, and generally for administration. After a decree for accounts, A. assigned his share, with notice of the suit, and was subsequently found to be indebted as executor to B.'s estate beyond the amount of his share. By the order, on further directions, A.'s share had been declared liable to make good his debt:—Held, that the creditors of B. were entitled to be paid out of the estate in priority to the assignees of A.'s share. *Irby* v. *Irby*, 6 W. R. 853; 4 Jur., N. S., 989. And see 24 Beav. 525; 3 Jur., N. S., 1314.

6. A grandfather having made a will of his real and personal estate in 1808, cancelled it in 1810, but wrote on the back of the will a letter addressed to his only daughter, stating that she was his heiress-at-law, and charging her to fulfil his wishes at her death, by a disposition of a specified freehold estate to her eldest son, and by an equal disposition of his "property" equally among his grandchildren, her eldest and youngest son and daughter, her three only children. The letter was unattested, and thought to be inoperative as to the grandfather's personal as well as real property. The daughter became his administratrix, and entered into possession of his real estate, and she and her husband received his personal estate in right of the daughter, as sole next of kin. By a settlement, in 1811, between the husband of the daughter, and the daughter and two trustees, and the three children of the daughter, reciting the will, its cancellation, and the letter, and that the testator had died wholly intestate, but that the daughter was desirous of fulfilling the intention of the grandfather, his real estates were settled in accordance with the directions contained in the letter. The daughter died in 1827, and her husband became her administrator, and also administrator *de bonis non* of the grandfather. The husband of the daughter died in 1840, having previously, by will, after reciting his wish to carry into effect the desires of the grandfather, disposed of the grandfather's and his own real and personal property, between the two grandsons and the granddaughter, his children, accordingly. The granddaughter, who had married in 1843, obtained letters of administration to the grandfather with his letter to his daughter, which was then admitted as a will, annexed, and instituted a suit against the personal representative of her father, claiming that the personal estate of the grandfather should be accounted for to her; but the benefits she received under the settlement of 1811 and will of 1837 were greater than those she claimed under the testamentary paper, the letter of the grandfather; and it was con-

tended that she must elect between these benefits:—Held, that the deed of 1811 and will of 1837 were expressed to be founded on the intention of the grandfather in reference to his real estate only, and that, even after an acquiescence since 1811 in the family arrangement, no case of election arose. *Lee* v. *Egremont*, 5 De G. & Sm. 348; 16 Jur. 352.

Under the same circumstances, the granddaughter had received an allowance of 300*l.* a year from the time of her marriage, in 1829, till the death of her father; and her husband was also greatly indebted for advances made to him on several occasions, and became bankrupt, and obtained his certificate, and a disclaimer by the assignees of all interest under the grandfather's will in his favour:—Held, that the allowance must go towards satisfaction of interest on the granddaughter's one-third of the grandfather's personal estate; and that the debt due from the husband of the granddaughter must be set off against the third of his wife, the granddaughter, to be recovered by him in right of his wife against the estate of her father. *Ib.*

1. Bankers stopped payment, being indebted to A. on his separate account, and creditors of A. and B. on the joint account. A. assigned the credit to A. and B., and gave notice to the bankers to transfer it accordingly, which they neglected to do. Afterwards the bankers committed an Act of Bankruptcy, and were declared bankrupts:—Held, that, in equity, A. and B. were not entitled to set off the two debts. *Watts* v. *Christie*, 11 Beav. 546; 18 L. J., N. S., Ch., 173; 13 Jur. 244, 345.

2. A landowner employs an agent to act for him generally in his money matters, draw cheques on his bankers, etc. The person so employed, being directed by his principal to pay a certain debt on the next rent day, gives notice to the creditor that the debt will be paid at the time. *Semble*, that this direction and notice, even with the additional promise by the agent that the debt should be paid out of the rents, give the creditor no specific lien on the rents. *Moore* v. *Jervis*, 2 Colly. 60.

A debtor who, for money advanced, had given to his creditor his promissory note, and, as a collateral security, had deposited with him a policy of assurance, and who had, on the other hand, a right of set-off in respect of goods sold, applied to the creditor to have the policy delivered up, for a purpose unconnected with the debt, and replaced by another security. The policy was accordingly delivered:—Held, that the debtor's right of set-off was not thereby displaced. *Ib.*

T. being under a will trustee of 800*l.* for two persons, in moieties, leaves that sum outstanding on the promissory note of J. The note is payable to T. only, and not to T., or order. In 1839 T. becoming embarrassed, indorses the note to his banker M. (who is also the banker of J), as a security for advances, M. having no notice of the trust; in 1840 T. becomes beneficially entitled to one moiety of the 800*l.*; in 1841 J. becomes a creditor of T. for goods sold and claims set off against the note. On the 7th April 1842 J. has notice through his agent of the indorsement of the note of M. In July 1842 T. becomes bankrupt:—Held, that as to the moiety of the 800*l.* which is held by T. in trust, the trust must prevail against the banker's security; secondly, that as to the other moiety, the set-off of J. must prevail against the banker's security up to the 7th April 1842. *Ib.*

3. A defendant to a bill for specific performance of a clear contract for a specific sum, cannot resist it by way of set-off, on the ground that, on an account between him and the plaintiff in respect of antecedent transactions affecting the subject matter, there would be a balance due to the defendant. *Phipps* v. *Child*, 3 Drew. 709.

4. In an action by the assignees of a bankrupt underwriter against a broker, for premiums due to bankrupt, *semble*, that the broker cannot set off a loss on policy effected by him as agent, without a commission *del credere*, where there has been no adjustment, though the loss take place before the bankruptcy. *Baker* v. *Langhorn*, 2 Mar. 215.

5. The executors of a deceased partner are all, except one, partners in the firm, and leave his estate, or a portion thereof, invested in the business. This portion, to the amount of 19,000*l.*, is entered in the books to the credit of the executors, on an account of a residuary legatee, to whom it belonged when he should attain twenty-five. Moneys were advanced by the firm to this legatee on the credit of this and security of another fund to an amount which, after making the security available, left the sum of 11,000*l.* due. The firm became bankrupt. *Quære*, whether the 11,000*l.* could be recovered by way of set-off:—Held, the residuary legatee was entitled to it. *Fairlie* v. *Hartwell*, 3 Jur. 791.

6. A. and B., executors under a will under which A. was also residuary legatee, kept an executorship account with a bank, at which A. kept also a private separate account. The bankers stopped payment, and filed a liquidation petition, and a trustee was appointed. Previously to the stoppage the executors had paid all the debts, and funeral and testamentary expenses, and set apart securities to answer the annuities bequeathed by the will; but the executors were jointly liable for two small sums for rates and taxes, and their solicitor's bill of costs in relation to the estate. At the date of the stoppage a sum of 1,400*l.* was due from the bank on the executorship account, while a sum of 1,200*l.* was owing by A. on his separate account. A claimed to prove in the liquidation for the difference between the two sums, as having a right to set off as against the debt due from him the money owing from the bank on the executorship account, on the ground that the money on that account constituted in fact a clear net residue in which he was absolutely interested:—Held, that the one account could not be set off against the other, the rules of equitable set-off or mutual credit not applying unless A. was so much the person solely beneficially interested in the balance of the joint account that a court of equity would without any terms or further enquiry have obliged B. to transfer the account into the name of A. alone. *Exp. Morier, Re Willis*, 12 L. R., Ch. D., 491; 49 L. J., Bky., 9; 40 L. T. 792; 28 W. R. 235.

7. A devise of real estate to trustees for a term, upon trust, *inter alia*, to raise 1,000*l.* and to pay the dividends thereof to the

testator's daughter for her life, for her separate use, and after her decease to divide the capital among her children at twenty-one. In 1817 the trustees released the land, and assigned the term to the owner of the land subject to the charge. An entry of a memorandum, dated January 1816, was found in a private journal belonging to such owner (since deceased), stating that he had paid the 1,000*l.* to the daughter's husband. The daughter died in 1829. Her only surviving child attained twenty-one in 1835, when he was informed of the circumstances under which the release had been given. He did not file his bill until 1854: —Held, that the entry was admissible as evidence of the 1,000*l.* having been paid to the husband. Held, also, that although the plaintiff was put upon inquiry as to his rights in 1835, and was acquainted with the circumstances under which the legacy had been paid to his father, and therefore forbore to press his claim, lapse of time and acquiescence were no bar to the present suit. The surviving trustee became bankrupt, but did not prove under the commission:—Held, that he was liable to the extent of the dividends which might have been received had he so proved. The plaintiff received a distributive portion of his father's estate:—Held, that it must be set off against the proportionate amount due in respect of the legacy and interest. *Orrett* v. *Corser*, 1 Jur., N. S., 882.

1. Bills are drawn by the plaintiff upon the defendant and accepted by him, and the plaintiff executes an assignment of the furniture at his hotel as a collateral security, accompanied by a defeasance not under seal, admitting the bills to be the only consideration. The goods are seized on the first bill becoming due, and an injunction granted to restrain the seizure, and the money secured by the bills and assignment paid into court. The plaintiff claims damages, and also prays that, in any action he might bring, the defendant might be decreed to admit that the defeasance was under seal; and for an account. The defendant had resided at the plaintiff's hotel, and it was said there was an agreement for a set-off:—Held, that no agreement for a set-off appeared, although there was sufficient to warrant an inquiry. The plaintiff could have no damages, that being the province of a court of law; nor could the defendant be ordered to admit the defeasance to be under seal: if the plaintiff had no remedy at law, equity would not help him, there appearing to have been no fraud. *Drew* v. *Sheddon*, 2 W. R. 663.

2. In a suit for specific performance by the vendor (the purchaser having been in possession for ten years), a mortgage debt due to the purchaser carrying interest at 5 per cent. was set off against unpaid purchase money carrying interest at 4 per cent. *Wallis* v. *Bastard*, 2 W. R. 47; 17 Jur. 1107; 2 Eq. Rep. 508; 4 De G. M. & G. 251.

3. If A. assigns a debt to B. with notice to the debtor, and B. assigns to C. without such notice, and afterwards becomes bankrupt, the debtor may set-off against C. any other debt due to him from B. *Cavendish* v. *Geaves*, 5 W. R. 615; 24 Beav. 163; 27 L. J., Ch., 314; 3 Jur., N. S., 1086.

4. In order to establish a right of set-off on the basis of mutual credits between the parties, there must be an actual bankruptcy, and the assignment by the several partners of a firm is not sufficient to establish the right of set-off against their trustees, or to bind the joint estate. *London, Bombay, and Mediterranean Bank* v. *Narraway*, 27 L. T., N. S., 572.

When the plaintiff claimed to set off certain bills of exchange against the proceeds of a promissory note, which were claimed to be retained by A., and he was not the *bonâ fide* holder of the bills, but had got possession of them for the purpose of establishing the set-off, and was under an engagement to re-deliver them to the real holders in case the claim to set-off failed, the bill was dismissed with costs. *Ib.*

SETTING ASIDE JUDGMENTS.

See PRACTICE (JUDGMENTS, DECREES, AND ORDERS).

SETTING DOWN CAUSE OR ACTION.

See PRACTICE (TRIAL OR HEARING) — PRACTICE (APPEAL)—PRACTICE (FURTHER CONSIDERATION) — PRACTICE (SPECIAL CASE).

SETTLED ACCOUNT.

See ACCOUNT and other SPECIFIC TITLES.

SETTLED ESTATES ACTS.

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I. Jurisdiction. Ouster of.

1. By section 21 of the 19 & 20 Vict., c. 120, no application is to be granted where a similar application has been rejected by Parliament. Where, therefore, a petitioner had several times applied to Parliament for similar powers of leasing settled property as were asked for by the petition, and such applications were rejected:—Held, that the Court had no power to grant such an application. *Re Wilson*, 1 L. T., N. S., 25.

II. "Settlement" and "Settled Estates." What are.

2. G., in 1831, devised her estates, on trust, for her daughter for life, with remainder for all the daughter's children equally, as tenants in common, the shares of the children to be vested at twenty-one or marriage. The will contained clauses of survivorship and accruer, but no powers of sale or demise. The daughter died in 1856, leaving nine children. G. died in 1858, and the shares of two children were resettled by the parties entitled. Four other children had attained twenty-one, and their shares were vested absolutely in them. The other three children were infants. Under the provisions of the 19 & 20 Vict., c. 120, and the 21 & 22 Vict., c. 77, on a petition presented for the purpose by the parties entitled to all the shares (including the trustees and *cestuis que trustent* of the two shares resettled, certain mortgagees, and the guardians of the three infants), the Court made an order for a sale of the whole of the property. *Re Goodwin, Exp. Butler*, 8 Jur., N. S., 1170; 10 W. R. 612; 6 L. T., N. S., 530; 3 Giff. 623.

In determining whether the estate is "settled," reference must be had to the state of things at the date of the instrument, and not to the state of circumstances when it comes into operation. *Ib.*

The interest which may be taken by way of accruer is a limitation, "by way of succession," within the meaning of the Acts. *Ib.*

The shares of children who have attained twenty-one may be included in an order for sale of the whole estate upon such children becoming co-petitioners. *Ib.*

3. At the date of an application for a sale under the 19 & 20 Vict., c. 120, a succession, remainder, or reversion must be existing. The words "stand limited," in the 1st section of the Act, refer to the time of the application to the Court. The 27th section of the Act only limits the time within which the Court is empowered to lease or sell, etc., under the Act. *Re Birtie's Settled Estate*, 2 N. R. 252.

4. Property in the county palatine of Lancaster was, by will, limited to trustees during the life of the longest liver of his wife and five named children; and from the death of such longest liver to the respective issue then living of his children, in undivided fifth shares, as tenants in common in fee with cross limitations. The longest liver of the testator's wife and five children died in 1861, when the property vested absolutely in fee in undivided shares in numerous persons. All these persons, several of whom are still infants, concurred in an application for an order, under 19 & 20 Vict., c. 120, to sell the property; but, the Vice-Chancellor of the county palatine thought the property had ceased to be settled, and that he had no power to make an order. The Court, on appeal, agreed, considering that

ments might be considered sufficient. *Re Hemsley*, 16 L. R., Eq., 315; 21 W. R. 821; 29 L. T., N. S., 173; 43 L. J., Ch., 72.

2. Further Advertisements. When Necessary.

1. A leasing power having been granted by the Court to a tenant for life who had since died, a petition was presented by the succeeding tenant for life and her husband, praying that the power might be vested in one of the trustees of the settlement:—Held, that it was not necessary, under such circumstances, to repeat the advertisements, and the order was made accordingly. *Re Kentish Town Estate, Weeding* v. *Weeding*, 1 John. & H. 230.

2. In amending a petition for the purpose of obtaining the Court's authority to grant a lease of trust property, it is not necessary to republish advertisements relating to the same, provided the averments contained in such advertisements are not affected by the amendment. *Re Corbet*, 15 L. T., N. S., 173.

3. Upon a petition, an infant, remotely interested, had been born after the advertisement had been made. The Court permitted him to be made a party by amendment, and dispensed with further advertisements. *Re Horton*, 34 Beav. 386.

4. When, after a petition has been presented under the Leases and Sales of Settled Estates Act, 19 & 20 Vict., c. 120, and advertised, amendments in it became necessary, it is not of course upon the amended petition to begin *de novo* with respect to the advertisements. The course to be adopted will depend upon the discretion of the Court, which will be governed by the particular circumstances of each case. *Re Bunbury*, 4 De G. J. & S. 573; 11 Jur., N. S., 27; 13 W. R. 370; 11 L. T., N. S., 585; 5 N. R. 229.

If the amendment involves the statement of such new facts or the introduction of such new parties as to give to the petition a new character, new advertisements would be directed. *Ib.*

Circumstances under which advertisements of an amended petition under the Act were held not to be necessary. *Ib.*

Where in a joint petition of an eldest and a youngest son, it was alleged that the former was the customary heir, instead of the latter, no fresh advertisements need issue. *Ib.*

So, where an amendment of a petition was directed in consequence of one of the petitioners having, subsequently to its presentation, made an appointment of a share of the property after his decease to his wife, fresh advertisements were unnecessary. *Ib.*

5. After a petition had been advertised, one of the parties married and assigned a portion of his interest in the settled estate to the trustees of his marriage settlement. The Court allowed the trustees to be made parties by amendment, and dispensed with further advertisements. *Re Wilkinson*, 21 W. R. 537. And see S. C. 9 L. R., Eq., 71.

6. Interpretation put upon a judge's order, that advertisements be entered in certain newspapers for three successive weeks. *Browne* v. *Pennefather*, 4 N. R. 221.

7. When a petition was presented under the above Act by a lady who at the time of the presentation was a feme sole, nad the usual advertisements were inserted in the newspapers and she married before the hearing of the petition, a question arose as to whether new advertisements should be issued, and also whether she ought to be examined as a feme covert:—Held, that fresh advertisements were not necessary. *Re Marshall*, 27 L. J., N. S., 439; 15 L. R., Eq., 66.

8. A petition and advertisements under the repealed Acts for the Leases and Sales of Settled Estates omitted to describe in the title certain property contained in a contract for sale and ordered by the Court to be sold. On a fresh petition under the Settled Estates Act 1877, containing proper descriptions, fresh advertisements were not directed. The Court further dispensed with the consent and examination of married women contingently entitled to rent charges on or to portions out of the settled estates, the trustees for one of the married women and the trustees for raising portions being before the Court; and service on their respective husbands and children (if any) was also dispensed with. *Re Kilmorey (Earl)*, 25 W. R. 54.

9. Where trustees have obtained, on petition, general barring powers, and it is desired to obtain the same power for the tenant for life, the Court will rescind the former order, and without prejudice to anything done under it make the order. The advertisements issued on the first petition need not, however, be repeated. *Wheeler* v. *Tootal*, 18 L. T., N. S., 534; 16 W. R. 273.

IV. PARTIES.

10. Where a testator leaves property to his widow for life or during widowhood, and she and the parties entitled in remainder join in a petition, under the 19 & 20 Vict., c. 120, that is a sufficient compliance with the terms of the 16th section. *Williams* v. *Williams*, 9 W. R. 888.

11. A person of unsound mind, not found lunatic by inquisition, was entitled to a charge of 200*l.* per annum upon the property proposed to be dealt with:—Held, that such person was not a necessary party to a petition, as the Court would direct that what was done under the petition should be subject to that charge. *Re Tarbutt*, 11 W. R. 657; 8 L. T., N. S., 603; 2 N. R. 158.

12. After a petition had been advertised, one of the parties married and assigned a portion of his interest in the settled estate to the trustees of his marriage settlement. The Court allowed the trustees to be made parties by amendment, and dispensed with further advertisements. *Re Wilkinson*, 21 W. R. 537. And see 9 L. R., Eq., 371.

13. Leasehold interests in mines were limited to trustees for a term of twenty-one years, upon trust that during that period the mines should be worked by the trustees, and the profits invested on certain trusts, and subject to the trusts of that term, upon trusts corresponding to limitations of freehold estates, under which A. was tenant for life, with remainders over. A. presented a petition for the sale of the mines:—Held, that during the subsistence of the trust term of twenty-one years the Court had not jurisdiction to make the required order for sale upon the petition of A. alone, but that the Court would have

jurisdiction if the trustees were joined as co-petitioners, and liberty to amend the petition was accordingly given. *Exp. Pusley*, 2 Ir. R., Eq., 237.

1. Persons beneficially entitled to real estates settled by a will applied by petition, to which two beneficiaries, of whom one was an infant, were made respondents, for the sale of the estates out of court:—Held, that the petition was properly presented, all the beneficiaries being before the Court, but that the sale could not be made out of Court, but must be made under the direction of the Court. *Re Dryden's Settled Estates*, 50 L. J., Ch., 752; 45 L. T. 254; 29 W. R. 884.

2. When the Court sees clearly on the construction of a will that two persons or one of them are or is indefeasibly entitled to an estate in fee simple, it can direct a sale on the petition of the two persons so entitled. *Re Williams*, 20 W. R. 967; 27 L. T., N. S., 335.

3. On a petition by a married woman and her children and others under the Settled Estates Acts (19 & 20 Vict., c. 120, and the 37 & 38 Vict., c. 33):—Held, that an infant born after the presentation of the petition need not be served. *Re Lewis*, 24 W. R. 103.

4. An order under the Leases and Sales of Settled Estates Acts (19 & 20 Vict., c. 120, and the 37 & 38 Vict., c. 33) can only be made upon the petition of a person who is, within the meaning of the Acts, "entitled to the possession or the receipt of the rents and profits" of the settled estate, and if there is no such person, no order can be made. *Taylor* v. *Taylor*, 1 L. R., Ch. D., 426; 45 L. J., Ch., 373. Affirmed 3 L. R., Ch. D., 145; 35 L. T., N. S., 450.

5. Where an estate is vested in trustees and there is not for the time being any beneficial owner of the rents and profits, the trustees are persons who may, under the 23rd section of the Settled Estates Act 1877, apply to the Court by petition in a summary way to exercise the powers conferred by the Act. *Wolley* v. *Jenkins* (23 Beav. 53; 26 L. J., Ch., 379; 3 Jur., N. S., 321) discussed. *Vine* v. *Raleigh*, 24 L. R., Ch. D., 238; 49 L. T. 440; 31 W. R. 855.

6. Leave to serve a petition under the Leases and Sales of Settled Estates Act, 19 & 20 Vict., c. 120, on a respondent out of the jurisdiction was refused. *Re Mewburn*, 22 W. R. 752.

7. The Leases and Sales of Settled Estates Amendment Act 1874, s. 3, does not enable the Court to dispense with any consent to an application under the principal Act without notice of the application being given, in manner provided by s. 2 of the Amendment Act, to the person whose consent is required by the principal Act. *Re Rylar*, 24 W. R. 949.

See also Next Subdivision.

V. CONSENTS AND NOTICES.

1. *By Whom*, 6155.
2. *When Dispensed with by the Court*, 6156.
3. *Infants*, 6157.
4. *Lunatics*, 6158.
5. *Married Women, Examination of*, 6158.

1. By Whom.

8. *Cestuis que trustent* of a term for raising portions must be served with a copy of a petition presented under the 19 & 20 Vict., c. 120, s. 17, although their trustees, who have powers of sale and of giving receipts for the purchase money of the property, appear and consent to the prayer of the petition. *Re Boughton*, 12 W. R. 34; 9 L. T., N. S., 360.

9. Estates were settled upon A. for life, and then to trustees, with powers of sale, upon trust for the children of A.:—Held, that the trustees, and not the children, ought to be served with a petition under the 19 & 20 Vict., c. 120. *Re Potts*, 15 W. R. 29. And see 16 L. R., Eq., 631. n.

10. A devise and bequest to trustees upon trust to sell and convert at their discretion and invest the proceeds, and pay the income to one for life with remainders over, constitute a "settled estate" within the meaning of 19 & 20 Vict., c. 120, s. 1. In such a case if there are remaindermen who are *sui juris*, and who may become beneficially interested in the proceeds of sale, they must be served as well as the trustees. But service on the infant children of such remaindermen who may ultimately become beneficially entitled instead of their parents may be dispensed with under 37 & 38 Vict., c. 33. *Re Chamberlain*, 23 W. R. 852.

11. Real estate, the equity of redemption in which was devised in strict settlement, was ordered to be sold, and an order was made, appointing A. and B., under the 19 & 20 Vict., c. 120, to convey. A subsequent order declared that the order should bind the mortgagees. After this the mortgagees conveyed the legal estate in the real estate to the trustees of the will:—Held, that notwithstanding such conveyance by the mortgagees, A. and B. had power to convey, and that the concurrence of the trustees of the will was unnecessary. *Eyre* v. *Saunders*, *Exp. Yeo*, 5 Jur., N. S., 703; 28 L. J., Ch., 439.

12. The expression "persons entitled" in 19 & 20 Vict., c. 120, means persons beneficially entitled, and all persons beneficially entitled must concur. Trustees can only consent for unborn children; but trustees with a power of sale may join in a sale which will bind all persons claiming under their trust. *Grey* v. *Jenkins*, 26 Beav. 351.

13. The Court cannot authorise a lease, under the 19 & 20 Vict., c. 120, if any one of the parties interested under the settlement opposes the application. *Re Merry*, 36 L. J., Ch., 168; 15 L. T., N. S., 529; 15 W. R. 307.

14. The persons whose consent is required by s. 17 of the 19 & 20 Vict., c. 120, to an application for a sale are persons whose consents are capable of being obtained. *Beioley* v. *Carter*, 4 L. R., Ch., 230; 38 L. J., Ch., 381; 20 L. T., N. S., 381; 17 W. R. 300. Reversing 19 L. T., N. S., 472; 38 L. J., Ch., 92; 17 W. R. 130.

Therefore, where a freehold estate was limited in trust for A. for life, with remainder (subject to a general power of appointment by A.) in trust for the person whom A. should leave her heir-at-law in fee:—Held, that an order for sale made on the application of A., with the concurrence of the trustee of the settlement, was not invalid by reason of the nonconcurrence of the unascertained contingent remainderman. *Ib.*

15. Lands were devised to trustees for a tenant for life, and after her death to sell, with

ments might be considered sufficient. *Re Hemsley*, 16 L. R., Eq., 315; 21 W. R. 821; 29 L. T., N. S., 173; 43 L. J., Ch., 72.

2. Further Advertisements. When Necessary.

1. A leasing power having been granted by the Court to a tenant for life who had since died, a petition was presented by the succeeding tenant for life and her husband, praying that the power might be vested in one of the trustees of the settlement:—Held, that it was not necessary, under such circumstances, to repeat the advertisements, and the order was made accordingly. *Re Kentish Town Estate, Weeding* v. *Weeding*, 1 John. & H. 230.

2. In amending a petition for the purpose of obtaining the Court's authority to grant a lease of trust property, it is not necessary to republish advertisements relating to the same, provided the averments contained in such advertisements are not affected by the amendment. *Re Corbet*, 15 L. T., N. S., 173.

3. Upon a petition, an infant, remotely interested, had been born after the advertisement had been made. The Court permitted him to be made a party by amendment, and dispensed with further advertisements. *Re Horton*, 34 Beav. 386.

4. When, after a petition has been presented under the Leases and Sales of Settled Estates Act, 19 & 20 Vict., c. 120, and advertised, amendments in it became necessary, it is not of course upon the amended petition to begin *de novo* with respect to the advertisements. The course to be adopted will depend upon the discretion of the Court, which will be governed by the particular circumstances of each case. *Re Bunbury*, 4 De G. J. & S. 573; 11 Jur., N. S., 27; 13 W. R. 370; 11 L. T., N. S., 585; 5 N. R. 229.

If the amendment involves the statement of such new facts or the introduction of such new parties as to give to the petition a new character, new advertisements would be directed. *Ib.*

Circumstances under which advertisements of an amended petition under the Act were held not to be necessary. *Ib.*

Where in a joint petition of an eldest and a youngest son, it was alleged that the former was the customary heir, instead of the latter, no fresh advertisements need issue. *Ib.*

So, where an amendment of a petition was directed in consequence of one of the petitioners having, subsequently to its presentation, made an appointment of a share of the property after his decease to his wife, fresh advertisements were unnecessary. *Ib.*

5. After a petition had been advertised, one of the parties married and assigned a portion of his interest in the settled estate to the trustees of his marriage settlement. The Court allowed the trustees to be made parties by amendment, and dispensed with further advertisements. *Re Wilkinson*, 21 W. R. 537. And see S. C. 9 L. R., Eq., 71.

6. Interpretation put upon a judge's order, that advertisements be entered in certain newspapers for three successive weeks. *Browne* v. *Pennefather*, 4 N. R. 221.

7. When a petition was presented under the above Act by a lady who at the time of the presentation was a feme sole, nad the usual advertisements were inserted in the newspapers and she married before the hearing of the petition, a question arose as to whether new advertisements should be issued, and also whether she ought to be examined as a feme covert:—Held, that fresh advertisements were not necessary. *Re Marshall*, 27 L. J., N. S., 439; 15 L. R., Eq., 66.

8. A petition and advertisements under the repealed Acts for the Leases and Sales of Settled Estates omitted to describe in the title certain property contained in a contract for sale and ordered by the Court to be sold. On a fresh petition under the Settled Estates Act 1877, containing proper descriptions, fresh advertisements were not directed. The Court further dispensed with the consent and examination of married women contingently entitled to rent charges on or to portions out of the settled estates, the trustees for one of the married women and the trustees for raising portions being before the Court; and service on their respective husbands and children (if any) was also dispensed with. *Re Kilmorey (Earl)*, 25 W. R. 54.

9. Where trustees have obtained, on petition, general barring powers, and it is desired to obtain the same power for the tenant for life, the Court will rescind the former order, and without prejudice to anything done under it make the order. The advertisements issued on the first petition need not, however, be repeated. *Wheeler* v. *Tootal*, 18 L. T., N. S., 534; 16 W. R. 273.

IV. PARTIES.

10. Where a testator leaves property to his widow for life or during widowhood, and she and the parties entitled in remainder join in a petition, under the 19 & 20 Vict., c. 120, that is a sufficient compliance with the terms of the 16th section. *Williams* v. *Williams*, 9 W. R. 888.

11. A person of unsound mind, not found lunatic by inquisition, was entitled to a charge of 200*l.* per annum upon the property proposed to be dealt with:—Held, that such person was not a necessary party to a petition, as the Court would direct that what was done under the petition should be subject to that charge. *Re Tarbutt*, 11 W. R. 657; 8 L. T., N. S., 603; 2 N. R. 158.

12. After a petition had been advertised, one of the parties married and assigned a portion of his interest in the settled estate to the trustees of his marriage settlement. The Court allowed the trustees to be made parties by amendment, and dispensed with further advertisements. *Re Wilkinson*, 21 W. R. 537. And see 9 L. R., Eq., 371.

13. Leasehold interests in mines were limited to trustees for a term of twenty-one years, upon trust that during that period the mines should be worked by the trustees, and the profits invested on certain trusts, and subject to the trusts of that term, upon trusts corresponding to limitations of freehold estates, under which A. was tenant for life, with remainders over. A. presented a petition for the sale of the mines:—Held, that during the subsistence of the trust term of twenty-one years the Court had not jurisdiction to make the required order for sale upon the petition of A. alone, but that the Court would have

jurisdiction if the trustees were joined as co-petitioners, and liberty to amend the petition was accordingly given. *Exp. Pawley*, 2 Ir. R., Eq., 237.

1. Persons beneficially entitled to real estates settled by a will applied by petition, to which two beneficiaries, of whom one was an infant, were made respondents, for the sale of the estates out of court:—Held, that the petition was properly presented, all the beneficiaries being before the Court, but that the sale could not be made out of Court, but must be made under the direction of the Court. *Re Dryden's Settled Estates*, 50 L. J., Ch., 752; 45 L. T. 254; 29 W. R. 884.

2. When the Court sees clearly on the construction of a will that two persons or one of them are or is indefeasibly entitled to an estate in fee simple, it can direct a sale on the petition of the two persons so entitled. *Re Williams*, 20 W. R. 967; 27 L. T., N. S., 335.

3. On a petition by a married woman and her children and others under the Settled Estates Acts (19 & 20 Vict., c. 120, and the 37 & 38 Vict., c. 33):—Held, that an infant born after the presentation of the petition need not be served. *Re Lewis*, 24 W. R. 103.

4. An order under the Leases and Sales of Settled Estates Acts (19 & 20 Vict., c. 120, and the 37 & 38 Vict., c. 33) can only be made upon the petition of a person who is, within the meaning of the Acts, "entitled to the possession or the receipt of the rents and profits" of the settled estate, and if there is no such person, no order can be made. *Taylor* v. *Taylor*, 1 L. R., Ch. D., 426; 45 L. J., Ch., 373. Affirmed 3 L. R., Ch. D., 145; 35 L. T., N. S., 450.

5. Where an estate is vested in trustees and there is not for the time being any beneficial owner of the rents and profits, the trustees are persons who may, under the 23rd section of the Settled Estates Act 1877, apply to the Court by petition in a summary way to exercise the powers conferred by the Act. *Wolley* v. *Jenkins* (23 Beav. 53; 26 L. J., Ch., 379; 3 Jur., N. S., 321) discussed. *Vine* v. *Raleigh*, 24 L. R., Ch. D., 238; 49 L. T. 440; 31 W. R. 855.

6. Leave to serve a petition under the Leases and Sales of Settled Estates Act, 19 & 20 Vict., c. 120, on a respondent out of the jurisdiction was refused. *Re Mewburn*, 22 W. R. 752.

7. The Leases and Sales of Settled Estates Amendment Act 1874, s. 3, does not enable the Court to dispense with any consent to an application under the principal Act without notice of the application being given, in manner provided by s. 2 of the Amendment Act, to the person whose consent is required by the principal Act. *Re Rylar*, 24 W. R. 949.

See also Next Subdivision.

V. CONSENTS AND NOTICES.

1. *By Whom*, 6155.
2. *When Dispensed with by the Court*, 6156.
3. *Infants*, 6157.
4. *Lunatics*, 6158.
5. *Married Women, Examination of*, 6158.

1. By Whom.

8. *Cestuis que trustent* of a term for raising portions must be served with a copy of a petition presented under the 19 & 20 Vict., c. 120, s. 17, although their trustees, who have powers of sale and of giving receipts for the purchase money of the property, appear and consent to the prayer of the petition. *Re Boughton*, 12 W. R. 34; 9 L. T., N. S., 360.

9. Estates were settled upon A. for life, and then to trustees, with powers of sale, upon trust for the children of A.:—Held, that the trustees, and not the children, ought to be served with a petition under the 19 & 20 Vict., c. 120. *Re Potts*, 15 W. R. 29. And see 16 L. R., Eq., 631. n.

10. A devise and bequest to trustees upon trust to sell and convert at their discretion and invest the proceeds, and pay the income to one for life with remainders over, constitute a "settled estate" within the meaning of 19 & 20 Vict., c. 120, s. 1. In such a case if there are remaindermen who are *sui juris*, and who may become beneficially interested in the proceeds of sale, they must be served as well as the trustees. But service on the infant children of such remaindermen who may ultimately become beneficially entitled instead of their parents may be dispensed with under 37 & 38 Vict., c. 33. *Re Chamberlain*, 23 W. R. 852.

11. Real estate, the equity of redemption in which was devised in strict settlement, was ordered to be sold, and an order was made, appointing A. and B., under the 19 & 20 Vict., c. 120, to convey. A subsequent order declared that the order should bind the mortgagees. After this the mortgagees conveyed the legal estate in the real estate to the trustees of the will:—Held, that notwithstanding such conveyance by the mortgagees, A. and B. had power to convey, and that the concurrence of the trustees of the will was unnecessary. *Eyre* v. *Saunders, Exp. Yeo*, 5 Jur., N. S., 703; 28 L. J., Ch., 439.

12. The expression "persons entitled" in 19 & 20 Vict., c. 120, means persons beneficially entitled, and all persons beneficially entitled must concur. Trustees can only consent for unborn children; but trustees with a power of sale may join in a sale which will bind all persons claiming under their trust. *Grey* v. *Jenkins*, 26 Beav. 351.

13. The Court cannot authorise a lease, under the 19 & 20 Vict., c. 120, if any one of the parties interested under the settlement opposes the application. *Re Merry*, 36 L. J., Ch., 168; 15 L. T., N. S., 529; 15 W. R. 307.

14. The persons whose consent is required by s. 17 of the 19 & 20 Vict., c. 120, to an application for a sale are persons whose consents are capable of being obtained. *Beioley* v. *Carter*, 4 L. R., Ch., 230; 38 L. J., Ch., 381; 20 L. T., N. S., 381; 17 W. R. 300. Reversing 19 L. T., N. S., 472; 38 L. J., Ch., 92; 17 W. R. 130.

Therefore, where a freehold estate was limited in trust for A. for life, with remainder (subject to a general power of appointment by A.) in trust for the person whom A. should leave her heir-at-law in fee:—Held, that an order for sale made on the application of A., with the concurrence of the trustee of the settlement, was not invalid by reason of the nonconcurrence of the unascertained contingent remainderman. *Ib.*

15. Lands were devised to trustees for a tenant for life, and after her death to sell, with

power to give receipts, and to hold the proceeds for all the children of the tenant for life who should be living at her death and should attain twenty-one, and the issue then living, who should attain twenty-one, of any child who should have previously died, per stirpes as tenants in common. The tenant for life had six children, one of whom, Mrs. W., was married and had infant children. Upon a petition for a sale under the Leases and Sales of Settled Estates Act, the trustee, the tenant for life, and all her children were either represented or willing to concur, but the infant children of Mrs. W. were not represented:—Held, first, that, as a class of persons entitled to a contingent interest who could not at present be ascertained, the concurrence of the infant children of Mrs. W. was not requisite. *Re Strutt*, 43 L. J., Ch., 69; 16 L. R., Eq., 629; 21 W. R. 880.

Held, secondly, that the property being devised to trustees upon trust for sale with power to give receipts, the concurrence of the *cestuis que trustent* was unnecessary. *Ib.*

1. A marriage settlement made in 1862 comprised certain shares, the liability on which was unlimited, and contained a provision for varying the investments with the consent of the tenant for life. A call was made on these shares in 1874, which (the trustee having no funds in hand to meet it) the remainderman paid to save forfeiture:—Held, that there was not sufficient ground for the Court to order a sale of the shares upon the application of the remainderman without the consent of the tenant for life. *Parke* v. *Thackray*, 24 W. R. 21.

2. When property was vested in a trustee upon trust after the death of the tenant for life to sell and divide the proceeds among numerous persons who would become absolutely entitled, with power to the trustee to give receipts on a petition by the tenant for life, for a sale of the property:—Held, that under the Settled Estates Act (19 & 20 Vict., c. 120), s. 17, the consent of all the beneficiaries was necessary. *Re Ives, Bailey* v. *Holmes*, 3 L. R., Ch. D., 690; 24 W. R. 1068.

3. An equitable tenant for life and one of the trustees under a will (which contained peculiar and unusual provisions as to management and as to the application of the rents and profits) presented a petition under 19 & 20 Vict., c. 120, praying for an order vesting in the concurring trustee a power to grant leases. The other trustee, who was entitled to the property in remainder in fee, contingently on his surviving the tenant for life, opposed the petition, on the ground that, from the nature of the property, his interests would be interfered with if there were a power to grant leases without his consent:—Held, that his consent was necessary and ought not to be dispensed with under the power to dispense given to the Court by 37 & 38 Vict., c. 33, s. 3. *Taylor* v. *Taylor*, *Taylor* v. *Keily*, 25 W. R. 279; 45 L. J., Ch., 848; 35 L. T. 450; 3 L. R., Ch. D., 145. Affirming 1 L. R., Ch. D., 426; 45 L. J., Ch., 373.

4. A. on her marriage settled a contingent reversionary interest to which she was entitled under a will. She had four children under age. On a petition to approve a sale of part of the settled estate:—Held, that under s. 17 of the Settled Estates Act 1856, her children were beneficiaries whose consent was necessary, and leave was given to amend the petition by making the children respondents, and serving notice on their father. *Re Dendy*, 46 L. J., Ch., 417; 4 L. R., Ch. D., 879; 25 W. R. 410.

To Application of Purchase Money.] 5. Estates having been sold under the 19 & 20 Vict., c. 120, and the proceeds paid into Court, a petition was presented for reinvestment in other lands:—Held, that it was unnecessary again to serve those parties whose concurrence had previously been obtained at the time of the sale. *Re Cleveland's (Duke) Harte Estate*, 1 Dr. & Sm. 481; 7 Jur., N. S., 769; 30 L. J., Ch., 862; 9 W. R. 883; 2 L. T., N. S., 78.

The words "every application," in the 17th section of the 19 & 20 Vict., c. 120, refer only to applications under the Act for the sale of estates, and not to petitions dealing with purchase money. *Ib.*

6. A private Act provided that sales of certain settled estates should be made under the provisions of the 19 & 20 Vict., c. 120, and contained a proviso as to the application of the purchase money precisely similar to s. 24 of the last mentioned Act. A petition was presented under the private Act by the tenant for life for the reinvestment of the purchase money, but was not served upon any of the other parties interested under the settlement:—Held, that the petition must be served upon the different parties interested under the settlement, down to the first tenant in tail. *Re Bolton Estates Act* 1863, 19 W. R. 429; 24 L. T., N. S., 86.

7. Where an estate has been sold under the 19 & 20 Vict., c. 120, it is not necessary to publish in the newspapers any notice of an application for the reinvestment of the purchase money in other land. *Re Sexton Barns*, 10 W. R. 416; 6 L. T., N. S., 40.

2. When Dispensed with by the Court.

8. Where a testator who had devised estates in settlement has, by his will, given to the tenant for life leasing powers, which are expressly to be exercised only with the consent of a person named (devisee for life of contiguous property), the Court will not exercise the powers given it by the 19 & 20 Vict., c. 120, so as to enable the tenant for life to dispense with such consent, even though it appears that the person whose consent is required has arbitrarily, but not maliciously, refused. *Re Hurle*, 2 Hem. & M. 196; 11 Jur., N. S., 78; 11 L. T., N. S., 592; 13 W. R. 171; 5 N. R. 167.

9. The Leases and Sales of Settled Estates Amendment Act 1874, s. 3, does not enable the Court to dispense with any consent to an application under the principal Act without notice of the application being given, in manner provided by s. 2 of the Amendment Act, to the person whose consent is required by the principal Act. *Re Rylar*, 24 W. R. 949.

10. On petition under the Settled Estates Acts 1856 and 1874, the beneficiaries being very numerous, the Court dispensed with service of the petition on a wife and her husband entitled to a life interest in one-tenth

of the settled estates, and with the separate examination of another married woman entitled to one-fortieth of the same estates; and also held that notice to the parties, whose concurrence was dispensed with, was unnecessary. *Re Cundee*, 37 L. T., N. S., 271.

1. A testator devised real estate to two trustees, of whom K. was one, in fee, to receive the annual produce and rents, and subject to the payment out of the rents of a portion of the estate of all ground rent, taxes, repairs, and other outgoings, to apply the net rents to M. for life; and by a codicil he gave the ultimate remainder in certain events to K. The will contained no power of leasing. On petition by M., which was opposed by K., praying that a power to grant leases might be vested in the other trustee:—Held, that the opposition of K. was fatal to the application. *Taylor* v. *Taylor*, *Taylor* v. *Keily*, 45 L. J., Ch., 848; 25 W. R. 279; 3 L. R., Ch. D., 145; 35 L. T. 450. Affirming 1 L. R., Ch. D., 426; 45 L. J., Ch., 373.

The Court will not dispense with the concurrence of persons opposing an application if their number and the value of their interests are nearly equal to those of the persons supporting the application. *Ib.*

2. Testator, being entitled in fee to a settled estate, subject to a shifting clause in favour of A. in the event of testator's children dying without issue under twenty-one, and being also seised in fee of another property adjoining and partly intermingled with the settled estate, devised all his real estate to trustees in trust for sale. Testator left four children, the eldest being twelve years old. The trustees presented a petition under the Settled Estates Act 1877 (40 & 41 Vict., c. 18), for the sale of the two properties together and the apportionment of the purchase money. A. opposed the sale:—Held, that A.'s interest was too remote to be considered, and the Court being satisfied on the evidence that the proposed sale would be more advantageous than if the properties were sold separately, the same was ordered accordingly. *Re Spurway's Settled Estates*, 10 L. R., Ch. D., 230; 48 L. J., Ch., 213; 27 W. R. 302; 40 L. T. 377.

3. A petition and advertisements under the repealed Acts for the Leases and Sales of Settled Estates omitted to describe in the title certain property contained in a contract for sale and ordered by the Court to be sold. On a fresh petition under the Settled Estates Act 1877, containing proper descriptions, fresh advertisements were not directed. The Court further dispensed with the consent and examination of married women contingently entitled to rent charges on or to portions out of the settled estates, the trustees for one of the married women and the trustees for raising portions being before the Court; and service on their respective husbands and children (if any) was also dispensed with. *Re Kilmorey (Earl)*, 25 W. R. 54.

Order made without prejudice.] 4. If upon a petition presented under the 19 & 20 Vict., c. 120, it is very difficult or impossible to obtain the consent of all the parties interested, the Court will, under the 18th section, make an order in the absence of those parties, expressing in the order that it is subject to and so as not to affect their rights. *Re Legge's Settled Estates*, 6 W. R. 20.

5. Order was made saving the rights of pecuniary legatees interested in the estate, who were numerous. *Re Parry*, 34 Beav. 462.

Amending Order.] 6. Order XLI. A (December 1879), provides as follows:—"Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a judge on motion without an appeal." Upon a motion under the above rule an order made on petition under the Settled Estates Act 1877, which had been passed and entered, was directed to be varied so as to dispense with the consent of tenants for life to the exercise of leasing powers granted by the order. *Re Riley's Trusts*, 30 W. R. 78.

3. Infants.

7. Under the 36th section of the 19 & 20 Vict., c. 120, a guardian to an infant may, after a petition has been presented by the infant, be appointed. Whilst they point out the most convenient course of proceeding under the Act, the regulations of the 8th August 1857 are not absolutely obligatory in every case. *Re Hargreaves*, 5 Jur., N. S., 60; 20 L. J., Ch., 197.

8. In a petition presented under the Settled Estates Act, 19 & 20 Vict., c. 120, when there are infant petitioners the concurrence of the father is not sufficient, though he has no adverse interest, but a guardian must be appointed in the regular manner on a summons at chambers. *Re Caddick's Settled Estates*, 7 W. R. 334.

9. The regulations of the 8th August 1857 are not absolutely binding as orders. *Re Longstaffe*, 1 Dr. & Sm. 142; 8 W. R. 491.

Therefore, though those regulations direct that a guardian to an infant petitioner must be appointed before the petition is presented, the Court authorised such an appointment on an application after petition had been presented and answered. *Ib.*

10. In a petition for a sale of property in which an infant is interested in remainder, the consent of the testamentary guardian of the infant is not sufficient, and a guardian must be appointed for the purpose of consenting on behalf of the infant. *Re James*, 5 L. R., Eq., 334.

11. Where an infant was entitled to an undivided share of land the Court refused to appoint one of the co-owners to exercise on behalf of the infant the power of concurring in a sale under the Settled Estates Act. Upon a sale under the Act the infant's share in the purchase money was directed to be brought into court. Form of application under the Act on behalf of an infant. *Re Greenville Estate*, 11 L. R., Ir., 138.

12. On a petition by a married woman and her children under the Settled Estates Acts (19 & 20 Vict., c. 120, and 37 & 38 Vict., c. 33):—Held, that an infant born after the presentation of the petition need not be served. *Re Lewis's Settled Estates*, 24 W. R. 103.

4. Lunatics.

1. The service of an intended application under the Settled Estates Acts (19 & 20 Vict., c. 120), on a person of unsound mind, not so found by inquisition, who had only a remote contingent interest in the property, was dispensed with, there being others in the same interest who concurred. *Re Frankling's Settled Estates*, 7 W. R. 45.

2. Consent to an application may be given on behalf of a person of unsound mind not found so by inquisition, by a guardian appointed by the Court for the purpose. *Re Venner*, 6 L. R., Eq., 249; 16 W. R. 1033.

3. The Court cannot appoint a guardian to consent, on behalf of a lunatic not so found by inquisition, to a sale of his estates. *Re Clough*, 42 L. J., Ch., 393; 15 L. R., Eq., 284; 21 W. R. 452; 28 L. T., N. S., 261.

4. The committee of a lunatic must obtain the permission of the Court of Lunacy before he consents to an application to the Court of Chancery under the 19 & 20 Vict., c. 120. *Re Woodcock*, 3 L. R., Ch., 229; 16 W. R. 469, 532.

5. A notice, under 37 & 38 Vict., c. 33, s. 2, of an application under the Leases and Sales of Settled Estates Act, may be given to a person of unsound mind, not so found by inquisition. *Re Crabtree*, 44 L. J., Ch., 261; 10 L. R., Ch., 201; 23 W. R. 761; 32 L. T., N. S., 349.

5. Married Woman. Examination of.

(*a*) *At What Stage*, 6158.
(*b*) *How Taken*, 6158.
(*c*) *When Necessary or Dispensed with*, 6159.

(*a*) *At What Stage.*

6. The examination of a married woman, under the 19 & 20 Vict., c. 120, s. 37, ought not to take place until the petition has been presented and answered, and carried into the chambers of the judge by whom it is to be heard, but ought to take place before any judicial step has been taken by him upon it. *Re Foster*, 1 De G. & J. 386; 24 Beav. 220; 26 L. J., Ch., 836; 5 W. R. 726.

The issuing of advertisements, under s. 20, before the examination, will not invalidate the proceedings; but as a general rule it is desirable that the examination should take place immediately after the petition has been carried into chambers and before the advertisements are issued. *Ib.*

7. The examination of a married woman applying to the Court under 19 & 20 Vict., c. 120, may be taken after the presentation of a petition at any time before it is heard. *Re Hooper's Settled Estates*, 5 W. R. 670.

8. The examination of a married woman, and her consent to any application intended to be made by her under the Leases and Sales of Settled Estates Act (19 & 20 Vict., c. 120), must be obtained before the petition is presented. *Re Brealy's Settled Estates*, 5 W. R. 613.

9. The examination of a married woman and her consent to any application under the Leases and Sales of Settled Estates Act (19 & 20 Vict., c. 120), must, if the married woman be a petitioner, be obtained before the petition is presented. But *quære* if she be a respondent. *Re Hadwen's Settled Estates*, 5 W. R. 614.

10. Where a married woman is the petitioner her consent under the 19 & 20 Vict., c. 120, ss. 37, 38, should be taken subsequent to the petition being answered, but before any further proceedings, and an independent solicitor should take her consent. *Re Manson's Settled Estates*, 24 Beav. 220.

11. A married woman entitled to a jointure charged on settled estates must be examined under the 37th section of the Leases and Sales of Settled Estates Act (19 & 20 Vict., c. 120). Upon an application under the Act the examination was allowed to be taken after the order was made on the petition, but before it was drawn up, the petition being ordered to be mentioned again after the examination. *Re Turbut's Estate*, 2 N. R. 487.

12. The examination of a married woman ordered to be taken in court when the petition came on to be heard. *Re Taylor*, 14 L. R., Eq., 557; 27 L. T., N.S., 335; 27 L. T. 335; 42 L. J., Ch., 504.

13. The examination by the Court of a married woman, who is herself a petitioner, under 19 & 20 Vict., c. 120, s. 27, may be taken at any time before an order is made. *Re Packer*, 39 L. J., Ch., 220.

(*b*) *How Taken.*

14. The 19 & 20 Vict., c. 120, s. 38, in requiring the appointment of a solicitor to examine a married woman abroad, meant a solicitor of the Court of Chancery in England, and therefore the Court refused to direct a commission to a barrister and solicitor of a court in Canada for that purpose, but this is not necessary since the 21 & 22 Vict., c. 77, s. 6. *Turner* v. *Turner*, 2 De G. & J. 534; 6 W. R. 355; 27 L. J., Ch., 272; 4 Jur., N. S., 127. Reversing 6 W. R. 95; 27 L. J., Ch., 232; 4 Jur., N. S., 57.

15. A writer to the signet will not be appointed to take the consent of a married woman residing in Scotland. *Re Hooper's Settled Estates*, 5 W. R. 670.

16. The examination of a married woman and her consent to any application intended to be made by her under the Leases and Sales of Settled Estates Act (19 & 20 Vict., c. 120), must be obtained before the petition is presented. *Semble*, the solicitor appointed to take such examination must not be the solicitor acting in the matter. *Re Brealy's Settled Estates*, 5 W. R. 613

17. The 38th section of 19 & 20 Vict., c. 120, does not authorise a commission to examine a married woman abroad. *Re Noyes' Settled Estates*, 6 W. R. 7.

18. No person connected with the husband ought to be present when a married woman's examination as to her consent is taken. *Re Bendyshe*, 5 W. R. 816; 3 Jur., N. S., 727; 26 L. J., Ch., 814.

19. On a petition by a married woman under the Settled Estates Acts, 19 & 20 Vict., c. 120, and 37 & 38 Vict., c. 33:—Held, that the fact that the signatures of the married woman and the commissioner to her examination had been attested by the husband's solicitor, will be no objection to the admission of the certifi-

cate. (Contrary to a dictum of Kindersley, V.-Ch., in *Re Bendyshe*, 5 W. R. 816.) *Re Lewis*, 24 W. R. 103.

(b) When Necessary or Dispensed with.

1. The Court dispensed with the separate examination of a married woman, as to her consent to an application, under the 19 & 20 Vict., c. 120, s. 37, where her interest was remote, and was sufficiently represented by trustees, who consented. *Re De Tabley (Lord)*, 8 L. T., N. S., 719; 11 W. R. 936.

2. Where a petition has been presented under the Settled Estates Act (19 & 20 Vict., c. 120), but not answered, in which a married woman is co-petitioner, her examination previously to the presenting of the petition being requisite, the Court gave leave to omit the name of the married woman as a petitioner. *Re Reedley's Settled Estates*, 5 W. R. 649.

3. When a petition asked for general leasing powers, which would greatly benefit the estate, the separate examination of a married woman, who was entitled to a life interest with a possible absolute interest in the whole, and who was living in America, was dispensed with by the Court. *Re Thorne*, 20 W. R. 587.

4. For the purposes of the 19 & 20 Vict., c. 120, a married woman who is under age is in the same position as if she were of full age, and must be examined under s. 37. It is not sufficient for her to concur in the petition as an infant by a special guardian. *Re Broadwood*, 7 L. R., Ch., 323; 41 L. J., Ch., 349; 26 L. T., N. S., 650; 20 W. R. 458.

5. Where a married woman is a petitioner, the Court may, upon reasonable ground, dispense with the examination required by s. 37, of the 19 & 20 Vict., c. 120, and will do so where it is satisfied that the order asked for is beneficial to all parties, and that the delay necessary for taking the examination would be prejudicial. *Re Halliday*, 12 L. R., Eq., 199; 19 W. R. 966; 40 L. J., Ch., 687.

6. When a petition is presented to authorise a sale of settled estates under 19 & 20 Vict., c. 120, and a party interested, being a married woman, is abroad and served, the Court will dispense with her acknowledgment. *Re Tibbett*, 20 L. T., N. S., 299; 17 W. R. 394.

7. Notwithstanding the provision of s. 50 of the Settled Estates Act 1877 that when a married woman consents to an application to the Court under the Act, she is to be examined apart from her husband as to her consent, such an examination is not now necessary in the case of a woman who has married since the commencement of the Married Women's Property Act 1882. *Ridel* v. *Errington*, 26 L. R., Ch. D., 220; 50 L. T. 584; 32 W. R. 680.

8. A petition and advertisements under the repealed Acts for the Leases and Sales of Settled Estates omitted to describe in the title certain property contained in a contract for sale and ordered by the Court to be sold. On a fresh petition under the Settled Estates Act 1877, containing proper descriptions, fresh advertisements were not directed. The Court further dispensed with the consent and examination of married women contingently entitled to rent charges on or to portions out of the settled estates, the trustees for one of the married women and the trustees for raising portions being before the Court; and service on their respective husbands and children (if any) was also dispensed with. *Re Kilmorey (Earl)* 25 W. R. 54.

9. A spinster, with others, presented a petition under the above Act. After the publication of advertisements, but before the hearing of the petition, she married. Fresh advertisements, and the examination of the married woman, were dispensed with. *Re Marshall*, 15 L. R. Eq., 66; 27 L. T. 439.

Affidavit of no Settlement.] 10. An Affidavit of no settlement is not necessary in the case of a married woman under the Settled Estates Act. *Re Standish*, 25 W. R. 8.

VI. TIME FOR SETTING DOWN OR HEARING.

11. Where the publication of the last of the advertisements required by 19 & 20 Vict., c. 120 would expire in time to allow the twenty-one days necessary to elapse before setting down the petition for a hearing, so that the petitioner would be thrown over the long vacation, the Court allowed the petition to be set down on the last day of petitions before the vacation. *Re Adam*, 6 L. T., N. S., 604.

12. An application to set down a petition, under the 19 & 20 Vict., c. 120, before the time fixed by the Consolidated Order XLI., art. 20, refused. *Re Mallin*, 6 Jur., N. S., 809.

13. Where a petition is presented under 19 & 20 Vict., c. 120, before it can come on to be heard, the secretary of the Lord Chancellor must certify that the advertisements ordered have been inserted, and that the twenty-one days since the last advertisement, required by the General Order XLI., Rule 20, have expired. *Re Blake*, 6 Jur., N. S., 724; 8 W. R. 539.

14. Special leave granted to move under 19 & 20 Vict., c. 120, s. 20 (the seven days after the publication of the advertisement of the application having expired), where the applicant was resident out of the jurisdiction. *Re Merry*, 14 W. R. 665; 14 L. T., N. S., 510.

Such special leave refused in the case of an applicant not resident out of the jurisdiction, who assigned no reason for his delay. *Ib.*

15. The Court will abridge the time required by the General Orders to elapse between the publication of the last advertisement of a petition under 19 & 20 Vict., c. 120, and the hearing of the petition, when the petition would otherwise be thrown over the long vacation. *Re Bower*, 18 W. R. 1085; 23 L. T., N. S., 358.

16. A petition cannot be set down for hearing until the expiration of twenty-one days from the publication of the last of the advertisements, although that time may prevent the petition being set down till after the long vacation. *Re Townsend*, 14 L. R., Eq., 433.

17. A petition was allowed to be placed in the paper for the last petition day before the long vacation, although the twenty-one days from the last advertisement prescribed by Consolidated Order XLI., Rule 20, would not then have expired. *Re Taylor*, 14 L. R., Eq., 557; 27 L. T., N. S., 335; 42 L. J., Ch., 504.

V. Leases.

I. *When Authorised*, 6160.
II. *By Whom*, 6160.
III. *Vesting Powers of Leasing in Trustees*, 6161.
IV. *Settlement of Leases by the Court*, 6161.
V. *Of Infants' Estate under* 1 *Will.* 4, *c.* 65.
See INFANT.

I. WHEN AUTHORISED.

1. The powers of leasing conferred by the 19 & 20 Vict., c. 120, s. 2, can only be exercised in cases where the contracts for granting the leases are strictly within the terms of that Act. In such cases the Trustee Acts apply only after a decree in a suit to which the intended lessees would be necessary parties. If the powers of leasing are not aided by either of these Acts, the prudent course is to apply to Parliament for the proper powers. *Cust* v. *Middleton*, 7 Jur., N. S., 151; 30 L. J., Ch., 260; 9 W. R. 242.

A testator in his lifetime entered into contracts for leases of parts of his estate for building purposes. The contracts provided for granting separate leases of the houses when built, apportioning the whole ground-rent among some of them, and leaving the rest to be demised at a peppercorn rent. He devised the estate in strict settlement, without any power under which the leases could be granted:—Held, that the 19 & 20 Vict., c. 120, could not safely be resorted to for granting these leases. S. C. 3 De G. F. & J. 33.

2. Declaratory decree that it is fit and proper that an application should be made to Parliament to extend the leasing powers affecting a settled estate. *Savil* v. *Bruce*, 29 Beav. 557.

3. The Court authorised the granting of building leases of settled estates for 999 years, or at fee-farm rent, upon evidence that, according to the custom of the country, that was the mode of disposing of property for building purposes, and that it could not be beneficially disposed of for such purposes on any other terms. *Re Carr*, 7 Jur., N. S., 1267; 6 W. R. 776.

4. The Court will authorise the grant of a new lease upon the surrender of an old one, if the best rent, which under all the circumstances of the case can be retained, is reserved. *Re Rawling*, 14 W. R. 218; 13 L. T., N. S., 626. S. C. *nom. Re Rawlin*, 1 L. R., Eq., 286.

5. A lease may be authorised upon the surrender of an existing lease, although an underlease granted by the surrendering lessee is unexpired. *Re Ford*, 8 L. R., Eq., 309.

6. When a mansion house and appurtenances were settled in strict settlement under a will which contained an express direction that the mansion house should not be let, the Court, though it would have been greatly for the benefit of all parties, and of the estate, that the house should be let (the tenant for life not having a sufficient income to keep it up), refused an application by the tenant for life with the consent of the remainderman, to let it for seven years. *Re Cleveland* (*Duchess*), 22 W. R. 818.

7. Trustees of a charity authorised to grant building leases for 600 years, such being the custom of the neighbourhood, and it appearing beneficial. *Re Cross*, 27 Beav. 592.

8. Under the 19 & 20 Vict., c. 120, the Court will not authorise the sale of a portion of the estate, for raising money to make the necessary roads on building land; but it will authorise leases on the terms of the lessees making such roads. *Re Chambers*, 28 Beav. 653; 29 L. J., Ch., 924; 6 Jur., N. S., 1005; 8 W. R. 646.

9. The trustees of a will, by which two contiguous estates were devised to them upon distinct trusts, obtained from the Court an order giving them power to grant mining leases in conformity with and subject to the provisions of the Settled Estates Act 1856, 19 & 20 Vict., c. 120, s. 10, and with the consent of the respective tenants for life for the time being. The trustees and the tenants for life of the two estates afterwards entered into an agreement to grant a mining lease of the two estates for forty years, rents and royalties being reserved as if the two estates were one property. On a bill by the trustees to enforce specific performance of the agreement:—Held, that the trustees had no power to grant such a lease of the two estates, and that the bill therefore must be dismissed. *Tolson* v. *Sheard*, 36 L. T., N. S., 756; 5 L. R., Ch. D., 19; 25 W. R. 667.

10. Trustees of a marriage settlement had power to grant mining leases for twenty-one years, and an order was made under 19 & 20 Vict., c. 120. The lessees asked that words might be introduced into the order which would include contiguous lands:—Held, that the words "so much land as the trustees should consider necessary for the convenient and effective working of the minerals" might be inserted. *Re Reveley*, 11 W. R. 744; 8 L. T., N. S., 450; 32 L. J., Ch., 812.

II. BY WHOM.

11. A husband devised two-fifths of real and personal estate to trustees, to receive the rents and income and pay the same to his widow for life. He then, subject to annuities and legacies, gave his residuary real and personal estate to the same trustees upon trust, after defraying "ground and landlord's rent (if any), and all taxes, charges, and expenses of insurance, repairs, collections, and other necessary outlay," to pay the "net annual rents, interest, and income then left" to his widow for life, with remainder over. The will contained no power of leasing:—Held, that his widow had no power to grant leases under the Leases and Sales of Settled Estates Act, s. 33 (19 & 20 Vict., c. 120). *Taylor* v. *Taylor, Exp. Taylor*, 44 L. J., Ch., 727; 20 L. R., Eq., 297; 23 W. R. 947; 33 L. T., N. S., 89.

The fact that the Court in its discretion might upon terms put an equitable tenant for life into possession, or take the receipt of the rents from the trustees, and give them to him, does not make him a person "entitled to the possession, or to the receipt of the rents and profits," within s. 32. *Ib.*

III. VESTING POWERS OF LEASING IN TRUSTEES.

1. On petition, the Court made an order vesting in trustees of a settlement certain powers to grant leases, and to do other things, without in the first instance directing a reference to the conveyancing counsel, or ordering an inquiry as to the propriety of the powers. *Re Jones*, 5 Jur., N. S., 138, 564.

2. The Court will grant an order under 19 & 20 Vict., c. 120, s. 10, and 27 & 58 Vict., c. 45, s. 2, vesting in trustees powers of granting mining leases, without inserting in such order a clause requiring a form of lease to be settled in chambers. *Re Dorning's Settled Estates*, 14 W. R. 125; 13 L. T., N. S., 494.

3. An assignee of a tenant for life having petitioned the Court to sanction a particular mining lease, and to grant a power of making mining leases, and there being persons unborn interested, the Court entertained the application as to particular lease, but refused the general power to make mining leases. *Re Hutchinson*, 12 Jur., N. S., 244; 14 W. R. 473; 14 L. T., N. S., 129.

4. Where the Court has granted general powers of leasing to trustees, enabling them, under 19 & 20 Vict., c. 120, s. 14, to lay out lands for squares, roads, etc., the Court will not always require plans to be laid before it. *Re Hargreave*, 15 W. R. 54; 15 L. T., N. S., 173.

5. Where trustees have obtained, on petition, general leasing powers, and it is desired to obtain the same powers for the tenant for life, the Court will rescind the former order, and, without prejudice to anything done under it, make the order. *Wheeler* v. *Tootal*, 18 L. T., N. S., 534; 16 W. R. 273.

6. Two contiguous estates were devised to trustees upon trust for distinct *cestuis que trustent*. By an order made under the Settled Estates Act (19 & 20 Vict., c. 130) power was given to the trustees to grant mining leases in conformity with and subject to the provisions of the Settled Estates Act; such leases to be granted with the consent of the respective tenants for life if of age. The trustees and the tenants for life entering into an agreement with the defendants to grant them a mining lease of the two estates for forty years (or fifty years if the Court should consent), both estates were intended to be comprised in the same lease, and the rents and royalties were to be reserved as if they were one estate, and there was to be one shaft for working the minerals under both estates; and it was also agreed that the lessors should be at liberty to apply to the Court under the Settled Estates Act for further powers of leasing:—Held, that the trustees had no power to grant such a lease of the two estates, and specific performance of the agreement was refused. *Tolson* v. *Sheard*, 5 L. R., Ch. D., 19; 25 W. R. 667; 46 L. J., Ch., 815; 35 L. T., N. S., 756.

7. A testator devised real estate to two trustees, of whom K. was one, in fee, to receive the annual produce and rents, and subject to the payment out of the rents of a portion of the estate of all ground-rent, taxes, repairs, and other outgoings, to apply the net rents to M. for life; and by a codicil he gave the ultimate remainder in certain events to K. The will contained no power of leasing. On petition by M., which was opposed by K., praying that a power to grant leases might be vested in the other trustee:—Held, that the opposition of K. was fatal to the application. *Taylor* v. *Taylor*, *Taylor* v. *Keily*, 45 L. J., Ch., 848; 3 L. R., Ch. D., 145; 35 L. T. 450. Affirming 1 L. R., Ch. D., 246; 45 L. J., Ch., 373.

8. A testator gave his real estate to trustees for a term of one hundred years, on trust to raise annuities, and accumulate the rents and profits for twenty-one years or till some devisee entitled in possession should attain twenty-five; the accumulations to be laid out in real estate to be conveyed to the uses of the will. Subject to the term of one hundred years, he gave his real estate to A. for life, remainder to his first and other sons in tail male, with divers remainders over. He gave power to any tenant for life in possession who should have attained twenty-one, and to trustees during minorities, to grant building leases. A. had attained twenty-one, but not twenty-five. The first tenant in tail in existence was an infant. The trustees having purchased a building estate, a petition was presented by the trustees and A. and the first tenant in tail, asking that power to grant building leases might be vested in the trustees so long as there should be no tenant for life in possession who should have attained twenty-five:—Held, that as all parties interested concurred, and the exercise of a power of leasing would be beneficial to the estate, the Court would give the power. *Re Harris's Settled Estates*, 42 L. T. 583; 28 W. R. 721.

IV. SETTLEMENT OF LEASES BY THE COURT.

9. Leases granted by trustees under an order in pursuance of the 19 & 20 Vict., c. 120, s. 10, must be settled in chambers. *Re Procter's Settled Estates*, 5 W. R. 464; 3 Jur., N. S., 534.

10. Under the 19 & 20 Vict., c. 120, an order was made, authorising leases to be granted by trustees of settled estates, subject to a condition that the leases should be granted with the approbation of the judge in chambers. Subsequently to making this order, the 27 & 28 Vict., c. 45, was passed. On an application under s. 2, the Lord Chancellor varied the order, by the insertion of the following words, "The Lord Chancellor doth not think fit to insert a condition requiring the leases to be settled by the Court or a judge thereof, or to be made conformable with a model lease deposited in the judge's chambers." *Re Hoyle*, 10 Jur., N. S., 811; 12 W. R. 1125; 10 L. T., N. S., 775.

11. Where the Court, under the 27 & 28 Vict., c. 45, s. 2, amended an order under the 19 & 20 Vict., c. 120, s. 10, by striking out a condition that certain mining leases should be settled by the judge, the costs of the application were directed to be paid out of the one-fourth part of the rents set aside by the trustees as representing the share of the inheritance, in accordance with the terms of the prior one. *Lovat* v. *Leeds* (*Duke*), 11 L. T., N. S., 442.

12. Where trustees have been enabled by the Court under the Settled Estates Act (19 & 20 Vict., c. 120) to grant building leases over a

small piece of ground in the neighbourhood of a town, the Court will direct a model lease to be settled and adopted for all the remaining leases without the necessity of applying to chambers in each case. *Re Hemingway*, 7 W. R. 279.

1. An order is made under the 19 & 20 Vict., c. 120, to empower trustees to grant agricultural, mining, and building leases, and the words "and such leases to be settled by the judge" are inserted in the order. The building leases relate to small takes, and have heretofore been granted in a printed form at a trifling cost, but if every lease is to be settled by the judge the expense will be more than doubled: under these circumstances:—Held, that the words "and such leases to be settled by the judge" must be expunged. *Re Jersey (Earl)*, 9 W. R. 609.

2. An order made on petition under 19 & 20 Vict., c. 120, s. 10, contained a condition as to settling the leases, such as was formerly required by the practice of the Court; but it appearing that 27 & 28 Vict., c. 45, which provided that no such condition should be inserted in future, had become law between the presentation and the hearing of the petition, the order was amended by striking out the condition. *Re Russell*, 22 W. R. 399.

3. Where it was necessary to grant a large number of building leases of charity lands in nearly the same form, under the provisions of an Act of Parliament, and one lease had been settled in chambers, the Court allowed the charity to grant other building leases from time to time in the same form, without reference to chambers, the model leave being appended to the order. *Att.-Gen.* v. *Christ Church, Oxford*, 3 Giff. 514; 8 Jur., N. S., 989; 7 L. T., N. S., 238.

See also Preceding Subdivision.

VI. Sales.

I. *When Authorised*, 6162.
II. *Severance of Minerals*, 6163.
III. *How Carried out*, 6163.
IV. *Vesting Powers of Sale in Trustees*, 6164.
V. *Indefeasible Title of Purchaser*, 6164.

I. WHEN AUTHORISED.

4. Where realty, which was comprised in a settlement, had been in part subjected to subsettlements, operating through powers of appointment in the original deed, and in part emancipated from all settlement, by becoming vested in persons as tenants in fee, and in other persons as mortgagees:—Held, that an order obtained in the matter of the 19 & 20 Vict., c. 120, and in the matter of the estates comprised in the original settlement, for the sale of all the lands comprised therein, was erroneous. *Re Thompson, Green* v. *Thompson*, 1 Johns. 418; 5 Jur., N. S., 1343.

It is competent to a purchaser, under the 19 & 20 Vict., c. 120, to object at any time before completion that the order for sale was in excess of the jurisdiction of the Court. *Ib.*

Semble, that the Court has jurisdiction to order a sale under the Act, notwithstanding the existence of powers under which the proposed sale may be effectual. *Ib.*

5. The power given to the Court by the 14th section of the Leases and Sales of Settled Estates Act (19 & 20 Vict., c. 120) is not incident to the grant of a power of leasing under the Act, but can be exercised independently of it. When the settlor declared that the estate shall not be leased or sold until the happening of a future event, the Court will not, merely to save expense, make a prospective order. *Semble*, that the relative weight to be attached to the expression of intention in the settlement, and to extrinsic evidence under the 29th section, is the same whether the settlement came into operation before or after the passing of the Act. *Re Hurle's Settled Estates*, 5 N. R. 167; 2 Hem. & M. 196; 11 Jur., N. S., 78; 11 L. T., N. S., 592.

6. A testator devised real estate to trustees upon trust to pay an annuity to his daughter, and after her death upon trust for all her children who should attain twenty-one, equally. The daughter died, leaving children, some of whom were infants. The trustees having entered into a contract for the sale of a portion of the real estate, a petition was presented on behalf of the infant children for an order authorising such sale under the 19 & 20 Vict., c. 120, but the Court refused to make the order asked for. *Re Burdin*, 5 Jur., N. S., 1378; 2 L. T., N. S., 70. Affirming 7 W. R. 711.

7. Land of which a lunatic is tenant for life cannot be sold for building purposes, under 16 & 17 Vict., c. 70, s. 125, which applies only to lands of which a lunatic is seised or entitled in fee. *Re Corbett*, 1 L. R., Ch., 516; 12 Jur., N. S., 679; 35 L. J., Ch., 793; 14 W. R. 904; 14 L. T., N. S., 748.

Neither can such land be sold under the powers conferred by s. 116, unless the sale is actually for one of the purposes specified in that section. *Ib.*

Semble, where it is desirable that the land of a lunatic tenant for life, who has a sufficient maintenance, should be sold for building purposes, the proper course is to apply to the Court under the Settled Estates Acts. *Ib.*

8. G., in 1831, devised her estates, on trust for her daughter for life, with remainder for all the daughter's children equally, as tenants in common, the shares of the children to be vested at twenty-one or marriage. The will contained clauses of survivorship and accruer, but no powers of sale or demise. The daughter died in 1856, leaving nine children. G. died in 1858, and the shares of two children were resettled by the parties entitled. Four other children had attained twenty-one, and their shares were vested absolutely in them. The other three children were infants. Under the provisions of the 19 & 20 Vict., c. 120, and the 21 & 22 Vict., c. 77, on a petition presented for the purpose by the parties entitled to all the shares (including the trustees and *cestuis que trustent* of the two shares resettled, certain

mortgages, and the guardians of the three infants), the Court made an order for a sale of the whole of the property. *Re Goodwin, Exp. Butler*, 8 Jur., N. S., 1170; 10 W. R. 612; 6 L. T., N. S., 530; 3 Giff. 623.

Where parties entitled absolutely to some of the shares joined as petitioners, the Court decreed the whole estate to be sold. *Ib.*

The shares of children who have attained twenty-one may be included in an order for sale of the whole estate upon such children becoming co-petitioners. *Ib.*

II. SEVERANCE OF MINERALS.

1. The 19 & 20 Vict., c. 120 empowers the Court to authorise the sale and conveyance of minerals situate under a settled estate, apart from the surface thereof. *Re Law*, 7 Jur., N. S., 511.

2. The Court has power, under the 19 & 20 Vict., c. 120, to authorise the sale and conveyance of minerals apart from the surface of the land. *Re Mallin*, 3 Giff. 126; 30 L. J., Ch., 929; 9 W. R. 588; 4 L. T., N. S., 435.

The contract for sale was ordered to be carried into effect by a grant, with a provision limiting the time within which the coal was to be worked out. *Ib.*

3. The Court has jurisdiction under the Leases and Sales of Settled Estates Act to order a sale of mines apart from the surface, with rights of using the surface for the workings, reserving a rent in respect of the surface damaged from time to time. *Re Milward*, 6 L. R., Eq., 248; 16 W. R. 1078.

Under Powers of Sale and the Confirmation of Sales Act (25 & 26 Vict., c. 108). See POWER, XXI. VIII. 8.

III. HOW CARRIED OUT.

4. On a petition for the purchase of a trust estate without the necessity of a sale by auction, the Court referred the matter to chambers, and directed that, if it should appear by the certificate that it was fit and proper, and for the benefit of all parties interested, the petitioner should be the purchaser of the property, a conveyance should be made to that effect. *Re Hilton*, 14 L. T., N. S., 129.

5. Upon a petition for the sale of settled real estate, partly freehold and partly copyhold, the Court directed the copyholds to be enfranchised, the whole to be sold as freehold, and the costs of enfranchisement to be paid out of the proceeds of sale. *Re Adair*, 42 L. J., Ch., 841; 16 L. R., Eq., 124.

6. It is competent to a purchaser under the 19 & 20 Vict., c. 120, to object at any time before completion that the order for sale was in excess of the jurisdiction of the Court. *Re Thompson, Green* v. *Thompson*, 1 Johns. 418; 5 Jur., N. S., 1343.

Conveyance.] 7. Real estate, the equity of redemption in which was devised in strict settlement, was ordered to be sold, and an order was made appointing A. and B., under the 19 & 20 Vict., c. 120, to convey. A subsequent order declared that the order should bind the mortgagees. After this the mortgagees conveyed the legal estate in the real estate to the trustees of the will:—Held, that notwithstanding such conveyance by the mortgagees, A. and B. had power to convey, and that the concurrence of the trustees of the will was unnecessary. *Eyre* v. *Saunders, Exp. Yeo*, 5 Jur., N. S., 703; 28 L. J., Ch., 439.

8. Where there was no trustee of the settled estate which had been sold in existence, the Court required new trustees to be appointed, and the conveyance of the lands purchased to be made to such new trustees. *Re Sexton Barnes*, 10 W. R. 416; 6 L. T., N. S., 40.

9. Pending the completion of a sale of a portion of a settled estate, one of the two trustees of the settlement died. A purchaser having refused to take a conveyance from the sole surviving trustee, the Court directed a petition to be presented for the appointment of a new trustee in the place of the deceased trustee. *Scott* v. *Heisch*, 33 L. T., N. S., 498; 24 W. R. 108.

10. Where land is sold pursuant to an order of the Court, under the 19 & 20 Vict., c. 120, the conveyance must be settled by the judge whether the parties differ or not. *Re Eyre*, 4 Kay & J. 268; 4 Jur., N. S., 830.

But where land is to be sold in lots, and one conveyance has been settled by the conveyancing counsel of the Court, it may be adopted by the chief clerk for all the rest, in which no special circumstances exist to render such a course improper. *Ib.*

11. The effect of a sale by the Court under the powers conferred by the Settled Estates Act 1877, of any settled estates, is, by the operation of the 22nd section of that Act, to revoke the uses of the settlement; and by the operation of the 42nd section of the Succession Duty Act 1853 the duty is shifted from the land sold to the purchase money or its investments, and the land in the hands of a purchaser is freed from the succession duty. *Re Warner's Settled Estates, Warner* to *Steel*, 17 L. R., Ch. D., 711; 50 L. J., Ch., 542; 45 L. T. 37; 29 W. R. 726.

Sale out of Court.] 12. A sale out of court may be directed under the Settled Estates Act 1877 (40 & 41 Vict., c. 18), the purchase money being brought into court; and such a sale may be authorised to be made by public auction or private contract, subject to a reserved price to be fixed by the judge in chambers. *Re Adams' Settled Estates*, 9 L. R., Ch. D., 116; 38 L. T., N. S., 877; 27 W. R. 110.

13. Persons beneficially entitled to real estates settled by a will applied by petition, to which two beneficiaries, of whom one was infant, were made respondents, for the sale of the estates out of court:—Held, that the petition was properly presented, all the beneficiaries being before the Court, but that the sale could not be made out of Court, but must be made under the direction of the Court. *Re Dryden's Settled Estates*, 50 L. J., Ch., 752; 45 L. T. 254; 29 W. R. 884.

14. The Court has no jurisdiction to direct a sale under the Settled Estates Act 1877 to be conducted out of court. *Re Adams' Settled Estates* (9 L. R., Ch. D., 116) not followed.

Re Harvey's Settled Estate, 21 L. R., Ch. D., 123; 30 W. R. 697.

Sales by Court Generally.] See VENDOR AND PURCHASER.

Conveyancing Counsel.] PRACTICE (CONVEYANCING COUNSEL).

IV. VESTING POWERS OF SALE IN TRUSTEES.

1. Under the 19 & 20 Vict., c. 120, the Court, upon petition to sanction a contract for sale by trustees, can only authorise a contract already entered into, or such contracts as the petitioners may satisfy the Court to be beneficial, but it cannot authorise a sale generally. *Re Peacock*, 12 Jur., N. S., 959; 15 W. R. 100; 15 L. T., N. S., 263.

2. Land stood settled upon trust for A. for life, and after her decease for sale. The trustees, tenant for life, and all other beneficiaries, petitioned that the Court would authorise a sale during her life. No particular contract was referred to in the petition:—Held, that the Court could under the 40 & 41 Vict., c. 18, s., 16 authorise the trustees to sell indefinitely, they bringing the proceeds into court. *Re Andrew*, 38 L. T., N. S., 877; 26 W. R. 811.

3. The Court has power under the Confirmation of Sales Act, 25 & 26 Vict., c. 108, to give a general direction that persons having powers of sale and exchange in a settlement or will which do not expressly authorise the reservation of mines and minerals on a sale of the settled property, or the sale of minerals apart from the land, may exercise the powers as if they did authorise such reservation or separation. *Re Wynn*, 16 L. R., Eq., 237; 21 W. R. 695.

V. INDEFEASIBLE TITLE OF PURCHASER.

4. Observations upon the effect of s. 28 of the 19 & 20 Vict., c. 120, in curing an informality in a sale made in pursuance of the Act. *Beioley* v. *Carter*, 4 L. R., Ch., 230; 38 L. J., Ch., 381; 20 L. T., N. S., 381; 17 W. R. 300.

5. Held, that if the order under the 19 & 20 Vict., c. 120, was wrong, the purchaser having the concurrence of all persons beneficially interested would take an indefeasible title under s. 28. *Re Shepheard*, 39 L. J., Ch., 173.

Under s. 28 a purchaser obtains by a conveyance under the Act an indefeasible title, except against persons beneficially interested whose concurrence has not been obtained, although the estate is not a settled estate. S. C. 8 L. R., Eq., 571; 21 L. T., N. S., 525.

6. *Semble*, that the conveyance when completed under the 19 & 20 Vict., c. 120, will give an indefeasible title by virtue of s. 28, notwithstanding any excess of jurisdiction. *Re Thompson, Green* v. *Thompson*, 1 Johns. 418; 5 Jur., N. S., 1343.

7. An order for sale under the Settled Estates Act 1877 contained a direction dispensing with the concurrence or consent of the persons entitled, whether beneficially or otherwise, to any estate or interest subsequent to a certain estate tail, without naming them. The purchaser objected to the title on the ground that the order on the face of it was irregular:—Held, by Hall, V.-Ch., that under the special circumstances of the case it was unnecessary for the parties whose concurrence was dispensed with to be named in the order. But held, by the Court of Appeal, that under the 70th section of the Conveyancing and Law of Property Act 1881, the purchaser would in any event have a good title—that section being applicable whether the objection to the order appears on the face of it or not, and that the purchaser must complete. *Re Hall Dare's Contract*, 21 L. R., Ch. D., 41; 51 L. J., Ch., 671; 46 L. T. 755; 30 W. R. 556.

VII. Dedications.

8. The Court refused to sanction the sale, under the 19 & 20 Vict., c. 120, s. 14, of one part of the settled estate, for the purpose of employing the produce of the sale in laying out roads on another part of the estate, with a view to granting building leases, but it will authorise leases on the terms of the lessees' making such roads. *Re Chambers*, 28 Beav. 653; 29 L. J., Ch., 924; 6 Jur., N. S., 1005; 8 W. R. 646.

A. devised property, subject to an annuity thereout for his widow, B., and the use for her life of the dwelling house upon the estate, to A. for life, with an ultimate remainder to A. in fee. The will provided that it should be lawful for A. during his life, "but nevertheless, during the life of B., only with her consent in writing for that purpose," to grant building leases. B. refused her consent. On petition by A., under the 19 & 20 Vict., c. 120, s. 18, to obtain authority from the Court to grant building leases, make roads, and raise the money for raising such roads by sale of a part of the settled estates:—Held, that the Court could not so disregard the terms of the will as to give power to A. to grant building leases against the consent of B., but that leave would be given to make roads and dedicate them to the public at his own expense; the Court refusing to sanction the sale of a portion of the estate for that purpose. *Ib.*

9. When a tenant for life, without power to dedicate roads to the public, applies to the Court for that purpose, the Court will direct such roads to be made only where they are either beneficial to the property in its actually existing state, or required for the purposes of houses then about to be built on leases then immediately contemplated, and will not sanction the laying out of roads prospectively upon the chance that they may be beneficial at some future time to the property in its then state; and the Court will not, in any case, sell any portion of the property for the purpose of making such roads. *Re Hurle*, 13 W. R. 171; 2 Hem. & M. 196; 11 L. T., N. S., 592; 2 N. R. 167.

10. Before the 19 & 20 Vict., c. 120, the Court had no power to charge, mortgage, or sell part of a settled estate in order to raise money for making roads and sewers on building land forming other part of the estate; nor had it

power to apply for that purpose money which was liable to be laid out in the purchase of lands to be settled to the same uses as the settled estate. *Re Venour, Venour* v. *Sellon*, 2 L. R., Ch. D., 522; 45 L. J., Ch., 409; 24 W. R. 752.

1. The Settled Estates Act 1877 does not empower the Court to direct the carrying out of schemes of drainage for agricultural purposes; but the power given by ss. 20 and 21 have reference to the development of lands for the purposes of a building estate. Order of reference under the Drainage Act (8 & 9 Vict., c. 56). *Re Poynder's Settled Estates, Dickson-Poynder* v. *Cook*, 50 L. J., Ch., 753; 45 L. T. 403; 30 W. R. 7.

2. Where the Court has granted general powers of leasing to trustees, enabling them, under 19 & 20 Vict., c. 120, s. 14, to lay out lands for squares, roads, etc., the Court will not always require plans to be laid before it. *Re Hargreave*, 15 W. R. 54; 15 L. T., N. S., 173.

Sites for Churches.] 3. A father who was a tenant for life, of a settled estate cannot, as guardian by nature of his infant son, who is entitled to the inheritance in remainder, concur on the son's behalf in a grant by himself of part of the settled estate as a site for a church under 36 & 37 Vict., c. 50, s. 1, Places of Worship Sites Act. *Re Salisbury (Marquis) and Ecclesiastical Commissioners*, 2 L. R., Ch. D., 29; 45 L. J., Ch. Div., 250; 24 W. R. 380; 34 L. T., N. S., 5. Reversing 20 L. R., Eq., 527; 44 L. J., Ch., 541; 23 W. R. 824.

VIII. Protection of Settled Estates.

4. The trustees of settled estates presented a petition under s. 30 of Lord St. Leonards' Act 1859, asking the opinion of the Court whether they were justified—(1) in applying money in their hands, proceeds of sales, and enfranchisements of the settled estates, towards paying costs incurred by the tenant for life as plaintiff and defendant in a series of actions undertaken by him to resist claims of rights of common over the settled estates; (2) whether they might apply similar sums to be derived from future sales, and towards discharging their costs; (3) whether in discharging these costs they might properly treat them as a solicitor and costs; (4) whether they might adopt the acts and proceedings of the tenant for life. The petition was also entitled in the Settled Estates Act 1877, under which the trustees prayed that such costs as were not provided for as above might be raised and paid as between solicitor and client by means of a charge on the settled estates:—Held, that the first four questions might be answered in the affirmative, and that the order for raising and paying the residue of the costs as between solicitor and client might be made to the Court under s. 17, although no application had been made to the Court before commencing proceedings. *Re De la Warr's (Earl) Settled Estates*, 51 L. J., Ch., 407; 46 L. T. 340.

Where proceedings have been instituted (though without the preliminary sanction of the Court), whether by claim in an action, or by defence to an action, for the protection of a settled estate, the Court will, if it sees fit, give permission to the trustees to apply the proceeds of the sale of a portion of the estate in defraying the costs already incurred, and which must necessarily be incurred, by the tenant for life, in instituting such proceedings. S. C. 16 L. R., Ch. D., 587; 50 L. J., Ch., 383; 50 L. J., Ch., 383; 44 L. T. 56; 29 W. R. 350.

5. The tenant for life of settled estates having successfully opposed a sewage scheme proposed by the sanitary authority of the parish in which the settled estates were situate, on the ground that the works would deteriorate the value of the estate, incurred certain costs. The trustee of the settled estates applied, under 22 & 23 Vict., c. 35, s. 30, for the advice of the Court, whether they would be justified in paying these costs out of money in their hands, representing the proceeds of part of the settled estates sold under the order of the Court made in 1874. The petition was entitled in the matter of the Settled Estates Act 1856, and the Amendment Acts of 1858 and 1864, and the Act 22 & 23 Vict., c. 35. The Court was of opinion that s. 30 of the Act 22 & 23 Vict., c. 35, only gave the Court power to advice, and did not empower it to authorise the payment, but that the case came within s. 17 of the Settled Estates Act 1877, and ordered that the petition should be amended by entitling it in the matter of that Act, when, on the amount extended by the tenant for life not exceeding a sum named, being proved before the registrar, the Court would advise the trustees to pay it. *Re Willan's Settled Estates*, or *Re Twyford Abbey Settled Estates*, 45 L. T. 745; 30 W. R. 268.

6. Where an estate was settled on legal limitations in favour of one for life, with remainder to an infant tenant in tail, the Court declined to order that the costs of an application to parliament for a private Act to carry into effect a proposed sale which was beneficial to the estate should be borne by the estate whether such application were or were not successful. But the tenant for life consenting, the Court, being of opinion that the proposed application to parliament would be for the benefit of the infant, sanctioned the application on the terms that the costs were to be borne by the tenant for life, unless an Act of Parliament was obtained otherwise directing. *Stanford* v. *Roberts*, 52 L. J., Ch., 50; 48 L. T. 262.

IX. Purchase Money. Application and Investment.

I. *Whether Real or Personal Estate*, 6166.
II. *Interim Investment*, 6166.
III. *Permanent Investment*, 6166.
IV. *Application to the Court Dispensed with*, 6167.
V. *Payment out*, 6167.
VI. *Apportionment of on Sales of Leaseholds*, 6168.

VI. APPORTIONMENT OF ON SALES OF LEASEHOLDS.

1. Leaseholds for lives in settlement subject to a trust for renewal were, after refusal of the lessor to renew, sold under the Leases and Sales of Settled Estates Act 1877:—Held, that the first taker was entitled only to the income of the purchase money. *Re Barber's Settled Estates*, 18 L. R., Ch. D., 624; 50 L. J., Ch., 769; 45 L. T. 433; 29 W. R. 909.

2. Where leasehold property, held for an unexpired term of years, was sold under the Settled Estates Act 1877, and the tenant for life suffered by reason of the sale a diminution of income, the Court, applying the principle of *Askew* v. *Woodhead* (14 L. R., Ch. D., 27), directed a calculation to be obtained from an actuary of what equal half-yearly sums, for the residue of the terms, the proceeds of the sale would produce, taking interest at 3 per cent. so as to exhaust that sum at the expiration of the term, and that in each half-year the dividends on the stock then remaining, in which the proceeds of sale were invested, should be paid to the tenant for life, and so much of the stock transferred to the same person as with the cash dividend would make up the half-yearly sum so to be ascertained, the residue of the fund, if any, at the expiration of the life interest, to go to the persons absolutely entitled in remainder. The Court allowed the tenant for life the costs, as between solicitor and client, of the application for compensation. *Re Walsh's Trusts*, 7 L. R., Ir., 554.

See also LANDS CLAUSES ACT, XIII. v. 4—LIFE, ESTATE FOR, VI.

X. Costs and Expenses.

3. Petitions having been presented under the 19 & 20 Vict., c. 120, and under a private Act, respecting money in court, to which an infant remainderman was entitled, the Court directed that a guardian *ad litem* should be appointed to represent the infant remainderman, and also that the trustees of the will, under which the property was settled, should have their costs of appearing upon the petition. *Re Hart Estates Act*, 29 L. J., Ch., 530; 8 W. R. 336; 2 L. T., N. S., 78.

4. Where the Court, under the Settled Estates Amendment Act (27 & 28 Vict., c. 45, s. 2), amended an order made under the Settled Estates Act (19 & 20 Vict. c. 120, s. 10), by striking out a condition that certain mining leases should be settled by the judge, the costs of the application were directed to be paid out of the one-fourth part of the rents set aside by the trustees as representing the share of the inheritance, in accordance with the terms of the Act. *Lovat* v. *Leeds* (*Duke*), 11 L. T., N. S., 442.

5. Costs under the Settled Estates Act, 19 & 20 Vict., c. 120, ordered to be paid out of corpus as the deficiency was caused by the testator. *Wheeler* v. *Tootal*, 16 W. R. 273.

6. The Court will grant an order under the 19 & 20 Vict., c. 120, s. 10, and the 27 & 28 Vict., c. 45, s. 2, vesting in trustees powers of granting mining leases, without inserting in such order a clause requiring a form of lease to be settled at chambers. The costs to come out of the three-fourths of the profits which the Act directed to be set apart for the inheritance. *Re Dorning's Settled Estates*, 14 W. R. 125; 13 L. T., N. S., 494.

7. Upon a petition for the sale of settled real estate, partly freehold and partly copyhold, the Court directed the copyholds to be enfranchised, the whole to be sold as freehold, and the costs of enfranchisement to be paid out of the proceeds of sale. *Re Adair*, 16 L. R., Eq., 124; 42 L. J., Ch., 841.

8. The Court, in approving of an agreement to demise landed estates, and in directing that the costs of the application should be a charge on the property, ordered the name of the person advancing the money necessary for the payment of such costs to be inserted in the order. *Re Tunstall*, 14 L. T., N. S., 352.

9. A. devised property, subject to an annuity thereout for his widow, B., and the use for her life of the dwelling-house upon the estate, to A. for life, with an ultimate remainder to A. in fee. The will provided that it should be lawful for A. during his life, "but nevertheless, during the life of B., only with her consent in writing for that purpose," to grant building leases. B. refused her consent. On petition by A., under the 19 & 20 Vict., c. 120, s. 18, to obtain authority from the Court to grant building leases, make roads, and raise the money for making such roads by a sale of a part of the settled estates:—Held, that the Court could not so disregard the terms of the will as to give power to A. to grant building leases against the consent of B., but that leave would be given to make roads and dedicate them to the public at his own expense; the Court refusing to sanction the sale of a portion of the estate for that purpose. *Re Hurle*, 13 W. R. 171; 5 N. R. 167; 2 Hem & M. 196; 11 Jur., N. S., 78; 11 L. T., N. S., 592.

Semble, a fund in court held upon the same trusts as the settled estate can be so applied. S. C. 5 N. R. 167.

10. Where leasehold property, held for an unexpired term of years, was sold under the Settled Estates Act 1877, and the tenant for life suffered by reason of the sale a diminution of income, the Court allowed the tenant for life the costs, as between solicitor and client, of the application for compensation. *Re Walsh's Trusts*, 7 L. R., Ir., 554.

XI. Settled Land Act 1882 (45 & 46 Vict., c. 38).

I. *Effect of on Settlement Powers*, 6168.
II. *Appointment of Trustees*, 6169.
III. *Sales*, 6170.
IV. *Purchase Money. Application and Investment*, 6171.
V. *Costs and Expenses*, 6171.

I. EFFECT OF ON SETTLEMENT POWERS.

11. Upon a summons under the Settled Land Act 1882 to obtain the opinion and direction of

the Court as to the effect of the Act upon certain clauses in a settlement where an infant tenant in tail was entitled to possession, the following questions were decided: (1) The settlement gave the trustees power, during the minority of any person entitled to possession, to receive and apply rents and profits in management of estate and maintenance of infant, and to accumulate and apply the surplus in paying off charges or in purchase of real estate, to be settled to the same uses:—Held, that the rents and profits received by the trustees during the minority were to be treated in manner directed by the settlement, and without regard to the Act. *Re Newcastle's (Duke) Estates*, 24 L. R., Ch. D., 129; 52 L. J., Ch., 645; 48 L. T. 779; 31 W. R. 782.

Sale and Exchange.] (2) Power in the settlement to the trustees, with the consent of tenant for life, if of age, and if not, of his guardians, to sell or exchange:—Held, that this power was exercisable by the trustees during the minority, at the request and by the direction of the guardians of the infant tenant in tail. *Ib.*

Powers of Leasing.] (3) Power in the settlement for the guardians during minority to grant leases for twenty-one years, building leases for ninety-nine years, and mining leases for sixty years:—Held, that this power was exercisable during minority by the guardians, with the consent of the trustees. *Ib.*

Mining Leases.] (4) Held, that the rents derived from mining leases were to be applied by the trustees in manner directed by the settlement, as coming within the term "contrary intention" expressed in the 11th section of the Act:—(5) Held, that there being no power in the settlement to sell surface land apart from minerals, the trustees could exercise that power under s. 17 of the Act; and this being an execution of a statutory power, the consent of the guardians would not be necessary. *Ib.*

II. APPOINTMENT OF TRUSTEES.

1. Where a tenant for life is a lunatic and his committee wishes to exercise the powers of leasing given by the Settled Land Act 1882, if there are no trustees of the settlement in existence new trustees must be appointed for the purposes of the Act. *Re Taylor*, 52 L. J., Ch., 728; 49 L. T. 420; 31 W. R. 596.

2. It is a sufficient objection to the appointment of one of the trustees of a settlement of lands as a trustee of the same lands for the purposes of the Settled Land Act 1882, that he is the solicitor of the tenant for life, and has been acting for him in the matter of a proposed sale of the lands. *Re Walker's Trusts*, 48 L. T. 632; 31 W. R. 716.

3. A testator devised his real estate to the use of G. and W. in fee upon trusts in strict settlement, and bequeathed to them his residuary personal estate upon trust to invest it in the purchase of land to be conveyed to them upon the same trusts. The will contained no power of sale. W. was the family solicitor, a person of good position and high character, and after the death of the testator, he acted as solicitor to the trustees and also to the tenant for life. The tenant for life being desirous of selling part of the estates under the powers of the Settled Land Act 1882, applied to the Court to appoint G. and W. trustees for the purposes of the Act:—Held, that W. ought not to be appointed, for that although he was in all other respects a most proper person, his being solicitor to the tenant for life, made him unsuitable for an office the duties of which required him to check the proceedings of the tenant for life. *Re Kemp's Settled Estates*, 24 L. R., Ch. D., 485; 52 L. J., Ch., 950; 49 L. T. 231; 31 W. R. 930.

4. The share or interest of an infant under the Statute of Distributions in realty which has improperly been allowed to remain unconverted, is settled land within the meaning of s. 59 of the Settled Land Act 1882, so as to enable the Court, under s. 38, to appoint trustee to exercise the powers conferred by that Act. *Re Wells*, 49 L. T. 859; 31 W. R. 764.

5. Where a testator's daughter was beneficial tenant for life of a fund paid into court upon the compulsory purchase of the testator's property, the daughter being one of the two trustees of the will, and both trustees being desirous of resigning their trusts, and there being no power of sale in the will, the Court appointed two new trustees of the settlement effected by the will for the purposes of the Settled Land Act 1882, and ordered the fund to be paid out to such trustees, to be held by them upon the trusts of the will. *Re Wright's Trusts*, 24 L. R., Ch. D., 662.

6. J. W. by his will, devised an estate to trustees upon trust to receive and pay the rents to his grandson for life, and after his decease to sell and to stand possessed of the moneys for all the grandson's children. The tenant for life was upwards of seventy years of age, and a widower. He had one child only, a daughter, and she and her husband in July 1880, contracted to sell her reversion in the estate to the plaintiff. The Settled Land Act (45 & 46 Vict., c. 38) came into operation in January 1883, and the tenant for life at the end of that month advertised the estate for sale under the powers of the Act. The plaintiff brought an action for an injunction to restrain the tenant for life from selling; and to restrain the other defendants, devisees of the legal estate under the will of the survivor of the trustees of J. W.'s will appointed by the Court, from executing any assurance of the estate, and on motion for that purpose:—Held, that the tenant for life had power under the Act to sell the fee-simple and inheritance of the property if he should comply with the provisions of the Act; but held, also, that there were no trustees to whom he could under s. 45 give notice; and an injunction was granted to restrain him from selling until trustees had been properly appointed for the purposes of the Act. *Wheelwright* v. *Walker*, (No. 1), 23 L. R., Ch. D., 752; 52 L. J., Ch., 274; 48 L. T. 70; 31 W. R. 363.

Held, also, that the plaintiff was entitled to be served with any summons for the appointment of new trustees, and (the plaintiff objecting) that the defendant's solicitor ought not to be appointed. *Ib.*

7. Certain estates were devised to the use of

VI. APPORTIONMENT OF ON SALES OF LEASEHOLDS.

1. Leaseholds for lives in settlement subject to a trust for renewal were, after refusal of the lessor to renew, sold under the Leases and Sales of Settled Estates Act 1877:—Held, that the first taker was entitled only to the income of the purchase money. *Re Barber's Settled Estates*, 18 L. R., Ch. D., 624; 50 L. J., Ch., 769; 45 L. T. 433; 29 W. R. 909.

2. Where leasehold property, held for an unexpired term of years, was sold under the Settled Estates Act 1877, and the tenant for life suffered by reason of the sale a diminution of income, the Court, applying the principle of *Askew* v. *Woodhead* (14 L. R., Ch. D., 27), directed a calculation to be obtained from an actuary of what equal half-yearly sums, for the residue of the terms, the proceeds of the sale would produce, taking interest at 3 per cent. so as to exhaust that sum at the expiration of the term, and that in each half-year the dividends on the stock then remaining, in which the proceeds of sale were invested, should be paid to the tenant for life, and so much of the stock transferred to the same person as with the cash dividend would make up the half-yearly sum so to be ascertained, the residue of the fund, if any, at the expiration of the life interest, to go to the persons absolutely entitled in remainder. The Court allowed the tenant for life the costs, as between solicitor and client, of the application for compensation. *Re Walsh's Trusts*, 7 L. R., Ir., 554.

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4. Where the Court, under the Settled Estates Amendment Act (27 & 28 Vict., c. 45, s. 2), amended an order made under the Settled Estates Act (19 & 20 Vict. c. 120, s. 10), by striking out a condition that certain mining leases should be settled by the judge, the costs of the application were directed to be paid out of the one-fourth part of the rents set aside by the trustees as representing the share of the inheritance, in accordance with the terms of the Act. *Lovat* v. *Leeds* (*Duke*), 11 L. T., N. S., 442.

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7. Upon a petition for the sale of settled real estate, partly freehold and partly copyhold, the Court directed the copyholds to be enfranchised, the whole to be sold as freehold, and the costs of enfranchisement to be paid out of the proceeds of sale. *Re Adair*, 16 L. R., Eq., 124; 42 L. J., Ch., 841.

8. The Court, in approving of an agreement to demise landed estates, and in directing that the costs of the application should be a charge on the property, ordered the name of the person advancing the money necessary for the payment of such costs to be inserted in the order. *Re Tunstall*, 14 L. T., N. S., 352.

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XI. Settled Land Act 1882 (45 & 46 Vict., c. 38).

I. *Effect of on Settlement Powers*, 6168.
II. *Appointment of Trustees*, 6169.
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I. EFFECT OF ON SETTLEMENT POWERS.

11. Upon a summons under the Settled Land Act 1882 to obtain the opinion and direction of

the Court as to the effect of the Act upon certain clauses in a settlement where an infant tenant in tail was entitled to possession, the following questions were decided: (1) The settlement gave the trustees power, during the minority of any person entitled to possession, to receive and apply rents and profits in management of estate and maintenance of infant, and to accumulate and apply the surplus in paying off charges or in purchase of real estate, to be settled to the same uses:—Held, that the rents and profits received by the trustees during the minority were to be treated in manner directed by the settlement, and without regard to the Act. *Re Newcastle's (Duke) Estates*, 24 L. R., Ch. D., 129; 52 L. J., Ch., 645; 48 L. T. 779; 31 W. R. 782.

Sale and Exchange.] (2) Power in the settlement to the trustees, with the consent of tenant for life, if of age, and if not, of his guardians, to sell or exchange:—Held, that this power was exercisable by the trustees during the minority, at the request and by the direction of the guardians of the infant tenant in tail. *Ib.*

Powers of Leasing.] (3) Power in the settlement for the guardians during minority to grant leases for twenty-one years, building leases for ninety-nine years, and mining leases for sixty years:—Held, that this power was exercisable during minority by the guardians, with the consent of the trustees. *Ib.*

Mining Leases.] (4) Held, that the rents derived from mining leases were to be applied by the trustees in manner directed by the settlement, as coming within the term "contrary intention" expressed in the 11th section of the Act:—(5) Held, that there being no power in the settlement to sell surface land apart from minerals, the trustees could exercise that power under s. 17 of the Act; and this being an execution of a statutory power, the consent of the guardians would not be necessary. *Ib.*

II. APPOINTMENT OF TRUSTEES.

1. Where a tenant for life is a lunatic and his committee wishes to exercise the powers of leasing given by the Settled Land Act 1882, if there are no trustees of the settlement in existence new trustees must be appointed for the purposes of the Act. *Re Taylor*, 52 L. J., Ch., 728; 49 L. T. 420; 31 W. R. 596.

2. It is a sufficient objection to the appointment of one of the trustees of a settlement of lands as a trustee of the same lands for the purposes of the Settled Land Act 1882, that he is the solicitor of the tenant for life, and has been acting for him in the matter of a proposed sale of the lands. *Re Walker's Trusts*, 48 L. T. 632; 31 W. R. 716.

3. A testator devised his real estate to the use of G. and W. in fee upon trusts in strict settlement, and bequeathed to them his residuary personal estate upon trust to invest it in the purchase of land to be conveyed to them upon the same trusts. The will contained no power of sale. W. was the family solicitor, a person of good position and high character, and after the death of the testator, he acted as solicitor to the trustees and also to the tenant for life. The tenant for life being desirous of selling part of the estates under the powers of the Settled Land Act 1882, applied to the Court to appoint G. and W. trustees for the purposes of the Act:—Held, that W. ought not to be appointed, for that although he was in all other respects a most proper person, his being solicitor to the tenant for life, made him unsuitable for an office the duties of which required him to check the proceedings of the tenant for life. *Re Kemp's Settled Estates*, 24 L. R., Ch. D., 485; 52 L. J., Ch., 950; 49 L. T. 231; 31 W. R. 930.

4. The share or interest of an infant under the Statute of Distributions in realty which has improperly been allowed to remain unconverted, is settled land within the meaning of s. 59 of the Settled Land Act 1882, so as to enable the Court, under s. 38, to appoint trustee to exercise the powers conferred by that Act. *Re Wells*, 49 L. T. 859; 31 W. R. 764.

5. Where a testator's daughter was beneficial tenant for life of a fund paid into court upon the compulsory purchase of the testator's property, the daughter being one of the two trustees of the will, and both trustees being desirous of resigning their trusts, and there being no power of sale in the will, the Court appointed two new trustees of the settlement effected by the will for the purposes of the Settled Land Act 1882, and ordered the fund to be paid out to such trustees, to be held by them upon the trusts of the will. *Re Wright's Trusts*, 24 L. R., Ch. D., 662.

6. J. W. by his will, devised an estate to trustees upon trust to receive and pay the rents to his grandson for life, and after his decease to sell and to stand possessed of the moneys for all the grandson's children. The tenant for life was upwards of seventy years of age, and a widower. He had one child only, a daughter, and she and her husband in July 1880, contracted to sell her reversion in the estate to the plaintiff. The Settled Land Act (45 & 46 Vict., c. 38) came into operation in January 1883, and the tenant for life at the end of that month advertised the estate for sale under the powers of the Act. The plaintiff brought an action for an injunction to restrain the tenant for life from selling; and to restrain the other defendants, devisees of the legal estate under the will of the survivor of the trustees of J. W.'s will appointed by the Court, from executing any assurance of the estate, and on motion for that purpose:—Held, that the tenant for life had power under the Act to sell the fee-simple and inheritance of the property if he should comply with the provisions of the Act; but held, also, that there were no trustees to whom he could under s. 45 give notice; and an injunction was granted to restrain him from selling until trustees had been properly appointed for the purposes of the Act. *Wheelwright* v. *Walker*, (No. 1), 23 L. R., Ch. D., 752; 52 L. J., Ch., 274; 48 L. T. 70; 31 W. R. 363.

Held, also, that the plaintiff was entitled to be served with any summons for the appointment of new trustees, and (the plaintiff objecting) that the defendant's solicitor ought not to be appointed. *Ib.*

7. Certain estates were devised to the use of

the testator's wife and G. T., upon trust to pay the net rents and income of the estates to the wife for the maintenance, education, and benefit of the testator's son until he should attain twenty-one, and without being liable to account to the trustees or to the son for the same; and upon the son's attaining twenty-one, then upon trust for him absolutely; but if he should die under twenty-one without leaving issue, then upon trust to permit the wife to receive such rents and income for her life, and after her death upon the trusts therein mentioned. The trustees of the will appointed trustees for the purposes of the Settled Land Act 1882. *Re Morgan*, 24 L. R., Ch. D., 114; 48 L. T. 964; 31 W. R. 948.

III. SALES.

1. Subject to a term for raising certain sums freehold estates were devised to the use of trustees during the life of A. without impeachment of waste, with remainders to the use of A.'s children in tail. The trustees were to enter into possession, and during the life of A. manage the property and pay all expenses and outgoings, and keep down the interest on charges, and pay the balance or ultimate residue of the rents and profits to A. during his life. After paying all outgoings, only a very small annual surplus remained payable to A.:—Held, that A. was under the will a person "entitled to the income of land under a trust or direction for payment thereof to him during his life, subject to expenses of management," within the Settled Land Act 1882, s. 58, cl. 1 (ix.), and therefore possessed the powers of selling given by the Act to tenants for life. *Re Jones*, 24 L. R., Ch. D., 583; 50 L. J., Ch., 969; 48 L. T. 812.

2. Certain portions of a settled estate were, in 1878, directed by the Court to be sold with the approbation of the judge, under the Settled Estates Act 1877. No sale had taken place, and trustees for sale under the Settled Land Act 1882 had been recently appointed:—Held, that the order of 1878 would prevent the tenant for life from selling under the Settled Land Act 1882, but that the Court had power, if a proper case were made out, to stay proceeding under that order. *Re Barrs-Haden's Settled Estates*, 49 L. T. 661; 32 W. R. 194.

3. The notice to be given, under s. 45 of the Settled Land Act 1882, by the tenant for life of settled land to the trustees of the settlement for the purposes of the Act, when he is intending to make a sale or lease, must be—not merely general notice of an intention to sell or lease all or any part of the estate at any time after the expiration of one month from the date of the notice as and when a proper opportunity shall from time to time occur—but a notice of a specific sale or lease which is contemplated at the time when the notice is given. The committee of a lunatic tenant for life cannot give a valid notice under s. 45, unless he has previously obtained authority from the Court of Lunacy to do so. *Re Ray's Settled Estates*, 25 L. R., Ch. D., 464; 53 L. J., Ch., 205; 32 W. R. 458.

4. J. W., by his will, devised an estate to trustees upon trust to receive and pay the rents to his grandson for life, and after his decease to sell and to stand possessed of the moneys for all the grandson's children. The tenant for life was upwards of seventy years of age, and a widower. He had one child only, a daughter and she and her husband, in July 1880, contracted to sell her reversion in the estate to the plaintiff. The Settled Land Act (45 & 46 Vict., c. 38), came into operation in January 1883, and the tenant for life at the end of that month advertised the estate for sale under the powers of the Act. The plaintiff brought an action for an injunction to restrain the tenant for life from selling; and to restrain the other defendants, devisees of the legal estate under the will of the survivor of trustees of J. W.'s will appointed by the Court, from executing any assurance of the estate, and on motion for that purpose:—Held, that the tenant for life had power under the Act to sell the fee-simple and inheritance of the property if he should comply with the provisions of the Act; but held, also, that there were no trustees to whom he could under s. 45 give notice; and an injunction was granted to restrain him from selling until trustees had been properly appointed for the purposes of the Act. *Wheelwright* v. *Walker*, (No. 1), 23 L. R., Ch. D., 752; 52 L. J., Ch., 74; 48 L. T. 70; 31 W. R. 363.

Held, also, that the plaintiff was entitled to be served with any summons for the appointment of new trustees, and (the plaintiff objecting) that the defendant's solicitor ought not to be appointed. *Ib.*

5. Where the tenant for life of a settled estate is attempting to sell it under the provisions of the Settled Land Act 1882, and the remainderman offers to buy the estate at its full value, the remainderman is entitled to an injunction restraining the tenant for life from selling at a less price than that offered by the remainderman, or from selling to any person other than the remainderman without giving him a reasonable opportunity of purchasing the estate at a higher price than may be offered by any other bidder. *Wheelwright* v. *Walker* (No. 2), 48 L. T. 867; 31 W. R. 912.

6. Certain estates were devised to the use of the testator's wife and G. T., upon trust to pay the net rents and income of the estates to the wife for the maintenance, education, and benefit of the testator's son until he should attain twenty-one, and without being liable to account to the trustees or to the son for the same; and upon the son's attaining twenty-one then upon trust for him absolutely; but if he should die under twenty-one without leaving issue, then upon trust to permit the wife to receive such rents and income for her life, and after her death upon the trusts therein mentioned:—Held, under the Settled Land Act 1882, s. 58, sub-s. 2, that the infant son had the powers of a tenant for life, being tenant in fee-simple with an executory limitation over in case of dying under twenty-one without issue. The trustees of the will appointed trustees for the purposes of the Act. *Re Morgan*, 24 L. R., Ch. D., 114; 48 L. T. 964; 31 W. R. 948.

7. Independently of the cumulative powers of sale given to tenants for life by the Settled Land Act 1882, the tenant for life, and the trustees under a will which gives them power to sell the estate at the request and by the direction of the person or persons for the time being entitled to the actual freehold of the

devised property, will not be restrained from selling the estate at the request and for the benefit of the tenant for life on merely speculative evidence adduced by the remainderman objecting to an immediate sale, of an expected future increase in the value of the property from the development of coal mines, and the construction of a railway through the estate. *Thomas* v. *Williams*, 24 L. R., Ch. D., 558; 52 L. J., Ch., 603; 49 L. T. 111; 31 W. R. 943.

1. In determining whether land vested in trustees on an absolute trust for sale is subject to the provisions of s. 63 of the Settled Land Act 1882, the Court must look simply at the instrument which created the trust, and if at the time when a contract for sale is entered into by the trustees, there is no person who, by virtue of the provisions of that instrument, is entitled to the income of the money arising from the sale, or of the land until sale, for his life, or any other limited period, s. 63 does not apply, but the trustees can exercise the trusts for sale just as they could have done prior to the passing of the Act. *Re Earle and Webster's Contract*, 24 L. R., Ch. D., 144; 52 L. J., Ch., 828; 48 L. T. 961; 31 W. R. 887.

Conveyancing Act 1881, 44 & 45 Vict., c. 41, *s.* 41—*Infant.*] 2. Real estate to which an infant was entitled contingently on his attaining twenty-one was ordered to be sold as a settled estate within the provisions of the Act. *Re Liddell, Liddell* v. *Liddell*, 52 L. J., Ch., 207; 31 W. R. 238.

IV. PURCHASE MONEY, APPLICATION AND INVESTMENT.

3. Where, under a will, money is bequeathed to trustees in trust to lay it out in the purchase of land, to be settled in strict settlement, the trustees may invest it in debenture stock, in accordance with the provisions of s. 21 of the Settled Land Act 1882. *Re Mackenzie's Trusts*, 23 L. R., Ch. D., 750; 52 L. J., Ch., 726; 48 L. T. 936; 31 W. R. 948.

4. Lands belonging absolutely to a charity were taken by a public body, and the purchase money paid into court under the Lands Clauses Act:—Held, that the purchase money could be dealt with under the provisions of the 32nd section of the Settled Land Act 1882, as "money liable to be laid out in the purchase of land to be made subject to a settlement." *Re Byron's Charity*, 23 L. R., Ch. D., 171; 48 L. T. 515; 31 W. R. 517.

5. In a petition presented by the trustees of a settlement for payment out to them of a sum paid into court under the Lands Clauses Consolidation Act 1845, it appeared that the trustees had a power to sell, but no power to sell reserving the minerals, and, as it was desired to effect a sale reserving the minerals, the sale had been effected by the tenant for life under the Lands Clauses Consolidation Act 1845, s. 7, and the question arose whether the Court had jurisdiction to make the order for payment out to the trustees by virtue of the provisions of the Settled Land Act 1882:—Held, that the Court has jurisdiction, under ss. 22 and 32 of the Settled Land Act 1882, to order money paid in upon a sale of land by the tenant for life under the Lands Clauses Consolidation Act 1845, to be paid to the trustees of the settlement, the tenant for life consenting. *Re Rutland's (Duke) Settlement*, 49 L. T. 196; 31 W. R. 947.

6. A testator devised freehold property to trustees in trust for his grandson for life, and then for his issue in tail. There were four trustees of the will, and the testator's grandson was one of such trustees. The will contained no power of sale. Shortly after the testator's death a portion of the property comprised in the will was purchased by a railway company under their powers, and the money was paid into court. Upon petition for payment of the money out of court, an order was made appointing three of the trustees of the will, omitting the testator's grandson (the tenant for life), to be trustees of the settlement effected by the will for the purposes of the Settled Land Act 1882; and the fund was ordered to be paid out to such three trustees to be held by them upon the trusts of the will. And it appearing that the trustees of the will had advanced a large sum of money on mortgage including, by anticipation, a sum of money equivalent to the fund in court, it was ordered that the three trustees appointed by the Court be at liberty to pay the fund to the four trustees of the will upon the execution by them of a declaration of trust in favour of the three trustees of so much of the principal sum, secured by the mortgage, as should be equivalent to the proceeds of the fund ordered to be paid out of court. *Re Harrop's Trusts*, 24 L. R., Ch. D., 717; 48 L. T. 937.

V. COSTS AND EXPENSES.

7. The Settled Land Act 1882, s. 32, provides that where, under any special Act, money is in court liable to be laid out in the purchase of land to be settled, that money may be invested as capital money arising under the Act, on the like terms, if any, "respecting costs," as if the mode of investment were authorised by the special Act:—Held, that the costs of an interim investment in debenture stock of such money, paid into court by the Commissioners of Sewers under their special Act (which did not authorise an investment in debenture stock), must be paid by them in like manner as if the mode of investment were authorised by the special Act. *Re Hanbury*, 52 L. J., Ch., 687; 31 W. R. 784.

8. Settled property which had been put up for sale by auction by the tenant for life under the Settled Land Act 1882, but withdrawn for want of any sufficient offer, having been sold by private contract on the same day:—Held, on summons by the trustees for the decision of the Court, that one charge, according to the scale set out in Part I. of Schedule 1 of the General Order under the Solicitor's Remuneration Act 1881 was payable out of the purchase money to the tenant for life's solicitor for conducting the sale, including the conditions of sale, and one charge for deducting the title and completing the conveyance, including the preparation of the contract; and that the costs of the concurrence in the sale by the mortgagees of the tenant for life, and a proper sum for the auctioneer's charges, were also payable out of the purchase money. *Re Peck, Cartington Estate, Re*, 24 L. R., Ch. D., 608; 52 L. J., Ch., 815; 49 L. T. 95; 31 W. R. 910.

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VIII. *Objections to Title of Vendor.* See VENDOR AND PURCHASER.

I. Agreement for. Statute of Frauds.

1. Whether a letter written during a treaty of marriage, and there are subsequent treaties and proposals, is an agreement within the Statute of Frauds. *Cokes* v. *Mascal*, 2 Vern. 34.

Marriage agreement reduced into writing, but not signed by either party, yet decreed to be performed. *Id.* 200.

2. Agreements since the Statute of Frauds are not to be part parol, and part in writing, yet a deposit for performance of a written agreement, though there is no writing declaring the deposit to be a security, is not within the statute. *Hales* v. *Van Berchem*, 2 Vern. 617.

3. An agreement not in writing before marriage by the husband is within the Statute of Frauds. *Montacute (Viscountess)* v. *Maxwell*, 1 P. W. 618; 1 Stra. 236.

4. Bond by husband on marriage, reciting agreement to settle wife's estate on the issue, etc.; the wife not an executing party. After the marriage, a real estate of the wife came into possession. The husband dies; the wife marries B. and dies. Bill by a younger child against B., and the heir of his mother; it seems that the Statute of Frauds could not have been taken advantage of on account of the wife not having been an executing party, since the marriage took place in consequence of the instrument executed by the husband. Here, however, the wife had proved, and acted under her first husband's will, which recited the bond, from whence it was held, she had bound herself at all events. *Archer* v. *Pope*, 2 Ves. 523.

5. On a marriage treaty, the intended husband and the young lady's father went to a counsellor's chambers to have, in consideration of the portion the father proposed to give, a settlement drawn. Minutes of the agreement were taken down in writing by the counsel, and given by him to his clerk to be drawn up in form. The next day the father dies, and the day following the marriage was solemnised. This agreement, notwithstanding these preparations, held to be within the Statute of Frauds and Perjuries. *Bawdes* v. *Amherst*, Pre. Ch. 402.

6. A father on treaty of marriage of his daughter, agrees by letter written to a third person, to give 1,500*l.* portion to his daughter, and to charge it upon his land; this, as it is a writing signed by the party, takes it out of the Statute of Frauds, and being to charge land, is properly suable in equity. *Moore* v. *Hart*, 1 Vern. 110, 201.

7. Promising by letter to give so much as a portion, sufficient to bring the agreement out of the Statute of Frauds. *Seagood* v. *Meale*, Pre. Ch. 561.

8. A letter from a father to his daughter, by which he agrees to give her 3,000*l.* portion, and this not shown to the man who afterwards marries her, does not take the promise out of the Statute of Frauds. *Ayliffe* v. *Tracy*, 2 P. W. 65.

9. Pending an arrangement for a marriage, the grandmother of the lady signed a memorandum drawn by her agent, stating that she intended to leave the lady 2,000*l.* at her death, to be secured by a bond, as a provision for her on her intended marriage. On the same day her agent by her directions wrote to the intended husband, stating that she intended giving the lady 2,000*l.* at her death, and her house at Cheltenham. The agent shortly after wrote to the grandmother, stating that the intended husband wished to have her bond, and also the house she intended giving, and that he had referred him to her solicitor. That letter was read to the grandmother, who gave it to the lady, saying that it related to her affairs. The marriage was solemnised, and the grandmother died without having executed either bond or conveyance:—Held, that there was a sufficient agreement in writing within the Statute of Frauds. *Saunders* v. *Cramer*, 3 Dr. & War. 87; 5 Ir. Eq. R. 12. S. C. *nom. Greene* v. *Cramer*, 2 Con. & L. 54.

A contract upon marriage, as well as one upon the sale of land, may be made out from a correspondence. *Ib.*

10. A., who under a settlement entered into upon the marriage of his father in 1783, was entitled to a younger child's portion, filed his bill in 1825 for the purpose of raising the same, praying at the same time an account of all prior incumbrances, the inheritrix having set up certain prior articles executed in the year 1765 upon the marriage of the plaintiff's uncle (the elder brother of his father), and which articles had been registered in the year

1767; the plaintiff amended his bill in 1829 by bringing before the Court B. and her husband, who were the only parties beneficially entitled under these articles. B. having answered the bill, a decree was pronounced in 1834, according to the terms of the prayer, and the usual reference made; B. and her husband claimed before the Master, in right of her charge under the articles of 1765, the principal sum so charged by those articles, and sixty-eight years' interest thereon. The Master having made his report:—Held, upon exceptions thereto, that the memorial of the articles of 1765 was good secondary evidence of those articles, possession having been shown to have gone along with them, and that execution of that memorial by the grantee was sufficient to satisfy the statute. *Peyton* v. *M'Dermott*, 1 Dr. & Wal. 198.

1. To a parol agreement by a father to convey property in consideration of the marriage then contemplated of his daughter, followed by delivery of possession to the husband after the marriage, the Statute of Frauds cannot be set up by way of defence. *Surcome* v. *Pinniger*, 17 Jur. 196; 22 L. J., Ch., 419.

A father, shortly before the marriage of his daughter, told her intended husband that he meant to give certain leasehold property to the couple on their marriage. After the marriage he gave up possession of the property to the husband, to whom he directed the tenants to pay the rents, and handed to the husband the title-deeds. The husband expended money upon the property:—Held, sufficient part performance to take the case out of the Statute of Frauds. S. C. 3 De G. M. & G. 571.

2. A. encouraged his son's courtship to B.'s daughter. B. promised, by letter, to give her 500*l.* if A. would settle 100*l.* per annum on the son, which A. refused. The son and daughter married privately. After this letter, A. consented and B. refused. On a bill for performance of this agreement, objected, that these promises were within the Statute of Frauds, and that the letter, being after the marriage, should not bind. But decreed *contra*, for the father consented to the marriage. The agreement was admitted by the answer, and was out of the statute, as if no letter had been written; but this case did not depend upon parol evidence or admission, for the letter after marriage, considering the transaction before, is sufficient. *Hodgson* v. *Hutchinson*, 5 Vin. 522, pl. 34.

3. A parent, by his agent, on the marriage of his daughter, entered into an engagement in writing with her intended husband, in which his name was written but not signed:—Held, that a letter written by the parent after the marriage, referring to the memorandum as stating the terms of the engagement, was either a sufficient agreement signed by the party within the Statute of Frauds, or a sufficient recognition of the use made of his name in the memorandum. *De Biel* v. *Thompson*, 3 Beav. 469. Affirmed on appeal S. C. *nom. Hammersley* v. *De Biel* (*Baron*), 12 Cl. & F. 45.

4. A father having agreed to settle a certain sum for the benefit of his daughter, and the children of her intended marriage with Lord G., a memorandum of the terms of the settlement was by his direction written by his solicitor, and approved of by him and Lord G., and he gave the solicitor instructions to prepare such settlement, but died before the same was ready for execution, having by his will given the daughter real estates and a moiety of the residue of his personal estate. Lord G. married the daughter, and performed his part of the settlement in conformity to the written memorandum:—Held, that the memorandum was not a complete agreement binding within the Statute of Frauds, and of an incomplete agreement there cannot be part performance. *Thynne* (*Lady*) v. *Glengall* (*Earl*), 2 H. L. Ca. 131; 12 Jur. 805. Affirming S. C. *nom Glengall* (*Earl*) v. *Barnard*, 1 Keen 769; 6 L. J., N. S., Ch., 25.

5. A father verbally promised, in contemplation of the marriage of his daughter, to give her a house as a wedding present, and immediately after the marriage he put the daughter and her husband into possession. The father was then the owner of the house, which was leasehold, and was subject to a charge in favour of a building society, payable by instalments. The father paid those which fell due during his lifetime, and at his death there remained a balance of 110*l.*, which fell due shortly afterwards:—Held, that the verbal promise to give the house having been established, the possession was a part performance which took the case out of the Statute of Frauds, that the contract was to give the house free from incumbrances, and that the 110*l.* was payable out of the father's estate. *Ungley* v. *Ungley*, 4 L. R., Ch., 73; 46 L. J., Ch., 189; 25 W. R. 39; 35 L. T., N. S., 189 Affirmed 5 L. R., Ch., 887; 46 L. J., Ch., 854; 25 W. R. 733; 37 L. T., N. S., 52.

6. Invalidity of a parol agreement of the husband, prior to marriage, to settle the wife's property. *Spicer* v. *Spicer*, 24 Beav. 365.

7. Prior to his marriage, a husband entered into a parol contract to settle his intended wife's property. The property was not settled after the marriage:—Held, that the ante-nuptial parol contract was inoperative, under the Statute of Frauds, that the marriage was not a part performance, that the post-nuptial settlement was voluntary, and, the husband being greatly indebted at the time, that the settlement was void as against the husband's creditors. *Warden* v. *Jones*, 23 Beav. 487; 5 W. R. 446; 26 L. J., Ch., 427; 3 Jur., N. S., 459; 2 De G. & J. 76.

The execution of a post-nuptial settlement in pursuance of a parol ante-nuptial agreement is not a part performance which avoids the statute. *Semble* there can be no such part performance in the case of a parol agreement for a marriage settlement unless some part of the agreement is to be performed by a third party. *Ib.*

8. A written memorandum after marriage of a prior agreement is sufficient within the 29 Car. 2, c. 3, s. 4. *Barkworth* v. *Young*, 4 Drew. 1; 3 Jur., N. S., 34; 26 L. J., Ch., 153; 5 W. R. 156.

An affidavit made in chancery is a sufficient writing within the statute. *Ib.*

A plaintiff stated in his bill a verbal promise given by a testator, and a subsequent affidavit by the testator referring to the words

used by him when he gave the promise:—Held, on demurrer, that the promise was sufficiently stated in the bill, and was in compliance with the requisitions of the Statute of Frauds. *Ib.*

The promise was one from the testator to the intended husband of his daughter, previous to her marriage, that she should share in the testator's property, equally with the rest of his children. The daughter married and died in the lifetime of the testator, leaving issue by the plaintiff two children, who survived the testator. The testator died, leaving two daughters him surviving. He gave nothing to the wife on her marriage, and by his will, after giving a legacy to one of his two surviving daughters, he bequeathed the residue of his property to the other absolutely:—Held, that the agreement might have been performed in two ways by the testator, making a provision by will for his daughter, or by dying intestate; and that though he was precluded by his daughter's death from performing it in the first way, he was not thereby exonerated from making a provision in the way still open to him of dying intestate, and therefore the plaintiff was entitled to a third of the testator's residuary property in right of his deceased wife, but that her personal representative was a necessary party to the suit. *Ib.*

1. M. had given a bond and warrant of attorney to secure the re-payment of a sum of money. Judgment had been entered up, but not executed; the bond and warrant of attorney came into the possession of L., as personal representative of the original obligee. She was on terms of affectionate friendship with M., and often said that he had been unfairly treated, in being made to enter into these securities. L. had in early life received from the father of M. a conveyance of some property in India; the deed of conveyance was expressed to be for a money consideration of 10,000 rupees. In truth, the money consideration was, if any, a debt of 1,200 rupees; the rest was a purely voluntary gift, and no money whatever passed when the conveyance was executed. M. was about to marry, and when his marriage was in contemplation, discussions arose about the bond and warrant of attorney. M.'s father told L. that he was advised, if she did not abandon the claim on the bond and warrant of attorney against his son, to execute a deed, which would put an end to the conveyance of this Indian property as a voluntary conveyance made without consideration. In his depositions he said that L. promised not to enforce the bond and warrant of attorney, if he would abstain from interfering with the conveyance. Other evidence was given of directions by her, that she had abandoned the claim, and of a promise, often repeated, that she would never trouble M. about it:—Held, that this promise, if it constituted a contract, was not a contract made in consideration of marriage, so as to bring it within the words of the Statute of Frauds. *Jorden* v. *Money*, 5 H. L. Ca. 185; 23 L. J., Ch., 865. S. C. *nom. Money* v. *Jordan*, 2 De G. M. & G. 318; 21 L. J., Ch., 893.

2. G., in anticipation of the marriage of his daughter S., had conversations with her, in which he promised her that he would after her marriage pay her the interest on a certain sum of money during her life, and he further said that her husband would have the principal after his death. G., as alleged, made several payments on account of the interest due on the principal sum, but the payments were not regular, and no settlement was ever come to during his life. In administering the estate of G., S. and her husband claimed to be entitled to a certain sum as the balance of the interest due, but, in consequence of dispositions in their favour made by the testator in his will, the principal sum was not claimed. The chief clerk allowed the claim. On motion to vary the certificate, the Court held, that, even admitting the payments by G., during his life to have been made in pursuance of a virtual agreement, they did not constitute such a part performance as to take the case out of the Statute of Frauds, and therefore the claim must be disallowed. *Re Gulliver, Stroughill* v. *Gulliver*, 2 Jur., N. S., 700; 4 W. R. 684.

3. In consideration of B. giving security for an advance to A. of 1,000*l.* and paying off mortgages for 4,000*l.* on A.'s estate, A. agreed to settle his estate on his wife (B.'s daughter) and children. The 1,000*l.* was obtained, but nothing more was done under the agreement until A.'s death, several years after:—Held, that it did not create any charge in favour of the children of A. as against creditors. *Cubitt* v. *Blake*, 2 W. R. 604, 640.

4. Prior to a marriage the intended husband and wife caused a settlement of the wife's property to be prepared in accordance with a memorandum in the husband's handwriting; but before its execution the husband verbally promised the wife that if she would forego the settlement he would give her the same benefits by his will. In accordance with this promise, he, immediately after the marriage, executed a will to that effect prepared before the marriage. Upon his death, some years afterwards, that will was not forthcoming, but a later will was found disposing of the property in a different manner:—Held, that there was no contract within the Statute of Frauds binding the husband to make a will, or any fraud or part performance to take the case out of the statute. *Caton* v. *Caton*, 1 L. R., Ch., 137; 12 Jur., N. S., 171; 35 J. L., Ch., 292; 14 W. R. 267; 14 L. T., N. S., 171. Affirmed 2 L. R.. H. L., 127; 36 L. J., Ch., 886. Reversing 34 L. J., Ch., 564; 13 W. R. 800; 12 L. T., N. S., 532.

Subsequent marriage is not part performance of a parol contract in consideration of marriage. Acts of part performance by the party sought to be charged will not prevent the operation of the statute. *Ib.*

5. C., proposing to marry H., wrote out a paper beginning thus: "In the event of a marriage between the undermentioned parties, the following conditions as a basis for a marriage settlement are mutually agreed upon." Then followed several sentences, each in this form, "C. to do so-and-so, H. to have so-and-so." No name of either party was signed to the paper, which was delivered by C. to H.'s solicitor for the purpose of drawing the settlement. Two of the clauses in it appeared to have been, by mutual arrangement, struck out. No settlement was ever executed; it was dispensed with by H. at C.'s request, upon C.'s verbal promise to give H. certain advan-

tages by his will. C. died, and the will was not found to fulfil the promise:—Held, that H. was not entitled (independently of the question whether, as a matter of fact, there had been any waiver) to specific performance of the arrangements mentioned in the written paper, as it did not constitute a contract within the meaning of the Statute of Frauds. S. C. 2 L. R., H. L., 127; 36 L. J., Ch., 886.

1. A partial performance of a marriage contract will not be enforced by the Court, *semble*. *Fryer* v. *Cooke*, 12 L. J., N. S., Ch., 487.

Where the whole right of the plaintiff depends on the execution of a contract which he has entered into, that right must be first established by him before he can make it a foundation for proceedings to enforce a right against another person. Demurrer allowed, with liberty to amend. *Ib.*

2. By a parol ante-nuptial agreement, it was agreed that the husband should take a certain portion of the wife's property, and that the residue should be settled for her separate use. This agreement was carried out so far as related to the husband, but no settlement was made on the wife. The wife, subsequently to her marriage, filed her bill by her next friend, stating these facts, and praying that her interests in certain property consisting of real estate coming to her might be declared accordingly. The husband, by his answer, admitted the statements in the bill. A deed was then prepared, purporting to be a settlement on the wife, in pursuance of the agreement, and giving her a power to dispose of her property by will. This deed, though signed by the wife, was not acknowledged by her. She made a will disposing of her property in favour of her husband and other parties, and died. The husband then filed a supplemental bill, praying, as against the heir of the wife, that the parol agreement might be carried into effect, that the want of an acknowledgment might, if necessary, be supplied, and that the will of the wife might be established as a valid execution of the power given to her by the deed:—Held, that the contract so entered into before marriage, there being nothing but marriage following, could not be carried into effect under the Statute of Frauds; and that the Court would not supply the want of the acknowledgment, as tending to destroy the protection which the law throws around married women. *Lassence* v. *Tierney*, 1 Macn. & G. 551; 2 H. & Tw. 115; 14 Jur. 182.

3. A. being tenant for life, under a settlement, with remainder to his wife for her jointure, remainder to the issue male of the marriage, remainder over, with a power to revoke all the uses, except those to his wife and her issue, agrees that in consideration of her surrendering her jointure estate so as to enable him to suffer a recovery and raise 6,000*l.* to pay his debts, he would re-settle his whole estate to particular uses. The surrender was made, and the money raised, but no settlement made according to the agreement:—Held, that this agreement, having been in part performed, the parties were entitled to a specific execution, and decreed accordingly. *Herbert* v. *Winchelsea* (*Earl*), 1 Bro. P. C. 145.

II. Representations and Promises before Marriage. When enforced.

4. A. by letter says he will give 1,500*l.* with his daughter; the daughter marries and A. is privy to it, and seems to approve of it. The daughter dies and the husband takes administration. The father decreed to pay the 1,500*l.* portion. *Wankford* v. *Fotherley*, 2 Vern. 322.

5. The mother, who was the absolute owner of a term, is present at a treaty for her son's marriage, and hears her son declare that the term was to come to him at his mother's death, and is a witness to the deed, whereby the reversion of the term is settled on the issue of this marriage after the mother's death. The mother is compellable in equity to make good this settlement, and to settle the reversion of the term accordingly after her death. *Hunsden* v. *Cheyney*, 2 Vern. 150.

6. A second husband having, by letters in his lifetime, declared he was willing the daughter of his wife by her first husband should have the mother's whole fortune; as he is dead, these letters are to be taken as an appropriation of the fortune for the benefit of the infant. *Grosvenor* v. *Lane*, 2 Atk. 181.

7. Bill by husband to have wife's portion, part of which was invested in stock, made up of money, on ground either of express contract or representation upon which the marriage took place, dismissed; the description by articles, though generally "the sum of 4,000*l.*" referring to that sum in settlement, and the representation under circumstances not amounting to warranty, and proceeding on a common mistake. *Ainslie* v. *Medlycott*, 9 Ves. 13.

8. On a treaty of marriage the husband applied to the wife's brother, to know her fortune, and how it was secured. The brother represented it fairly, as he then conceived it, and as being charged on a real estate under the father's will; and added, that the husband need not examine the will, nor the father's family deeds, for the fact was as he represented. A recital to the same effect was also made in the settlement, to which the brother was a party. It afterwards turned out that the father had no power to charge the estate by his will; but this fact was unknown to all the family at the time of the marriage:—Held, that the representation of the brother would not bind him to make it good. *Merewether* v. *Shaw*, 2 Cox 124.

9. Annuity given by father on daughter's marriage, by a letter to the intended husband in these words, viz., "I promise to you, until it is convenient to me to do something better for you, to allow to my daughter 100*l.* a year, which you can have as you may require":—Held, to be an annuity during the joint lives of the father and daughter; and though incapable of valuation, and though no other evidence of the genuineness of the letter, held to be provable (*Sir J. Cross*, dissent, upon the ground that the facts required further investigation). *Exp. Annandale, Re Curtis*, 4 Dea. & Ch. 511.

10. Settlement decreed according to a letter previously to the marriage, though no express assignment, the marriage having taken place immediately: a distinct positive dissent would be necessary to prevent the effect of the

letter, and that could be evidenced only by an actual settlement before marriage. *Luders* v. *Anstey*, 4 Ves. 501.

1. A., on the marriage of his son B., wrote a letter to his intended wife's mother, stating his intention to leave him certain property, and promising him an annuity in the meantime. On the marriage of E., another son, A., agreed to settle the lands of S., and to secure him 400*l.* a year if the lands should not produce so much, which agreement was afterwards carried out by a deed by which it was declared that the deficiency should be made up out of A.'s other property:—Held, first, that the letter was a mere expression of intention and not an agreement; second, that E. was entitled to have the deficiency (which arose) made up out of A.'s other freehold property; and third, that property devised by A. to B. was not exempt from contribution. *Quinlan* v. *Quinlan*, Hay & J. 785.

2. Construction of a letter as not amounting to an absolute agreement to give a marriage portion. *Randall* v. *Morgan*, 12 Ves. 67.

A letter subsequent to the marriage, authorising the husband to draw for interest due on a bond which was never executed, cannot prevail as evidence of a promise, which, if subsequent to the marriage, is void as *nudum pactum*. *Ib.*

3. Material representations of the circumstances of a person contracting marriage, directed to be made good, even at the instance of persons concerned in fraudulently defeating such representations. *De Manneville* v. *Crompton*, 1 Ves. & B. 355.

4. A., by letter under his hand, promises 1,000*l.* with his niece, but in his letter dissuaded her from marrying the plaintiff; and though he was afterwards present at the marriage, and gave her in marriage, yet the Court would not decree the payment of the 1,000*l.*, but left the plaintiff to his action at law. *Douglas* v. *Vincent*, 2 Vern. 202; *sed quære*. And see *id.* n.

5. A., on the marriage of B., promised, by letter, to join him in a bond of indemnity against a rent-charge issuing out of B.'s estate. A. never signed the bond, but the marriage took effect in confidence of A.'s letter. B. died insolvent, and then A. died:—Held, the marriage is a sufficient consideration to support the undertaking to indemnify, and it will support an assumpsit at law. *Ramsden* v. *Oldfield*, 4 Vin. Abr. 453, pl. 5.

6. A representation made by one party for the purpose of influencing the conduct of another, and acted on by him, will in general be sufficient to entitle him to the assistance of a court of equity for the purpose of realising such representation. And so in proposals of marriage, if the parent or his agent deliberately holds out inducements to the suitor to celebrate it, believing it was intended that he should have the benefits so held out to him, a court of equity will give effect to the proposals. Proposals of marriage, written by the lady's brothers, acting by her father's authority, stated that "Mr. J. P. T., the father, also intends to leave a further sum of 10,000*l.* in his will to Miss T., to be settled on her and her children, the disposition of which, supposing she has no children, will be prescribed by the will of her father. These are the bases of the arrangement, subject of course to revision, but they will be sufficient for Baron B. to act upon." Baron B., upon receiving the proposals, provided a jointure as required by them for his intended wife, and then married her. In the settlement afterwards executed, there was no mention of this sum of 10,000*l.*; and it was not left by J. P. T. in his will:—Held, that his estate was liable to the payment of 10,000*l.*, with interest from the end of one year after his death. *Hammersley* v. *De Biel* (*Baron*), 12 Cl. & F. 45. Affirming S. C. *nom.* *De Biel* v. *Thompson*, 3 Beav. 469; and an order of the Lord Chancellor.

7. A., being informed that an eligible offer of marriage was made by the plaintiff to his grand-niece, wrote to her mother:—"I have always told you what I intended leaving her, which is 2,000*l.*, and which I am now also ready to settle on her, provided there is a proper settlement made on her, and all matters arranged to your satisfaction." He had previously desired that no communication should be made to him till the match was off or on. The plaintiff answered the letter, offering to settle an equal sum, and saying he waited A.'s reply. A. wrote immediately before the marriage disapproving of the match, and saying, that the plaintiff's father should come forward, but the letter was not shown to the plaintiff till just before the marriage ceremony. The plaintiff made a suitable settlement, the lady's mother was satisfied, and the plaintiff was afterwards well received by A.:—Held, that the promise of A. had never become an absolute one, and that there was no representation on the faith of which the marriage was brought about, such as to give plaintiff a claim on A.'s assets. *Madox* v. *Nowlan*, Beat. 632.

8. P. C., while in India, made his will, leaving his daughter, who was born there, a lac of rupees. Upon the completion of her education, P. C., who had returned to England, sent her back to India, and on that occasion he wrote to a particular friend, to whose guardianship and charge he confided her, "In regard to her settlement in life I shall be naturally anxious." "You may assure the young gentleman she may choose, that, on his marriage with her, he shall have 2,000*l.* sterling; nor will that be all. She is and shall be noticed in my will, but to what further amount I cannot say, owing to the present reduced and reducing state of interest, which puts it out of my power to determine at present what I may have to dispose of." H. M. having made proposals of marriage, was informed of the letter written by P. C., and also of the will he had made, and after some negotiations, the marriage was solemnised in 1826; and in 1829, H. M. and his wife returned to England. In the same year, P. C., who was a domiciled Scotchman, executed, in Edinburgh, another will, by which he gave all his real and personal property for the benefit of his wife and his two sons by her; and, in case of their dying without issue, he gave the whole to the issue of his daughter. P. C. died in 1831, without having made any provision for his daughter, leaving the will made by him in India in the state it was when he executed it; and upon a bill filed by his daughter, insisting that the testator had contracted to settle a lac of rupees

upon her, and that the contract was contained in the letter written by him:—Held, that in construing contracts, the Court must ascertain the real meaning of the words used; that when no definite or specific sum was mentioned or referred to, the Court cannot enforce any contract; that the testator had not afforded means of reference to any other document; that, except from the answer of H. M., there was no evidence that he married on the faith and belief that a lac of rupees would be settled; and that it was not evidence to be acted upon in favour of the plaintiff against the estate of the testator, as previous to marriage it had been pointed out to H. M. that the letter did not state any precise sum; and that the testator had left himself unfettered by any contract: and the bill was dismissed, but without costs. *Moorhouse* v. *Colvin*, 21 L. J., Ch., 177; 15 Beav. 341. Affirmed 21 L. J., Ch., 782.

1. On a treaty respecting the marriage of H. M., who was believed to have considerable expectations from his uncle, H. E., the guardians of the lady desired a settlement; and H. M. addressed a letter to H. E., who answered, "I have made my will, and left you my property in the county of T., which is very considerable." The guardians still refused their consent, "until a suitable settlement shall be made by Mr. H. E. of real estate upon the marriage, in the usual course of settlement, and until the sum of 10,000*l.* shall be secured to the trustees of the estate" of the father of the lady, from whom H. M. had some time before borrowed that money, in order to become a partner in a bank. The resolution of the trustees was communicated to H. E., who, in September 1815, wrote: "My sentiments respecting you continue unalterable; however, I shall never settle part of my property out of my power while I exist; my will has been made for some time, and I am confident that I shall never alter it to your disadvantage. I have mentioned before, and I again repeat, that my county of Tipperary estate will come to you at my death, unless some unforeseen occurrence should take place. I have never settled anything on any of my nephews, and I should give cause for jealousy if I was to deviate in this instance from a resolution I have long made." This answer was, at the desire of H. E., communicated to the guardians, who, in March 1816, consented to the proposed marriage, which accordingly took place in July of that year. A settlement was then drawn up, in which it was recited, that "H. M. has reason to expect that he will, upon the decease of H. E., become entitled, by virtue of the will of H. E., to a certain portion of his estate and property, pursuant to the declaration of H. E., contained in his letter to H. M. of September 1815." H. E. was made one of the trustees of the settlement, and, about twelve months afterwards, he executed the deed; but there was no evidence that he knew anything of its contents, beyond the fact that he was named as one of the trustees. H. E. afterwards devised his property to other persons:—Held, affirming the decision of the Court below, that H. M. could not maintain a suit to compel the trustees under the will of H. E. to convey the Tipperary estate to him, for that H. E.'s letters did not amount to a contract to settle it on him. *Maunsell* v. *White*, 4 H. L. Ca. 1039; 1 J. & L. 539; 7 Ir. Eq. R. 413.

2. It is a principle equally of law and of equity that if a person makes any false representation to another, who acts upon it, the person making it shall not afterwards be allowed to set up that what he said was false, and to assert the real truth in place of the falsehood which has so misled the other. Actual knowledge of the falsity of the representation is not necessary if the party makes it under such circumstances that he had resonable ground for supposing that the person whom he was misleading was to act upon it. But *dissentiente St. Leonards* (*Lord*), this doctrine does not apply where the representation is not a representation of a fact, but a statement of something which the party intends or does not intend to do. And in this case the not adhering to the statement is not a fraud. Therefore where a bond creditor at various times declared that she had abandoned the debt, and particularly upon the occasion of negotiations respecting the marriage of the obligor represented that she had abandoned it, and upon the faith of such representations the marriage took effect and settlements were made:—Held, nevertheless, that the representations amounted merely to a promise not to enforce the debt, binding only in honour, and that therefore the creditor could not be restrained afterwards suing on the bond. But, *è contra per St. Leonards* (*Lord*), it is immaterial whether it is a misrepresentation of fact as it actually existed, or a misrepresentation of an intention to do or to abstain from doing an act which would lead to the damage of the party who is thereby induced to deal in marriage, or in purchase, or in anything of that sort, upon the faith of that representation. And *per eundem*, the Statute of Frauds in such a case will have no operation, but the promise to do an act, followed by marriage, which cannot be undone, is equivalent to a binding agreement to do that act. A promise not to sue on bonds is not within the Statute of Frauds. If a particular allegation is supported by only one witness and is positively denied by the answer, and there is nothing to show that the one is to be credited more than the other, the claim founded upon that allegation cannot be enforced against the defendant. For this purpose the answer must be looked at with all the concomitant circumstances which may tend to depreciate it, and the value of the particular denial may be legitimately tested by a comparison of the answer with the evidence on other points. *Jorden* v. *Money*, 5 H. L. Ca. 185; 23 L. J., Ch., 865.

During a treaty for a marriage, which afterwards took place, a bond creditor of the intended husband, who was an intimate friend of his family, and was aware of the proposed marriage, repeatedly declared it to be her determination never to enforce payment of the bond debt, and made these declarations under circumstances which were calculated to lead, and which did lead, to the communication of them to the friends of the intended wife:—Held, by the Lord Justice Knight Bruce, agreeing with the Master of the Rolls, that the declarations above mentioned afforded possibly

sufficient ground for the interposition of a court of equity to restrain proceedings at law upon the bond; and there being, in addition, the testimony of one witness to a positive promise to the above effect, in consideration of another promise on the part of the witness, which he performed:—Held, that although this promise was denied by the answer, yet that the answer being in many respects inaccurate, showed that the defendant's memory could not be depended on, so that the testimony of the witness ought to prevail, and that the case was a proper one for a perpetual injunction, a decree for which was accordingly affirmed, *dissentiente* Lord Cranworth, who held, that the declarations being of intention merely, and not of fact, were not such representations as to bind the creditor, on the ground of fraud or otherwise, and that an actual contract could not, in opposition to the answer, be considered proved by the evidence of one witness, S. C. *nom. Money* v. *Jordan*, De G. M. & G. 318; 21 L. J., Ch., 893.

Held, that forbearance to make a new settlement upon an intended marriage, would be a sufficient consideration to support the release of a debt due to a person who was a *cestui que trust* under an existing settlement which appeared to be voluntary, although it might be doubtful whether that settlement was voluntary, or could have been defeated by a subsequent settlement. *Ib.*

1. K. in 1832, after a long correspondence with Mrs. and Miss B., in reference to making a provision for his son, the plaintiff, on the occasion of his marriage with Miss B., stated to the latter his ultimate proposals, namely, to give his son a sum, inclusive of his own property, equal in value to 5,000*l.*, of which 3,600*l.* would be settled upon him and his children before marriage, so as to make up the joint income to 600*l.* a year, till such time as their own resources rendered it unnecessary; "and, finally, to recognise his son, in common with the rest of the family, in the future provisions of his will." In November 1832 the marriage took place. K. settled 3,600*l.* on the plaintiff, and expended about 1,000*l.* in furnishing a house on his marriage, and by his will, dated in April 1841, after directing his trustees to pay the rents of the trust property to five of his children (not including the plaintiff) for life, with remainder for the benefit of their issue, directed that in case either of the five children should die without leaving issue at his or her decease, his or her part or share should be transferred, or paid to, or appropriated for the benefit of any other surviving child (including the plaintiff), and the issue then living of any of his sons and daughters (including the issue of the plaintiff) who might be then dead. By a codicil, dated in 1846, K. bequeathed to the plaintiff a legacy of 2,500*l.* On a bill praying that the plaintiff might be declared to be entitled to one equal sixth part of the residuary estate, or that he was entitled to one equal seventh part of the same, the plaintiff being willing, upon receiving such payment, to deal with the interest bequeathed to him by the will and codicil in such manner as the Court should direct:—Held, that the provision made by the will and codicil was such a recognition of the plaintiff by K. in common with the rest of his family, as to sufficiently comply with the promise upon the faith of which the marriage took place; but inasmuch as the difficulty had been created by K. in the negotiations conducted and the representation made by him, the costs were ordered to be paid out of his estate. *Kay* v. *Crook*, *Kay* v. *Kay*, 3 Jur., N. S., 104; 3 Sm. & G. 407.

2. Where it was shown, with sufficient certainty, that declarations and representations were actually made by a father to an intended husband, and to other persons, previously to, and in contemplation of, and subsequent to the marriage of his natural daughter to him, and that the marriage was contracted in a confidence in such representations, that he had irrevocably settled or intended to settle an estate, and a sum of sicca rupees, as a provision for, and which would upon his death become the property of his reputed daughter and her children: and where there was evidence that certain documents, purporting to settle the estate and sicca rupees, were executed by the settlor, but there was a total want of evidence as to the contents or effect of such documents, the Court gave effect to the representations by declaring that the children of the marriage were entitled to the estate and the sicca rupees as tenants in common absolutely. *Prole* v. *Soady*, 5 Jur., N. S., 1382.

It is essential in such a case that there should also be perfect or reasonable certainty as to the amount and nature of the property to which the representations apply. *Ib.*

The settlor having, by his will, bequeathed to trustees 4,000*l.* in trust for the children of the marriage of his daughter and her husband, the Court directed a reference to the chief clerk, for him to inquire and certify whether it would be for the benefit of the children to take the estate and the sicca rupees, or to take the benefits given to them by the will. *Ib.*

Where the husband's statement, that he was himself to have a life estate, was not supported by other evidence:—Held, that he was not entitled to it. *Ib.*

A bill by infants against the devisee of their grandfather, to establish a settlement of real and personal estate, alleged to have been made or promised on the marriage of their parents. The Court, on parol evidence that the marriage had taken place on the faith of representations made by the testator previously to the marriage, and on evidence of representations made by him after the marriage, directed a settlement in accordance with such representations, though the bill was not filed until seventeen years afterwards. S. C. 2 Giff. 1; 29 L. J., Ch., 721.

3. In the course of a conversation between L. & H., with respect to the provision to be made on the marriage of L. with the daughter of H., a statement was made by H. which was thus referred to in a letter written by L. to H. shortly afterwards: "You were pleased to say, that with relation to your property, it would be equally divided between your children who survived you." H., in reply, stated, "All we possess will be divided at our decease equally among our children." Subsequent correspondence took place between L. and H. upon the subject, to the same effect, but in a settlement

executed prior to the marriage there was no expression of any such intention:—Held, that all that was intended to be binding on the father was embodied in the settlement. *Lowley* v. *Heath*, 1 De G. F. & J. 489; 6 Jur., N. S., 436; 29 L. J., Ch., 313. Affirming 6 Jur., N. S., 262; 8 W. R. 314; 27 Beav. 523.

If a father, in contemplation of the marriage of his daughter, corresponds with his intended son-in-law, and makes promises which are personal to his daughter, they will not enure for the benefit of her husband or child. *Ib.*

1. A., hearing that a marriage, to which he had not given his assent, had been fixed between his daughter and B., signed and sealed a document, by which he agreed to settle, assign, and make over to his daughter, on the occasion of her marriage with B., a house free of all rent for his own term thereof, to the purpose that it should be settled on herself and her issue by B.; and to execute any further instrument or conveyance of the same which counsel should advise or deem necessary to carry out the assignment of the premises to his daughter, as a marriage portion. That document was enclosed in a letter to D., in which A. expressed his ultimate intentions as to the remainder of this property to be, that after the death of himself and his wife, part of it should go to his sons, and another part should be divided, share and share alike, among his three daughters, with such arrangements as should secure the property to the family, so that, if one died without issue, that portion should not go to strangers, but pass to the other branches of the family. The letter reached B. on the morning of the marriage, which had been previously fixed, and which took place. B., being separated from his wife, filed a petition, in the name of himself and his wife, for a specific performance of the agreement, by an assignment, in trust for A. for life, or until bankruptcy or insolvency; then to his wife, to her separate use; and, after their death, to the issue of the marriage; and if no issue, to A. absolutely. *Semble*, the agreement should be carried into effect by settling the house to the separate use of A.'s daughter for her life, and after her death upon her issue, if any, or by settling it on her without any limitation to her separate use; but:—Held, that the letter would not be enforced as an addition to the agreement, or as itself containing a binding agreement. *Kirwan* v. *Burchell*, 10 Ir. Ch. R. 63.

Held, also, that the letter could not be enforced as a representation, as the marriage did not take place on the faith of it; and there was a written contract executed by A. *Ib.*

2. A parol ante-nuptial contract is not a good consideration to support a post-nuptial settlement, as against creditors. *Goldicutt* v. *Townsend*, 28 Beav. 445.

A parol promise by a father, prior to the marriage of his son, to make a future provision for him, his wife and children, cannot be enforced, if the marriage did not take place by reason of any reliance on such promise, or if it was not acted on as a reason and consideration for the marriage. *Ib.*

3. Parents of the contracting parties to a marriage mutually agreed in writing, after the marriage, as a mode of giving effect to the verbal promises made before, to provide a marriage portion, and the father of the woman promised to pay 200*l.* to his son-in-law, and the father of the man to pay 100*l.*:—Held, that the son-in-law being a stranger to the consideration could not sue the executor of his father-in-law, upon the promise; and that the relation of parent and child did not create any exception to the rule. *Tweddle* v. *Atkinson*, 30 L. J., Q. B., 265; 9 W. R. 781; 4 L. T. N. S., 468.

4. Upon negotiations taking place previously to a marriage, the father of the lady wrote to the gentleman's father in these words: "When my eldest daughter married, I gave her 1,000*l.* settled on herself, with a promise of sharing with my other daughters what I may be able hereafter to leave them; and this I can do for A." (the intended bride). A settlement was prepared in the Scotch form, and executed, whereby the father assigned 1,000*l.* to trustees for his daughter, and also all other means and estate whatsoever to which she would be entitled to succeed on his death. The father afterwards transferred 3,333*l.* to the trustees of his daughter A.'s settlement, and he made his will, whereby he gave more property to his other daughters than to A. Upon a bill by the daughter and her husband claiming to be entitled to an equal share with the other children:—Held, that the settlement was a final instrument, and the estate of the father could not be bound by his letter, and the daughter had no right to come upon his assets for an equal share with his other children. *Sands* v. *Sodon*, 31 L. J., Ch., 870; 10 W. R. 765.

5. Upon the treaty for a marriage, the father of the lady wrote to the husband, "I still adhere to my last proposition, viz., to allow Elizabeth 100*l.* a year, . . . and at my decease she shall be entitled to her share of whatever property I may die possessed of":—Held, first, that this was a contract binding on the father. *Laver* v. *Fielder*, 32 Beav. 1; 11 W. R. 245; 7 L. T., N. S., 602; 9 Jur., N. S., 190; 32 L. J., Ch., 365; 1 N. R. 188.

Held, secondly, that it was not so vague as to prevent its being enforced. *Ib.*

Held, thirdly, that it did not include freehold property. *Ib.*

Held, fourthly, that the daughter was entitled to an equal share with the other children of the personal estate of which the testator died possessed, after deducting the widow's one-third share and the debts and expenses. *Ib.*

Held, fifthly, that parol evidence was inadmissible to show what was intended by the words "her share." *Ib.*

Held, sixthly, that the suit ought not to be by the daughter alone, but that her husband ought to be a co-plaintiff. *Ib.*

6. Previously to a marriage, the solicitor to the father of the intended wife in a letter stated that the father did not propose to exercise a certain power of appointment; and the fund to which the wife would become entitled in default of appointment was comprised in the settlement made on the marriage. The father afterwards exercised his power in favour of his other children:—Held (affirming 11 Jur., N. S., 106; 13 W. R. 335; 11 L. T., N. S., 620), under the circumstances, that the child of the marriage was entitled to have brought into the settlement, out of the father's estate, a sum

equal to that which would have come under the settlement in default of appointment. *Walford* v. *Gray*, 11 Jur., N. S., 473; 13 W. R. 761; 12 L. T., N. S., 437.

1. Distinction between an ante-nuptial parol contract between husband and wife in consideration of marriage, and an ante-nuptial parol contract between a third party and the husband, for other valuable consideration. The Court will enforce the latter after the marriage, but not the former. *Warden* v. *Jones*, 2 De G. & J. 76; 23 Beav. 487.

2. In a letter containing proposals of marriage with a young lady, addressed to her mother, the writer said: "If your daughter has, or may have, money, my wish and intention would be, that it should be so settled for her sole and entire use." The marriage took place shortly afterwards without the mother's knowledge, and without a settlement:—Held, that the husband was bound, on the faith of the promise, to make a settlement of the whole of the wife's property, present and future, to her separate use. *Alt* v. *Alt*, 8 Jur., N. S., 1075; 7 L. T., N. S., 266.

3. An infant wrote to the trustee of the property of his intended wife, who was an adult, begging him "as speedily as possible to arrange matters concerning her little property," and adding, "I especially wish it entirely settled on herself, lest her friends might think I had pecuniary reasons for marrying her." On the day on which that letter was written, the parties intermarried; but no further settlement was executed. The wife, however, afterwards expressed to the trustee a wish to have her property settled upon herself:—Held, that the letter was neither a settlement, nor an agreement for a settlement, binding on either the husband or the wife, and that the subsequent expression of her wishes on the subject amounted to nothing, as she was then a married woman. *Beaumont* v. *Carter*, *Carter* v. *Beaumont*, 32 Beav. 586; 8 L. T., N. S., 685.

4. By a marriage settlement, it was recited that the husband was absolutely entitled to 7,000*l.*, part of the personal estate of a deceased person then being administered in the Court of Chancery. The husband settled 5,000*l.*, part of the 7,000*l.*, but the assets proved insufficient to pay the 5,000*l.*:—Held, that this was not a representation which the husband was bound to make good, and that the deficiency did not constitute a debt payable out of his assets. *Evans* v. *Wyatt*, 31 Beav. 217; 10 W. R. 813; 7 L. T., N. S., 86; 8 Jur., N. S., 499.

5. H., during the negotiation which preceded the marriage of his daughter T. with the plaintiff, stated to the latter that she would have "10,000*l.* at the very least" after his own and his wife's death, and himself drew up a document as instructions for the marriage settlement, expressing his desire that a covenant upon his own part should be therein contained to the effect that his daughter should, upon his own and his wife's death, have a property of not less than that amount. A settlement, to which H. was a party, was accordingly prepared and executed, reciting that T. would, upon the death of both her parents, be entitled to 10,000*l.* and upwards; but no covenant was contained therein upon the part of H.:—Held, after the death of H. and his wife, that, upon the above representation, the same having been clearly and distinctly made, the estate of H. was bound to make good the fortune of T. to the amount of 10,000*l.* *Bold* v. *Hutchinson*, 24 L. J., Ch., 285; 1 Jur., N. S., 365; 3 Eq. Rep. 743.

6. The plaintiff in the suit having been advised that his daughter, then an infant, was entitled in fee to two-fourth parts of certain freehold estates, then vested in trustees, subject only to a question whether he, the plaintiff, was or was not entitled to the rents thereof for his life, as tenant by the curtesy of England, instituted, in 1826, a suit, to which he was not a party, but in which he was named and acted as next friend of his infant daughter, and in 1830 obtained a decree in such suit, inconsistent with any title in himself as tenant by the curtesy, declaring his daughter to have become entitled at the death of her mother "to two-fourths of the estates in fee, and to the rents and profits thereof," and directing a partition, and an allotment of two-fourths of the estates to the daughter. In 1833, the father, still acting as next friend of his daughter in the suit, obtained an order of the Court approving of a deed of partition, containing a conveyance by the trustees of two-fourths of the estates in question to the daughter in fee, and declaring that the father, his executors, etc., should have the use of the same for ten years, if the daughter should so long live, and remain an infant and unmarried; and from and after the happening of either of those events, to the daughter in fee; and providing that the rents received by the father should be applied, at the discretion of the father, towards the maintenance of the daughter. This the father accordingly did until the daughter attained her majority in 1843; after which, until her marriage in 1847, without her father's consent, he duly accounted to her for the rents of the estates. After the marriage the daughter and her husband brought ejectment against the father, who thereupon, in 1852, obtained the common injunction, claiming by the same bill to be entitled as tenant by the curtesy to the rents of the estates in question, on the ground that his title was not concluded by the suit commenced in 1826, to which he was not a party, but which he alleged had been instituted and conducted by him as next friend of his daughter, in ignorance of his own right to curtesy:—Held, dismissing, with costs, an appeal from the decision of Sir J. Stuart, V.-Ch., declaring the plaintiff not entitled to curtesy, that the proceedings and conduct of the plaintiff from the commencement of the suit of 1826 were tantamount to a waiver, as against his daughter and her husband, of his right to curtesy out of the estates in question; and moreover that the representations shown in evidence to have been made by him to his daughter were such as that the marriage must be considered as having been contracted by her upon the faith of the correctness of those representations, and the plaintiff considered as liable to have that faith treated as the legitimate consequence of such representations. *Stone* v. *Godfrey*, 18 Jur. 524; 23 L. J., Ch., 769; 5 De G. M. & G. 76; 2 Eq. Rep. 886.

7. A promise to a woman about to marry of a sum of money to be settled for her benefit previous to her marriage, if communicated

to her intended husband, entitles her to call for a settlement for the benefit of her children; but if she dies without exercising that right, her husband, as her administrator, is entitled absolutely, to the exclusion of the issue of the marriage. *Lovett* v. *Lovett*, 1 Johns. 118.

1. Where a person seeks to make a third party make good representations made by him on his marriage, he must establish, and that clearly, first, that sufficient representations were made; and, secondly, that the marriage took place on the faith of them. *Jameson* v. *Stein*, 21 Beav. 5; 25 L. J., Ch., 41.

A husband and wife alleged that, on their marriage, the wife's father stated, in a letter, which, however, they stated had been destroyed, "that he could do no more for her than he had done, and that he had settled his W. estate upon her." He had, in fact, previously settled that estate on her, but subject to a prior charge of 5,000*l*. They sought to have the representation made good, by payment of the 5,000*l*. out of the father's estate. The Court doubted whether the principle applied to such representation, and also whether the marriage took place on the faith of it, and refused relief. *Ib.*

2. Letters written by a widower previously to the marriage of his only daughter stated that he would settle all his property after his death on her and her children. The father married again, and by his will left certain benefits to his widow:—Held, that the daughter was entitled to have the whole of her father's property settled. *Coverdale* v. *Eastwood*, 42 L. J., Ch., 118; 15 L. R., Eq., 121; 21 W. R. 216; 27 L. T., N. S., 646.

3. A father, before the marriage of his son, stated in a letter to the father of the intended wife, "I will give C. one-third of my business, which will at present be sufficient to support them respectably and something to spare; and at my death he will have half the business and a child's share of what property I may be worth." The father, in his lifetime, in consideration of love and affection, assigned a mortgage to the son, to take effect at the father's death, with a power of revocation reserved thereby to the father, which he did not exercise. He also advanced other property to others of his children at different periods during his life. By his will he left to his son C. "one shilling in full of all claims in reference to my property, having already given to him what I consider fair and reasonable;" he directed his debts to be paid, and divided his property among his widow and other children:—Held, that by the letter the father contracted a debt payable out of the assets which he left at his death, but that the son was bound to bring into account and give credit for the value of the mortgage which the son insisted on retaining. Held, also, that the other children were not bound to bring into account the advancements made to them. *Keays* v. *Gilmore*, 8 Ir. R., Eq., 290; 22 W. R. 465.

4. A. verbally promised to give his daughter 200*l*., on her marriage with B., if B.'s father would give the like amount. B. told A. that his father would do so. A. then paid the 200*l*., after which the marriage was solemnised. B.'s father paid 50*l*. of his 200*l*., and died leaving B. his executor. B. claimed a right to retain 150*l*. out of his father's assets. The judge of the county court decided in his favour; and an appeal from that decision was dismissed with costs. *Williams* v. *Williams*, 18 L. T., N. S., 783; 37 L. J., Ch., 854.

5. The fact that a parol promise had been made by a relative of a young lady to her then intended husband that he would "make a suitable provision for her" does not supply a valuable consideration for a bond for 200*l*. passed by him to the husband subsequently to the marriage. *M'Askie* v. *M'Cay*, 16 W. R. 1187; 2 Ir. R., Eq., 447.

6. A., upon the engagement of his daughter to T., wrote a letter to T. saying that the settlement proposed by him was satisfactory, and that he, A., had made his will, dividing his property equally among his daughters. The marriage took place, T. believing, as he alleged, that the will operated as a settlement of one-third of A.'s property on his wife. T. made no settlement, and his wife died in A.'s life, leaving children. A. died, having made another will, whereby he left all his property to H., another daughter. Upon a claim by T. and his children to a third share of A.'s estate:—Held, that the letter constituted only a conditional contract, and that T. not having performed his part of the contract, it was not binding, and that in any event the letter was too vague to be enforced as a contract, and the claim was disallowed. *Re Allen, Hinchs* v. *Allen*, 49 L. J., Ch. 553; 28 W. R. 533.

7. An unattested paper signed by A. and by him handed to B., stated that as a mark of his esteem and great friendship he agreed to allow B. 500*l*. a year, and that after his (A.'s) death he had in lieu thereof bequeathed to him 10,000*l*. B. took this document to C., who thereupon consented to the marriage of her daughter with B., such consent having hitherto been withheld on the ground of B.'s want of means. The marriage took place, but no settlement was made by B. on his wife. A. died about six months after signing the paper, having paid B. the first quarter of the allowance of 500*l*. a year. His will contained no provision whatever in favour of B.:—Held, that assuming the consent of C. to her daughter's marriage with B. to have been given on the faith of the engagement contained in the paper, there was no such connection between A.'s promise or representation and the consent given by C. as to sustain a claim against A.'s estate. *Dashwood* v. *Jermyn*, 12 L. R., Ch. D., 776; 27 W. R. 868.

8. The Court, having come to the conclusion, as a matter of fact, that the marriage of W. had taken place upon the faith of a previous voluntary settlement made by his father:—Held, first, that the marriage supplied an *ex post facto* consideration for the settlement. *Guardian Assurance Co.* v. *Avonmore (Viscount)*, 6 Ir. R., Eq., 391.

Held, secondly, that, in such a case, there is no presumption as to whether or not a marriage had taken place on the faith of the voluntary deed, but that it is the duty of the Court, in the absence of direct proof, to form a reasonable judgment, by way of inference from the circumstances shown to have existed, whether or not the parties did know of the deed and act on it. *Ib.*

1. Previously to the marriage of the plaintiff and his wife C. W., negotiations for a settlement of her property had been going on, and on the 14th January 1878 M., a connection of C. and trusteee of her property, wrote to the plaintiff: "I trust to you that all will be done as we should desire, and if from any cause you are tempted to marry before the settlements are signed, you will before the wedding write a letter to our solicitors contracting to settle on C. all her fortune coming to her eventually." On the 16th January the plaintiff accordingly wrote to the solicitor: "In the event of my marriage with Miss W. taking place before the settlements are ready, I agree to Miss W.'s fortune being settled on herself." The marriage took place next day without any settlement or any further agreement or articles having been signed:—Held, that the marriage must be presumed to have taken place in reliance by C. W. upon the plaintiff's letter, and that there was a contract to settle C.'s property signed by the parties to be charged. Reference accordingly to chambers to settle a proper settlement. *Viret* v. *Viret*, 17 L. R., Ch. D., 365. n.; 50 L. J., Ch., 69; 43 L. T. 493.

2. The father of a lady wrote to her intended husband that he and his wife had determined to settle on their daughter 2,000*l.*, and that in addition she would have 2,000*l.* on her mother's death, and at least as much on her father's death. Eleven months afterwards the marriage took place; and on that occasion a formal agreement for a settlement of 2,000*l.* was executed, the letter not being in any way referred to. The mother died sixteen years and the father died twenty-five years after the marriage. The husband then claimed from the father's estate 4,000*l.* under the promises contained in the letter:—Held, that the letter had, under the circumstances, been superseded by the agreement for a settlement, and claim disallowed. *Re Badcock, Kingdon* v. *Tagert*, 17 L. R., Ch. D., 361; 43 L. T. 688; 29 W. R. 278.

See also Preceding Subdivision.

III. Covenants to Settle Specific Property.

I. *Covenants to Bequeath*, 6184.
II. *Covenants to leave Property as upon an Intestacy*, 6187.
III. *Covenants by Husband or Wife*, 6187.
IV. *Covenants by Parents*, 6191.
V. *Covenants by Brother*, 6195.
VI. *Deficiency of Fund Covenanted to be Settled*, 6195.

I. COVENANTS TO BEQUEATH.

3. Covenant in marriage articles, "to leave wife a moiety of personal estate at his death": —Held, to apply to his property at the time of the articles. *Webster* v. *Milford*, 2 Eq. Abr. 362.

4. By covenant in a marriage settlement, the husband was bound to give, by his last will or otherwise, to his children in equal shares, all his real estates other than a settled estate and personal property:—Held, that the covenant bound only such real estate as he should die seised of; and that the covenant bound shares of the settled estate, which the husband became entitled to by a devise from a child who died in his lifetime. The children living at the death of the husband were alone entitled to the benefit of the covenant. *Needham* v. *Smith*, 4 Russ. 318; 6 L. J., Ch., 107.

5. By marriage articles M. S. covenanted that he would, at his death, leave and devise to W. S., his heirs, executors, etc., all such property, real and personal, as he should then be possessed of, or entitled unto, charged with a jointure for his wife, and with pecuniary legacies not exceeding 1,000*l.*; and that the eldest son of the marriage should have and be entitled under 400*l.* a year, to issue out of, and be charged upon all and singular the real and personal estates which M. S. or W. S., or either of them, should be seised and possessed of or entitled unto, subject to sum of 2,000*l.* for the younger children of the marriage:—Held, that by the proper construction of this covenant, it bound only the estates real and personal of M. S. at his death after payment of his debts, and the jointure and the legacy of 1,000*l.* *Ennis* v. *Smith*, Jon. & C. 400.

6. The testator, upon the marriage of his daughter C., covenanted to make her fortune equal to that of any one of his five other daughters. By his will he gave to C. absolutely a provision equal to that which he gave to any one of his other five daughters and their issue; but the fortunes bequeathed to these five daughters were limited to them for life only, with remainder to their issue; and in case any one of the five should die without leaving issue, her share was to go to the others of the four daughters and their issue, in the same manner as their original shares. One of the five died without issue:—Held, the provision for C. being given to her absolutely, she thereby takes an equivalent in value to the contingent interests which the five daughters took in each other's share, and she is therefore not entitled to claim any further provision in respect of the benefit derived by the four daughters from the share of the fifth daughter, who died without issue. *Clegg* v. *Clegg*, 2 Russ. & M. 570.

7. Under an agreement executed previously to the intended marriage, "that in case one or either of the parties survives the other, the survivor shall, in case of issue, leave the said issue two-thirds of whatever property may remain, retaining one-third, or, to be more specific, that if the husband survived he should settle two-thirds of the property he may possess; and if the wife survived, she should settle and hand over two-thirds of any property remaining at the time":—Held, that the wife surviving was entitled to one-third of all the property, and was bound to hand over two-thirds immediately to the children. *M'Donnell* v. *M'Donnell*, 2 Con. & L. 481; 4 Dr. & War. 376.

If the husband had survived, his obligation would have been confined to a disposition by will. *Ib.*

1. A father, upon the marriage of his daughter, covenanted with the husband, his executors, etc., by deed or will to give, leave, and bequeath unto his (the covenantor's) daughter, an equal share with his other children of all the real and personal estate of which he should die seised or possessed. The daughter died in the lifetime of the father, and the father, having made some disposition of property in favour of a son in his lifetime, by his will devised and bequeathed his real and personal estate for the benefit of his widow and surviving daughters:—Held, by the Court of Common Pleas, and by this Court, concurring in the certificate, that the husband and covenantee had not, under the circumstances, any good cause of action against the executor of the father; and that if the father had died possessed of no personal estate, the husband could not have recovered any substantial damages in such action. *Jones* v. *Howe*, 7 Hare 267; 19 L. J., N. S., Ch., 324; 14 Jur. 145. And see S. C. at law, 9 C. B. Rep. 1.

2. A father on the marriage of his daughter A., gave her husband 1,500*l.* for her present portion or fortune, and he covenanted that, in case he should give his other daughter B., on her marriage or otherwise, a greater portion or fortune than 1,500*l.* in money or value, his executors would, within a year after the death of himself and wife, pay or deliver to the husband of A. such further or other sum or property as would be equal with the portion or fortune given to B. The father, on the marriage of B., gave her a portion of 1,500*l.*, and by his will, after charging his real estate with the payment of his debts, gave B. his furniture and a life interest for her separate use in some freehold and leasehold property:—Held, that the life interest was within the covenant, but the furniture not; and, secondly, that a debt of this nature was charged on the real estate. *Eardly* v. *Owen*, 10 Beav. 572; 11 Jur. 1047; 17 L. J., N. S., Ch., 67.

3. Covenant on her marriage, to make provision for daughter, by will or otherwise, as great as testator should, by will or otherwise, provide for his other children:—Held, that proportion did not extend to any advancement made for other children during lifetime of testator. *Willis* v. *Black*, 1 Sim. & S. 525; 2 L. J., Ch., 131.

P. B., on his daughter's marriage, settled a sum of money on her and her husband, and their issue, and, after reciting that he had agreed to make a further provision for his daughter equal to his younger children, covenanted to settle, by his will or otherwise, on the husband and wife, and their issue, as great a share of his property as he should, by his will or otherwise, provide for any of his other younger children, to take effect on the death of the survivor of himself and wife; and if he died intestate, or omitted to make such provision, that his executors should pay to the trustees as great a share of his property as any of his younger children should in that event become entitled to:—Held, that the trustees had a claim upon the executors in respect of subsequent advancements by the settlor to his other younger children in his lifetime, and not merely for a provision equal to that which any of the other children became entitled to at his death. S. C. on appeal, 4 Russ. 170; 7 L. J., Ch., 3.

4. A father joined in a settlement executed on the marriage of his daughter, which contained a recital that he was desirous to give her, as a marriage portion, such sum or child's share as he might be entitled to dispose of, which child's share it was calculated would be at the least 5,000*l.*, but the same or the precise amount could not be ascertained until his death, and the intended husband, who had a power to jointure to the amount of 10*l.* per cent. on the fortune which he should receive with his wife appointed a jointure of 500*l.* a year, which was also collaterally secured on other land not the subject of the power. The daughter died in the father's lifetime:—Held, that the recital amounted to an absolute covenant that his daughter should have, on his death, an equal share of his personal estate with his other children. *Duckett* v. *Gordon*, 11 Ir. Ch. R. 181.

Held, also, that the obligation was not discharged by the daughter's death in his lifetime. *Ib.*

Held, also, in calculating the amount payable under the covenant, sums advanced to other children by the father in his lifetime should be taken in account, and be added to the assets. *Ib.*

Held, also, that interest should not be calculated on the sums so advanced. *Ib.*

5. A letter, addressed to the intended husband of the writer's daughter, contained the words, "she shall be entitled to her share in whatever property I may die possessed of":—Held, that the daughter and her husband were entitled only to the share of the personalty which the daughter would have taken in case of intestacy. *Laver* v. *Fielder*, 1 N. R. 188; 33 Beav. 1; 11 W. R. 245; 7 L. T., N. S., 602; 9 Jur., N. S., 190; 32 L. J., Ch., 365.

6. A covenant in a marriage settlement that the wife shall, out of the property of which the husband shall die seised or possessed, receive an annuity, only binds the residue of his property after payment of debts. *Rowan* v. *Chute*, 13 Ir. Ch. R. 169.

7. Covenant by A. to bequeath to B. by will "one full fourth part of the real and personal estate whatsoever of or to which A." should, at the time of his death, be entitled, and in default, that his heirs and executors should immediately after his death convey "one full fourth part" of it:—Held, upon the context, to mean one fourth in value, and not one undivided fourth of every item of property in specie. *Bell* v. *Clarke*, 25 Beav. 437; 27 L. J., Ch., 674; 4 Jur., N. S., 499; 6 W. R. 476.

8. A father covenanted, at his daughter's marriage, to leave her at his death a full and equal share of his personal estate with his son; he began and continued for some years to sell real estates, and vested the produce in bank stock, together with the produce of his personal estate, the whole of which he transferred into his son's name, who verbally promised to pay the father the dividends for life. The son sold out the bank stock, and invested produce in India stock, which produced a greater interest, but paid his father only the amount of former interest

The father died, and left personalty only to a small amount. The India stock held liable to the articles. *Jones* v. *Martin*, 6 Bro. P. C. 437.

1. A., in consideration of the intended marriage of his niece, entered into a bond, with a penalty conditioned to give by will or otherwise, unto or in trust for her or the issue of the intended marriage, so much in money or in valuable effects, as he should by his will give or bequeath to any one of his next of kin, or to any other person whomsoever:—Held, that this condition was not to be satisfied by the penalty, but must be specifically performed. All voluntary assignments and transfers of personal property, and all conveyances of real estate purchased subsequently to the date of the bond, in which real estate or personal property the obligor retained a life interest, were declared to be in the nature of testamentary dispositions, to be considered in equity, for the purpose of giving effect to the true intent of the agreement in the bond, as if the said estates had been given or devised by the obligor's will. The persons entitled to the benefit of the bond were declared to be specialty creditors upon the obligor's estate, for satisfaction of their claims under the bond. *Logan* v. *Wienholt*, 1 Cl. & F. 611; 7 Bli. N. S. 1.

2. Where a settlor intimated his wish to settle a certain sum, part of a particular share of property, which he specified, but that share did not prove of so much value as the sum he wished to settle, his general estate held not liable to make good the difference. *Evans* v. *Wyatt*, 10 W. R. 813; 7 L. T., N. S., 86; 31 Beav. 217; 8 Jur., N. S., 449.

3. A father, on a treaty for his eldest son's marriage, promised, by letter, to settle a sum of money forthwith, and to recognise his son, in common with the rest of his family, in the future provisions of his will. The sum of money was settled and the marriage took place on the faith of the representation in the letter. By his will the testator made a substantial provision for his son, but much less than equal to those made for his other children:—Held, that the promise was so vague as to the amount, that, consistently with it, the testator might leave all his property to a stranger, and that the promise was satisfied by the provision in the will and codicil. *Kay* v. *Crook*, 3 Sm. & G. 407; 3 Jur., N. S., 104.

4. Covenant in settlement to leave by will satisfied by legacy to amount, though followed by general direction for payment of debts. *Wathen* v. *Smith*, 4 Madd. 236, 325.

5. A covenant to bequeath a sum of money constitutes a specialty debt against the covenantor's estate, and is not satisfied by the mere insertion of such a bequest in his will. *Graham* v. *Wickham*, 9 Jur., N. S., 702; 11 W. R. 1009; 8 L. T., N. S., 679; 31 Beav. 447; 2 N. R. 410; 1 De G. & S. 474.

The covenantee being the son of the covenantor, the covenant is not satisfied by an appointment under a power to appoint to children contained in the covenantor's marriage settlement. *Ib.*

6. A., on the marriage of his daughter, covenanted that in certain events (which happened) he would by his will, or otherwise, in his lifetime, give or charge upon all his real or personal estate (except his share in certain real hereditaments), of or to which he might be seised, or possessed, or entitled at or immediately before his decease, 3000*l.*, upon certain trusts, for the benefit of his daughter and her issue. He accordingly bequeathed to the trustees, in satisfaction of this covenant, a legacy of 3,000*l.* Upon his death his estate proved insufficient:—Held, that the trustees were entitled, not as legatees merely, but as specialty creditors against the estate. *Eyre* v. *Munro*, 3 Kay & J. 305; 3 Jur., N. S., 584; 26 L. J., Ch., 757; 5 W. R. 870.

7. A person who has covenanted to bequeath or otherwise provide that a share of his estate shall go to the covenantee, fulfils his covenant by bequeathing the share to the covenantee, who then stands in the same position as any other legatee. *Jervis* v. *Wolferstan*, 18 L. R., Eq., 18; 43 L. J., Ch., 809; 30 L. T., N. S., 452.

A testator had covenanted to leave by will or otherwise provide for his daughter one-third of the residuary estate; he bequeathed one-third to her, which was settled on her marriage and paid to the trustees of her marriage settlement:—Held, that the testator had satisfied his covenant; that the daughter took her share, not as a creditor, but as a residuary legatee, and that her trustees must refund the amount with the other residuary legatees. *Ib.*

8. S. conveyed certain real estate to M., his natural daughter, and covenanted for payment after his death by his heirs, executors, and administrators to M. of 500*l.* out of his real and personal estate, thereby charging all his real and personal estate with the payment; and in case the personal estate should prove insufficient and default should be made in payment within a reasonable time, M. was empowered to enter upon all or any part of the real estate of which he should die seised, and retain the rents until the 500*l.* had been satisfied. S. subsequently conveyed the remainder of his real estate to his son J., in consideration of natural love and affection:—Held, that the real estate conveyed to J. was not liable to payment of the 500*l.*, and that M. was entitled to payment out of the personal estate, and if that was insufficient out of the real estate (if any) of which S. died seised. *Watson* v. *Argile*, 30 L. T. 215.

9. By articles executed on the marriage of his daughter, a father covenanted to give, by will, to trustees, a child's share or equal part of all the real and personal estate of which he should die possessed, to the use of the husband for life, remainder to the daughter for life, remainder to the children of the marriage as the husband and wife or the survivor should appoint, and, in default of appointment, to the children in equal shares, with benefit of survivorship in case of the death of any one or more of the children under twenty-one without issue, and if but one such child the whole to such one child, with remainder over. The father made his will in the terms of the covenant. Only one child of the marriage attained twenty-one, and he died intestate and unmarried before the testator:—Held, that this child took no interest under the will or under the covenant. *Re Brookman*, 18 W. R. 199. Reversing 38 L. J., Ch., 585; 17 W. R. 818.

Satisfaction of, in case of Children.] See PORTION, XI. 1. 3.

II. COVENANTS TO LEAVE PROPERTY AS UPON AN INTESTACY.

1. A covenant to settle on particular persons all the covenantor's personal estate, subject only, nevertheless, and without prejudice to any other dispositions, qualifications, or changes, which he should make by his will of or concerning the same or any part thereof, is only a provision for a case of intestacy, and does not prevent the covenantor from bequeathing the whole of his personal estate to other persons. *Stocken* v. *Stocken*, 4 Myl. & C. 95; 7 L. J., N. S., Ch., 305; 2 Jur. 693; 4 Sim. 152. And see 2 Myl. & K. 489.

2. Covenant to leave a portion of the personal estate, as upon an intestacy, does not prevent the covenantor's expending the whole; or admit his reserving part for his own benefit, nor consequently vesting it in land. *Cochran* v. *Graham*, 19 Ves. 66.

3. Father, under covenant for an equal division at death, of all the property he should die seised or possessed of, between his two daughters or their families, though he retains the power of free disposition by act in his life, cannot defeat the covenant by a disposition in effect testamentary, as by reserving to himself an interest for life. *Fortescue* v. *Hennah*, 19 Ves. 67.

III. COVENANTS BY HUSBAND OR WIFE.

1. *What Property Included*, 6187.
2. *Lien of*, 6188.
3. *Further Security by Husband*, 6189.
4. *How Enforced*, 6189.
5. *Proof on in Bankruptcy.* See BANKRUPTCY, XXIV. xxvii.

1. What Property Included.

4. A., on his marriage, covenanted that if his wife should die before him, leaving issue of their bodies, he would pay, etc., to and for such issue one-third part of all his chattels, real and personal, which at the death of his wife he should be possessed of, to be divided between them; if more than one, as he should direct. The wife died, leaving two daughters, and the husband, during the coverture, acquired some freehold leases for lives:—Held, that these leases were included in the covenant, but that daughters were not entitled to a division till after father's death, he being ordered to give security. *Hankes* v. *Jones*, 5 Bro. P. C. 136.

5. Effect of a contract on marriage by bond, to devise, convey, or assure all such goods, personal and effects, that the husband should at any time during the joint lives of him and his wife be possessed of, to the use of them and the survivor; attaching on capital, not income, unless laid up as capital; admitting, therefore, expenditure and debts, in a fair application of income, not liable to a minute account. On that principle an estate, purchased by the husband with money partly his own, partly borrowed on his personal security, and some paid off by him, was after his death held to belong, not to the trust, but to the heir, charged for the benefit of the trust with the money that was his own, the debts paid on account of that purchase, and expenditure in repairs, improvements, etc. *Lewis* v. *Maddocks*, 17 Ves. 48.

6. Bond executed on marriage of obligor conditioned to settle lands, "if he should become seised in possession," affects copyhold as well as freehold. *Prebble* v. *Boghurst*, 1 Swan. 580; 1 Wils. 161.

A bond conditional to settle lands, "if the obligor shall become seised," will not affect lands of which he is seised at the date of the bond. *Id.* 321.

J., on his marriage with S., executed bond in penalty of 2,000*l.*, with condition to be void if, in event of S. surviving J., his executors, etc., should, within three months after his decease, pay to trustees 1,000*l.* in trust for S.; and if, in event of J. surviving S., and there being any child or children of marriage living at decease of J., his executors, etc., should, within three months after his decease, pay to trustees 1,000*l.* in trust for such child or children; and further, if J. should, at any time during his natural life, become seised of any messuages, etc., in possession, and should settle same upon S. and issue of intended marriage, by such good conveyances in law as counsel should advise, in such parts and proportions, and to such use and uses, as should be thought requisite, better to make a provision for S. in case she should happen to survive J.; after death of S., J. having married again, and then, and not before, become seised of real estates, and having, at his death, left issue by both marriages, all real estates of which he became seised during his life were subject to obligation, and settled on issue of first marriage as tenants in common in fee. S. C. 1 Swan. 309; 1 Wils. 161.

7. A husband covenanted to settle the share of his wife and of himself "in her right" in the stocks comprised in her great-uncle's will. Under the will, the fund was limited to the husband, in case of his surviving his wife and her father, and of there being no issue:—Held, that the husband's interest was not comprised in his covenant. *Ibbetson* v. *Grote*, 25 Beav. 17.

8. By an ante-nuptial settlement, a trader covenanted with the trustees of it to pay them 3,000*l.* out of the first capital moneys, or real or capital personal estate, or capitalised income, of or to which he should be or become possessed or in anywise entitled after the solemnisation of the marriage, within six months after he should "have become" so possessed or entitled. The trader was at the time possessed of the stock in trade and effects exceeding in value 3,000*l.*, and so continued for more than six months after the date of the settlement, but did not after the marriage acquire additional property to that amount. He became bankrupt after the expiration of the six months:—Held, that the event contemplated by the covenant had happened before the bankruptcy, and that there was a breach of the covenant entitling the trustees to prove. *Exp. Evans*, 2 De G. M. & G. 948; 22 L. J., Bky., 5.

9. Under a marriage settlement real estate stood limited to H., the husband, for life, with remainder to the use of such of the children or issue of the marriage as he should by deed or will appoint; and in default of appoint-

The father died, and left personalty only to a small amount. The India stock held liable to the articles. *Jones* v. *Martin*, 6 Bro. P. C. 437.

1. A., in consideration of the intended marriage of his niece, entered into a bond, with a penalty conditioned to give by will or otherwise, unto or in trust for her or the issue of the intended marriage, so much in money or in valuable effects, as he should by his will give or bequeath to any one of his next of kin, or to any other person whomsoever:—Held, that this condition was not to be satisfied by the penalty, but must be specifically performed. All voluntary assignments and transfers of personal property, and all conveyances of real estate purchased subsequently to the date of the bond, in which real estate or personal property the obligor retained a life interest, were declared to be in the nature of testamentary dispositions, to be considered in equity, for the purpose of giving effect to the true intent of the agreement in the bond, as if the said estates had been given or devised by the obligor's will. The persons entitled to the benefit of the bond were declared to be specialty creditors upon the obligor's estate, for satisfaction of their claims under the bond. *Logan* v. *Wienholt*, 1 Cl. & F. 611; 7 Bli. N. S. 1.

2. Where a settlor intimated his wish to settle a certain sum, part of a particular share of property, which he specified, but that share did not prove of so much value as the sum he wished to settle, his general estate held not liable to make good the difference. *Evans* v. *Wyatt*, 10 W. R. 813; 7 L. T., N. S., 86; 31 Beav. 217; 8 Jur., N. S., 449.

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4. Covenant in settlement to leave by will satisfied by legacy to amount, though followed by general direction for payment of debts. *Wathen* v. *Smith*, 4 Madd. 236, 325.

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The covenantee being the son of the covenantor, the covenant is not satisfied by an appointment under a power to appoint to children contained in the covenantor's marriage settlement. *Ib.*

6. A., on the marriage of his daughter, covenanted that in certain events (which happened) he would by his will, or otherwise, in his lifetime, give or charge upon all his real or personal estate (except his share in certain real hereditaments), of or to which he might be seised, or possessed, or entitled at or immediately before his decease, 3000*l.*, upon certain trusts, for the benefit of his daughter and her issue. He accordingly bequeathed to the trustees, in satisfaction of this covenant, a legacy of 3,000*l.* Upon his death his estate proved insufficient:—Held, that the trustees were entitled, not as legatees merely, but as specialty creditors against the estate. *Eyre* v. *Munro*, 3 Kay & J. 305; 3 Jur., N. S., 584; 26 L. J., Ch., 757; 5 W. R. 870.

7. A person who has covenanted to bequeath or otherwise provide that a share of his estate shall go to the covenantee, fulfils his covenant by bequeathing the share to the covenantee, who then stands in the same position as any other legatee. *Jervis* v. *Wolferstan*, 18 L. R., Eq., 18; 43 L. J., Ch., 809; 30 L. T., N. S., 452.

A testator had covenanted to leave by will or otherwise provide for his daughter one-third of the residuary estate; he bequeathed one-third to her, which was settled on her marriage and paid to the trustees of her marriage settlement:—Held, that the testator had satisfied his covenant; that the daughter took her share, not as a creditor, but as a residuary legatee, and that her trustees must refund the amount with the other residuary legatees. *Ib.*

8. S. conveyed certain real estate to M., his natural daughter, and covenanted for payment after his death by his heirs, executors, and administrators to M. of 500*l.* out of his real and personal estate, thereby charging all his real and personal estate with the payment; and in case the personal estate should prove insufficient and default should be made in payment within a reasonable time, M. was empowered to enter upon all or any part of the real estate of which he should die seised, and retain the rents until the 500*l.* had been satisfied. S. subsequently conveyed the remainder of his real estate to his son J., in consideration of natural love and affection:—Held, that the real estate conveyed to J. was not liable to payment of the 500*l.*, and that M. was entitled to payment out of the personal estate, and if that was insufficient out of the real estate (if any) of which S. died seised. *Watson* v. *Argile*, 30 L. T. 215.

9. By articles executed on the marriage of his daughter, a father covenanted to give, by will, to trustees, a child's share or equal part of all the real and personal estate of which he should die possessed, to the use of the husband for life, remainder to the daughter for life, remainder to the children of the marriage as the husband and wife or the survivor should appoint, and, in default of appointment, to the children in equal shares, with benefit of survivorship in case of the death of any one or more of the children under twenty-one without issue, and if but one such child the whole to such one child, with remainder over. The father made his will in the terms of the covenant. Only one child of the marriage attained twenty-one, and he died intestate and unmarried before the testator:—Held, that this child took no interest under the will or under the covenant. *Re Brookman*, 18 W. R. 199. Reversing 38 L. J., Ch., 585; 17 W. R. 818.

Satisfaction of, in case of Children.] See PORTION, XI. 1. 3.

II. COVENANTS TO LEAVE PROPERTY AS UPON AN INTESTACY.

1. A covenant to settle on particular persons all the covenantor's personal estate, subject only, nevertheless, and without prejudice to any other dispositions, qualifications, or changes, which he should make by his will of or concerning the same or any part thereof, is only a provision for a case of intestacy, and does not prevent the covenantor from bequeathing the whole of his personal estate to other persons. *Stooken* v. *Stooken*, 4 Myl. & C. 95; 7 L. J., N. S., Ch., 305; 2 Jur. 693; 4 Sim. 152. And see 2 Myl. & K. 489.

2. Covenant to leave a portion of the personal estate, as upon an intestacy, does not prevent the covenantor's expending the whole; or admit his reserving part for his own benefit, nor consequently vesting it in land. *Cochran* v. *Graham*, 19 Ves. 66.

3. Father, under covenant for an equal division at death, of all the property he should die seised or possessed of, between his two daughters or their families, though he retains the power of free disposition by act in his life, cannot defeat the covenant by a disposition in effect testamentary, as by reserving to himself an interest for life. *Fortescue* v. *Hennah*, 19 Ves. 67.

III. COVENANTS BY HUSBAND OR WIFE.

1. *What Property Included*, 6187.
2. *Lien of*, 6188.
3. *Further Security by Husband*, 6189.
4. *How Enforced*, 6189.
5. *Proof on in Bankruptcy*. See BANKRUPTCY, XXIV. xxvii.

1. What Property Included.

4. A., on his marriage, covenanted that if his wife should die before him, leaving issue of their bodies, he would pay, etc., to and for such issue one-third part of all his chattels, real and personal, which at the death of his wife he should be possessed of, to be divided between them; if more than one, as he should direct. The wife died, leaving two daughters, and the husband, during the coverture, acquired some freehold leases for lives:—Held, that these leases were included in the covenant, but that daughters were not entitled to a division till after father's death, he being ordered to give security. *Hankes* v. *Jones*, 5 Bro. P. C. 136.

5. Effect of a contract on marriage by bond, to devise, convey, or assure all such goods, personal and effects, that the husband should at any time during the joint lives of him and his wife be possessed of, to the use of them and the survivor; attaching on capital, not income, unless laid up as capital; admitting, therefore, expenditure and debts, in a fair application of income, not liable to a minute account. On that principle an estate, purchased by the husband with money partly his own, partly borrowed on his personal security, and some paid off by him, was after his death held to belong, not to the trust, but to the heir, charged for the benefit of the trust with the money that was his own, the debts paid on account of that purchase, and expenditure in repairs, improvements, etc. *Lewis* v. *Maddocks*, 17 Ves. 48.

6. Bond executed on marriage of obligor conditioned to settle lands, "if he should become seised in possession," affects copyhold as well as freehold. *Prebble* v. *Boghurst*, 1 Swan. 580; 1 Wils. 161.

A bond conditional to settle lands, "if the obligor shall become seised," will not affect lands of which he is seised at the date of the bond. *Id.* 321.

J., on his marriage with S., executed bond in penalty of 2,000*l.*, with condition to be void if, in event of S. surviving J., his executors, etc., should, within three months after his decease, pay to trustees 1,000*l.* in trust for S.; and if, in event of J. surviving S., and there being any child or children of marriage living at decease of J., his executors, etc., should, within three months after his decease, pay to trustees 1,000*l.* in trust for such child or children; and further, if J. should, at any time during his natural life, become seised of any messuages, etc., in possession, and should settle same upon S. and issue of intended marriage, by such good conveyances in law as counsel should advise, in such parts and proportions, and to such use and uses, as should be thought requisite, better to make a provision for S. in case she should happen to survive J.; after death of S., J. having married again, and then, and not before, become seised of real estates, and having, at his death, left issue by both marriages, all real estates of which he became seised during his life were subject to obligation, and settled on issue of first marriage as tenants in common in fee. S. C. 1 Swan. 309; 1 Wils. 161.

7. A husband covenanted to settle the share of his wife and of himself "in her right" in the stocks comprised in her great-uncle's will. Under the will, the fund was limited to the husband, in case of his surviving his wife and her father, and of there being no issue:—Held, that the husband's interest was not comprised in his covenant. *Ibbetson* v. *Grote*, 25 Beav. 17.

8. By an ante-nuptial settlement, a trader covenanted with the trustees of it to pay them 3,000*l.* out of the first capital moneys, or real or capital personal estate, or capitalised income, of or to which he should be or become possessed or in anywise entitled after the solemnisation of the marriage, within six months after he should "have become" so possessed or entitled. The trader was at the time possessed of the stock in trade and effects exceeding in value 3,000*l.*, and so continued for more than six months after the date of the settlement, but did not after the marriage acquire additional property to that amount. He became bankrupt after the expiration of the six months:—Held, that the event contemplated by the covenant had happened before the bankruptcy, and that there was a breach of the covenant entitling the trustees to prove. *Exp. Evans*, 2 De G. M. & G. 948; 22 L. J., Bky., 5.

9. Under a marriage settlement real estate stood limited to H., the husband, for life, with remainder to the use of such of the children or issue of the marriage as he should by deed or will appoint; and in default of appoint-

ment, to the use of the children of the marriage equally as tenants in common in fee. There was issue of the marriage two children only, a son and a daughter. The daughter married, and by her marriage settlement she and her intended husband covenanted with the trustees for the conveyance and settlement of all property which she then was "seised of, or interested in, or entitled to," upon the trusts therein mentioned, including in effect reversionary interests. The daughter survived her husband, and thereupon H. by deed appointed the real estate comprised in the original settlement, subject to his life estate, to his son and daughter equally in fee, the daughter thus taking the same share as she would have taken in default of appointment: —Held, that inasmuch as the reversionary moiety appointed to the daughter constituted a new interest acquired by her subsequently to the date of her settlement, such moiety was not bound by the covenant in her marriage settlement. *Sweetapple* v. *Horlock*, 11 L. R., Ch. D., 745; 48 L. J., Ch., 660; 27 W. R. 865; 41 L. T. 272.

1. Where a man in his marriage settlement describes himself as entitled to an expectant estate in remainder in two pieces of land, and covenants that when "such remainder" in two pieces of land shall become vested in possession he will convey it to the uses of the settlement, if he becomes possessed of either of these pieces of land by a title different from that described in the settlement, the covenant will not attach upon it. *Smith* v. *Osborne*, 6 H. L. Ca. 375; 3 Jur., N. S., 1181; 6 W. R. 21.

A marriage settlement of C. contained a recital that he was entitled, under the will of his grandfather, to a contingent remainder in property. In a subsequent part of the deed there was a covenant by him, "as soon as the remainder should become vested in possession in him," to assure the same to the uses of the settlement. The settlement incorrectly recited the effect of the will, the interest of C. under it being that of an expectant heir in tail. The tenant in tail, however, barred the entail, and subsequently devised the property to the covenantor. On a bill to enforce the covenant:—Held, that C. having acquired the estate under a title *aliunde*, and not under the will of his grandfather, the covenant did not attach, and he was not therefore bound to convey the estate. *Ib.*

2. A covenant in a settlement to settle all the property of the wife of which she was possessed at the date thereof includes property to which she was entitled jointly with other persons in remainder after an estate in tail, though the covenant was in terms only the covenant of the husband and not of the wife, and though the recitals in the settlement specified property to which the wife was entitled in expectancy, but did not allude to this particular interest. *Caldwell* v. *Fellowes*, 39 L. J., Ch., 618.

3. A marriage settlement contained a covenant, that if the wife then was, or should at any time during the coverture become, entitled to any real or personal property of the value of 400*l.*, for any estate or interest whatsoever, it should be settled upon certain trusts. At the date of the settlement, the wife was entitled, on the death of her mother, to a share in stock in her own right, and a further share as one of the next of kin of a deceased brother. The value of the two shares taken together was above 400*l.*, but the value of the wife's reversionary interest in them at the date of the settlement was much less than 400*l.* On the death of the mother, the husband and wife presented a petition to have the two shares paid to the husband:—Held, first, that the share in the trust fund was included in the first part of the covenant, as property to which the wife was entitled at the time of her marriage. *Re Mackenzie*, 2 L. R., Ch., 345; 36 L. J., Ch., 320; 15 W. R. 662; 16 L. T., N. S., 138.

Held, secondly, that the covenant referred to the value of the property, not to the value of the wife's reversionary interest in it. *Ib.*

Held, thirdly, that, in estimating the value of the share, the aggregate value of the two sums must be taken, and not the value of each sum separately. *Ib.*

See also IV. *post.*

2. Lien of.

4. One agrees, before marriage, to settle certain lands on his wife for life, and afterwards devises these lands for payment of his debts; the covenant is a specific lien on the lands: *secus*, had it been only an agreement to settle so much per annum without mentioning any lands in certain. *Fremoult* v. *Dedire*, 1 P. W. 429.

5. A., on his marriage, gave a bond of 600*l.*, with a warrant of attorney to confess judgment thereon, defeasance on payment of 300*l.* to his wife, if she survived. Afterwards, she joined him in conveyance by fine of his real estate:—Held, that this extinguished her right, or any lien created by this judgment on the real estate. *Goodrick* v. *Shotbolt*, Pre. Ch. 333; Gilb. Eq. Rep. 18.

6. By a settlement A. is made tenant for life, remainder to the heirs of his body by his wife; and in the same deed A. covenants not to suffer a recovery, but that the lands shall be enjoyed according to those limitations; afterwards A. suffers a recovery, and devises the lands. On a bill brought for specific performance of the covenant, it was decreed that the lands devised were not affected, though the covenant was good to bind the assets; and such covenant being at first accepted, equity ought not to vary or alter it. *Collins* v. *Plummer*, 1 P. W. 104. See also *Bovil* v. *Brander*, *id.* 461.

7. A party entitled as equitable tenant in tail, under a settlement, in which is a covenant to convey lands to the uses of such settlement; afterwards, and upon his own marriage, covenants also to convey lands of less value. Though he obtains a decree for the execution of the first-mentioned covenant, the second covenant is no lien in equity upon the lands so decreed to be conveyed. *Gardner* v. *Townshend* (*Marquis*), Coop. 301.

8. On a bill filed to raise a sum of 2,000*l.*, which A. had on his marriage specifically charged not only on the real estates which he then had in his possession, but also on all his after-acquired real and personal estate, Lord

Manners decreed that the same was a valid charge affecting the after-acquired property in the event of the lands specifically named in the settlement (which were declared to be the primary fund) not being sufficient, and was given a priority accordingly. *Gubbins* v. *Gubbins*, 1 Dr. & Wal. 160. n.

1. A. being entitled to a moiety of an estate covenanted to settle it on himself for life, with remainder to his wife and children. He afterwards acquired the other moiety, and mortgaged the entirety to B., who having no notice, obtained priority over the wife and children of A. By the will of B. the mortgage was given to C. for life, with remainder to A. absolutely. A. died, and C., by virtue of the mortgage, received the rents of the entirety to the disappointment of the wife and children of A. C. afterwards died:—Held, that the widow and children of A. had no equity as against the general creditors of A. to have a lien on the second moiety of the estate, to recoup the loss sustained by them by C.'s receiving the rents of the moiety of the estate bound by the settlement from the death of A. to the death of C., but that they must come in as specialty creditors under the covenant. *Aldridge* v. *Westbrook*, 5 Beav. 188.

2. Where the husband, having estates in the counties of O. and B., covenanted, on his marriage, to settle such part of them, of the value of —*l*., as should secure a jointure to the wife of 800*l*., to be charged thereon; but never having executed the settlement, he, by his will, confirmed the covenant, and devised his estates in O. and B. to his wife for life, but afterwards, by deed, revoked his will as to the estates in O., which descended, on his death, to the heir-at-law:—Held, that the covenant operated to charge, and that the estates both in O. and B. were liable to contribute ratably in satisfaction of the covenant, and that the jointress could not claim to be entitled to the estate in B., exempt therefrom, in the absence of any intention on the face of the will to benefit her to that extent. *Eyre* v. *Green*, 2 Colly. 527; 10 Jur. 184.

3. Where a bankrupt had an interest in a trust fund settled on his marriage, and was also under a covenant to pay a sum to the trustees of that fund upon the trusts of the settlement, the trustees may make his interest in the fund settled available in satisfaction of his covenant, and if that interest is contingent they may sell it. *Exp. Gonne, Re March*, 3 Mont. & A. 166; Dea. 278; 6 L. J., N. S., Bky., 57.

4. A., upon his marriage, executed to the trustees of his marriage settlement a bond, and also a mortgage of his estates at S.; for securing to them a sum of 15,000*l*., the trusts of which were declared to be for A. for life, and afterwards for the benefit of his wife and children. A., not having paid this sum at the time specified in the bond, without notice to the trustees assigned his life interest therein to B.; as a security for the repayment of a debt due from A. to B. A. having afterwards become bankrupt, B. filed his bill against the trustees and the assignees under the bankruptcy, to obtain the benefit of security; and a decree was made in that suit, directing the life interest of A. in the 15,000*l*. to be sold, and the produce to be paid to B. In the course of the proceedings in the bankruptcy, the assignees sold the S. estates, but the proceeds of the sale did not amount to 15,000*l*.:—Held, that the trustees were entitled, as against B., to retain the annual produce of the sum for which the S. estates were actually sold, until the whole of the 15,000*l*. should be reinstated. *Smith* v. *Smith*, 1 Y. & Coll. 338.

5. Immediately before a marriage the intended husband signed a memorandum agreeing that certain bonds (in the memorandum called stocks), which were part of the wife's property, should be transferred to her and her son by a former marriage in trust for her, "neither party having power to dispose of the stocks without consent of both parties to such disposal." After the marriage the husband obtained possession of part of these bonds without the consent of the son, and disposed of them:—Held, that the husband was liable to make good the amount of the bonds so disposed of by him, and that the wife and her trustee were entitled to a lien for the amount upon all her other property which remained in specie, and that the amount must be settled. *Hastie* v. *Hastie*, 2 L. R., Ch. D., 304; 34 L. T. 747; 24 W. R. 564. Affirming 24 W. R. 242.

3. Further Security by Husband.

6. One covenants on marriage articles to pay 1,000*l*. within six months after his death, and, after growing old and infirm, covenantee would have obliged him to have given security; but the Court held that it could not alter the agreement of the parties, or make it better than they themselves had; and though executors might be obliged to give better security for legacies payable in future, that is because they are in nature of trustees, and there is no agreement one way or another. *Warrington* v. *Langham*, Pre. Ch. 89.

7. Covenant by a trader, on his marriage, in case of death or failure in his circumstances, to repay the trustee 1,000*l*., which was his wife's fortune, which was paid to him, with the usual covenant for further assurance. Being applied to by the trustee before the event, he granted a mortgage to secure the 1,000*l*., and soon after a commission of bankruptcy issued against him:—Held, on petition in the matter, by the mortgagee, to take the account on foot of his mortgage, that the mortgage, even if not affected by contemplation of bankruptcy, was void as *nudum pactum*, the trustee having no right to sue, except in the two events, the covenant for further assurance not extending to a new security, but only to effectuate the actual agreement; and the deed not containing a provision that the trader should be at liberty, if so minded, to give a further security; but the petition was not dismissed: but to terminate the question, the order that petitioner should be at liberty to prove, and take a dividend ratably with the other creditors, was made, without requiring another petition to be presented. *Exp. Robinson*, 1 Moll. 291.

4. How Enforced.

8. Covenant in consideration of marriage, to settle lands of 350*l*. per annum on husband and wife, and issue male of the marriage, remainder to the brothers of the husband, equity will enforce specific performance, and

not put party to an action of covenant in the trustees' name. *Vernon* v. *Vernon*, 2 P. W. 594.

1. Where obligee sues in equity for specific performance of bond to settle estates, defendant, obligor, cannot insist on his suing at law to recover the penalty merely. *Hopson* v. *Trevor*, 1 Stra. 533.

2. Feme gives a bond to her intended husband, that in case of their marriage, she will convey her lands to him in fee; they intermarry; the wife dies without issue, and then husband dies. The bond, though void in law, is yet good evidence of an agreement in equity, and the heir of the husband shall obtain specific performance against the heir of the wife. *Cannel* v. *Buckle*, 2 P. W. 243.

A feme infant seised in fee, on marriage with consent of her guardians, covenants in consideration of a settlement to convey her inheritance to her husband: if done in consideration of a competent settlement, equity will enforce it, though no action would lie at law to recover damages. *Ib.*

3. A man, on his marriage, covenants to purchase and settle lands of 400*l.* a year, to the use of himself for life, then to his wife for life, remainder to the heirs of their two bodies; and if he died before a settlement, the wife might elect either to have the 400*l.* a year, or 3,000*l.* in money, in lieu of dower and thirds. The husband dies before a settlement made. On a bill by the creditors, the wife, by answer, elects the 3,000*l.*, and the children insist on having a settlement made according to the articles expectant on their mother's death, by which means all the assets would be exhausted:—Decreed, a settlement to be made on the wife and children, notwithstanding the election. *Hancock* v. *Hancock*, 2 Vern. 605.

4. A., being indebted 700*l.*, agrees, on his marriage, to settle lands of 100*l.* a year on himself for life, remainder to his wife for her jointure, remainder in tail upon their issue:—Decreed, the land to be sold to pay the 700*l.*, and the surplus of the money to be laid out in the purchase of lands, to be settled on the wife and her children; but this decree was reversed on a bill for review, there being no provision made for the husband in the lands to be purchased. *Carpenter* v. *Bennet*, 1 Vern. 203.

5. A. covenanted, on marriage, that within a month he would surrender his copyhold to his wife for life, remainder over; and if he neglected, then that he would leave his wife 500*l.* at his death. The husband made no surrender, but died after the month without assets:—Decreed, the heir to surrender. *Wood* v. *Pesey*, 5 Vin. Abr. 547, pl. 36.

6. A. covenants for himself and his heirs, that he will purchase lands, and settle the same on himself for life; remainder to wife for life; remainder to himself in fee. Equity will compel the executor to lay out the money, though the heir is both debtor and creditor. *Leohmere* v. *Carlisle*, 3 P. W. 224.

7. A. covenants by marriage articles, that estate agreed to be settled is worth 500*l.* per annum, and to purchase other lands worth 300*l.* per annum, and settle them to the same uses. The new purchase was never made, and the estate settled was incumbered beyond its value:—Held, that, out of the purchase money of A.'s estate not settled, so much shall be paid to eldest son as is equivalent in value to 800*l.* per annum computed at twenty-two years' purchase. *Barker* v. *Ivers*, 5 Bro. P. C. 127.

8. In agreements, no relief in equity where an action at law would not lie by reason of a substantial defect, such as a contingency not happening. Husband covenants in marriage articles, in six months after the death of his mother, and that he should come to and be in possession of the estate in jointure, to settle, etc. He dies in mother's life, having no issue. The estate comes to his heir, who shall not be compelled by the wife to a specific performance. *Whitmel* v. *Farrel*, 1 Ves. 256.

9. A husband by a deed to which the wife was a party, covenants to assign a contingent portion of the wife's to the uses of the marriage. The husband dies without calling in the portion. The wife is bound by the covenant. *Bush* v. *Dalway*, 1 Ves. 19.

By settlement on the marriage of A. with C., in case there was no issue male, and there should be daughters living at the death of the father, who should attain twenty-one, or be married, then such daughters should have 2,000*l.* a piece. There were three daughters and no sons. Defendant, one of the daughters, married D., and previous to his marriage, he covenanted to assign (with the wife's consent) 500*l.* to trustees in trust, after the death of D. and the defendant to pay it amongst the children of the bodies of defendant and D., and that he should, after the marriage, assign to the trustees all the moneys and securities for it, then due and belonging to defendant. A. died in 1744. D. died in 1745 intestate, to whom defendant administered and received the 2,000*l.*:—Held, that the children, who were a son and daughter, have a right to the portion, which was decreed to be secured for their benefit, though under the articles the real estate was in the mother's power and vested in her in tail, yet in equity it is to be carried into strict settlement to the wife for life, then to the first, etc., sons in tail, and in default of issue male to daughters. S. C. *nom.* *Bash* v. *Dalway*, 3 Atk. 530.

10. The testator, in the settlement of an estate, reserved to himself an election as to parcels, and afterwards, by indenture, he was to have an option of paying a certain sum within twenty-four calendar months. Not having elected in his lifetime, and his personal estate being inadequate to payment of his debts, the estate covenanted shall be conveyed. *Tyssen* v. *Benyon*, 2 Bro. C. C. 5.

11. Defendant who had covenanted to pay a sum of money to trustees of his marriage settlement, but had omitted to do so, ordered on motion in suit for performance of trusts, to pay money into court. *Rothwell* v. *Rothwell*, 2 Sim. & S. 217.

12. One, upon his marriage, covenants to levy a fine of his freehold lands, and to surrender his copyhold to the use of himself and wife for their lives, remainder to the heirs male of his body, and dies, leaving issue a son and a daughter, before any fine levied, or surrender made. The son, for securing money, covenants to levy a fine of freehold, and to surrender copyhold, and by will devises his lands for payment of his debts, and dies without issue, having surrendered copyhold, but levied no fine of freehold. On a bill by daughter to have

lands settled according to marriage agreement, decreed both freehold and copyhold to the daughter. *White* v. *Thornburgh*, 2 Vern. 702.

Upon a re-hearing before Lord Chancellor Cowper, he confirmed the decree as to the freehold, but for different reasons; and as to the copyhold, there appearing no particular custom within the manor for suffering a recovery, he was of opinion the surrender would bar the entail, in case the copyhold had been well settled, and dismissed the bill as to the copyhold. *Id.* 704.

1. Covenant by husband in consideration of —*l.* (the purchase money of an estate of his wife) within two years, to convey lands in the county of N., of the value of such purchase-money, by way of settlement. The husband having died without performing the covenant, performance of the same decreed against his representatives, by laying out, in the purchase of lands so to be settled, a sum equal to the present value of the estates in N., which (at the time when the covenant ought to have been performed) should have been worth the amount of the purchase money, with interest at 4 per cent. from the death of the covenantor. *Sheffield* (*Lady*) v. *Sheffield* (*Lord*), 3 Meriv. 699.

2. By an ante-nuptial settlement, reciting that the husband had agreed to secure to the wife, after his death, an annual sum or rent-charge of 300*l.* to be issuing out of the hereditaments thereinafter charged therewith, and of or to which he was entitled or seised in fee simple, the husband granted the annual sum or rent charge of 300*l.* to the wife in case she should survive him, to be issuing out of specified hereditaments and all other the hereditaments in specified parishes, of or to which he, or any persons in trust for him, was or were seised or entitled for any estate of inheritance at law or in equity; and he covenanted that it should be lawful for the grantee, when the rent charge was in arrear, to distrain on the premises. He also granted and demised the premises for a term to secure the annuity:—Held, that the terms of the deed amounted to a covenant, and created a debt payable out of the husband's personal assets. *Monypenny* v. *Monypenny*, 3 De G. & J. 572; 5 Jur., N. S., 253; 28 L. J., Ch., 303.

3. On an assignment by way of settlement of a reversionary interest in trust funds, the settlor covenanted that he and all persons claiming through him would, upon the request of the trustees of the settlement, do all acts necessary for further assuring the premises to the trustees. The settlor afterwards obtained possession of the premises, and died, after applying the same for his own use:—Held, that the trustees were entitled to prove for the amount of the settled funds, as for a specialty debt. *Re Dickson*, *Blackburn* v. *Dickson*, 40 L. J., Ch., 707; 12 L. R., Eq., 154; 25 L. T., N. S., 118.

4. By an ante-nuptial agreement, signed by the intended husband and wife and the parents of the wife, the parents agreed to appoint a share of real estate (which was subject to their life interest and to the appointment of them and the survivor of them) to the wife, and the husband agreed that he would settle his wife's reversionary share of the real estate upon the usual trusts for the husband and wife, and their children. The wife's father having survived her mother, released the power and granted the estate after his death, giving his daughter a share. The wife predeceased the husband, and left two children. The property being still reversionary, an action was brought by the husband and one of the children against the other child, the wife's heir-at-law, for specific performance of the agreement:—Held, that the agreement bound the wife, as having assented to her father's stipulation, and also her heir-at-law, and specific performance decreed accordingly. *Lee* v. *Lee*, 4 L. R., Ch. D., 175; 46 L. J., Ch., 81; 36 L. T. 138; 25 W. R. 225.

IV. COVENANTS BY PARENTS.

1. *Lien of*, 6191.
2. *How Enforced*, 6193.
3. *Proof on in Bankruptcy*. See BANKRUPTCY, XXIV. xxvii.

1. Lien of.

5. A father covenanted at his daughter's marriage to leave her at his death a full and equal share of his personal estate with his son; he began and continued for some years to sell real estates, and vested the produce in bank stock, together with the produce of his personal estate, the whole of which he transferred into his son's name, who verbally promised to pay the father the dividends for life. The son sold out the bank stock, and invested produce in India stock, which produced a greater interest, but paid his father only the amount of former interest. The father died, and left personalty to a small amount. The India stock held liable to the articles. *Jones* v. *Martin*, 6 Bro. P. C. 437.

6. A., on the marriage of his son, covenants for himself and his executors, without naming his heirs, to settle lands of 150*l.* a year on his son, and the issue of the marriage, but dies before any settlement made. The son enters on the rent estate as heir to his father, and settles it for the jointure of a second wife, who has no notice of the articles:—Decreed, the articles to be a lien upon the lands, whereof the father was then seised, though no particular lands are mentioned in the articles. *Roundell* v. *Breary*, 2 Vern. 482.

7. A father being seised of estates in tail and in fee, on his daughter's marriage covenanted with two trustees, one of whom was his son, to pay an annuity to his daughter out of the rents and income of his real and personal estates, and by deed or will to settle an estate of 200*l.* a year, or, at his own election, 4,000*l.* in lieu of it, on certain trusts for the benefit of his daughter, and her husband, and their issue. By a subsequent deed the father and son, no other person being a party, agreed to suffer a recovery of the entailed estates, and to sell them, and also the fee-simple estates, and that out of the proceeds the father's debts (for some of which the son was surety) should be paid, and that certain sums should be taken by the father and son for their own use; and that 4,000*l.* should be paid, and provision made for the annuity, pursuant to the covenant on the daughter's marriage. A recovery was accordingly suffered, and the estates

were limited to the father and son in fee. The father and son afterwards agreed to abandon the last-mentioned agreement, and in consideration of the son covenanting to pay the father's debts, the estates were conveyed by them to the son in fee. The son afterwards mortgaged the estates comprised in the recovery:—Held, that the covenant for payment of the annuity created a charge on the estates, and that the mortgagee having had notice of that covenant, the premises were subject to the annuity, but that the covenant to settle the estate, or 4,000*l.* in lieu of it, created no lien or charge on any of the father's estates, and that the subsequent agreement between the father and son was merely voluntary, and was fairly abandoned by them. *Ravenshaw* v. *Hollier*, 7 Sim. 3. Affirmed *Id.* 16. n.; 4 L. J., N. S., Ch., 119.

1. Where a father, being entitled to a sum of money on mortgage, covenanted, on the marriage of his daughter, that a certain specific part of it should be transferred to the trustees of the marriage settlement within three months after his death, and covenanted to pay interest in the meantime, such covenant was held to amount to an actual assignment. *Brownlow* v. *Meath* (*Earl*), 2 Ir. Eq. R. 383; 2 Dr. & Wal. 674.

By a settlement executed on the marriage of A. with B., the daughter of W., trusts were declared of two several sums of 5,000*l.*, whereof one was secured by the bond of W., and the other by the covenant of A., and each was made payable to the trustees of the settlement within six months after the death of the settlor; and, as a further security for payment of the latter sum, A. assigned to the trustees certain policies of assurance which he had effected on his own life to the value of the principal money comprised in his covenant. The trusts declared of the former sum were for B. for life, for her separate use, and after her death for A. for life, and after the death of both, and in default of children of the marriage, for the benefit of B.'s estate. The trusts of the latter sum were for B. for life, and after her death, failing children of the marriage, for the executors, administrators, and assigns of A. After the marriage A. became bankrupt, having up to that time paid the premiums on the policies of assurance. Under his bankruptcy the trustees proved for the value of his covenant, and invested the dividends received under that proof in the purchase of 431*l.* consols. At the same time W. purchased of A.'s assignees all A.'s interest in the settlement, and took from them an assignment of that interest. A. afterwards died, whereupon the trustees received the produce of the policies, and invested it in 5,992*l.* consols. Ultimately W. became bankrupt and died:—Held, that notwithstanding that the interest of W. in the trust funds did not arise from the settlement, but by purchase and assignment from A.'s assignees, the assignees of W. could take no interest in the 5,992*l.* stock, without first satisfying to the trustees of the settlement what was due to them in respect of W.'s bond for 5,000*l.* And *quære*, whether, notwithstanding the assignment to W. of A.'s interest under the settlement, A.'s assignees had not a right to recall the dividend which produced the 431*l.* consols. *Burridge* v. *Row*, 1 Y. & Coll. C. C. 183, 583; 11 L. J., N. S., Ch., 369; 6 Jur. 121, 499. Affirmed 13 L. J., N. S., Ch., 173; 9 Jur. 299; but they afterwards disclaimed in court.

2. By a private Act a fund was directed to be raised for the conditional benefit and relief of widows, children, and other relatives of the officers and others employed in the department of customs in England; and that rules and regulations should be made for the formation of such fund, and directors and other officers appointed who were to have the management of the same. The code of rules in force at the time of the execution of the following instrument was dated the 28th July 1836. The rules provided, that the admission by the directors of a nominee of a subscriber should take place during the lifetime of such subscriber; and that the subscriber should have power to direct, by any instrument in writing, to be deposited with the directors, or by his will, that the whole capital money insured or forthcoming at his death should be paid, in any manner he might think proper, for the benefit of his widow, children, or relatives, or of his nominee who should have been duly admitted. P. was in July 1826 admitted as a subscriber to the fund for 1,200*l.* In March 1840 a letter was sent from the fund office to P., in which his attention was drawn to the rules of 1836, and acquainting him that if he gave directions by will as to the manner in which the sum insured was to be appropriated at his death, he must make specific mention of his insurance in the Customs Fund; that "relatives," used in the rules, included only relations by blood, and not sons-in-law or daughters-in-law; and if he had disposed of his insurance to a son-in-law, or to any other party who was not a relation by blood, the directors must, at his instance, during his lifetime, admit him his nominee, to entitle him to receive the sum set apart for his benefit. In October 1845, P., in pursuance of the rules, signed an instrument, in which he directed that the capital money forthcoming at his death should be invested in the purchase of 3*l.* per cent. stock, and the interest applied for the benefit of his wife during her life, if she should survive him, and at her death the stock should be divided between his two daughters, B. and C., in equal proportions; and in the event of either of them marrying and leaving issue, then her or their shares to her or their children respectively; and in case both his daughters should die without issue, then over to his son. P. directed, that if he survived his wife, the whole sum forthcoming should be paid to his daughters B. and C. or their children, or to his son. This instrument was in October 1845 deposited by P. with the directors of the fund, and he died in December 1855. In May 1852, P. by will bequeathed all his estate and effects unto his daughters B. and C., and appointed them executrixes, but he made no specific mention of the fund. The wife of P. died in 1847, and the son died intestate and unmarried in 1851. B. and C. applied to the directors for payment to them of the fund, but were informed that G., who in November 1826 intermarried with L., another daughter of P., had given notice to the directors not to pay it to them. G. alleged, that by an indenture of the 13th August 1832 (after reciting that on his

marriage no settlement was made, but that upon the treaty for such marriage it was agreed that upon the decease of P., G. and L. his wife should take a share, equal with J. P.'s other daughters who should be living at his decease, of and in all his property), P. covenanted with G. and L. his wife, that they, or such of them as should be living at his decease, should immediately after his decease take a share equal to his other daughters of all the property which he might be seised or possessed of, or in any manner entitled unto or interested in, at the time of his death; and that he would forthwith make his last will, whereby he would give, devise, and bequeath all his property in such manner as to effectuate the intentions thereinbefore expressed, and would not revoke or alter such will. L., the wife of G., died in 1852. The capital money was, under the 10 & 11 Vict., c. 96, paid by the directors of the fund into court. On petition presented by B. and C.:—Held, first, that the covenant of P. did not affect the particular fund in question, as it was not a part of his general estate, and therefore the claim of G. must be rejected. *Re Powell*, 2 Jur., N. S., 799.

Held, secondly, that under the instrument of nomination B. and C. were, in the events which had happened, entitled to take the fund absolutely. *Ib.*

1. A fund was established under a special Act as a provision, upon the principle of a life insurance, by officers of the custom for their widows, children, and relatives. Under the Act, directors of the fund were appointed, with power to frame rules for the management of the fund, and with discretion to admit nominees of the subscribers, other than relatives, to the benefit arising out of any subscriptions. By the Act a restriction was placed on alienation of the benefit provided for them by the fund, by widows, children, and other claimants without consent of the directors. By the rules, each subscriber had power to direct how his portion of the fund should be applied for the benefit of his widow, children, or relatives, or his nominees, who should have been duly admitted by the directors. A subscriber, a widower, made, on the occasion of his daughter's marriage, an appointment of his share of the fund to the trustees of his daughter's settlement, the trusts being for his daughter for her life, remainder to her husband for life, remainder to the children of the marriage. The trustees were never formally admitted under the rules, though their names were sent in for that purpose by the settlor. The daughter predeceased her father. On his death, the directors paid his share into court, one moiety of it being claimed by the surviving son of the subscriber:—Held, that the settlement on the daughter's marriage was such a settlement for the benefit of his daughter as the subscriber had a right to make, and did not require the consent of the directors to complete the title of the trustees to the fund, and that therefore their formal admission by the directors as the nominees of the settlor was unnecessary, and, consequently, that the fund must be paid to them. *Re Pocock's Policy*, 40 L. J., Ch., 681; 6 L. R., Ch., 445; 19 W. R. 801; 25 L. T., N. S., 233.

2. How Enforced.

2. A., on the marriage of his daughter to B., covenants that B. should have his land, called C., for 1,500*l.* less than any other would give for it, and afterwards devises the premises to his grandson for life, with remainder over, and dies. Court refused to decree a specific performance of this agreement, by reason of the uncertainty and want of mutuality in it. *Bromley* v. *Jefferies*, 2 Vern. 415; Pre. Ch. 138.

3. Where a mother who was tenant for life, with remainder to her son in fee, who was under age, covenanted, on his marriage, that they would settle, within two years, an estate on the heirs male of the marriage; bill, for a specific performance by decreeing a strict settlement, dismissed; and even if it had appeared that there had been a sufficient covenant for that purpose, a great length of time having elapsed, and none of the parties having asserted their rights, the Court would not have interfered. *Howarth* v. *Deem*, 1 Eden 351.

4. A., on the marriage of his son, covenants to purchase lands, and settle them to the use of his son B. for life, remainder to the heirs male of the body of B. The son dies, leaving issue a son, who brings a bill against the executor of A., for the performance of the covenant. Bill dismissed in regard the plaintiff's father would have been tenant in tail, if the estate had been settled, and might have barred it. *Cann* v. *Cann*, 1 Vern. 480.

5. Where a father, being the heir of a lunatic, who might be induced to make a disposition of his estate injurious to him, was in embarrassed circumstances, and incapable of bearing the expenses of suing out a commission, agreed, in consideration of his son's prosecuting it, that in the event of the lunacy being established, and the estate descending upon him, he would execute a settlement in favour of his son and issue, the circumstances wholly repelling fraud or inadequacy of consideration, decree for specific performance of the settlement, reversing the judgment below. *Persse* v. *Persse*, 1 West 110; 7 Cl. & F. 279.

6. Before the marriage of G. his wife's father covenanted to pay 1,000*l.* on the marriage, and that his heirs, executors, etc., should pay G. 500*l.* six months after his death, and G., by same deed, contracted to give security by specialty, to pay 1,000*l.* six months after his death, to his wife if she survived. Accordingly, three days after marriage, he gave a bond, and then became bankrupt, but before bankruptcy, and after the father's death, he assigned the 500*l.* to plaintiff as a security for a debt. Upon a bill by plaintiff against the father's executors, and the husband's assignee, Lord Chancellor directed the executors to account to plaintiff for the 500*l.*, which was never the wife's money but the husband's, and said, if he were to stand neuter, the husband's assignees, who had the legal estate, and less equity than the plaintiff, might receive the money. *Brett* v. *Forcer*, 3 Atk. 403.

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marriage no settlement was made, but that upon the treaty for such marriage it was agreed that upon the decease of P., G. and L. his wife should take a share, equal with J. P.'s other daughters who should be living at his decease, of and in all his property), P. covenanted with G. and L. his wife, that they, or such of them as should be living at his decease, should immediately after his decease take a share equal to his other daughters of all the property which he might be seised or possessed of, or in any manner entitled unto or interested in, at the time of his death; and that he would forthwith make his last will, whereby he would give, devise, and bequeath all his property in such manner as to effectuate the intentions thereinbefore expressed, and would not revoke or alter such will. L., the wife of G., died in 1852. The capital money was, under the 10 & 11 Vict., c. 96, paid by the directors of the fund into court. On petition presented by B. and C.:—Held, first, that the covenant of P. did not affect the particular fund in question, as it was not a part of his general estate, and therefore the claim of G. must be rejected. *Re Powell*, 2 Jur., N. S., 799.

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1. A fund was established under a special Act as a provision, upon the principle of a life insurance, by officers of the custom for their widows, children, and relatives. Under the Act, directors of the fund were appointed, with power to frame rules for the management of the fund, and with discretion to admit nominees of the subscribers, other than relatives, to the benefit arising out of any subscriptions. By the Act a restriction was placed on alienation of the benefit provided for them by the fund, by widows, children, and other claimants without consent of the directors. By the rules, each subscriber had power to direct how his portion of the fund should be applied for the benefit of his widow, children, or relatives, or his nominees, who should have been duly admitted by the directors. A subscriber, a widower, made, on the occasion of his daughter's marriage, an appointment of his share of the fund to the trustees of his daughter's settlement, the trusts being for his daughter for her life, remainder to her husband for life, remainder to the children of the marriage. The trustees were never formally admitted under the rules, though their names were sent in for that purpose by the settlor. The daughter predeceased her father. On his death, the directors paid his share into court, one moiety of it being claimed by the surviving son of the subscriber:—Held, that the settlement on the daughter's marriage was such a settlement for the benefit of his daughter as the subscriber had a right to make, and did not require the consent of the directors to complete the title of the trustees to the fund, and that therefore their formal admission by the directors as the nominees of the settlor was unnecessary, and, consequently, that the fund must be paid to them. *Re Pocock's Policy*, 40 L. J., Ch., *681*; 6 L. R., Ch., 445; 19 W. R. *801*; *25 L. T., N. S., 233.*

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2. A., on the marriage of his daughter to B., covenants that B. should have his land, called C., for 1,500*l.* less than any other would give for it, and afterwards devises the premises to his grandson for life, with remainder over, and dies. Court refused to decree a specific performance of this agreement, by reason of the uncertainty and want of mutuality in it. *Bromley* v. *Jefferies*, 2 Vern. 415; Pre. Ch. 138.

3. Where a mother who was tenant for life, with remainder to her son in fee, who was under age, covenanted, on his marriage, that they would settle, within two years, an estate on the heirs male of the marriage; bill, for a specific performance by decreeing a strict settlement, dismissed; and even if it had appeared that there had been a sufficient covenant for that purpose, a great length of time having elapsed, and none of the parties having asserted their rights, the Court would not have interfered. *Howarth* v. *Deem*, 1 Eden 351.

4. A., on the marriage of his son, covenants to purchase lands, and settle them to the use of his son B. for life, remainder to the heirs male of the body of B. The son dies, leaving issue a son, who brings a bill against the executor of A., for the performance of the covenant. Bill dismissed in regard the plaintiff's father would have been tenant in tail, if the estate had been settled, and might have barred it. *Cann* v. *Cann*, 1 Vern. 480.

5. Where a father, being the heir of a lunatic, who might be induced to make a disposition of his estate injurious to him, was in embarrassed circumstances, and incapable of bearing the expenses of suing out a commission, agreed, in consideration of his son's prosecuting it, that in the event of the lunacy being established, and the estate descending upon him, he would execute a settlement in favour of his son and issue, the circumstances wholly repelling fraud or inadequacy of consideration, decree for specific performance of the settlement, reversing the judgment below. *Persse* v. *Persse*, 1 West 110; 7 Cl. & F. 279.

6. Before the marriage of G. his wife's father covenanted to pay 1,000*l.* on the marriage, and that his heirs, executors, etc., should pay G. 500*l.* six months after his death, and G., by same deed, contracted to give security by specialty, to pay 1,000*l.* six months after his death, to his wife if she survived. Accordingly, three days after marriage, he gave a bond, and then became bankrupt, but before bankruptcy, and after the father's death, he assigned the 500*l.* to plaintiff as a security for a debt. Upon a bill by plaintiff against the father's executors, and the husband's assignee, Lord Chancellor directed the executors to account to plaintiff for the 500*l.*, which was never the wife's money but the husband's, and said, if he were to stand neuter, the husband's assignees, who had the legal estate, and less equity than the plaintiff, might receive the money. *Brett* v. *Forcer*, 3 Atk. 403.

Where a wife has a demand in her own right, and the husband applies in her right, if there be no agreement on her behalf before marriage, the Court will take care of her. Ib.

If the husband had not been a bankrupt, and had brought a bill for performance of the father's covenant, he could only have been com-

pelled to give a bond, and the wife must have taken her chance, and an assignee shall not be in a worse condition than an assignor, but it has often been held he should be in a better. *Ib.*

1. A., in consideration of the intended marriage of his niece, entered into a bond, with a penalty conditioned to give by will or otherwise, unto or in trust for her, or the issue of the intended marriage, so much in money, or in valuable effects, as he should by his will give or bequeath to any one of his next of kin, or any other person whomsoever:—Held, that this condition was not to be satisfied by the penalty, but must be specifically performed. All voluntary assignments and transfers of personal property, and all conveyances of real estate purchased subsequently to the date of the bond, in which real estate or personal property the obligor retained a life interest, were declared to be in the nature of testamentary dispositions, to be considered in equity, for the purpose of giving effect to the true intent of the agreement in the bond, as if the said estates had been given or devised by the obligor's will. The persons entitled to the benefit of the bond were declared to be specialty creditors upon the obligor's estate for satisfaction of their claims under the bond. *Logan* v. *Wienholt*, 1 Cl. & F. 611.

2. Where funds came to the wife after marriage, the husband being in India, a contract of settlement of those and of other funds, by her father, was prepared and executed by the latter, and sent out for execution by the husband, who in the meantime had given instructions for a settlement in different terms:—Held, that the husband not being bound to execute the former, the father was not bound by it, although executed by him, and containing covenants for the benefit of an infant. *Woodcock* v. *Monckton*, 1 Colly. 273.

3. Marriage articles recited that L., the father of the intended husband, had agreed, in case the marriage should take effect, to pay 200*l.*, and also to settle the lands of T. in the manner, to the uses, and upon the trusts thereinafter mentioned; and that S., the father of the intended wife, who was an infant, had agreed to convey the lands of G., in the manner, at the time, to the uses, and upon the trusts thereinafter mentioned, and also to pay to the intended husband 100*l.* upon the marriage. It was then covenanted by L. that, in case the marriage should take effect, and S. should, as soon as the intended wife came of age, settle the lands of G. to the uses thereinafter expressed, he, L., would settle the lands of T. to his own use until the marriage, and, from and after the marriage, to his own use for life, with remainder, upon certain trusts, for the benefit of the husband and wife, and the issue of the marriage; and it was covenanted by S. that, in case the marriage should take effect, and L. should perform his covenant, he, S., would settle the lands of G. to the use of himself for life, with remainder, upon certain trusts, for the benefit of the husband and wife, and issue of the marriage. The marriage took effect, and the wife came of age, but S. failed to settle the lands of G.:—Held, nevertheless, that L. was bound to perform the covenant on his part. *Lloyd* v. *Lloyd*, 2 Myl. & C. 192; 5 L. J., N. S., Ch., 191; 6 L. J., N. S., Ch., 135.

4. Father on the marriage of his eldest son settled certain lands, and covenanted to pay all incumbrances affecting them. The Court will decree a specific performance without an inquiry whether any or what damage has been sustained, incumbrancers having actually instituted suits, and the lands being in danger of being sold. *Vereker* v. *Gort* (*Lord*), 1 Ir. Eq. R. 1.

5. A bond was given by the father of an illegitimate child to her intended husband, in contemplation of their intended marriage, in the penal sum of 2,000*l.* and interest. It was recited in the condition, that, in consideration of the intended marriage, the obligor had proposed to the obligee to surrender certain copyhold property, then let on lease at a rent of 50*l.* per annum, to the uses thereinafter mentioned; and if such surrender should not be so made within eighteen months after the marriage, the husband and wife, or the survivor, should receive, after the death of the obligor, 1,000*l.*; and he was, in the meantime, to pay the husband and wife 50*l.* a year for the interest thereof, until the said principal sum should be fully discharged. The condition was to the effect of the recital, and that if the estate should be so settled in substance, to the use of the husband and wife for life, remainder to the survivor, remainder to their issue; and if the 1,000*l.* and interest should be paid, or if the obligor should make such surrender in his lifetime, and pay the arrears of interest up to the time of the surrender, the obligation to be void. The obligor died without making the surrender, having regularly paid the 50*l.* per annum, and by his will he devised the copyhold estate to his daughter, the wife of the obligee:—Held, that the bond was not forfeited by reason of the breach of the condition; that it was merely an agreement to settle the land, and as such satisfied by the devise, although absolute to the wife; and that it was an agreement of which equity would enforce the specific performance; the penalty being only meant to secure the settlement recited in the condition. Time for the performance of the condition is not of the essence of the contract. The obligor held to have no power to elect either to pay the money, or settle the land. *Roper* v. *Bartholomew*, 12 Price 796.

6. A father, on his daughter's marriage, agreed by a memorandum in writing to charge his property with 1,000*l.* as her fortune to be settled in trustees for her benefit, she to receive the interest at 5 per cent. on her sole and separate receipt during the term of her natural life; but if she had a family, she was to have the power of disposing of it amongst her children as she and her husband might think proper; the father to have the power to lodge the 1,000*l.*, with her consent and that of her trustee, in any security they might agree upon. No settlement was executed, and the wife died without issue:—Held, that the husband, who survived and who took out letters of administration to his wife's effects, was entitled to the 1,000*l.*; and the Court directed specific performance against the father to effectuate payment of the 1,000*l.* to the husband as such administrator. *Dennehy* v. *Delany*, 10 Ir. R., Eq., 377.

7. A father, in contemplation of the mar-

riage of his son, proposed, in writing, to settle an estate in a specified parish, "worth 200*l.* a year," free from incumbrances, on himself, for life, with successive remainders to his son and his intended wife, and the children, charged with 50*l.* a year to his own widow, for life. By a settlement, not referring to the proposal, the father conveyed an estate, held in fee, worth 57*l.* a year, and an estate of which he was tenant for life, with limitation to his son in tail, of the yearly value of 190*l.*, both in the specified parish, to the proposed uses, and absolutely covenanted that the conveyed hereditaments were of the annual value of 200*l.*, and that he was absolutely seised in fee of them. The marriage took effect, and both the son and his wife died, leaving an infant daughter; the son had married a second time, and left a son, who became tenant in tail of the hereditaments worth 190*l.* a year. In a suit by the infant daughter and the trustee of her settlement, against the representatives of her grandfather, the settlor, for damages for the breach of his covenant:—Held, that the proposals could not be looked to as defining the value of the property to be settled; and that the plaintiffs were entitled to damages to the full extent of the value of the settled land, though that would create a total income under the settlement of 247*l.* instead of only 200*l.* *Wace* v. *Biokerton*, 3 De G. & Sm. 751; 14 Jur. 784; 19 L. J., Ch., 254.

1. A settlement, to which A., B., and T. were parties, executed previously to the marriage of A. (B.'s daughter) with T., recited T.'s title to certain estates, and that B. agreed to give and appoint to A. a portion of 3,000*l.*, of which the sum of 1,000*l.* was to be paid in cash, and the remainder to be charged on the estates of B., and that T. had agreed to secure a jointure of 400*l.* a year for A., and to charge his estates with 3,000*l.* for the younger children of the intended marriage; and that, subject to such jointure and charge, T.'s estate should be settled on the first and other sons of the marriage, in tail; further, that B. had under a power charged his estates with 3,000*l.* portions for his younger children (of whom A. was one), and that it had been agreed that B. should pay 1,000*l.*, part of the marriage portion to A., immediately to T., and that B. should appoint 2,000*l.* the residue of the 3,000*l.*, a charge on his estates, the two sums to be in full for the marriage portion of A. B. appointed 2,000*l.* out of the 3,000*l.*, and directed it to be raised and paid to A. at his death, and T. charged his estates with a jointure of 400*l.* a year, and 3,000*l.* for younger children. By another deed, reciting the appointment of the 2,000*l.* by B., which with the 1,000*l.* was to be in full for the portion of A., A. and T. released B. and his heirs, and his property real and personal, from all claims in respect of certain provisions out of other funds provided for his younger children:—Held, that the deeds contained no personal covenant by B. to pay the 2,000*l.* even though it should turn out that the amount was not well charged on the estates by reason of a bad execution of the power by B. *Borrowes* v. *Borrowes*, 6 Ir. R., Eq., 368.

2. A. B. covenanted in the settlement, made in contemplation of his son's marriage, that upon certain events he would, by will or otherwise, in his lifetime settle out of all his real and personal estate, subject, to his wife's life estate, 3,000*l.* or property to that amount, so that the same should immediately after the death of the survivor of himself and his wife be well and effectually vested in trustees upon trusts for the benefit of his son's intended wife and the issue of the marriage:—Held, that the trustees were entitled to prove as specialty creditors in respect of the 3,000*l.* in the administration of A. B.'s estate. *Eyre* v. *Monro*, 5 W. R. 870; 3 Jur., N. S., 584; 3 Kay & J. 305; 26 L. J., Ch., 757.

3. Marriage articles entered into between an intended husband and the father of the wife, whereby each party covenanted to settle funds on the usual trusts, were enforced by the husband against the father's estate after death of the wife without issue, although the husband had always neglected and refused to fulfil his part of the agreement. *Jeston* v. *Key*, 40 L. J., Ch., 503; 6 L. R., Ch., 610; 25 L. T., N. S., 522; 19 W. R. 864. Affirming 24 L. T., N. S., 10; 19 W. R. 342.

V. COVENANTS BY BROTHER.

4. W. M., on the death of his father, became entitled to considerable estates, subject to a charge of 5,000*l.* for his eight brothers and sisters, who were also entitled to a share of the personal estate of their father. Their portions being small compared with his fortune, he entered into correspondence with a common friend, in which it was agreed that they should give up all their present rights, in lieu of which they should have a charge upon the estate for a sum of 4,000*l.* each. An arrangement having thus been effected, he actually paid interest on the amount agreed to be charged. The sister afterwards married, and, upon the treaty for the marriage, the intended husband was informed by the common friend that her fortune was 4,000*l.*, charged on W. M.'s estates. The marriage took effect:—Held, that this was an agreement of which a court of equity will decree specific performance as to all the younger children. *Montgomery* v. *Reilly*, 1 Bli. N. S. 383; 1 Dow & Cl. 62. Affirming Hay. & J. (App.) liv.

VI. DEFICIENCY OF FUND COVENANTED TO BE SETTLED.

5. A testator, upon the marriage of a daughter, entered into a bond conditioned for the transfer to the trustees of her settlement, during his life, or within twelve months after his decease, of 10,000*l.* 4 per cent. bank annuities; the only 4 per cent. bank annuities then existing, were afterwards reduced to 3½ per cents.; but there was existing at the time of his death a new 4 per cent. stock, which had been created two years after the reduction of the old 4 per cents. The bond is satisfied by a transfer of 10,000*l.* 3½ per cents. *Sheffield* v. *Coventry* (*Earl*), 2 Russ. & M. 317.

6. By a marriage settlement, the husband covenanted to secure to the wife for her life, if she survived him, the dividends of a sum of 4,000*l.* navy 5 per cent. annuities. The husband had no stock in the navy 5 per cents. at the date of the settlement, or at any subsequent period. By an Act of Parliament, the

navy 5 per cents. were converted into new 4 per cents., and by another Act it was provided that all obligations for the transfer of the navy 5 per cents. should be satisfied by a transfer of 106*l.* in the new 4 per cents. for every 100*l.* in the navy 5 per cents. By a subsequent Act, the new 4 per cents. were converted into new 3½ per cent. annuities, and it was provided that all obligations to transfer the new 4 per cents. should be satisfied by transferring an equal sum of new 3½ per cents. The widow under her settlement is entitled only to a transfer of 105*l.* in the new 3½ per cents. for every 100*l.* of the navy 5 per cents. under her husband's covenants. *Milward* v. *Milward*, 3 Myl. & K. 311; 3 L. J., N. S., Ch., 141.

1. In a marriage contract the husband covenanted to secure to his wife the benefits of the pension or annuity payable to the widows of subscribers to a certain fund to which he was a subscriber, "and failing thereof, or in case the said pension or annuity, from whatever cause, shall not be available to her, saving and excepting only through her right to and possession of such separate funds as by the rules and regulations of the said fund would exclude her from all benefit thereby," to pay a yearly sum equal to the pension. At his death he had secured to her 365*l.* a year, on the Bombay Military Fund. A deduction from this was first made, and finally, on her second marriage, the allowance was stopped:—Held, that the first husband's estate was bound under his covenant to make good the deficiencies. *Taylor* v. *Hosack*, 5 Cl. & F. 380.

2. By a settlement reciting an agreement to provide a jointure for the intended wife, but not stating the amount, the intended husband covenanted with the trustees to convey to them certain lands, then held in trust for him, upon trust, after his death, to permit the intended wife, during her life, to take out of the land an annuity of 220*l.*, with power of distress and right of entry; and the settlor covenanted to do all such other acts as should be necessary for the further and better assuring the annuity, according to the true intent and meaning of the deed; the lands having proved, after the husband's death, insufficient to pay the annuity in full:—Held, that there was nothing in the settlement amounting to a covenant for or warranty of the adequacy of the lands for payment of the annuity in full, and that the personal assets of the settlor were not liable to make good the deficiency. *Weldon* v. *Bradshaw*, 7 Ir. R., Eq., 168.

3. A father, in consideration of 2,600*l.* to be paid him on his son's marriage, as the wife's portion, articles to settle 600*l.* a year on the marriage; and it being after discovered that she had only 1,600*l.*, the father was decreed to make a settlement for the 1,600*l.* only, in proportion to what he was to have made for the 2,600*l.*, and not to deduct out of the 600*l.* per annum 1,000*l.* worth of land, viz., 50*l.* per annum, as was urged he should. *Baskerville* v. *Gore*, Pre. Ch. 186; 2 Vern. 448.

4. Bill by husband to have wife's portion, part of which was invested in stock, made up money, on ground either of express contract or representation upon which the marriage took place, dismissed; the description by articles, though generally "the sum of 4,000*l.*" referring to that sum in settlement, and the representation under circumstances not amounting to warranty, and proceeding on a common mistake. *Ainslie* v. *Medlycott*, 9 Ves. 13.

5. Where a settlor intimated his wish to settle a certain sum, part of a particular share of property, which he specified, but that share did not prove of so much value as the sum he wished to settle, his general estate held not liable to make good the difference. *Evans* v. *Wyatt*, 10 W. R. 813; 7 L. T., N. S., 86; 10 W. R. 813; 8 Jur., N. S., 499; 31 Beav. 217.

6. By a marriage settlement executed in 1797, reciting that S., the intended husband, was entitled to real estate on the decease of his father, and to certain sums in the English funds, as residuary legatee of his grandmother, S. covenanted with the trustees that he would, as soon as he could after the execution of the settlement, transfer to them the money, and invest in such funds as should be thought most advisable, in the names of the trustees, such further sums, the interest of which should amount to 600*l.* a year, free from all deductions, in trust for S. for his life, and after his death upon trust to pay the interest to A., his intended wife, as a jointure, with a power to S. to revoke the trust of the fund so to be invested, on conveying to the trustees real estate of the value of 600*l.* a year, to be held on the same trusts. S. died in 1798, leaving one son, who died in 1812. In 1799 and 1801, his executors transferred to the trustees of the settlement 4*l.* per cent. stock, then producing 600*l.* a year, but which was, by successive Acts of Parliament, ultimately reduced to 3 per cent. stock, and became insufficient to pay the 600*l.* a year:—Held, that A. was not entitled to have the deficiency made good out of the assets of S., the covenant having been performed by the transfer of stock, which, in 1801, produced 600*l.* a year. *Napier* v. *Staples*, 10 Ir. Ch. R. 344.

See also JOINTURE.

IV. Covenants to settle After-acquired Property.

I. *Construction. General Words*, 6196.
II. *Property Included*, 6197.
III. *Consent of Wife*, 6213.
IV. *Limitations in, and Objects of, Settlement, in pursuance of*, 6214.
V. *Other Matters*, 6215.

I. CONSTRUCTION. GENERAL WORDS.

7. Covenant in an infant's marriage settlement, that whatever should come to the wife from the mother, or otherwise, should be bound by the settlement, restrained to what shall come from the mother, not to property coming unexpectedly from other quarters. *Williams* v. *Williams*, 1 Bro. C. C. 152.

8. Share of an unappointed fund over which A. had had power of appointment by will coming to B., held bound by covenant to settle whatever B. should take under or by virtue of the wills of A. and X., or either of them, or otherwise howsoever, the Court refusing to cut

down these words by reference to the recital in which the expression was "under the wills or otherwise of the said two testators." *Re Owen's Trust*, 19 Jur., N. S., 1069.

1. A marriage settlement recited an agreement that all property which the wife or intended husband in her right should become entitled to under H.'s will, or should otherwise be derived from H., should be settled upon certain trusts, and contained a covenant by the husband to settle upon the same trusts all the property which should come to husband and wife, or either of them, under the will of H. or otherwise:—Held, that the covenant was restrained by the recital to property derived from H., so that a legacy bequeathed to the wife by another person was not subject to the covenant. *Re Neal's Trusts*, 4 Jur., N. S., 6.

2. Upon the marriage of one of several residuary legatees under her father's will, the intended husband and wife assigned to trustees all and every the sum and sums of money, legacy and legacies, and other personal property then due and payable, or belonging to or to become due and payable to the intended wife, under or by virtue of her father's will, "or otherwise howsoever," upon trusts for her separate use for her life, without power of anticipation, with trusts in remainder in favour of the children of the marriage. By the next witnessing part of the same settlement, it was agreed that in case any real or personal property should during the coverture be given or bequeathed to the wife, the husband should settle it upon trust, so that the wife should have sole power of disposing of the same:—Held, that a legacy bequeathed by another will to the wife after the marriage was not subject to the trusts for the children, the latter witnessing part of the settlement showing that the former must be read in a restricted sense. *Exp. Stephenson*, 3 De G. M. & G. 969.

3. A settlement on marriage was made of A.'s one-fifth share in stock, and all her interest, "by survivorship or otherwise," in the same. A. was one of five children, and in an event, which had become impossible when the settlement was made, there might have been survivorship among the children as to each other's shares. On the death of one of A.'s brothers, A. became entitled, as one of his next of kin, to a share in his one-fifth part of the stock:—Held, that the interest which A. thus took in the stock was not bound by the settlement. *Edwards* v. *Broughton*, 11 W. R. 1038; 2 N. R. 476; 32 Beav. 667.

See also IX. 1. *post.*

II. PROPERTY INCLUDED.

1. *Property vested in Interest or Possession at Date of Marriage*, 6197.
2. *Reversionary Interests in Personalty*, 6199.
3. *Remainders and Contingent Interests in Real Estate*, 6203.
4. *Property Acquired after Termination of Coverture*, 6204.
5. *Property Settled to Separate Use of Wife*, 6205.
6. *Other Property*, 6209.
7. *Amount*, 6212.

1. Property Vested in Interest or Possession at Date of Marriage.

4. Personal property vested at the marriage of a lady in trustees, upon trust for her and her mother during their lives, in equal shares, and after the death of either of them upon trust for the survivor for her life; and after the death of the survivor (in the events which happened), upon her trust for executors, administrators, or assigns; was held to be bound by a covenant by the husband, that if his wife, or he in her right, should, during the coverture, succeed to the possession of or acquire any property, real or personal, such property should be settled, though the settlement did not refer to it. *Grafftey* v. *Humpage*, 1 Beav. 46; 8 L. J., N. S., Ch., 98; 3 Jur. 622.

5. Where the settlement noticed only funded property of the wife, and recited an agreement that the same and all other personal estate which she then had, or at any time during the marriage should become entitled to, exceeding 200*l.*, should be settled, with a covenant by the husband that he would well and effectually assign any money or personal estate which he should thereafter become possessed of or interested in her right, exceeding the amount of 200*l.*, unto the trustees, upon the same trusts as those declared of the funded property: it appearing that the wife was at the time of the marriage also possessed of shares in waterworks, exceeding 200*l.* in value:—Held, that they became subject to the trusts of the settlement. *James* v. *Durant*, 2 Beav. 177.

6. A covenant in a marriage settlement, that in case, at any time "thereafter" during the coverture, any real or personal estate should "descend, come to, or vest in" the wife (who was then an infant), it should be settled:—Held, to include the proceeds of real estate taken by a public company, to which the wife, at the execution of the settlement, was entitled in remainder. *Exp. Blake*, 16 Beav. 463.

7. By a marriage settlement 1,500*l.* and 2,700*l.* stock, of which the lady was possessed, were settled in trust for her separate use for life, remainder in trust for her intended husband for life, and after his death as the wife should appoint by will; and the intended husband covenanted that if the marriage should take effect he would, as often as occasion should require, join with his wife in doing all necessary acts for assigning to the trustees all the property to which his wife should become entitled during the coverture upon the trusts declared of the 1,500*l.* and 2,700*l.* stock. At the date of the settlement the wife had an absolute vested interest in 1,935*l.* stock expectant on her father's death, but it was not mentioned in the settlement. During the marriage, the husband became bankrupt, and then the wife's father died:—Held, that the 1,935*l.* stock did not belong to the husband's assignee as part of his estate, but was bound by his covenant, as being property to which the wife would become entitled during the coverture. *Blythe* v. *Granville*, 13 Sim. 190; 12 L. J., N. S., Ch., 82; 6 Jur. 961.

8. By a marriage settlement property was assigned to trustees, and the husband covenanted that all the estate and effects to which

the wife at any time during the coverture should become seised, possessed of, or entitled to should be settled and assured as therein mentioned. The wife at the time of the marriage was entitled to a moiety of a leasehold house, and to a third part of the proceeds of the sale of real estate, which real estate was not sold or distributed for many years after the marriage:—Held, that the settlement contemplated future acquired title; that these were present titles, and not included in the covenant to settle. *Wilton* v. *Colvin*, 3 Drew. 617; 2 Jur., N. S., 867; 25 L. J., Ch., 850; 42 W. R. 759.

The cases of *Blythe* v. *Granville* (13 Sim. 190), and *Exp. Blake* (16 Beav. 463), observed upon. *Ib.*

1. Certain personal property, which a lady had at the time of her marriage, but which was not noticed in her settlement, was held to be bound by a covenant with A. by her husband B., that in case he in her right should at any time thereafter, during their joint lives, become possessed of or interested in any sum or sums of money or other personal property, estate, or effects, exceeding in value 200*l.* at any one time, then the same should be assigned, upon the trusts of the settlement. *James* v. *James*, 9 L. J., N. S., Ch., 85.

2. A covenant in an ante-nuptial settlement, that all the personal estate "to which the wife shall become entitled" should be subject to the trusts of the settlement:—Held, not to extend to property to which, without the knowledge of the intended husband or the trustees, she was then absolutely and immediately entitled. *Otter* v. *Melville*, 2 De G. & Sm. 257; 17 L. J., N. S., Ch., 345; 12 Jur. 845.

In a marriage settlement, reciting that it had been agreed that all such personal estate as the intended wife might at any time during her coverture with the intended husband become entitled to should be settled as therein mentioned, the intended husband and wife covenanted with the trustees that all and singular the personal estate to which the intended wife should at any time or times during her coverture become entitled should be settled upon certain trusts. At the time of the marriage, the lady, unknown to the husband and trustees, was entitled to a sum of money absolutely. The marriage took effect, and the husband filed a bill against the trustees, to whom the money had been paid, praying a declaration that it was not subject to the trusts of the settlement. The trustees demurred for want of equity; but the demurrer was overruled. *Ib.*

3. By a marriage settlement sums amounting to 10,000*l.* were settled to the separate use of the wife for life. A share in 3,333*l.* 9*s.* 8*d.* Consols, to which she was entitled, was not mentioned in the settlement. The husband covenanted to settle on the wife her future acquired property, "except such as she is now entitled to, in possession, reversion, remainder, or contingency." Subsequently the husband became unable to support her, and treated her with harshness; and the only income she received was 120*l.*:—Held, that her share in the Consols was purposely omitted, and that she was not entitled to a settlement thereout against the mortgages thereof. *Brooke* v. *Hickes*, 12 W. R. 703; 10 L. T., N. S., 404.

4. When an interest in property existing at the date of a marriage is increased in value by the death of other persons, such increment is not after-acquired property within the meaning of a covenant in a marriage settlement. *Re Browne*, 38 L. J., Ch., 316; 7 L. R., Eq., 231.

A marriage settlement contained a recital of an agreement to settle all personal property which the wife should at any time during the marriage become entitled to, and a covenant by the husband and the wife for the settlement of all personal property which the wife, or the husband in her right, at any time or times during the marriage should become possessed of or entitled to by transmission, gift, or otherwise, and whether in possession or expectancy. Another marriage settlement contained no recital of any agreement as to the settlement of future property, but a covenant by the husband and wife to settle any personal property of the value of 200*l.* or upwards which should at any time or times during the coverture be given or bequeathed to, or in any manner vest in, the wife. In each case the wife was, under the will of her mother, entitled at the date of the settlement to the beneficial interest in an undivided share of four Irish tontine debentures. The holder of one of these debentures was entitled during the life of a person therein named to an annuity of 7*l.* 10*s.* Irish currency, and also to a proportionate share of all other annuities under similar debentures which might cease to become payable to the holders thereof by reason of the death of the *cestuis que vient* therein named. At the dates of the settlements the debentures were of small value; but ultimately large sums became payable thereunder. No mention was made of them in the settlements:—Held, that no part of the annuities payable thereunder was included in either of the covenants. *Ib.*

5. A testator made two wills, one of his English, the other of his American property. Neither of the wills referred to the other. His daughter, who was entitled to personal property under both wills, executed previously to her marriage a settlement of various descriptions of personal property, including specifically her property under the English will, but not mentioning or referring to her property under the American will. The settlement contained a clause providing that such further personal estate (if any) as should during her life become vested in, or accrue to, or be assignable by her and her husband, should be assigned upon the trusts of the settlement:—Held, that this clause did not affect her American property. *Hoare* v. *Hornby*, 2 Y. & Coll. C. C. 121; 12 L. J., N. S., Ch., 151; 7 Jur. 424.

6. By a settlement made in June 1842, property of the wife was settled, and the husband covenanted that if, during the coverture, any real or personal estate should "descend or devolve to or vest" in his wife, or in him in her right, he would settle it. In August 1842, a sum, part of the distributive share of the wife in the estate of her father, who died in 1821, and which had been overlooked, was recovered and paid to the trustees of the settlement, and the husband received the income for twelve years:—Held, that it was not within the covenant to settle, and that the husband had not so acquiesced as to make

it subject to the trusts of the settlement. *Churchill* v. *Shepherd*, 33 Beav. 107.

1. A marriage settlement contained an agreement that if the wife then was, or if during the coverture she or her husband in her right, at one and the same time, should, under a certain settlement therein mentioned, or under the will of the wife's father, become seised or possessed of or entitled to any real or personal property of the value of 300*l.* or upwards, for any estate or interest whatsoever in possession, reversion, remainder, or expectancy, then the husband and wife and all other necessary parties would, as soon as circumstances would admit, convey the said real or personal property to, or otherwise cause the same to be vested in, the trustees. The wife's father was dead at the date of the settlement, having by his will devised certain real estate upon trust for his said daughter and the heirs of her body, with a gift over in default or on failure of her issue:—Held, that the estate tail was not within the agreement contained in the settlement. *Hilbers* v. *Parkinson*, 25 L. R., Ch. D., 200; 53 L. J., Ch., 194; 49 L. T. 502; 32 W. R. 315.

2. By an ante-nuptial settlement, the intended husband and wife covenanted with the trustees that all personal estate (save certain expected particulars) to which the wife or the husband in her right should become entitled during the coverture should be vested in the trustees upon the trusts of the settlement. A sum of money not mentioned in the settlement was handed by the wife to the husband before the marriage took place, and the evidence, in the opinion of the Court, established that the transaction was simply a loan:—Held, that the sum of money was caught by the settlement, and was subject to the trusts thereof. *Hamilton* v. *James*, 11 Ir. R., Eq., 223.

2. Reversionary Interests in Personalty.

3. By a settlement made before marriage, part of the wife's fortune was settled for the use of the husband and wife, and then the children of the marriage; and it was stipulated, "that all other the personal estate to which the wife was, or might be or become, entitled, should be permitted to vest absolutely in the husband by right of marriage": the wife survived the husband:—Held, that a contingent reversionary interest, which was in the wife at the date of the settlement, and which continued reversionary and contingent during the whole period of coverture, belonged to the wife, and not to the executors of the husband. *Farrer* v. *Grant*, 7 L. J., Ch., 95.

4. A. being entitled to a reversionary interest in property for her separate use, both she and her intended husband separately covenanted to settle any property which she, or her husband in her right, was or might become entitled to. The above interest having fallen into possession:—Held, that it was subject to the trusts of the settlement. *Tawney* v. *Ward*, 1 Beav. 563; 8 L. J., N. S., Ch., 319.

5. Upon the marriage of a ward, the intended husband proposed to settle the whole of her fortune. The Master, in ascertaining her fortune, omitted to state a reversionary interest. Her property was settled, omitting the reversionary interest, and the husband covenanted to settle any property to which the wife, or he in her right, "should at any time during the marriage" become entitled:—Held, that the reversionary interest ought to be settled. *Bute* (*Marquis*) v. *Harman*, 9 Beav. 320.

6. A reversion of a moiety of a farm was settled on a marriage, and the trustees were empowered to sell it when in possession; and the intended husband and wife covenanted, if they should thereafter acquire any other share or interest in the farm, they would immediately thereupon convey the same so that it might become vested in the trustees upon the trusts and subject to the powers declared of the settled moiety. After that moiety had fallen into possession, a moiety of the other moiety descended to the wife, not in possession, but subject to a life interest:—Held, nevertheless, that it, as well as the settled moiety, were salable under the power. *Giles* v. *Homes*, 15 Sim. 359.

7. By an ante-nuptial settlement, the intended husband and wife covenanted with the trustees that if the intended husband and wife, or either of them in her right, should at any time during the coverture "be or become entitled to any personal property of the value of 100*l.* or upwards, the same should be settled." At the time of executing the settlement the wife was interested in a legacy, which had been bequeathed in trust for all the daughters of her father living at the time of his death, who should attain twenty-one or marry, in equal shares. The marriage was solemnised, and the wife's father survived her husband:—Held, first, that the interest of the wife in the legacy during the coverture was contingent. *Atcherley* v. *Du Moulin*, 2 Kay & J. 186.

Held, secondly, that it was not within the covenant in the settlement. *Ib.*

8. A covenant on a marriage settlement to settle all property to which the wife, or the husband in her right, should, during the coverture, become entitled, includes property to which the wife was at the time of the marriage entitled in reversion, but not property to which she was entitled in possession. *Archer* v. *Kelly*, 6 Jur., N. S., 814; 29 L. J., Ch., 911; 8 W. R. 684; 1 Dr. & Sm. 300.

Where there is a covenant to settle after-acquired property of the husband and wife, or either of them, in her right, that does not apply to the property of the husband acquired at the moment of the marriage, *jure mariti*; but only to property of the wife which comes to her after the marriage. *Ib.*

The words "during coverture" apply to the time which elapses after coverture commences and before it terminates. *Ib.*

Where a lady, at the date of her marriage, was entitled to a contingent interest in remainder in real estate, and was also entitled in possession to stock, and in the settlement executed on her marriage no mention was made of her interest either in the real estate or in the stock, but the settlement contained a covenant to settle upon the trusts declared by the settlement any real or personal property to which the husband, wife, or either of them in right of the wife should, "by gift, descent, succession, or otherwise howsoever become entitled" during the coverture; and the wife's contingent interest in remainder in the real estate fell into possession during the cover-

the wife at any time during the coverture should become seised, possessed of, or entitled to should be settled and assured as therein mentioned. The wife at the time of the marriage was entitled to a moiety of a leasehold house, and to a third part of the proceeds of the sale of real estate, which real estate was not sold or distributed for many years after the marriage:—Held, that the settlement contemplated future acquired title; that these were present titles, and not included in the covenant to settle. *Wilton* v. *Colvin*, 3 Drew. 617; 2 Jur., N. S., 867; 25 L. J., Ch., 850; 42 W. R. 759.

The cases of *Blythe* v. *Granville* (13 Sim. 190), and *Exp. Blake* (16 Beav. 463), observed upon. *Ib.*

1. Certain personal property, which a lady had at the time of her marriage, but which was not noticed in her settlement, was held to be bound by a covenant with A. by her husband B., that in case he in her right should at any time thereafter, during their joint lives, become possessed of or interested in any sum or sums of money or other personal property, estate, or effects, exceeding in value 200*l.* at any one time, then the same should be assigned, upon the trusts of the settlement. *James* v. *James*, 9 L. J., N. S., Ch., 85.

2. A covenant in an ante-nuptial settlement, that all the personal estate "to which the wife shall become entitled" should be subject to the trusts of the settlement:—Held, not to extend to property to which, without the knowledge of the intended husband or the trustees, she was then absolutely and immediately entitled. *Otter* v. *Melville*, 2 De G. & Sm. 257; 17 L. J., N. S., Ch., 345; 12 Jur. 845.

In a marriage settlement, reciting that it had been agreed that all such personal estate as the intended wife might at any time during her coverture with the intended husband become entitled to should be settled as therein mentioned, the intended husband and wife covenanted with the trustees that all and singular the personal estate to which the intended wife should at any time or times during her coverture become entitled should be settled upon certain trusts. At the time of the marriage, the lady, unknown to the husband and trustees, was entitled to a sum of money absolutely. The marriage took effect, and the husband filed a bill against the trustees, to whom the money had been paid, praying a declaration that it was not subject to the trusts of the settlement. The trustees demurred for want of equity; but the demurrer was overruled. *Ib.*

3. By a marriage settlement sums amounting to 10,000*l.* were settled to the separate use of the wife for life. A share in 3,333*l.* 9*s.* 8*d.* Consols, to which she was entitled, was not mentioned in the settlement. The husband covenanted to settle on the wife her future acquired property, "except such as she is now entitled to, in possession, reversion, remainder, or contingency." Subsequently the husband became unable to support her, and treated her with harshness; and the only income she received was 120*l.*:—Held, that her share in the Consols was purposely omitted, and that she was not entitled to a settlement thereout against the mortgages thereof. *Brooke* v. *Hickes*, 12 W. R. 703; 10 L. T., N. S., 404.

4. When an interest in property existing at the date of a marriage is increased in value by the death of other persons, such increment is not after-acquired property within the meaning of a covenant in a marriage settlement. *Re Browne*, 38 L. J., Ch., 316; 7 L. R., Eq., 231.

A marriage settlement contained a recital of an agreement to settle all personal property which the wife should at any time during the marriage become entitled to, and a covenant by the husband and the wife for the settlement of all personal property which the wife, or the husband in her right, at any time or times during the marriage should become possessed of or entitled to by transmission, gift, or otherwise, and whether in possession or expectancy. Another marriage settlement contained no recital of any agreement as to the settlement of future property, but a covenant by the husband and wife to settle any personal property of the value of 200*l.* or upwards which should at any time or times during the coverture be given or bequeathed to, or in any manner vest in, the wife. In each case the wife was, under the will of her mother, entitled at the date of the settlement to the beneficial interest in an undivided share of four Irish tontine debentures. The holder of one of these debentures was entitled during the life of a person therein named to an annuity of 7*l.* 10*s.* Irish currency, and also to a proportionate share of all other annuities under similar debentures which might cease to become payable to the holders thereof by reason of the death of the *cestuis que vient* therein named. At the dates of the settlements the debentures were of small value; but ultimately large sums became payable thereunder. No mention was made of them in the settlements:—Held, that no part of the annuities payable thereunder was included in either of the covenants. *Ib.*

5. A testator made two wills, one of his English, the other of his American property. Neither of the wills referred to the other. His daughter, who was entitled to personal property under both wills, executed previously to her marriage a settlement of various descriptions of personal property, including specifically her property under the English will, but not mentioning or referring to her property under the American will. The settlement contained a clause providing that such further personal estate (if any) as should during her life become vested in, or accrue to, or be assignable by her and her husband, should be assigned upon the trusts of the settlement:—Held, that this clause did not affect her American property. *Hoare* v. *Hornby*, 2 Y. & Coll. C. C. 121; 12 L. J., N. S., Ch., 151; 7 Jur. 424.

6. By a settlement made in June 1842, property of the wife was settled, and the husband covenanted that if, during the coverture, any real or personal estate should "descend or devolve to or vest" in his wife, or in him in her right, he would settle it. In August 1842, a sum, part of the distributive share of the wife in the estate of her father, who died in 1821, and which had been overlooked, was recovered and paid to the trustees of the settlement, and the husband received the income for twelve years:—Held, that it was not within the covenant to settle, and that the husband had not so acquiesced as to make

it subject to the trusts of the settlement. *Churchill* v. *Shepherd*, 33 Beav. 107.

1. A marriage settlement contained an agreement that if the wife then was, or if during the coverture she or her husband in her right, at one and the same time, should, under a certain settlement therein mentioned, or under the will of the wife's father, become seised or possessed of or entitled to any real or personal property of the value of 300*l.* or upwards, for any estate or interest whatsoever in possession, reversion, remainder, or expectancy, then the husband and wife and all other necessary parties would, as soon as circumstances would admit, convey the said real or personal property to, or otherwise cause the same to be vested in, the trustees. The wife's father was dead at the date of the settlement, having by his will devised certain real estate upon trust for his said daughter and the heirs of her body, with a gift over in default or on failure of her issue:—Held, that the estate tail was not within the agreement contained in the settlement. *Hilbers* v. *Parkinson*, 25 L. R., Ch. D., 200; 53 L. J., Ch., 194; 49 L. T. 502; 32 W. R. 315.

2. By an ante-nuptial settlement, the intended husband and wife covenanted with the trustees that all personal estate (save certain expected particulars) to which the wife or the husband in her right should become entitled during the coverture should be vested in the trustees upon the trusts of the settlement. A sum of money not mentioned in the settlement was handed by the wife to the husband before the marriage took place, and the evidence, in the opinion of the Court, established that the transaction was simply a loan:—Held, that the sum of money was caught by the settlement, and was subject to the trusts thereof. *Hamilton* v. *James*, 11 Ir. R., Eq., 223.

2. Reversionary Interests in Personalty.

3. By a settlement made before marriage, part of the wife's fortune was settled for the use of the husband and wife, and then the children of the marriage; and it was stipulated, "that all other the personal estate to which the wife was, or might be or become, entitled, should be permitted to vest absolutely in the husband by right of marriage": the wife survived the husband:—Held, that a contingent reversionary interest, which was in the wife at the date of the settlement, and which continued reversionary and contingent during the whole period of coverture, belonged to the wife, and not to the executors of the husband. *Farrer* v. *Grant*, 7 L. J., Ch., 95.

4. A. being entitled to a reversionary interest in property for her separate use, both she and her intended husband separately covenanted to settle any property which she, or her husband in her right, was or might become entitled to. The above interest having fallen into possession:—Held, that it was subject to the trusts of the settlement. *Tawney* v. *Ward*, 1 Beav. 563; 8 L. J., N. S., Ch., 319.

5. Upon the marriage of a ward, the intended husband proposed to settle the whole of her fortune. The Master, in ascertaining her fortune, omitted to state a reversionary interest. Her property was settled, omitting the reversionary interest, and the husband covenanted to settle any property to which the wife, or he in her right, "should at any time during the marriage" become entitled:—Held, that the reversionary interest ought to be settled. *Bute (Marquis)* v. *Harman*, 9 Beav. 320.

6. A reversion of a moiety of a farm was settled on a marriage, and the trustees were empowered to sell it when in possession; and the intended husband and wife covenanted, if they should thereafter acquire any other share or interest in the farm, they would immediately thereupon convey the same so that it might become vested in the trustees upon the trusts and subject to the powers declared of the settled moiety. After that moiety had fallen into possession, a moiety of the other moiety descended to the wife, not in possession, but subject to a life interest:—Held, nevertheless, that it, as well as the settled moiety, were salable under the power. *Giles* v. *Homes*, 15 Sim. 359.

7. By an ante-nuptial settlement, the intended husband and wife covenanted with the trustees that if the intended husband and wife, or either of them in her right, should at any time during the coverture "be or become entitled to any personal property of the value of 100*l.* or upwards, the same should be settled." At the time of executing the settlement the wife was interested in a legacy, which had been bequeathed in trust for all the daughters of her father living at the time of his death, who should attain twenty-one or marry, in equal shares. The marriage was solemnised, and the wife's father survived her husband:—Held, first, that the interest of the wife in the legacy during the coverture was contingent. *Atcherley* v. *Du Moulin*, 2 Kay & J. 186.

Held, secondly, that it was not within the covenant in the settlement. *Ib.*

8. A covenant on a marriage settlement to settle all property to which the wife, or the husband in her right, should, during the coverture, become entitled, includes property to which the wife was at the time of the marriage entitled in reversion, but not property to which she was entitled in possession. *Archer* v. *Kelly*, 6 Jur., N. S., 814; 29 L. J., Ch., 911; 8 W. R. 684; 1 Dr. & Sm. 300.

Where there is a covenant to settle after-acquired property of the husband and wife, or either of them, in her right, that does not apply to the property of the husband acquired at the moment of the marriage, *jure mariti*; but only to property of the wife which comes to her after the marriage. *Ib.*

The words "during coverture" apply to the time which elapses after coverture commences and before it terminates. *Ib.*

Where a lady, at the date of her marriage, was entitled to a contingent interest in remainder in real estate, and was also entitled in possession to stock, and in the settlement executed on her marriage no mention was made of her interest either in the real estate or in the stock, but the settlement contained a covenant to settle upon the trusts declared by the settlement any real or personal property to which the husband, wife, or either of them in right of the wife should, "by gift, descent, succession, or otherwise howsoever become entitled" during the coverture; and the wife's contingent interest in remainder in the real estate fell into possession during the cover-

ture:—Held, that the words "become entitled" imported a change of condition in the property, and that the parties contemplated the wife's becoming entitled during the coverture, and did not intend to include property to which she was entitled at the time of the coverture; and therefore that the wife's interest in the real estate having changed during the coverture, it fell within the covenant; but that the wife having been absolutely entitled to the stock at the date of the marriage, and there having been no subsequent change in her interest, the stock did not come within the terms of the covenant. *Ib.*

1. Where a covenant to settle after acquired property was contained in a settlement executed on the marriage of a lady, who at the time was entitled to a contingent interest liable to be divested, and which afterwards fell into possession; and who afterwards became entitled to property to her separate use, as to part of which there was a proviso against alienation:—Held, that the property to which the lady was contingently entitled at the time of her marriage came within the terms of the covenant, but that the property settled to her separate use, and as to which there was a proviso against alienation, was not included in it. *Brooks* v. *Keith*, 1 Dr. & Sm. 462; 7 Jur., N. S., 482; 9 W. R. 565; 4 L. T., N. S., 541.

2. By a marriage settlement, it was expressed to be agreed between the parties thereto, and the husband covenanted, that if any personal property should, during coverture, come to or vest in the wife, or in him in her right, the same should be transferred, by all proper parties, upon the trusts of the settlement. The wife became entitled to a reversionary interest in a chose in action, which did not fall into possession until after the death of the husband:—Held, that the wife was bound to settle it. *Butcher* v. *Butcher*, 14 Beav. 222.

3. In a marriage settlement the parties agreed, and the husband covenanted for assignment to the trustees, upon the usual trusts, of any property which the husband in right of the wife, or the wife, should become possessed of:—Held, that this covenant did not apply to property over which the wife had a general power of appointment, or to property in which she had a life interest to her separate use, but did apply to her reversionary chose in action, in the event of the husband surviving her. *Townshend* v. *Harrowby*, 4 Jur., N. S., 353; 27 L. J., Ch., 553.

4. A husband covenanted by his marriage settlement to settle future acquired property on the trusts of the settlement, which were for the husband for life, and after his death for his wife for life. He became entitled to a sum of money as next of kin, and his wife acquiesced in his receiving such sum, and signed a memorandum, by which she undertook not to take proceedings against the intestate's administrator. No notice was given to the trustee of the settlement. After the death of the husband, the wife and the trustee filed a bill against the devisee of the administrator, whose assets had been administered:—Held, that the wife being under coverture could not bind her reversionary interest, and that the real estate of the administrator in the hands of his devisee must make good the breach of trust. *Cresswell* v. *Dewell*, 12 W. R. 123.

5. A testator gave and bequeathed all his personal estate and effects to his daughter, the same to be always considered as vested in her, upon her attaining twenty-one, and to be subject to her disposition thereof; and the testator further directed that in case his daughter should happen to depart this life without attaining twenty-one, or without disposing by her will of the property bequeathed to her, then the same to be subject to the disposition by will of his wife. The testator's daughter married under twenty-one, and by articles previously to her marriage the husband covenanted to settle all the property left her by the testator upon his wife and himself for life, and then for the benefit of the children of the marriage:—Held, that the daughter took the property not absolutely but for life only, with power to dispose of it by will, and that her husband not having reduced it into possession, the articles were not binding upon the wife. *Borton* v. *Borton*, 16 Sim. 552; 18 L. J., N. S., Ch., 219; 13 Jur. 247.

6. Where for valuable consideration the wife by ante-nuptial settlement assigned to her husband an interest at the time reversionary, the Court, when the interest was reduced into possession, ordered payment to the husband without the wife's consent. *Chalmers* v. *Macleod*, 1 Jur., N. S., 724.

7. W. C., the intended husband, by articles of agreement before marriage, covenanted with the intended wife and her trustee that he would, on demand in writing by either of them, settle any property to which she should become entitled, upon trust, during her life, as she should appoint; and in default, to her separate use; and after her decease, to the use of W. C. for life, if he should survive; and after the decease of both, upon trust, as to one moiety, as she should by will appoint; and in default, to her next of kin. During the lives of W. C. and his wife certain reversionary property of the wife fell into possession, one moiety of which was realised by W. C., and the other moiety was invested by the former trustees, who took a release as to the moiety from the husband. W. C. died in the lifetime of his wife, without leaving issue of the marriage:—Held, that the widow was absolutely entitled to the moiety in the hands of the trustee, freed from the trusts of the marriage articles:—Held, that as the covenant was only the covenant of the husband, and not of the wife, and merely executory, he never having executed any assignment, the wife was not bound. *Cramer* v. *Moore*, 3 Sm. & G. 141; 1 Jur., N. S., 915; 3 W. R. 347.

8. By a marriage settlement, the sum of 3,000*l.* was assigned by the father of the intended wife to trustees, to be held after his decease as to 2,000*l.*, part for the wife, her husband, and children, and as to the residue, for her husband absolutely; and it was covenanted that all the property which the wife, or the husband in her right, should during her coverture become seised or possessed of or entitled to, should be settled upon the trusts therein declared of the premises thereby settled:—Held, first, that property to which the wife became absolutely entitled in reversion during the coverture, was bound by

the covenant. *Hughes* v. *Young*, 9 Jur., N. S., 376; 32 L. J., Ch., 137; 1 N. R. 166.

Held, secondly, that the sum given by the settlement in trust for the husband absolutely was not "settled" within the meaning of that word as used in the covenant. *Ib.*

1. A marriage settlement recited that it was agreed that if any property should descend or devolve to the wife, it should be settled upon the trusts of the settlement. The indenture contained a covenant to the same effect as the recital, but entered into by the husband only. The husband died, and subsequently reversionary personal property of the wife fell into possession:—Held, that it was not subject to the trusts of the settlement. *Young* v. *Smith*, 11 Jur., N. S., 963; 35 Beav. 87.

2. Covenant by husband and wife to settle "all real or personal estate, property, or effects to which the wife or the husband in her right shall by gift, descent, succession, or otherwise become entitled":—Held, to include reversionary interests in consols, which fell in by the death of a tenant for life, after the decease of both husband and wife. *Re Hughes*, 4 Giff. 432.

3. Where a woman in an ante-nuptial settlement joins in a covenant with her future husband to settle after acquired property to which she or he in her right shall become entitled in possession, reversion, remainder, or expectancy, that covenant does not apply to a general power, of appointment and a life interest given to her under a will, but does apply to a reversionary interest to which she is entitled under the same will so far as her husband, in the event of his surviving her, would be entitled in her right. A power of appointment, a life interest, and a reversion given to a married woman by one will are as distinct as if given by three separate instruments. *Townsend* (*Marchioness*) v. *Harrowby* (*Earl*), 4 W. R. 413; 4 Jur., N. S., 353.

4. By a marriage settlement made between R. the intended husband, K. the intended wife, and C. and D. the trustees, certain property therein mentioned was settled on the usual trusts. The settlement then contained the following clause: "And it is hereby declared and agreed by and between the parties hereto, and R. doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said C. and D., their executors and administrators, that if the said K., or the said R. in right of the said K., shall at or upon the said marriage, or at any time thereafter, become interested in or entitled to any sum or sums of money, or real or personal estate, etc., which already hath or have been, or shall or may at any time or times hereafter be, given or bequeathed, or which shall descend to K., that then the same shall be and remain, etc., upon the same trusts, etc., as are hereinbefore mentioned, etc., of and concerning the said trust moneys, stocks, and premises hereinbefore assigned; and for the better effecting this purpose, R., his heirs, etc., will, upon request, pay, etc., and join with K. in assigning, etc., all such sums, etc., to C. and D." R. died, and after his death certain sums of money, to which his wife during his life had a reversionary interest, fell into possession:—Held, that this covenant applied to the property only to which the marital right attached, and that the property to which K. became entitled after the death of her husband was not bound by it. *Reid* v. *Kenrick*, 1 Jur., N. S., 897; 24 L. J., Ch., 503; 3 Eq. Rep. 1031; 3 W. R. 530.

5. H. was entitled to a reversionary interest in personal property. In a settlement made on her marriage, it was recited, that it was agreed that any property to which the husband and H., or either of them in her right, "should by any means become absolutely entitled," should be settled, and that the husband and H. should enter into the covenant thereinafter contained. The husband and H. jointly and severally covenanted with the trustees, that if at any time during the marriage the husband and H., or either of them in her right, should, by gift, "descent, succession, or otherwise howsoever, become entitled to any real or personal property" to the amount of 100*l.* and upwards, the same should be assigned to the trustees, "so far as the estates or interests in such future property would extend." H. died in 1859, and her husband in August 1862; and in December 1862 several sums exceeding 100*l.* became payable under the deeds of 1812 and 1822:—Held, that they were included within the terms of the covenant. *Re Hill*, 9 Jur., N. S., 942; 11 W. R. 930; 8 L. T., N. S., 825.

6. A feme sole, being entitled to property under a will, if she attained twenty-one, married, and by a settlement made immediately previously to the marriage, the intended husband covenanted with the trustees that all the estate, property, and effects, real and personal, which he and his intended wife, or either in her right, should at any time during the coverture become seised or possessed of or entitled to, at law or in equity, of the value of 200*l.* or upwards under any gift, devise, or bequest, or by descent, representation, or any other means whatsoever, should be settled:—Held, that the contingent interest to which the wife was entitled was within the covenant. *Re Worsley*, 16 L. T., N. S., 826.

7. A marriage settlement contained a covenant to settle any property which should come to or devolve upon the intended wife, or her husband in her right, "at any time or times after the solemnisation of the said intended marriage and during the continuance thereof." At the date of the settlement, the intended wife was entitled to a reversionary interest in personalty, subject to the life interest of her mother. The wife died before the tenant for life, leaving the husband surviving:—Held, that the wife's reversionary interest was bound by the covenant. *Rose* v. *Cornish*, 16 L. T., N. S., 786.

8. A covenant, by husband and wife, to settle property to which the wife or the husband in her right "shall become entitled" during the coverture, held to include property vested in reversion before the coverture, and falling into possession during the coverture, but not to include property to which they are entitled only in reversion during the coverture, and which fell into possession after the coverture. *Re Clinton*, *Exp. Holloway*, *Exp. Weare*, 41 L. J., Ch., 191; 20 W. R. 326; 13 L. R., Eq., 295; 26 L. T., N. S., 159.

9. By a marriage settlement the intended husband and wife severally covenanted with the trustees that all the real and personal property (if any) not thereinbefore settled, to

which the wife, or the husband in her right, "shall at any time or times during the intended coverture become beneficially entitled in possession or reversion, or in any manner whatever, derivable directly or indirectly from" J., should be settled as therein mentioned. At the date of the settlement and of the marriage the wife was entitled to a fund bequeathed by J., subject to the life interest of a person who outlived the wife:—Held, that the fund was not subject to the covenant. *Re Jones*, 2 L. R., Ch. D., 362; 45 L. J., Ch., 428; 24 W. R. 697; 35 L. T., N. S., 25.

1. Covenant in marriage settlement to settle property to which the wife then was or she or her husband in her right should during the coverture become entitled. At the date of the settlement a trust fund stood so limited that on the death of the wife without issue one moiety thereof would belong to her, subject to the life interest therein of her husband, as her share of an intestate's estate:—Held, that the wife's contingent reversionary interest in this fund was bound by the covenant. *Cornmell* v. *Keith*, 3 L. R., Ch. D., 767; 45 L. J., Ch., 689; 24 W. R. 633; 35 L. T., N. S., 29.

2. A marriage settlement to which the wife was a party recited that it had been agreed that all moneys should be settled to which she then was or thereafter during the coverture, or to which her husband in her right might become entitled, and that the husband should enter into the covenant to that effect thereinafter contained. The covenant was by the husband that he would settle all such moneys and execute all deeds for carrying out such settlement:—Held, that the wife was not bound by the covenant, and was entitled after her husband's death to receive a sum which, although vested in her at the marriage, had not been reduced into possession during the coverture. *Re Webb*, 46 L. J., Ch., 769.

3. A marriage settlement which recited an agreement to settle certain specified property upon the trusts thereinafter declared, and that it had been agreed that the husband should enter into the covenant thereinafter contained for settling upon the same trusts any future property to which the wife might become entitled after the solemnisation of the marriage, contained a covenant by the husband that if at any time during the joint lives of the husband and wife any future portion, or real or personal estate, should come to or devolve upon the wife, or upon the husband in her right, and whether in possession, reversion, remainder, contingency, or expectancy, the husband would settle, or concur with the wife in settling, such future portion, real or personal estate, upon the trusts declared by the settlement concerning the settled funds. At the time of the marriage the wife was entitled under a will to a contingent reversionary interest in personal estate which, during the coverture, became vested, but did not come into possession until after the coverture had determined by the death of the wife:—Held, that it was not within the covenant. *Re Michell*, 9 L. R., Ch. D., 5; 38 L. T., N. S., 462; 26 W. R. 762. Reversing 47 L. J., Ch., 12; 6 L. R., Ch. D., 618; 36 L. T., N. S., 915.

4. A mother had an exclusive power of appointment over a fund in favour of her children, and which, in default, was divisible equally, the share of the daughters to vest at twenty-one or marriage. She had a son and a daughter, and she appointed 10,000*l.* to her son on his marriage. His marriage settlement recited that he was entitled to the 10,000*l.*, and was also contingently entitled to the other moiety in the event of his sister dying unmarried under twenty-one, and it recited an agreement to settle the 10,000*l.* and "all other his part, share, and interest, as well vested as contingent," in the trust funds. He then assigned his interest in the same terms. The daughter attained twenty-one, and died, and the mother afterwards appointed the residue of the fund to her son:—Held, that such residue did not pass under his settlement. *Childers* v. *Eardley*, 28 Beav. 648.

5. By an ante-nuptial settlement the husband and wife, after settling certain trust funds belonging to the wife, covenanted with the trustees "that if at the time of the solemnisation of the intending marriage the wife shall be, or if at any time thereafter, and during the joint lives of the husband and wife, she, or her husband in her right, shall become beneficially entitled to any real or personal property, estate, or effects, for any estate or interest whatsoever, then and in every such case the husband and wife and all other necessary parties shall, as soon as circumstances will permit," assure such property and effects to the trustees in trust for sale, and to hold the proceeds upon the trusts thereinbefore declared of the wife's trust funds, "or as near thereto in all respects as the deaths of parties and other circumstances will admit":—Held, that a reversionary interest in personalty vested in the wife at the date of the marriage, but liable to be divested by the exercise of a power of appointment, was included in the covenant. *Re Jackson's Will*, 13 L. R., Ch. D., 189; 49 L. J., Ch., 82; 28 W. R. 209; 41 L. T. 499.

6. By a post-nuptual settlement a husband covenanted to settle any property to which the wife, or he in her right, either then was or at any time during the coverture should become entitled:—Held, that a contingent interest in a fund standing in court to the credit of a cause, which fell into possession after the termination of the coverture, was bound by the covenant. *Agar* v. *George*, 2 L. R., Ch. D., 706; 24 W. R. 696; 34 L. T., N. S., 487.

7. A marriage settlement, made in 1828, contained a joint covenant by the husband and wife to concur and join in conveying and settling upon the trusts of the settlement, all property, real or personal, which the wife, or the husband in her right, might thereafter become entitled to or interested in, under the will or intestacy of, or by gift from, the wife's father, or under the will or intestacy of, or by gift from, any other person or persons whomsoever. The wife's father died in 1836, and under his will she became entitled, in reversion, to 100*l.*, which did not, however, fall into possession until after the husband's death:—Held, notwithstanding, that this was subject to the covenant. *Dickinson* v. *Dillwyn*, 39 L.J., Ch., 266; 22 L. T. 647; 8 L. R., Eq., 546; 17 W. R. 1122.

8. By post-nuptial settlement in 1848, in consideration of natural love and affection, and divers other good causes and considerations, W. covenanted that if at any time he should

by gift, descent, succession, or otherwise from or through M. become entitled to any real or personal estate or effects to the amount of 2,000*l.* or upwards, the same should be conveyed, transferred, and assigned to the trustees of the settlement upon the same trusts as were thereinbefore expressed of the proceeds of a certain policy thereby settled. W. was entitled to various interests in remainder subject to the life interest of M., who died in 1857, and to property under the will greatly exceeding 2,000*l.* in value:—Held, that the covenant did not amount to a declaration of trust, or to an assignment so as to render the property derived by the settlor from M. liable to the trusts of the settlement. *Wilkinson* v. *Wilkinson*, 4 Jur., N. S., 47.

3. Remainders and Contingent Interests in Real Estate.

1. The intended wife being seised of a remainder in fee, which would vest in her immediately upon her father's decease, if he died without having had other issue, it was settled upon the intended husband for life upon the death of the wife "if she ever became entitled thereto, but not otherwise":—Held, that the husband's life estate vested in him, although the wife did not survive her father. *Wallace* v. *Wallace*, 1 Con. & L. 491; 2 Dr. & War. 452.

2. A. being, under the marriage settlement of her father and mother, tenant in tail in remainder of certain lands, expectant on the failure of male issue of her only brother, there is made on her marriage a settlement, containing a covenant, by which, after reciting that it was possible that she might, under and by virtue of the limitations contained in the former settlement, eventually become entitled to a certain estate, or a part of certain lands, it is agreed that in case she shall in her lifetime become entitled to any such estate as aforesaid, the same shall be conveyed to the uses, and for the trusts therein mentioned; the brother afterwards suffers a recovery, and dies intestate, without issue; whereupon the fee simple of one part of the lands comprised and referred to in the settlements, descends upon her as one of his co-heiresses:—Held, that the covenant does not affect the fee-simple so coming to her by descent. *Tayleur* v. *Dickenson*, 1 Russ. 521.

3. By a marriage settlement, a husband covenanted, that if any real or personal estate should be given or devised, descend or devolve, be bequeathed or come, to the wife or to the husband in her right, he would execute such deeds as would be necessary for vesting it in trustees, upon certain trusts, including a power of appointment after the end of the coverture. The wife was at that time entitled to a reversion. Some time after the marriage a new trustee of the settlement was appointed, and on the same day the wife sold and appointed the reversion to the old trustee:—Held, that the reversion was included in the settlement, and that the sale must be set aside. *Spring* v. *Pride*, 10 Jur., N. S., 646; 12 W. R. 892; 10 L. T., N. S., 473.

4. Where a lady, at the date of her marriage, was entitled to a contingent interest in remainder in real estate, and was also entitled in possession to stock, and in the settlement executed on her marriage no mention was made of her interest either in the real estate or in the stock, but the settlement contained a covenant to settle upon the trusts declared by the settlement any real or personal property to which the husband and wife, or either of them in right of the wife, should "by gift, descent, succession, or otherwise howsoever become entitled" during the coverture; and the wife's contingent interest in remainder in the real estate fell into possession during the coverture:—Held, that the words "become entitled," imported a change of condition in the property, and that the parties contemplated the wife's becoming entitled during the coverture, and did not intend to include property to which she was entitled at the time of coverture; and therefore that the wife's interest in the real estate having changed during the coverture, it fell within the covenant; but that the wife having been absolutely entitled to the stock at the date of the marriage, and there having been no subsequent change in her interest, the stock did not come within the terms of the covenant. *Archer* v. *Kelley*, 1 Dr. & Sm. 300; 6 Jur., N. S., 814; 29 L. J., Ch., 911; 8 W. R. 684,

5. A covenant in a marriage settlement by husband and wife to settle all the estate, property, and effects whatever which they or either of them in the right of the wife were or was at the date of the settlement, or should during the coverture become, seised or possessed of or entitled to at law or in equity, for all the estate and interest of them or either of them upon the trusts of the settlement, only includes indefeasibly vested interests, and therefore does not include the wife's interest in real estate which, at the date of the settlement, stood limited to A., the wife's father, for life, with remainder to his sons successively in tail male, with remainder to B. for life, with remainder to his sons successively in tail male, with remainder to the daughters of A. as tenants in common in tail, A., B., and two sons of A. having been alive at the date of the settlement, the two sons having died bachelors during the coverture, and A. and B. having survived the husband, and died without issue in the wife's lifetime. *Dering* v. *Kynaston*, 6 L. R., Eq., 210; 18 L. T., N. S., 346; 16 W. R. 819.

6. By a marriage settlement, the intended wife and husband severally covenanted with the trustees that, in case the marriage should be solemnised, all the estate, property, and effects, both real and personal, which the husband and wife, or either of them in right of the wife, "shall at any time or times during the intended coverture become seised or possessed of, or entitled to," should be settled. At the date of the settlement and of the marriage the wife was entitled to a vested remainder in land, expectant on the death of a tenant for life, who outlived the coverture:—Held, that the land was not subject to the trusts of the settlement. *Re Pedder*, 10 L. R., Eq., 585; 40 L. J., Ch., 77.

7. A covenant in a settlement to settle all the property of the wife of which she was possessed at the date thereof includes property to which she was entitled jointly with other persons in remainder after an estate in tail, though the covenant was in terms only the

which the wife, or the husband in her right, "shall at any time or times during the intended coverture become beneficially entitled in possession or reversion, or in any manner whatever, derivable directly or indirectly from" J., should be settled as therein mentioned. At the date of the settlement and of the marriage the wife was entitled to a fund bequeathed by J., subject to the life interest of a person who outlived the wife:—Held, that the fund was not subject to the covenant. *Re Jones*, 2 L. R., Ch. D., 362; 45 L. J., Ch., 428; 24 W. R. 697; 35 L. T., N. S., 25.

1. Covenant in marriage settlement to settle property to which the wife then was or she or her husband in her right should during the coverture become entitled. At the date of the settlement a trust fund stood so limited that on the death of the wife without issue one moiety thereof would belong to her, subject to the life interest therein of her husband, as her share of an intestate's estate:—Held, that the wife's contingent reversionary interest in this fund was bound by the covenant. *Cornmell* v. *Keith*, 3 L. R., Ch. D., 767; 45 L. J., Ch., 689; 24 W. R. 633; 35 L. T., N. S., 29.

2. A marriage settlement to which the wife was a party recited that it had been agreed that all moneys should be settled to which she then was or thereafter during the coverture, or to which her husband in her right might become entitled, and that the husband should enter into the covenant to that effect thereinafter contained. The covenant was by the husband that he would settle all such moneys and execute all deeds for carrying out such settlement:—Held, that the wife was not bound by the covenant, and was entitled after her husband's death to receive a sum which, although vested in her at the marriage, had not been reduced into possession during the coverture. *Re Webb*, 46 L. J., Ch., 769.

3. A marriage settlement which recited an agreement to settle certain specified property upon the trusts thereinafter declared, and that it had been agreed that the husband should enter into the covenant thereinafter contained for settling upon the same trusts any future property to which the wife might become entitled after the solemnisation of the marriage, contained a covenant by the husband that if at any time during the joint lives of the husband and wife any future portion, or real or personal estate, should come to or devolve upon the wife, or upon the husband in her right, and whether in possession, reversion, remainder, contingency, or expectancy, the husband would settle, or concur with the wife in settling, such future portion, real or personal estate, upon the trusts declared by the settlement concerning the settled funds. At the time of the marriage the wife was entitled under a will to a contingent reversionary interest in personal estate which, during the coverture, became vested, but did not come into possession until after the coverture had determined by the death of the wife:—Held, that it was not within the covenant. *Re Michell*, 9 L. R., Ch. D., 5; 38 L. T., N. S., 462; 26 W. R. 762. Reversing 47 L. J., Ch., 12; 6 L. R., Ch. D., 618; 36 L. T., N. S., 915.

4. A mother had an exclusive power of appointment over a fund in favour of her children, and which, in default, was divisible equally, the share of the daughters to vest at twenty-one or marriage. She had a son and a daughter, and she appointed 10,000*l.* to her son on his marriage. His marriage settlement recited that he was entitled to the 10,000*l.*, and was also contingently entitled to the other moiety in the event of his sister dying unmarried under twenty-one, and it recited an agreement to settle the 10,000*l.* and "all other his part, share, and interest, as well vested as contingent," in the trust funds. He then assigned his interest in the same terms. The daughter attained twenty-one, and died, and the mother afterwards appointed the residue of the fund to her son:—Held, that such residue did not pass under his settlement. *Childers* v. *Eardley*, 28 Beav. 648.

5. By an ante-nuptial settlement the husband and wife, after settling certain trust funds belonging to the wife, covenanted with the trustees "that if at the time of the solemnisation of the intending marriage the wife shall be, or if at any time thereafter, and during the joint lives of the husband and wife, she, or her husband in her right, shall become beneficially entitled to any real or personal property, estate, or effects, for any estate or interest whatsoever, then and in every such case the husband and wife and all other necessary parties shall, as soon as circumstances will permit," assure such property and effects to the trustees in trust for sale, and to hold the proceeds upon the trusts thereinbefore declared of the wife's trust funds, "or as near thereto in all respects as the deaths of parties and other circumstances will admit":—Held, that a reversionary interest in personalty vested in the wife at the date of the marriage, but liable to be divested by the exercise of a power of appointment, was included in the covenant. *Re Jackson's Will*, 13 L. R., Ch. D., 189; 49 L. J., Ch., 82; 28 W. R. 209; 41 L. T. 499.

6. By a post-nuptual settlement a husband covenanted to settle any property to which the wife, or he in her right, either then was or at any time during the coverture should become entitled:—Held, that a contingent interest in a fund standing in court to the credit of a cause, which fell into possession after the termination of the coverture, was bound by the covenant. *Agar* v. *George*, 2 L. R., Ch. D., 706; 24 W. R. 696; 34 L. T., N. S., 487.

7. A marriage settlement, made in 1828, contained a joint covenant by the husband and wife to concur and join in conveying and settling upon the trusts of the settlement, all property, real or personal, which the wife, or the husband in her right, might thereafter become entitled to or interested in, under the will or intestacy of, or by gift from, the wife's father, or under the will or intestacy of, or by gift from, any other person or persons whomsoever. The wife's father died in 1836, and under his will she became entitled, in reversion, to 100*l.*, which did not, however, fall into possession until after the husband's death:—Held, notwithstanding, that this was subject to the covenant. *Dickinson* v. *Dillwyn*, 39 L. J., Ch., 266; 22 L. T. 647; 8 L. R., Eq., 546; 17 W. R. 1122.

8. By post-nuptial settlement in 1848, in consideration of natural love and affection, and divers other good causes and considerations, W. covenanted that if at any time he should

by gift, descent, succession, or otherwise from or through M. become entitled to any real or personal estate or effects to the amount of 2,000*l.* or upwards, the same should be conveyed, transferred, and assigned to the trustees of the settlement upon the same trusts as were thereinbefore expressed of the proceeds of a certain policy thereby settled. W. was entitled to various interests in remainder subject to the life interest of M., who died in 1857, and to property under the will greatly exceeding 2,000*l.* in value:—Held, that the covenant did not amount to a declaration of trust, or to an assignment so as to render the property derived by the settlor from M. liable to the trusts of the settlement. *Wilkinson* v. *Wilkinson*, 4 Jur., N. S., 47.

3. Remainders and Contingent Interests in Real Estate.

1. The intended wife being seised of a remainder in fee, which would vest in her immediately upon her father's decease, if he died without having had other issue, it was settled upon the intended husband for life upon the death of the wife "if she ever became entitled thereto, but not otherwise":—Held, that the husband's life estate vested in him, although the wife did not survive her father. *Wallace* v. *Wallace*, 1 Con. & L. 491; 2 Dr. & War. 452.

2. A. being, under the marriage settlement of her father and mother, tenant in tail in remainder of certain lands, expectant on the failure of male issue of her only brother, there is made on her marriage a settlement, containing a covenant, by which, after reciting that it was possible that she might, under and by virtue of the limitations contained in the former settlement, eventually become entitled to a certain estate, or a part of certain lands, it is agreed that in case she shall in her lifetime become entitled to any such estate as aforesaid, the same shall be conveyed to the uses, and for the trusts therein mentioned; the brother afterwards suffers a recovery, and dies intestate, without issue; whereupon the fee simple of one part of the lands comprised and referred to in the settlements, descends upon her as one of his co-heiresses:—Held, that the covenant does not affect the fee-simple so coming to her by descent. *Tayleur* v. *Dickenson*, 1 Russ. 521.

3. By a marriage settlement, a husband covenanted, that if any real or personal estate should be given or devised, descend or devolve, be bequeathed or come, to the wife or to the husband in her right, he would execute such deeds as would be necessary for vesting it in trustees, upon certain trusts, including a power of appointment after the end of the coverture. The wife was at that time entitled to a reversion. Some time after the marriage a new trustee of the settlement was appointed, and on the same day the wife sold and appointed the reversion to the old trustee:—Held, that the reversion was included in the settlement, and that the sale must be set aside. *Spring* v. *Pride*, 10 Jur., N. S., 646; 12 W. R. 892; 10 L. T., N. S., 473.

4. Where a lady, at the date of her marriage, was entitled to a contingent interest in remainder in real estate, and was also entitled in possession to stock, and in the settlement executed on her marriage no mention was made of her interest either in the real estate or in the stock, but the settlement contained a covenant to settle upon the trusts declared by the settlement any real or personal property to which the husband and wife, or either of them in right of the wife, should "by gift, descent, succession, or otherwise howsoever become entitled" during the coverture; and the wife's contingent interest in remainder in the real estate fell into possession during the coverture:—Held, that the words "become entitled," imported a change of condition in the property, and that the parties contemplated the wife's becoming entitled during the coverture, and did not intend to include property to which she was entitled at the time of coverture; and therefore that the wife's interest in the real estate having changed during the coverture, it fell within the covenant; but that the wife having been absolutely entitled to the stock at the date of the marriage, and there having been no subsequent change in her interest, the stock did not come within the terms of the covenant. *Archer* v. *Kelley*, 1 Dr. & Sm. 300; 6 Jur., N. S., 814; 29 L. J., Ch., 911; 8 W. R. 684,

5. A covenant in a marriage settlement by husband and wife to settle all the estate, property, and effects whatever which they or either of them in the right of the wife were or was at the date of the settlement, or should during the coverture become, seised or possessed of or entitled to at law or in equity, for all the estate and interest of them or either of them upon the trusts of the settlement, only includes indefeasibly vested interests, and therefore does not include the wife's interest in real estate which, at the date of the settlement, stood limited to A., the wife's father, for life, with remainder to his sons successively in tail male, with remainder to B. for life, with remainder to his sons successively in tail male, with remainder to the daughters of A. as tenants in common in tail, A., B., and two sons of A. having been alive at the date of the settlement, the two sons having died bachelors during the coverture, and A. and B. having survived the husband, and died without issue in the wife's lifetime. *Dering* v. *Kynaston*, 6 L. R., Eq., 210; 18 L. T., N. S., 346; 16 W. R. 819.

6. By a marriage settlement, the intended wife and husband severally covenanted with the trustees that, in case the marriage should be solemnised, all the estate, property, and effects, both real and personal, which the husband and wife, or either of them in right of the wife, "shall at any time or times during the intended coverture become seised or possessed of, or entitled to," should be settled. At the date of the settlement and of the marriage the wife was entitled to a vested remainder in land, expectant on the death of a tenant for life, who outlived the coverture:—Held, that the land was not subject to the trusts of the settlement. *Re Pedder*, 10 L. R., Eq., 585; 40 L. J., Ch., 77.

7. A covenant in a settlement to settle all the property of the wife of which she was possessed at the date thereof includes property to which she was entitled jointly with other persons in remainder after an estate in tail, though the covenant was in terms only the

covenant of the husband and not of the wife, and though the recitals in the settlement specified property to which the wife was entitled in expectancy, but did not allude to this particular interest. *Caldwell* v. *Fellowes*, 39 L. J., Ch., 618; 9 L. R., Eq., 410; 22 L. T. 205; 18 W. R. 485.

1. By an ante-nuptial agreement, signed by the intended husband and wife and the parents of the wife, the parents agreed to appoint a share of real estate (which was subject to their life interest and to the appointment of them and the survivor of them) to the wife, and the husband agreed that he would settle his wife's reversionary share of the real estate upon the usual trusts for the husband and wife, and their children. The wife's father having survived her mother, released the power and granted the estate after his death, giving his daughter a share. The wife predeceased the husband and left two children. The property being still reversionary, an action was brought by the husband and one of the children against the other child, the wife's heir-at-law, for specific performance of the agreement:—Held, that the agreement bound the wife as having assented to her father's stipulation, and also her heir-at-law, and specific performance decreed accordingly. *Lee* v. *Lee*, 4 L. R., Ch. D., 175; 46 L. J., Ch., 81; 25 W. R. 225; 36 L. T., N. S., 138.

4. Property acquired after Termination of Coverture.

2. Covenant in marriage settlement by husband and wife to settle all property of the value of 200*l.* which the husband and wife, or either of them in her right, should during the coverture become entitled to other than separate property or life interests of the wife:—Held, that property devised and bequeathed to the husband and wife as joint tenants was not within the covenant. *Edye* v. *Addison*, 1 Hem. & M. 781; 33 L. J., Ch., 132; 3 N. R. 66. S. C. *nom.* *Edge* v. *Addison*, 9 Jur., N. S., 320; 12 W. R. 97.

Semble, that property which does not vest in possession during the coverture is not within a covenant so framed. *Ib.*

3. The words "during coverture" apply to the time which elapses after coverture commences and before it terminates. *Archer* v. *Kelly*, 6 Jur., N. S., 814; 29 L. J., Ch., 911; 8 W. R. 684; 1 Dr. & Sm. 300.

4. Covenant to settle after acquired property of the wife:—Held, to extend to property acquired after the death of the husband. *Stevens* v. *Van Voorst*, 17 Beav. 305.

5. A testator, by will, dated since 7 Will. 4 & 1 Vict., c. 26, gave a legacy to his daughter, a married woman, who predeceased him, leaving issue, and also her husband, her surviving. The settlement made on her marriage contained a covenant, that all property coming to her or to her husband in her right during the coverture should be settled:—Held, that notwithstanding the fictitious survivorship created by s. 33 for the purpose of preventing a lapse, the legacy was not acquired during the coverture, within the meaning of the covenant, and was therefore not bound by the settlement. *Pearce* v. *Graham*, 9 Jur., N. S., 568; 32 L. J., Ch., 359; 11 W. R. 415; 8 L. T., N. S., 378; 1 N. R. 507.

6. By a post-nuptial settlement, a husband and wife covenanted with trustees to settle all the property which the wife might become entitled to during the coverture on themselves for life, with remainder to their children. During the coverture, part of such property was allowed by the husband to be paid over to the trustees; the other part was not reduced into possession at the husband's death:—Held, first, that originally the settlement was binding on neither party. *Anderson* v. *Abbott*, 23 Beav. 457; 3 Jur., N. S., 833.

Held, secondly, that the part paid over had been effectually made subject to the trusts by the husband. *Ib.*

Held, thirdly, that the wife refusing, after the death of her husband, to perform her covenant, was not entitled to a life interest in the portion settled, which was applicable to recoup the children. *Ib.*

7. In a marriage settlement a covenant to settle the wife's after acquired property will be construed as applying only to property acquired during the coverture, although the words "during the coverture" are not inserted. *Carter* v. *Carter*, 8 L. R., Eq., 551; 21 L. T., N. S., 194; 39 L. J., Ch., 268.

A joint and several covenant by an intended husband and wife, that if the wife, her executors or administrators, or the husband, his executors or administrators, in her right, should "at any one time thereafter" become absolutely entitled to any real or personal estate, the husband and wife respectively, or their respective executors or administrators, would bring it into settlement, does not apply to real and personal estate coming to the wife under the husband's will. *Ib.*

8. A marriage settlement, made in 1828, contained a joint covenant by the husband and wife to concur and join in conveying and settling upon the trusts of the settlement, all property, real or personal, which the wife, or the husband in her right, might thereafter become entitled to or interested in, under the will or intestacy of, or by gift from, the wife's father, or under the will or intestacy of, or by gift from, any other person or persons whomsoever. The husband died in 1843, having by his will, made in 1841, left all his property to his wife absolutely:—Held, that the covenant did not apply to the property acquired by the wife under the husband's will. *Dickinson* v. *Dillwyn*, 39 L. J., Ch., 266; 22 L. T., N. S., 647; 8 L. R., Eq., 546; 17 W. R. 1122.

The wife's father died in 1836, and under his will she became entitled, in reversion, to 100*l.*, which did not, however, fall into possession until after the husband's death:—Held, notwithstanding, that this was subject to the covenant. *Ib.*

9. A husband and wife, by their marriage settlement, covenanted to assign to the trustees of the settlement upon the trusts thereof, any property which the wife, or the husband in her right, should at any time become possessed of or entitled to during the coverture. A decree *nisi* for the dissolution of the marriage was pronounced; but pending the decree being made absolute, the husband and wife appointed a new trustee of the settlement, and property fell into possession of the wife. Subsequently the wife married again:—Held, that the property was not bound by the covenant.

the covenant. *Hughes* v. *Young*, 9 Jur., N. S., 376; 32 L. J., Ch., 137; 1 N. R. 166.

Held, secondly, that the sum given by the settlement in trust for the husband absolutely was not "settled" within the meaning of that word as used in the covenant. *Ib.*

1. A marriage settlement recited that it was agreed that if any property should descend or devolve to the wife, it should be settled upon the trusts of the settlement. The indenture contained a covenant to the same effect as the recital, but entered into by the husband only. The husband died, and subsequently reversionary personal property of the wife fell into possession:—Held, that it was not subject to the trusts of the settlement. *Young* v. *Smith*, 11 Jur., N. S., 963; 35 Beav. 87.

2. Covenant by husband and wife to settle "all real or personal estate, property, or effects to which the wife or the husband in her right shall by gift, descent, succession, or otherwise become entitled":—Held, to include reversionary interests in consols, which fell in by the death of a tenant for life, after the decease of both husband and wife. *Re Hughes*, 4 Giff. 432.

3. Where a woman in an ante-nuptial settlement joins in a covenant with her future husband to settle after acquired property to which she or he in her right shall become entitled in possession, reversion, remainder, or expectancy, that covenant does not apply to a general power, of appointment and a life interest given to her under a will, but does apply to a reversionary interest to which she is entitled under the same will so far as her husband, in the event of his surviving her, would be entitled in her right. A power of appointment, a life interest, and a reversion given to a married woman by one will are as distinct as if given by three separate instruments. *Townsend (Marchioness)* v. *Harrowby (Earl)*, 4 W. R. 413; 4 Jur., N. S., 353.

4. By a marriage settlement made between R. the intended husband, K. the intended wife, and C. and D. the trustees, certain property therein mentioned was settled on the usual trusts. The settlement then contained the following clause: "And it is hereby declared and agreed by and between the parties hereto, and R. doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said C. and D., their executors and administrators, that if the said K., or the said R. in right of the said K., shall at or upon the said marriage, or at any time thereafter, become interested in or entitled to any sum or sums of money, or real or personal estate, etc., which already hath or have been, or shall or may at any time or times hereafter be, given or bequeathed, or which shall descend to K., that then the same shall be and remain, etc., upon the same trusts, etc., as are hereinbefore mentioned, etc., of and concerning the said trust moneys, stocks, and premises hereinbefore assigned; and for the better effecting this purpose, R., his heirs, etc., will, upon request, pay, etc., and join with K. in assigning, etc., all such sums, etc., to C. and D." R. died, and after his death certain sums of money, to which his wife during his life had a reversionary interest, fell into possession:—Held, that this covenant applied to the property only to which the marital right attached, and that the property to which K. became entitled after the death of her husband was not bound by it. *Reid* v. *Kenrick*, 1 Jur., N. S., 897; 24 L. J., Ch., 503; 3 Eq. Rep. 1031; 3 W. R. 530.

5. H. was entitled to a reversionary interest in personal property. In a settlement made on her marriage, it was recited, that it was agreed that any property to which the husband and H., or either of them in her right, "should by any means become absolutely entitled," should be settled, and that the husband and H. should enter into the covenant thereinafter contained. The husband and H. jointly and severally covenanted with the trustees, that if at any time during the marriage the husband and H., or either of them in her right, should, by gift, "descent, succession, or otherwise howsoever, become entitled to any real or personal property" to the amount of 100*l.* and upwards, the same should be assigned to the trustees, "so far as the estates or interests in such future property would extend." H. died in 1859, and her husband in August 1862; and in December 1862 several sums exceeding 100*l.* became payable under the deeds of 1812 and 1822:—Held, that they were included within the terms of the covenant. *Re Hill*, 9 Jur., N. S., 942; 11 W. R. 930; 8 L. T., N. S., 825.

6. A feme sole, being entitled to property under a will, if she attained twenty-one, married, and by a settlement made immediately previously to the marriage, the intended husband covenanted with the trustees that all the estate, property, and effects, real and personal, which he and his intended wife, or either in her right, should at any time during the coverture become seised or possessed of or entitled to, at law or in equity, of the value of 200*l.* or upwards under any gift, devise, or bequest, or by descent, representation, or any other means whatsoever, should be settled:—Held, that the contingent interest to which the wife was entitled was within the covenant. *Re Worsley*, 16 L. T., N. S., 826.

7. A marriage settlement contained a covenant to settle any property which should come to or devolve upon the intended wife, or her husband in her right, "at any time or times after the solemnisation of the said intended marriage and during the continuance thereof." At the date of the settlement, the intended wife was entitled to a reversionary interest in personalty, subject to the life interest of her mother. The wife died before the tenant for life, leaving the husband surviving:—Held, that the wife's reversionary interest was bound by the covenant. *Rose* v. *Cornish*, 16 L. T., N. S., 786.

8. A covenant, by husband and wife, to settle property to which the wife or the husband in her right "shall become entitled" during the coverture, held to include property vested in reversion before the coverture, and falling into possession during the coverture, but not to include property to which they are entitled only in reversion during the coverture, and which fell into possession after the coverture. *Re Clinton, Exp. Holloway, Exp. Weare*, 41 L. J., Ch., 191; 20 W. R. 326; 13 L. R., Eq., 295; 26 L. T., N. S., 159.

9. By a marriage settlement the intended husband and wife severally covenanted with the trustees that all the real and personal property (if any) not thereinbefore settled, to

1. Husband and wife covenanted to vest in the trustees of their settlement, upon the trusts thereof, "all property which should come to her absolutely, and not bound by any trust or provision otherwise than for her absolute use":—Held, that property bequeathed to her "for her separate use absolutely" was bound by the covenant; and, secondly, that leaseholds and chattels bound by the covenant were to be enjoyed in specie and unconverted. *Milford* v. *Peile*, 17 Beav. 602; 2 W. R. 181.

2. A marriage settlement recited an agreement that the future property of the wife should be settled, but the covenant to settle was on the part of the husband alone, to execute all necessary deeds, as that such property should (so far as he was concerned) be vested in the trustees, on the trusts of the settlement:—Held, that the property afterwards given to the separate use of the wife was not liable to be settled. *Hammond* v. *Hammond*, 19 Beav. 29; 3 Eq. Rep. 119.

3. Assignment of property to be acquired by wife will not make property over which she acquires a power only, subject to the settlement, unless she exercise the power in favour of herself absolutely. *Ewart* v. *Ewart*, 1 W. R. 466; 1 Eq. Rep. 536.

In a marriage settlement an intended wife assigned all the property to which she then was, or to which she or her intended husband in her right should, during the coverture, become entitled, to trustees upon the trusts thereby declared, for herself, the husband, and the children of the marriage. After the marriage her father died, having by his will given her a general power of appointment over his residuary estate. The wife, during the coverture, in exercise of the power contained in the will, appointed to herself, for her separate use, a gross sum of 1,000*l.*, and an annuity of 100*l.* for her life, and amongst her family the residue, upon trusts differing from those of the marriage settlement, reserving a power of revocation:—Held, that the terms of the assignment by the wife in the marriage settlement did not amount to a covenant to exercise a general power of appointment in favour of the objects and in conformity with the trusts of such settlement, and that property over which the wife afterwards acquired a general power of appointment was not by that circumstance brought within the operation of the settlement. S. C. 11 Hare 276.

Held, also, that upon the appointment by the wife of the 1,000*l.* for her own absolute use, that sum became bound by the trusts of the settlement, and the power of revocation was ineffectual. *Ib.*

Held, lastly, that the interest on the annuity of 100*l.* for her own life, for her separate use, which the wife took under her appointment (an interest which was in conformity with that which she would have taken under the trusts of the settlement if the annuity had been otherwise acquired), was not disturbed by the effect of the settlement, inasmuch as it was not the intention of the contract expressed therein that any after-acquired property should be converted or taken otherwise than in the state in which it should be so acquired. *Ib.*

4. By an ante-nuptial settlement real estate was vested in trustees for 500 years, on trusts after mentioned, and as to all the real estate, to pay a jointure to the wife, and subject thereto to such one or more of the children as the father should by deed or will appoint: and in default to the trustees for 1,000 years, to raise 5,000*l.* for portions for younger children, with remainder, subject to both terms, to the sons and daughters in tail with cross-remainders, with remainder to the right heirs of the settlor. Then followed the trusts of the 500 years' term; viz., to raise 4,000*l.*, and pay the interest to the wife for life with remainder to the children: sons at twenty-one, daughters at twenty-one, or on marriage equally. The father covenanted with the trustees, that in case his wife at any time during the coverture became entitled to any personal estate, he would do all necessary acts to vest the same in the trustees upon the trusts as were expressed of the 4,000*l.* to be raised by virtue of the 500 years' term. The marriage took place, and there was issue, and the wife became entitled to two sums of 3,000*l.*; one under a will to her separate use, and which she settled on her husband for life, and afterwards upon the trusts declared by their settlement of the 4,000*l.* to be raised under the 500 years' term; the other, not to her separate use, from other sources. The wife died, and on the question whether the 3,000*l.* so last settled was within the terms of the covenant:—Held, that it was not; but that the other 3,000*l.* was, and belonged to the children. *Gataker* v. *Reynardson*, 13 W. R. 417; 12 L. T., N. S., 134.

5. A covenant by a husband in marriage articles, to join his wife in assuring to the trustees all property, real or personal, to which the wife should become entitled or interested in, during the marriage:—Held, not to bring within the settlement a legacy subsequently given to the wife to be at her own disposal and control, and not to be subject to the *jus mariti*, or liable to be affected by his debts or deeds. *Grey* v. *Stuart*, 2 Giff. 398; 7 Jur., N. S., 989; 30 L. J., Ch., 884; 5 L. T., N. S., 200.

6. A married woman having, by her marriage settlement, executed when a minor, covenanted to confirm the settlement, and also to settle future property; and having acquired, by bequest, personal property to her separate use:—Held, bound to elect either to bring the bequest into settlement, or to make compensation out of reversionary personalty, and other property to which she would be entitled under the settlement, for her separate use, with a restraint on anticipation. *Willoughby* v. *Middleton*, 2 John. & H. 344; 8 Jur., N. S., 1055; 31 L. J., Ch., 683; 10 W. R. 460; 6 L. T., N. S., 814.

The covenant being to settle "any real or personal estate or effects," on trusts for sale and investment:—Held, that no exception could be implied as to specific jewels. *Ib.*

The mere omission of a recital of an intention that the wife should covenant:—Held, not to narrow the construction. *Ib.*

7. A covenant, by a husband alone, to settle the after acquired property of the wife does not bind her separate property, but such a covenant of the husband and wife does. Such a covenant to settle does not bind property over which a wife is deprived of the power of

by gift, descent, succession, or otherwise from or through M. become entitled to any real or personal estate or effects to the amount of 2,000*l.* or upwards, the same should be conveyed, transferred, and assigned to the trustees of the settlement upon the same trusts as were thereinbefore expressed of the proceeds of a certain policy thereby settled. W. was entitled to various interests in remainder subject to the life interest of M., who died in 1857, and to property under the will greatly exceeding 2,000*l.* in value:—Held, that the covenant did not amount to a declaration of trust, or to an assignment so as to render the property derived by the settlor from M. liable to the trusts of the settlement. *Wilkinson* v. *Wilkinson*, 4 Jur., N. S., 47.

3. Remainders and Contingent Interests in Real Estate.

1. The intended wife being seised of a remainder in fee, which would vest in her immediately upon her father's decease, if he died without having had other issue, it was settled upon the intended husband for life upon the death of the wife "if she ever became entitled thereto, but not otherwise":—Held, that the husband's life estate vested in him, although the wife did not survive her father. *Wallace* v. *Wallace*, 1 Con. & L. 491; 2 Dr. & War. 452.

2. A. being, under the marriage settlement of her father and mother, tenant in tail in remainder of certain lands, expectant on the failure of male issue of her only brother, there is made on her marriage a settlement, containing a covenant, by which, after reciting that it was possible that she might, under and by virtue of the limitations contained in the former settlement, eventually become entitled to a certain estate, or a part of certain lands, it is agreed that in case she shall in her lifetime become entitled to any such estate as aforesaid, the same shall be conveyed to the uses, and for the trusts therein mentioned; the brother afterwards suffers a recovery, and dies intestate, without issue; whereupon the fee simple of one part of the lands comprised and referred to in the settlements, descends upon her as one of his co-heiresses:—Held, that the covenant does not affect the fee-simple so coming to her by descent. *Taylour* v. *Dickenson*, 1 Russ. 521.

3. By a marriage settlement, a husband covenanted, that if any real or personal estate should be given or devised, descend or devolve, be bequeathed or come, to the wife or to the husband in her right, he would execute such deeds as would be necessary for vesting it in trustees, upon certain trusts, including a power of appointment after the end of the coverture. The wife was at that time entitled to a reversion. Some time after the marriage a new trustee of the settlement was appointed, and on the same day the wife sold and appointed the reversion to the old trustee:—Held, that the reversion was included in the settlement, and that the sale must be set aside. *Spring* v. *Pride*, 10 Jur., N. S., 646; 12 W. R. 892; 10 L. T., N. S., 473.

4. Where a lady, at the date of her marriage, was entitled to a contingent interest in remainder in real estate, and was also entitled in possession to stock, and in the settlement executed on her marriage no mention was made of her interest either in the real estate or in the stock, but the settlement contained a covenant to settle upon the trusts declared by the settlement any real or personal property to which the husband and wife, or either of them in right of the wife, should "by gift, descent, succession, or otherwise howsoever become entitled" during the coverture; and the wife's contingent interest in remainder in the real estate fell into possession during the coverture:—Held, that the words "become entitled," imported a change of condition in the property, and that the parties contemplated the wife's becoming entitled during the coverture, and did not intend to include property to which she was entitled at the time of coverture; and therefore that the wife's interest in the real estate having changed during the coverture, it fell within the covenant; but that the wife having been absolutely entitled to the stock at the date of the marriage, and there having been no subsequent change in her interest, the stock did not come within the terms of the covenant. *Archer* v. *Kelley*, 1 Dr. & Sm. 300; 6 Jur., N. S., 814; 29 L. J., Ch., 911; 8 W. R. 684,

5. A covenant in a marriage settlement by husband and wife to settle all the estate, property, and effects whatever which they or either of them in the right of the wife were or was at the date of the settlement, or should during the coverture become, seised or possessed of or entitled to at law or in equity, for all the estate and interest of them or either of them upon the trusts of the settlement, only includes indefeasibly vested interests, and therefore does not include the wife's interest in real estate which, at the date of the settlement, stood limited to A., the wife's father, for life, with remainder to his sons successively in tail male, with remainder to B. for life, with remainder to his sons successively in tail male, with remainder to the daughters of A. as tenants in common in tail, A., B., and two sons of A. having been alive at the date of the settlement, the two sons having died bachelors during the coverture, and A. and B. having survived the husband, and died without issue in the wife's lifetime. *Dering* v. *Kynaston*, 6 L. R., Eq., 210; 18 L. T., N. S., 346; 16 W. R. 819.

6. By a marriage settlement, the intended wife and husband severally covenanted with the trustees that, in case the marriage should be solemnised, all the estate, property, and effects, both real and personal, which the husband and wife, or either of them in right of the wife, "shall at any time or times during the intended coverture become seised or possessed of, or entitled to," should be settled. At the date of the settlement and of the marriage the wife was entitled to a vested remainder in land, expectant on the death of a tenant for life, who outlived the coverture:—Held, that the land was not subject to the trusts of the settlement. *Re Peddor*, 10 L. R., Eq., 585; 40 L. J., Ch., 77.

7. A covenant in a settlement to settle all the property of the wife of which she was possessed at the date thereof includes property to which she was entitled jointly with other persons in remainder after an estate in tail, though the covenant was in terms only the

1. Husband and wife covenanted to vest in the trustees of their settlement, upon the trusts thereof, "all property which should come to her absolutely, and not bound by any trust or provision otherwise than for her absolute use":—Held, that property bequeathed to her "for her separate use absolutely" was bound by the covenant; and, secondly, that leaseholds and chattels bound by the covenant were to be enjoyed in specie and unconverted. *Milford* v. *Peile*, 17 Beav. 602; 2 W. R. 181.

2. A marriage settlement recited an agreement that the future property of the wife should be settled, but the covenant to settle was on the part of the husband alone, to execute all necessary deeds, as that such property should (so far as he was concerned) be vested in the trustees, on the trusts of the settlement:—Held, that the property afterwards given to the separate use of the wife was not liable to be settled. *Hammond* v. *Hammond*, 19 Beav. 29; 3 Eq. Rep. 119.

3. Assignment of property to be acquired by wife will not make property over which she acquires a power only, subject to the settlement, unless she exercise the power in favour of herself absolutely. *Ewart* v. *Ewart*, 1 W. R. 466; 1 Eq. Rep. 536.

In a marriage settlement an intended wife assigned all the property to which she then was, or to which she or her intended husband in her right should, during the coverture, become entitled, to trustees upon the trusts thereby declared, for herself, the husband, and the children of the marriage. After the marriage her father died, having by his will given her a general power of appointment over his residuary estate. The wife, during the coverture, in exercise of the power contained in the will, appointed to herself, for her separate use, a gross sum of 1,000*l.*, and an annuity of 100*l.* for her life, and amongst her family the residue, upon trusts differing from those of the marriage settlement, reserving a power of revocation:—Held, that the terms of the assignment by the wife in the marriage settlement did not amount to a covenant to exercise a general power of appointment in favour of the objects and in conformity with the trusts of such settlement, and that property over which the wife afterwards acquired a general power of appointment was not by that circumstance brought within the operation of the settlement. S. C. 11 Hare 276.

Held, also, that upon the appointment by the wife of the 1,000*l.* for her own absolute use, that sum became bound by the trusts of the settlement, and the power of revocation was ineffectual. *Ib.*

Held, lastly, that the interest on the annuity of 100*l.* for her own life, for her separate use, which the wife took under her appointment (an interest which was in conformity with that which she would have taken under the trusts of the settlement if the annuity had been otherwise acquired), was not disturbed by the effect of the settlement, inasmuch as it was not the intention of the contract expressed therein that any after-acquired property should be converted or taken otherwise than in the state in which it should be so acquired. *Ib.*

4. By an ante-nuptial settlement real estate was vested in trustees for 500 years, on trusts after mentioned, and as to all the real estate, to pay a jointure to the wife, and subject thereto to such one or more of the children as the father should by deed or will appoint: and in default to the trustees for 1,000 years, to raise 5,000*l.* for portions for younger children, with remainder, subject to both terms, to the sons and daughters in tail with cross-remainders, with remainder to the right heirs of the settlor. Then followed the trusts of the 500 years' term; viz., to raise 4,000*l.*, and pay the interest to the wife for life with remainder to the children: sons at twenty-one, daughters at twenty-one, or on marriage equally. The father covenanted with the trustees, that in case his wife at any time during the coverture became entitled to any personal estate, he would do all necessary acts to vest the same in the trustees upon the trusts as were expressed of the 4,000*l.* to be raised by virtue of the 500 years' term. The marriage took place, and there was issue, and the wife became entitled to two sums of 3,000*l.*; one under a will to her separate use, and which she settled on her husband for life, and afterwards upon the trusts declared by their settlement of the 4,000*l.* to be raised under the 500 years' term; the other, not to her separate use, from other sources. The wife died, and on the question whether the 3,000*l.* so last settled was within the terms of the covenant:—Held, that it was not; but that the other 3,000*l.* was, and belonged to the children. *Gataker* v. *Reynardson*, 13 W. R. 417; 12 L. T., N. S., 134.

5. A covenant by a husband in marriage articles, to join his wife in assuring to the trustees all property, real or personal, to which the wife should become entitled or interested in, during the marriage:—Held, not to bring within the settlement a legacy subsequently given to the wife to be at her own disposal and control, and not to be subject to the *jus mariti*, or liable to be affected by his debts or deeds. *Grey* v. *Stuart*, 2 Giff. 398; 7 Jur., N. S., 989; 30 L. J., Ch., 884; 5 L. T., N. S., 200.

6. A married woman having, by her marriage settlement, executed when a minor, covenanted to confirm the settlement, and also to settle future property; and having acquired, by bequest, personal property to her separate use:—Held, bound to elect either to bring the bequest into settlement, or to make compensation out of reversionary personalty, and other property to which she would be entitled under the settlement, for her separate use, with a restraint on anticipation. *Willoughby* v. *Middleton*, 2 John. & H. 344; 8 Jur., N. S., 1055; 31 L. J., Ch., 683; 10 W. R. 460; 6 L. T., N. S., 814.

The covenant being to settle "any real or personal estate or effects," on trusts for sale and investment:—Held, that no exception could be implied as to specific jewels. *Ib.*

The mere omission of a recital of an intention that the wife should covenant:—Held, not to narrow the construction. *Ib.*

7. A covenant, by a husband alone, to settle the after acquired property of the wife does not bind her separate property, but such a covenant of the husband and wife does. Such a covenant to settle does not bind property over which a wife is deprived of the power of

in the settlement. *Re Pearson*, 20 W. R. 522; 26 L. T., N. S., 393.

1. A widow entitled to a life interest in a fund, and also to a moiety of the capital, subject to her own life interest, married again. By the settlement on the second marriage her life interest was settled, and she and her intended husband covenanted to settle property to which she or he in her right should, during the coverture, become entitled:—Held, that the words of futurity were satisfied in respect of the husband's interest, and that the moiety of the fund was subject to the covenant. *Re Viant*, 18 L. R., Eq., 436; 43 L. J., Ch., 832; 22 W. R. 686; 30 L. T., N. S., 544.

2. By a covenant in a marriage settlement it was provided that in case the wife, or the husband in her right, "should at any time thereafter, by descent, devise, bequest, or under the Statute of Distributions, acquire, succeed to, or become possessed of or entitled to any property, real or personal, which would at any time be of the value of 100*l.*," the same should be conveyed or assigned to the trustees of the settlement. The wife survived her husband:—Held, that this covenant only applied to such property of the wife as she became entitled to during the coverture, and that she had a right to have paid over to her a sum of money in court exceeding 100*l.*, to which she became entitled after the death of her husband. *Alleyne* v. *Hussey*, 22 W. R. 203.

3. A covenant to settle after acquired property will, in the absence of indications of a contrary intention, be read as limited to the duration of the coverture, and this though the covenant relates only to property from a specified source. *Re Campbell*, 6 L. R., Ch. D., 686; 46 L. J., Ch., 142; 25 W. R. 268.

4. In a marriage settlement a covenant to settle the wife's after acquired property will, in the absence of expressions showing a contrary intention, be construed as applying only to property acquired during the coverture, although the words "during the said intended coverture" are omitted. *Re Edwards*, 9 L. R., Ch., 97; 43 L. J., Ch., 265; 22 W. R. 144; 29 L. T., N. S., 712.

A marriage settlement contained a covenant by the husband and wife with the trustees that if, after the marriage, she, or the husband in her right, should become entitled to any property, real or personal, by any means whatever, then all such property should be vested in the trustees on the trusts of the settlement. The wife survived the husband, and after his death she became entitled, as one of the coheirs of a lunatic brother who had died intestate, to part of a fund in court, which represented the purchase money of land taken by a railway company:—Held, that the covenant must be construed to extend only to property acquired by the wife during the coverture, and that her share of the fund in question was not bound by the covenant. S. C. 22 W. R. 144.

5. The rule laid down in *Re Edwards* (9 L. R., Ch., 97; 22 W. R. 144), that in a marriage settlement a covenant to settle after acquired property applies only to property acquired during the coverture, governs those cases in which the settlement contains an assignment of after acquired property. *Holloway* v. *Holloway*, 25 W. R. 575.

6. By an ante-nuptial settlement, the intended husband and wife covenanted with the trustees that all personal estate (save certain excepted particulars) to which the wife or the husband in her right should become entitled during the coverture should be vested in the trustees upon the trusts of the settlement. A sum of money not mentioned in the settlement was handed by the wife to the husband before the marriage took place, and the evidence, in the opinion of the Court, established that the transaction was simply a loan:—Held, that the sum of money was caught by the settlement, and was subject to the trusts thereof. *Hamilton* v. *James*, 11 Ir. R., Eq., 223.

See also Preceding Subdivisions.

5. Property Settled to Separate Use of Wife.

7. Where by marriage articles it was agreed by the intended husband, that any money which might devolve by will or otherwise to the intended wife, should be settled on her and his children by her, he drawing the interest, and the wife's father afterwards bequeathed to her a legacy for her separate use, as to which the wife died intestate in the lifetime of her husband:—Held, that the legacy was not subject to the trusts of the articles, but that the husband took it *jure mariti*, and that a settlement which had been prepared at his instance, by which the interest of the legacy was settled upon himself for life, and the principal upon the children of the marriage at the age of twenty-one, should be carried into execution. *Drury* v. *Scott*, 4 Y. & Coll. 264; 5 Jur. 405.

8. In a marriage settlement the husband alone covenanted to settle any property which his wife, or he in her right, might thereafter acquire:—Held, that property, which was afterwards given to the wife for her separate use, was not affected by the covenant. *Travers* v. *Travers*, 2 Beav. 179.

9. A feme being entitled to a reversionary interest in property for her separate use, both she and her intended husband separately covenanted to settle any property which she, or her husband in her right, was or might become entitled to, upon certain trusts: the above interest having fallen into possession:—Held, that it was subject to the trusts of the settlement. *Tawney* v. *Ward*, 1 Beav. 563.

10. A marriage settlement contained a clause by which it was agreed, and the husband covenanted, that if any real or personal estate should descend or devolve to, or vest in the wife or in any person in trust for her, the husband should make, do, and execute, or cause or procure to be made, done, or executed, or join or concur with the wife in making, doing, or executing all such acts, deeds, etc., as should be necessary for settling such property on the trusts of the settlement. A legacy was left to the wife for her separate use:—Held, that it did not come within the agreement and covenant to settle, contained in the settlement. *Ramsden* v. *Smith*, 2 Drew. 298; 18 Jur. 566; 23 L. J., Ch., 757; 2 W. R. 435; 2 Eq. Rep. 660.

affect the reversionary interest so far as her husband, in the event of his surviving his wife, would be entitled to the property in her right, or as her executor or administrator. *Townshend* v. *Harrowby*, 4 Jur., N. S., 353; 27 L. J., Ch., 553.

1. Where a covenant to settle after acquired property was contained in a settlement executed on the marriage of a lady, who at the time was entitled to a contingent interest liable to be divested, and which afterwards fell into possession; and who afterwards became entitled to property to her separate use, as to part of which there was a proviso against alienation:—Held, that the property to which the lady was contingently entitled at the time of her marriage came within the terms of the covenant, but that the property settled to her separate use, and as to which there was a proviso against alienation, was not included in it. *Brookes* v. *Keith*, 1 Dr. & Sm. 462; 7 Jur., N. S., 482; 9 W. R. 565; 4 L. T., N. S., 541.

2. A covenant in a marriage settlement by the intended wife to settle property which shall afterwards devolve upon her, binds all property to which she may subsequently become entitled to her separate use for an interest exceeding an estate for her own life, and not subject to restraints on anticipation. *Re Portadown, Dungannon, & Omagh Junction Railway Co.*, 1 Ir. R., Eq., 293.

By a marriage settlement the husband and wife covenanted that, in case any estate, moneys, or property of any description whatsoever should descend to or devolve on either of them at any time during the coverture, they would convey or assign the same to the trustees upon the trusts of the settlement, viz., for the wife's separate use for her life; after her death, for the husband for life; and after the decease of both, for the children of the marriage. The wife's mother, by a will made in execution of a power of which her children were the sole object, appointed a sum of stock to the wife for her separate use, with a request that she would leave it to her children, and a direction, that she should not alienate the same during her life:—Held, that the stock was bound by the covenant, and subject to the trusts of the settlement. *Ib.*

3. Property settled to the separate use of a married woman will not be bound by a covenant by her in her marriage settlement to settle after acquired property if there are directions showing the donor's intention that it should not be so bound. *Exp. Young*, 15 W. R. 975.

4. In a marriage settlement it was declared, and the husband covenanted, that in case at any time during the coverture any real, personal, or mixed estate of the value of 500*l.* should come to or vest in the wife, or the husband in her right, at law or in equity, by devise, descent, gift, or otherwise, it should be conveyed and assigned from time to time without delay by the husband, his executors and administrators, and the wife upon the trusts of the settlement:—Held, that a legacy given to the separate use of the wife was within the covenant. *Campbell* v. *Bainbridge*, 6 L. R., Eq., 269; 37 L. J., Ch., 634; 17 W. R. 5; 19 L. T., N. S., 254.

5. A marriage settlement contained a covenant that if, during the coverture, the wife should become entitled to any property of the value of 500*l.* or upwards, it should be vested in the trustees upon the trusts of the settlement. After the marriage a sum of 5,499*l.* 19*s.* 1*d.* was bequeathed upon such trusts as the wife should appoint. She executed eleven successive deeds, several of them on the same day, by each of which she appointed 499*l.* 19*s.* 11*d.* for her own separate use:—Held, that the money was not bound by the covenant in the settlement, and that the wife was entitled to the whole. *Bower* v. *Smith*, 11 L. R., Eq., 279; 40 L. J., Ch., 194; 24 L. T., N. S., 118; 19 W. R. 399.

6. A marriage settlement recited that it had been agreed that the intended husband and wife should covenant for the settlement of such property as should devolve upon the wife or the husband in her right through C; and the husband and wife severally covenanted that if they or the husband in right of the wife should become possessed of or entitled to any such property, except interests given to the wife for her life, and which, as was thereby stated, should, unless settled to her separate use, be so settled, then such property should be settled upon the trusts of the settlement:—Held, that the terms of the covenant did not include property bequeathed by C. to the wife absolutely for her separate use, and that the construction was not altered by the recital or the words of exception. *Burn-Murdoch* v. *Charlesworth*, 23 W. R. 743.

7. By a marriage settlement, after a recital that on the treaty for the marriage it was agreed that all real and personal property which during the coverture should devolve upon or vest in the wife or the husband in her right to the value of 200*l.* at any one time should be settled upon the trusts thereinafter declared, it was witnessed that it was thereby agreed and declared between and by the parties thereto, and the husband thereby covenanted with the trustees, that if at any time during the coverture any real or personal estate should devolve on or vest in the wife or the husband in her right to the amount in value of 200*l.* at any one time, the husband would make, do, and execute, or cause and procure to be made, done, and executed, and join and concur in making, doing, and executing all such conveyances, etc., as would effectually vest such real and personal estate in the trustees upon the trusts therein declared. After the marriage a deed was executed by the wife's mother, under which, during the coverture, a sum exceeding 200*l.* became payable to the wife for her separate use:—Held, by Fry, J., that this sum was within the covenant, and must be settled. But held, by the Court of Appeal, that as the operative part of the deed was clear, the recital could not control it—that as the operative part of the deed only related to acts to be done by the husband, the agreement and declaration between and by the parties that those acts should be done did not import a covenant by any other party that they should be done, and that there was, therefore, no covenant by any one but the husband—that the covenant by him could not be held to relate to property over which he had no power and in which he had no interest—and that the wife, therefore, was not bound to bring into settlement property given to her separate use. *Dawes* v. *Tredwell*, 18 L. R., Ch. D., 354; 45

disposition. *Coventry* v. *Coventry*, 32 Beav. 612; 9 Jur., N. S., 613; 11 W. R. 868; 8 L. T., N. S., 819; 2 N. R. 349.

Covenant by husband and wife to settle all after acquired property, "not being already settled for her separate use":—Held, not to bind property subsequently bequeathed to the wife for her separate use. *Ib.*

1. F., at the time of her marriage with D., was entitled, as the only child of her father and mother, subject to their life interests and to a power of appointment in favour of children, grandchildren, or other issue given to them or the survivor of them, to 7,500*l.* In the settlement made on the marriage of F. with D. was a covenant by D. and F. to assure to the trustees all real and personal estate vested in F., or which should become vested in D. in her right, and all real and personal estate which F. or D., in her right during the coverture, might become entitled to. D. died, leaving two children; then F.'s father died, without ever having exercised the power. F.'s mother then died, having by her will appointed the whole fund to F. absolutely for her separate use. Afterwards F. married H., and no settlement was made on that marriage:—Held, that the fund was subject to the covenant, and must be paid to the trustees of the marriage settlement of F. and D. *Re Frowd*, 10 L. T., N. S., 367; 4 N. R. 54.

2. By a Scotch marriage settlement all the property which the wife might acquire during the coverture was settled upon the husband for life, with remainder to the wife absolutely. A legacy of 2,000*l.* was afterwards bequeathed upon trust for the wife for her separate use for life, without power of anticipation, with trusts over in favour of the husband and the children of the marriage. The husband having become bankrupt:—Held, that his assignees had no interest in the dividends on the 2,000*l.* which were ordered to be paid to the wife during her life. *Duncan* v. *Cannan*, 4 W. R. 2.

3. By a marriage settlement in 1838, real estate was conveyed to such uses as M. (the intended wife) should by deed or will appoint, and in default of appointment, to certain uses for the benefit of the children of the marriage, with an ultimate remainder to the use of M. in fee; and it was provided that all property which during the coverture should come to or vest in the husband in right of M., or in M. by descent, devise, limitation, gift, or otherwise, should be settled to the same uses. M., by will, made shortly after the settlement, devised and bequeathed all the residue of her property, "except such real and personal estate as might remain subject to the trusts of her marriage settlement, by reason of no specific disposition thereof having been made by her under the power therein contained." In 1854 M. purchased real estate out of the savings of her separate property, and it was conveyed to the same uses and trusts as those declared by the settlement of 1838, omitting only the uses in favour of children:—Held, that the exception in the will referred only to the property subject to the trusts of the marriage settlement at the date of the will, and that the real estate subsequently purchased by M. passed under her will. *Hughes* v. *Jones*, 32 L. J., Ch., 487; 11 W. R. 898; 9 L. T., N. S., 143; 2 N. R. 417.

4. Covenant in a marriage settlement to settle the wife's after acquired property (save and except "any estate or effects already settled to her separate use"):—Held, that a legacy afterwards bequeathed to her for her separate use was not included in the covenant. *Whitgreave* v. *Whitgreave*, 33 Beav. 533.

5. An assignment by an intended wife of her future property, followed by a covenant by the intended husband to settle the after acquired property of the wife, will not extend to property given to the wife in terms which are inconsistent with the trusts of the settlement. *Re Mainwaring's Settlement*, 2 L. R., Eq., 487; 14 W. R. 887.

Therefore, where an intended wife, by an ante-nuptial settlement, assigned all the personal estate to which she might at any time thereafter become entitled, in any way howsoever, upon the trusts of the settlement; and the deed contained a covenant by the intended husband to settle any real or personal estate whatsoever that should descend to, devolve upon, or vest in the wife; and where a legacy was, after the marriage, bequeathed to the wife, with a direction to the executors to pay such part of the legacy to the wife as she might require for her separate use, independent of her husband, and to be free in all respects from his debts and engagements:—Held, that the settlement had no operation upon such part of the legacy as was required by the wife to be paid to her upon her separate receipt. *Ib.*

6. By an ante-nuptial settlement the husband and wife covenanted with the trustees to settle all property to which the wife then was or during the coverture she or her husband in her right should become entitled by devise, bequest, or otherwise "for any estate or interest whatsoever." During the coverture the wife's father died, having by his will devised and bequeathed a moiety of his residuary real personal estate to her "for her separate use, and independently of any husband":—Held, that the moiety was bound by the covenant. *Re Mainwaring's Settlement* (2 L. R., Eq., 487), not followed. *Re Allnutt, Pott* v. *Brassey*, 22 L. R., Ch. D., 275; 52 L. J., Ch., 299; 48 L. T. 155; 31 W. R. 469.

7. By a marriage settlement it was declared and agreed between the parties, and the husband covenanted with the trustees, that in case the wife, or the husband in her right, should at any time during his life become possessed of, interested in, or entitled to any personal estate, moneys, effects, or other property in possession, reversion, remainder, or expectancy, by gift, bequest, or under the Statute of Distributions, the husband and wife would, within six months, transfer, assure, assign, and make over all such property to the trustees upon the trusts of the settlement. Subsequently to the marriage, the father of the wife, by his will, vested 5,000*l.* in trustees, to hold the same upon such trusts as the wife should, by deed or will, appoint; and in default of such appointment to pay the dividends and interest to the wife, for her separate use, and after her death upon trust for her executors or administrators:—Held, that the covenant in the settlement did not affect or control the general power of appointment given to the wife over the 5,000*l.* by her father's will; and that it did not affect her life interest to her separate use, but that it did

Beav. 184; 17 L. J., N. S., Ch., 466; 12 Jur. 762.

1. P., on his marriage with T., executed a bond in the penalty of 2,000*l.*, with condition to be void, if, in the event of T. surviving P., his executors, etc., should, within three months after his decease, pay to trustees 1,000*l.* in trust for T., and if in the event of P. surviving T., and there being any child or children of the marriage living at the decease of P., his executors, etc., should, within three months after his decease, pay to trustees 1,000*l.* in trust for such child or children: "and further, if P. should at any time during his natural life become seised of any messuages, etc., in possession, and should settle the same upon T. and the issue of the said intended marriage, by such good conveyances in the law as counsel should advise, in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for T., in case she should happen to survive P." After the death of T., P. having married again, and then, and not before, become seised of real estates, and having at his death left issue by both marriages, all the real estates of which he became seised during his life were subject to the obligation, and settled on the issue of the first marriage, as tenants in common in fee. *Preble* v. *Boghurst*, 1 Swan. 309; 1 Wils. 161.

2. A covenant by a husband to settle all future-acquired property on himself, his wife and children, does not include his life interest in property bequeathed to him, with a direction to settle it on himself and his family. *White* v. *Briggs*, 22 Beav. 176.

3. Settlement by a husband of all his personal estate to which he was then or might thereafter become entitled, in trust for himself for life, with remainder absolutely to his wife:—Held, not to comprise his interest in a fund bequeathed to him for life, with remainder to his children. *St. Aubyn* v. *Humphrey*, 22 Beav. 175.

4. In a marriage settlement an intended wife assigned all the property to which she then was, or to which she or her intended husband in her right should, during coverture, become entitled, to trustees upon the trusts thereby declared, for herself, the husband, and the children of the marriage. After the marriage her father died, having by his will given her a general power of appointment over his residuary estate. The wife, during coverture, in exercise of the power contained in the will, appointed to herself, for her separate use, a gross sum of 1,000*l.*, and an annuity of 100*l.* for her life, and amongst her family the residue, upon trusts differing from those of the marriage settlement, reserving a power of revocation:—Held, that the terms of the assignment by the wife in the marriage settlement did not amount to a covenant to exercise a general power of appointment in favour of the objects and in conformity with the trusts of such settlement, and that property over which she afterwards acquired a general power of appointment was not by that circumstance brought within the operation of the settlement. *Ewart* v. *Ewart*, 11 Hare 276; 1 W. R. 466; 1 Eq. Rep. 536; 17 Jur. 1022.

Held, also, that upon the appointment by the wife of the 1,000*l.* for her own absolute use, that sum became bound by the trusts of the settlement, and the power of revocation was ineffectual. *Ib.*

5. On the marriage of J. B. I. with E. B., neither party being possessed of any property, articles were entered into providing for the settlement of all the property which E. B. was then or thereafter might become entitled to, upon trust, as the wife should appoint; and in default of appointment, to her for her separate use for life, and then for the husband for life, and then for children; and that the settlement should contain a covenant by the husband that all the property which he or the wife should thereafter become entitled to should be settled upon the like trusts. The husband was largely indebted at the time of the marriage, and a few months afterwards he took the benefit of the Insolvent Debtors Act, and after that he became entitled, as heir-at-law and next of kin, to real and personal estate from a deceased brother:—Held, in a suit to enforce the articles against the assignee under the husband's insolvency, that the property which came to him from his brother was subject to the trusts of the articles, and was not liable, in the hands of the assignee, to pay the husband's creditors. *Hardey* v. *Green*, 11 Beav. 182; 18 L. J., N. S., Ch., 480; 13 Jur. 777.

6. In the year 1817, A., who was not then a trader, on his marriage covenanted that all his property, real and personal, as well that in possession as that after acquired, should be charged and chargeable with the sum of 3,000*l.* as a provision for his wife and the issue of the marriage. Some months after his marriage he became a trader, and in the year 1835 was declared a bankrupt:—Held, on bill filed by the wife and children, that the covenant to charge after acquired property created a valid charge on all the freehold estates of A. purchased subsequently to his marriage, and should be carried specifically into execution against the assignees of the bankrupt A. *Lyster* v. *Burroughs*, 1 Dr. & Wal. 149. And see *Gubbins* v. *Gubbins*, *id.* 160. n.

7. A trader by a settlement made before his marriage assigned a policy and some furniture to trustees for the benefit of his wife and the children of the marriage, and also covenanted that all other real or personal estate of which he should become seised, possessed, or entitled during the coverture, should be transferred to the trustees upon trusts thereby declared. No trusts of the after-acquired property were declared in the settlement. After the marriage, and when he was still solvent, he purchased some shares; the shares were registered in his name and he held the certificates. Subsequently he filed a petition for liquidation, and the trustee in the liquidation claimed these shares, as against the trustees of the settlement:—Held, that he could not be allowed in this way to withdraw the whole of his property from his creditors, and that the shares must be handed to the trustee in the liquidation. *Exp. Bolland, Re Clint*, 43 L. J., Bky., 16; 17 L. R., Eq., 115; 29 L. T., N. S., 543; 22 W. R. 152.

8. The five children of a testator were absolutely entitled to his residue. One of them, on her marriage, settled her fifth of such

L. T. 119; 29 W. R. 793. Reversing 44 L. T. 740; 29 W. R. 714.

1. A marriage settlement, in which the wife's property was vested in trustees for her separate use, without power of anticipation, contained a covenant by the husband and wife that if at any time during the joint lives of them any further portion, fortune, or estate should come to or devolve upon either of them, by or under any will, or otherwise, they would effectually settle the same (except such future portion, fortune, or estate as should be otherwise settled previously to the same devolving as aforesaid) upon the trusts of the settlement:—Held, that a gift of a legacy to the wife for her own sole and separate use, free from the debts, control, and engagements of her husband, was excluded from the operation of the covenant. *Kane* v. *Kane*, 16 L. R., Ch. D., 207; 50 L. J., Ch., 72; 43 L. T. 667; 29 W. R. 212.

2. An agreement by husband and wife, in an ante-nuptial settlement, for the settlement by the husband and wife of the wife's after-acquired property, is a covenant by the wife as well as by the husband, whether the wife is a minor or of full age. *Smith* v. *Lucas*, 18 L. R., Ch. D., 531; 45 L. T. 460; 30 W. R. 451.

If the wife is a minor, and the covenant is for her benefit, it is voidable only and not void, and is binding upon all property coming to her during the coverture for her separate use, without a restraint on anticipation, until she avoids or disaffirms the covenant as to such property; for she may, after attaining twenty-one, and during the coverture, elect whether the covenant shall be binding on her separate estate or not, such right of election being a necessary consequence of a married woman's power to dispose of, without her husband's consent, property settled to her separate use: but—inasmuch as a contract by a married woman, while under coverture, affecting her separate property, binds only her then existing separate property, and not separate property which she may thereafter acquire (*Pike* v. *Fitzgibbon*, 17 L. R., Ch. D., 454)—the wife, in electing to confirm the covenant, thereby binds only that separate property to which she is entitled at the date of the confirmation, and not that to which she may subsequently become entitled during the coverture. *Semble*, the doctrine of election or compensation does not apply in the case of a married woman entitled for her separate use with a restraint on anticipation. *Willoughby* v. *Middleton* (2 John. & H. 344) questioned on this point. *Ib.*

By an ante-nuptial settlement, dated in 1856, the lady being then a minor, after reciting that she would be entitled on attaining twenty-one to a share of her deceased father's estate, and the intention to settle the same, it was agreed and declared between the parties thereto, and the husband covenanted with the trustees, that the husband and wife and all other necessary parties would, as soon as the wife attained twenty-one, convey the share to the trustees upon trust for the wife during her life for her separate use without power of anticipation, and after her death for the husband till bankruptcy or alienation, with remainder for the issue of the marriage. And it was further agreed and declared that if the wife then was, or if at any time or times during the coverture she or her husband in her right should become seised or possessed of or entitled to any real or personal property for any estate or interest whatsoever, then and in every such case the husband and wife and all other necessary parties should assure the same to the trustees upon the trusts thereinbefore declared. The settlement contained a power for the trustees, at the request of the wife, to lend any of the trust funds to the husband on his personal security. The wife attained twenty-one in 1857, and in 1858 she and her husband, in pursuance of the covenant in that behalf in the settlement, conveyed her share of her father's estate to the trustees of the settlement. In 1863, upon the death of a brother, the wife became entitled under his will to certain funds thereby bequeathed to her for her separate use. These funds, and also funds arising from her share of her father's estate, were, with the assent of the wife, paid to the trustees of the settlement and by them lent, at her request, to the husband on his personal security. In 1880 the wife became entitled under the will of her mother to a sum of 4,000*l.* and a share of her residuary estate thereby bequeathed respectively to her for her separate use:—Held, that the wife could elect to retain the 4,000*l.* and share of residue for her separate use unbound by the covenant for the settlement of her after-acquired property. *Ib.*

3. A marriage settlement made in 1862 contained an agreement for the settlement of any future-acquired property of the wife to a specified amount (except interests settled and limited to her separate use). The wife, after the commencement of the Married Women's Property Act 1882, become entitled absolutely to a bequest above the specified amount, without any limitation as to separate use:—Held, that by the 19th section of the above Act the marriage settlement was exempted from the 5th and other sections; and that the bequest to the wife came within the covenant to settle future-acquired property, and must be dealt with as if the Act had never been passed. *Re Stoner's Trusts*, 24 L. R., Ch. D., 195; 52 L. J., Ch., 776; 48 L. T. 963; 32 W. R. 413.

6. Other Property.

4. By the settlement made on the marriage of an English lady with a foreigner, her bank annuities were settled in trust for her, her husband, and their children; and her real estates were directed to be sold and the produce held on similar trusts. And it was agreed between all the parties, and the husband covenanted, that in case any real or personal estate should vest in the wife, or in him in her right, he, as far as he lawfully could, would, either alone or in concurrence with his wife, settle the same upon the trusts, and subject to the powers, etc., therein expressed concerning the bank annuities. Real estates descended on the wife. The husband and some of the children were aliens:—Held, that the lands descended were bound by the covenant, and that they ought to be sold and the produce invested on the same trusts as the bank annuities. *Master* v. *De Croismar*, 11

fore it was included in the expression "of any person or persons whomsoever," was subject to the effect of the covenant, and was bound, as to one moiety, by the trusts in the settlement. *Maclurcan* v. *Lane, Melhuish* v. *Maclurcan*, 5 Jur., N. S., 56.

1. D., by his marriage settlement, agreed that if he then was, or should during the intended coverture, at one time and from one source, become entitled to any real or personal property of the value of 100*l.* or upwards from any estate or interest whatsoever, he and all necessary parties should execute and do such assurances and things as should be necessary for vesting the same in the trustees of the settlement. He was at the time of his marriage in receipt of half-pay (as lieutenant in the navy), which he subsequently commuted, under 34 & 35 Vict., c. 36, for 2,175*l.*:—Held, that the commutation money was not bound by the agreement in the settlement. *Churchill* v. *Denny*, 20 L. R., Eq., 534; 44 L. J., Ch., 578; 23 W. R. 825.

2. A testatrix, dying in 1883, bequeathed the residue of her personal estate to her daughter, a married woman, absolutely. The daughter, by her marriage settlement in 1862, covenanted to settle after-acquired property (except interests limited to her separate use), upon the trusts of the settlement:—Held, that s. 19 of the Married Women's Property Act 1882 exempted the marriage settlement from the operation of s. 5, and that the fund representing the residuary personalty was payable to the trustees of the settlement. *Re Stoner's Trusts*, 32 W. R. 413; 24 L. R., Ch. D., 195; 52 L. J., Ch., 776; 48 L. T. 963.

3. A husband and wife, by their marriage settlement, covenanted to assign to the trustees of the settlement upon the trusts thereof, any property which the wife or the husband in her right should at any time become possessed of or entitled to during the coverture. A decree nisi for the dissolution of the marriage was pronounced; but pending the decree being made absolute, the husband and wife appointed a new trustee of the settlement, and property fell into possession of the wife. Subsequently the wife married again:—Held, that the property was not bound by the covenant in the settlement. *Re Pearson*, 20 W. R. 522; 26 L. T., N. S., 393.

4. Where a lady had, by an ante-nuptial settlement, assigned and conveyed to trustees whatever she might "conquest or acquire" during the marriage:—Held, that the words "conquest" and "acquire," so used, were sufficient to pass to the trustees property of every kind which during the marriage had come to her by succession. *Diggens* v. *Gordon*, 1 L. R., H. L. (Sc.), 136.

7. Amount.

5. A marriage settlement contained a covenant by a husband and wife to settle all after-acquired property of the wife, of the value of 500*l.* and upwards. The wife's mother subsequently bequeathed to her some specific chattels, and to the trustees of the settlement the residue of her estate, upon the trusts of that settlement, being trusts for the separate use of the wife for life:—Held, that that residuary bequest could not be taken into account when computing the value of the specific chattels. *Forster* v. *Davies*, 8 Jur., N. S., 65; 31 L. J., Ch., 276; 10 W. R. 180; 4 De G. F. & J. 133.

6. Covenant in marriage articles, from the husband, "inasmuch as he was to be absolutely entitled to all the wife's personal estate," to settle "in respect of any sum that might come to her afterwards, after the rate of 100*l.* per annum, on her for life, for every 1,000*l.*, and upon certain contingencies that she should be paid back a moiety of all that he should receive as her portion." The husband obtained a decree for 400*l.* of the wife's money, but did not receive it:—Held, she was entitled to a settlement according to that proportion, and, the contingencies having happened, to the moiety likewise of all sums received, including the 400*l.*; since the husband might have received it. *Prime* v. *Stebbing*, 2 Ves. 409.

7. In a marriage settlement it was agreed to settle the property which the intended wife should at any time during the coverture become entitled to. At the date of the marriage the wife was entitled in reversion, on the death of her mother, to 212*l.*, and she became entitled by her mother's will to another sum of more than 500*l.*:—Held, that the words "at any time" meant "from one and the same source," and that the sum of 212*l.* was not bound by the covenant. *Re Hooper*, 11 Jur., N. S., 478; 13 W. R. 710; 12 L. T., N. S., 137; 5 N. R. 462.

8. When a covenant to settle after acquired property is limited to funds of a specified amount which shall at any time be acquired, a condition is implied that the amount shall be made up of funds derived from the same source. *Hood* v. *Franklin*, 16 L. R., Eq., 496; 21 W. R. 724.

When a party, having entered into such a covenant, becomes entitled in possession to property which would be subject to the settlement if sufficient in amount, and which has been reduced below the specified amount by the exercise of powers of advancement, the amount received by anticipation must be included for the purpose of determining whether the fund is large enough to be brought into settlement. *Ib.*

9. By a marriage settlement it was agreed that all property which, during the joint lives of the husband and wife, should devolve upon the wife or the husband in her right, and which should, at the time when the same should respectively so devolve, exceed the value of 500*l.*, should be settled upon the trusts of the settlement. By a subsequently executed will a legacy of 200*l.* was left to the wife, and a share of the residuary estate of the testator was also given to her for her separate use, such share being declared to be in addition to the legacy of 200*l.* The share of the residue exceeded 500*l.*, and was paid to the trustees of the settlement:—Held, that the legacy of 200*l.* need not be settled. *Re Middleton*, 16 W. R. 1107.

10. By a marriage settlement it was provided that all such further or other portion or personal estate (if any) as should during the life of the intended wife become vested in or accrue to her, or as should or might be assignable in law or equity either for a vested or contingent interest, should be assigned to the

residue, and all other her share by survivorship or otherwise, and all her right, contingent, reversionary, or otherwise, possibility, etc., therein. She afterwards became entitled to a further share, by the death of a brother intestate:—Held, that it was not included in the settlement. *Edwards* v. *Broughton*, 32 Beav. 667; 11 W. R. 1038; 2 N. R. 476.

1. By a marriage settlement, of 1794, A. conveyed certain specified lands, of which he was seised in tail in remainder, together with all other the lands which he was then or thereafter might be possessed of or entitled to, in reversion, remainder, or otherwise howsoever, to trustees, to the use of himself for life, remainder, as he should appoint, among the issue male of the marriage, remainder over; and covenanted to do any act or execute any conveyance, if required, of and concerning the specified lands, or any other lands and premises which he should, at any time thereafter, be possessed of or entitled unto, for the further, better, more perfect, and absolute carrying out the settlement, and the true intent and meaning of the parties thereto, into full, legal, and perfect execution. In 1819 a judgment was recovered against A.; and, in 1839, he became entitled, as heir-at-law of his brother, to other lands not specified in the settlement. In 1859 A. died:—Held, that the trusts of the deed of 1794 attached to the latter lands on their acquisition by A., without any further act by him, and that his eldest son, claiming under that deed, was entitled to hold them discharged of the judgment. *Stack* v. *Royse*, 12 Ir. Ch. R. 246.

2. By an ante-nuptial settlement real estate was vested in trustees for 500 years, on trusts after mentioned, and as to all the real estate, to pay a jointure to the wife, and subject thereto to such one or more of the children as the father should by deed or will appoint; and in default to the trustees for 1,000 years, to raise 5,000*l.* for portions for younger children, with remainder, subject to both terms, to the sons and daughters in tail with cross-remainders, with remainder to the right heirs of the settlor. Then followed the trusts of the 500 years' term; viz., to raise 4,000*l.*, and pay the interest to the wife for life, with remainder to the children: sons at twenty-one, daughters at twenty-one or on marriage, equally. The father covenanted with the trustees, that in case his wife, at any time during the coverture, became entitled to any personal estate, he would do all necessary acts to vest the same in the trustees upon the trusts as were expressed of the 4,000*l.* to be raised by virtue of the 500 years' term. The marriage took place, and there was issue, and the wife became entitled to two sums of 3,000*l.*; one under a will to her separate use, and which she settled on her husband for life, and afterwards upon the trusts declared by their settlement of the 4,000*l.* to be raised under the 500 years' term; the other, not to her separate use, from other sources. The wife died, and on the question whether the 3,000*l.* so last settled was within the terms of the covenant:—Held, that it was not; but that the other 3,000*l.* was, and belonged to the children. *Gataker* v. *Renyardson*, 13 W. R. 487; 12 L. T., N. S., 134.

3. A marriage settlement contained a covenant by husband and wife jointly, and each of them separately, to settle property which they or either of them in her right should become entitled to during the coverture, except the wife's life interests, and property settled to her separate use. The wife's brother gave all his real and personal estate to the wife and her husband, their heirs, executors, etc., as joint tenants:—Held, that the property was within neither the letter nor the spirit of the covenant. *Edye* v. *Addison*, 3 N. R. 66. S. C. *nom. Edge* v. *Addison*, 9 Jur., N. S., 1320; 12 W. R. 17; 1 Hem. & M. 781; 33 L. J., Ch., 132.

4. A covenant by husband and wife in an ante-nuptial settlement to settle after acquired property to which she or he in her right shall become entitled in possession, reversion, remainder, or expectancy, does not apply to a general power of appointment and a life interest given to her under a will. *Townshend* (*Marchioness*) v. *Harrowby* (*Earl*), 4 W. R. 413; 4 Jur., N. S., 353.

5. A covenant in a marriage settlement to settle property to be acquired "under or by virtue of" the will of the wife's father:—Held, not to comprise property over which the father had by will exercised a power of appointment amongst his children, given to him by an earlier settlement. *Evans* v. *Jennings*, 1 N. R. 178.

6. A marriage settlement made in 1819 recited an agreement that "one moiety of all such property and effects as A., the settlor, should or might at any time during the intended coverture be or become seised or possessed of, or interested in, or entitled unto (except certain arrears of tithes), should be settled as therein mentioned." The indenture contained a covenant by A. for himself, his heirs, executors, and administrators, whereby he covenanted to and with the trustees, their heirs, etc., "that in case any lands, tenements, hereditaments, legacy, sum of money, or other real or personal estate, over and above certain personal estate mentioned and intended to be thereby assigned, should at any time during the intended coverture accrue unto or vest in him, A., upon the death, or by the settlement, devise, or bequest, gift, or disposition of any of the relations of A., or of any person or persons whomsoever, he, A., should and would from time to time, at the request of the trustees, or the survivor of them, convey, settle, and assign . . . one full and equal undivided moiety of all such lands, so and in such manner as that the inheritance of such moiety might be vested in the trustees." The settlor's father, and an elder brother, were living. The elder brother died intestate in 1825, and the father died in 1828. Thereupon A. became his heir-at-law, and certain lands and tenements, of which he had a vested remainder in tail expectant on the death of his father, and defeasible under the father's power of appointment (which was not exercised), fell into possession. A disentailing deed was afterwards executed by A.:—Held, that, upon the true construction of the settlement (reading the covenant with the assistance of the recital), the estate, which became vested in fee in the settlor, was an estate which accrued to him for the first time, and became an indefeasible estate in possession upon the death of his father, and that there-

1. Where for valuable consideration the wife by ante-nuptial settlement assigned to her husband an interest at the time reversionary the Court, when the interest was reduced into possession, ordered payment to the husband without the wife's consent. *Chalmers* v. *Macleod*, 1 Jur., N. S., 724.

IV. LIMITATIONS IN, AND OBJECTS OF, SETTLEMENT, IN PURSUANCE OF.

2. In a marriage settlement, which comprised only the property of the wife, it was agreed between the intended husband and wife, and each of them covenanted with the trustees, that any property to which the wife might become entitled during the coverture should be conveyed to such uses as she should by deed or will appoint, and in default of appointment to the use of herself for life; remainder to the use of the husband for his life; remainder to the use of the wife's children, and, in default of such children, to the use of A. B., her niece, and her heirs. After the death of the wife without children, and without having exercised her power of appointment, the husband filed a bill against her heir-at-law, praying that a real estate to which she had become entitled during her lifetime might be conveyed to the uses of the settlement. On the question, whether the decree for specific performance should be confined to the life estate of the husband, or should extend to the limitation to the niece, who was also dead:—Held, that it should extend to the latter, on the ground that the right of the husband to a specific performance of part of the covenant drew with it the right to a specific performance of the whole, at least as against the heir of the settlor, whatever it might have done as against a purchaser for value. *Davenport* v. *Bishopp*, 1 Ph. 698. Affirming 2 Y. & Coll. C. C. 451; 12 L. J., N. S., Ch., 492; 7 Jur. 1077.

3. On agreement before marriage, that everything which should come to the wife by her father's death, should go to the husband and wife for their respective lives, and after the death of the survivor to the heirs of the body of the wife by the husband begotten:—Held, that 6,000*l.*, to which the wife was entitled under the settlement of her father and mother, vested in her only, and, the husband consenting, the 6,000*l.* was decreed to be settled on the younger children. *Green* v. *Ekins*, 2 Atk. 474.

4. A sum of 865*l.* stock, partly belonging to the husband and partly to the wife, was settled (subject to the interests given to the husband, wife, and children) as to the husband's part on the husband's executors, and as to the wife's to her next of kin. The settlement contained a covenant, that the after-acquired property of the wife should be settled on like trusts:—Held, that the husband and wife's representatives were, under the ultimate limitation, entitled to the wife's after-acquired property in proportion to their interests in the 865*l.* *Stevens* v. *Van Voorst*, 17 Beav. 305.

Covenant to settle after-acquired property of the wife:—Held, to extend to property acquired after the death of the husband. *Ib.*

5. A settlement contained the usual covenant by the husband and wife to assign after-acquired property of the wife to trustees, with a proviso that it should be lawful for the trustees, at the request of the husband and wife during their joint lives, and of the survivor during his or her life, and afterwards, at the discretion of the trustees, to sell and dispose of such property, and invest the proceeds upon the trusts of the settlement. The wife afterwards became entitled to leaseholds and specific personal chattels:—Held, that the trustees were not for the present to convert these things without the request in writing of the husband and wife. *Hope* v. *Hope*, 1 Jur., N. S., 770; 3 W. R. 617.

6. By a marriage settlement of B. and A. 7,500*l.*, 4*l.* per cent. bank annuities, were settled upon trust for B. for his life, then for A. for her life, and after the death of the survivor for the children equally; the shares of sons to vest at twenty-one, or dying under that age leaving issue then living. The settlement contained a covenant to settle after-acquired property of A. on her for life, and after her death "for all and every the issue of the then intended marriage, upon the same or the like trusts, and subject to the powers and provisoes as were thereinbefore expressed and declared of and concerning the 7500*l.*, 4*l.* per cent. bank annuities." A. died, leaving two sons, the only children of the marriage, both of whom had attained twenty-one, married, and had issue each three children, all infants. On a bill to obtain a declaration as to the construction of the covenant to settle the after-acquired property:—Held, that the word "issue" in the covenant must be restricted to children, and that the two sons, having survived their mother, and attained twenty-one, were entitled to her after-acquired property absolutely between them. *Marshall* v. *Baker*, 11 W. R. 78; 7 L. T., N. S., 303.

7. A. having, in his marriage settlement, conveyed leasehold estates, of which he was possessed, to trustees, to hold to his own use during his life, and after his decease to the use that his intended wife should receive thereout a jointure, covenants to charge all the lands of which he was seised at the time of his execution of the settlement, or of which he should at any time thereafter become seised, with the payment of the jointure, the settlement proceeded: "And, further, that the said land, after the decease of the survivor," should be to the use of the children of the marriage:—Held, that the words "the said lands" referred to the lands then conveyed to the trustees, and that the children of the marriage did not, under the settlement, acquire any interest in the after-acquired property. *Re Hammersly, Exp. Smith*, 12 Ir. Ch. R. 319.

8. An order was, in 1855, on the application of the father as next friend, made, directing a trustee to pay certain dividends to the father for the maintenance and education of an infant daughter during her minority, or while unmarried. Previously to the marriage of the daughter, the draft of a proposed settlement, which contained a covenant by the intended husband to settle after-acquired property of the wife, but no provision as to the children by a future husband, was sent to the intended husband, and returned by him without any

trustees of the settlement, and it was also provided that this proviso should not extend to any chattel or interest which the intended wife might from time to time become entitled to either in possession or in reversion unless every such legacy or interest should at each time amount to 500*l.* The wife became entitled under the will of her mother to 1,000*l.*, and also to 350*l.* on the death of one of her sisters as one of her next of kin. The property of which the sum of 350*l.* was a part was also derived from the will of the mother, by which it was bequeathed to the sister for life with remainder to her (the sister's) next of kin:—Held, that the sum of 350*l.* was not subject to the covenant. *Buller* v. *Hornby*, 20 W. R. 198; 25 L. T., N. S., 901.

1. By a marriage settlement it was agreed that if the wife, at the date of the settlement, or if during the coverture she or her husband in her right, should become seised, possessed of, or entitled to any real or personal property of the value of 500*l.*, or upwards, the same should, as soon as circumstances would admit, be conveyed to the trustees of the settlement. Under a will, which came into operation prior to the date of the settlement, an annuity was given to trustees to be applied wholly or in part for the benefit of a widow, as the trustees should in their discretion think fit, the unapplied balance to be accumulated, and the accumulation remaining at the death of the widow to be divided among a class of persons, of whom the wife, party to the marriage settlement, was one. The period for division happened after the determination of the coverture, and the share of each person participating then amounted to over 500*l.*, but neither at the date of the settlement, nor at any time during the coverture, did such share amount to 500*l.*:—Held, that the share was not subject to the covenant contained in the settlement. *Re Welstead*, *Welstead* v. *Leeds*, 47 L. T. 331.

2. A marriage settlement contained a covenant, that if the wife then was, or should at any time during the coverture become, entitled to any real or personal property of the value of 400*l.*, for any estate or interest whatsoever, it should be settled upon certain trusts. At the date of the settlement, the wife was entitled, on the death of her mother, to a share in stock in her own right, and a further share as one of the next of kin of a deceased brother. The value of the two shares taken together was above 400*l.*, but the value of the wife's reversionary interest in them at the date of the settlement was much less than 400*l.* On the death of the mother, the husband and wife presented a petition to have the two shares paid to the husband:—Held, first, that the share in the trust fund was included in the first part of the covenant, as property to which the wife was entitled at the time of her marriage. *Re Mackenzie*, 2 L. R., Ch., 345; 36 L. J., Ch., 320; 15 W. R. 662; 16 L. T., N. S., 138.

Held, secondly, that the covenant referred to the value of the property, not to the value of the wife's reversionary interest in it. *Ib.*

Held, thirdly, that, in estimating the value of the share, the aggregate value of the two sums must be taken, and not the value of each sum separately. *Ib.*

3. When an interest in property existing at the date of a marriage is increased in value by the death of other persons, such increment is not after-acquired property within the meaning of a covenant in a marriage settlement. *Re Browne*, 38 L. J., Ch., 316; 7 L. R., Eq., 231.

A marriage settlement contained a recital of an agreement to settle all personal property which the wife should at any time during the marriage become entitled to, and a covenant by the husband and the wife for the settlement of all personal property which the wife, or the husband in her right, at any time or times during the marriage should become possessed of or entitled to by transmission, gift, or otherwise, and whether in possession or expectancy. Another marriage settlement contained no recital of any agreement as to the settlement of future property, but a covenant by the husband and wife to settle any personal property of the value of 200*l.* or upwards which should at any time or times during the coverture be given or bequeathed to, or in any manner vest in, the wife. In each case the wife was, under the will of her mother, entitled at the date of the settlement to the beneficial interest in an undivided share of four Irish tontine debentures. The holder of one of these debentures was entitled during the life of a person therein named to an annuity of 7*l.* 10*s.* Irish currency, and also to a proportionate share of all other annuities under similar debentures which might cease to become payable to the holders thereof by reason of the death of the *cestuis que vient* therein named. At the dates of the settlements the debentures were of small value; but ultimately large sums became payable thereunder. No mention was made of them in the settlements:—Held, that no part of the annuities payable thereunder was included in either of the covenants. *Ib.*

III. CONSENT OF WIFE.

4. By articles made in contemplation of the marriage between E. S. and M. P., who was then an infant, after reciting "that it had been agreed that all the freehold, copyhold, leasehold, and other personal estate and property, or share or accruing shares therein of or to which the said M. P. was or might become seised or possessed, etc.," "should be conveyed, assigned, and settled," E. S. covenanted that "in case the said M. P. would voluntary consent thereto, but not otherwise," he and she would settle the same. Mrs. S. having become entitled to certain personal estate, stated in writing her wish that the money should not be put in settlement. The fund having been paid into court under the Trustee Relief Act, and E. S. having presented a petition for payment of it to him:—Held, that the personal estate in question must be settled, although the wife refused her consent, and that the consent of the wife was only applicable to real estate, which could not be settled without the consent of the wife to be taken in the ordinary way; but that as to the personal estate the wife's consent was not required, and the husband's covenant was absolute. *Re Daniel's Trusts*, 18 Beav. 309.

1. Where for valuable consideration the wife by ante-nuptial settlement assigned to her husband an interest at the time reversionary the Court, when the interest was reduced into possession, ordered payment to the husband without the wife's consent. *Chalmers* v. *Macleod*, 1 Jur., N. S., 724.

IV. LIMITATIONS IN, AND OBJECTS OF, SETTLEMENT, IN PURSUANCE OF.

2. In a marriage settlement, which comprised only the property of the wife, it was agreed between the intended husband and wife, and each of them covenanted with the trustees, that any property to which the wife might become entitled during the coverture should be conveyed to such uses as she should by deed or will appoint, and in default of appointment to the use of herself for life; remainder to the use of the husband for his life; remainder to the use of the wife's children, and, in default of such children, to the use of A. B., her niece, and her heirs. After the death of the wife without children, and without having exercised her power of appointment, the husband filed a bill against her heir-at-law, praying that a real estate to which she had become entitled during her lifetime might be conveyed to the uses of the settlement. On the question, whether the decree for specific performance should be confined to the life estate of the husband, or should extend to the limitation to the niece, who was also dead:—Held, that it should extend to the latter, on the ground that the right of the husband to a specific performance of part of the covenant drew with it the right to a specific performance of the whole, at least as against the heir of the settlor, whatever it might have done as against a purchaser for value. *Davenport* v. *Bishopp*, 1 Ph. 698. Affirming 2 Y. & Coll. C. C. 451; 12 L. J., N. S., Ch., 492; 7 Jur. 1077.

3. On agreement before marriage, that everything which should come to the wife by her father's death, should go to the husband and wife for their respective lives, and after the death of the survivor to the heirs of the body of the wife by the husband begotten:—Held, that 6,000*l.*, to which the wife was entitled under the settlement of her father and mother, vested in her only, and, the husband consenting, the 6,000*l.* was decreed to be settled on the younger children. *Green* v. *Ekins*, 2 Atk. 474.

4. A sum of 865*l.* stock, partly belonging to the husband and partly to the wife, was settled (subject to the interests given to the husband, wife, and children) as to the husband's part on the husband's executors, and as to the wife's to her next of kin. The settlement contained a covenant, that the after-acquired property of the wife should be settled on like trusts:—Held, that the husband and wife's representatives were, under the ultimate limitation, entitled to the wife's after-acquired property in proportion to their interests in the 865*l.* *Stevens* v. *Van Voorst*, 17 Beav. 305.

Covenant to settle after-acquired property of the wife:—Held, to extend to property acquired after the death of the husband. *Ib.*

5. A settlement contained the usual covenant by the husband and wife to assign after-acquired property of the wife to trustees, with a proviso that it should be lawful for the trustees, at the request of the husband and wife during their joint lives, and of the survivor during his or her life, and afterwards, at the discretion of the trustees, to sell and dispose of such property, and invest the proceeds upon the trusts of the settlement. The wife afterwards became entitled to leaseholds and specific personal chattels:—Held, that the trustees were not for the present to convert these things without the request in writing of the husband and wife. *Hope* v. *Hope*, 1 Jur., N. S., 770; 3 W. R. 617.

6. By a marriage settlement of B. and A. 7,500*l.*, 4*l.* per cent. bank annuities, were settled upon trust for B. for his life, then for A. for her life, and after the death of the survivor for the children equally; the shares of sons to vest at twenty-one, or dying under that age leaving issue then living. The settlement contained a covenant to settle after-acquired property of A. on her for life, and after her death "for all and every the issue of the then intended marriage, upon the same or the like trusts, and subject to the powers and provisoes as were thereinbefore expressed and declared of and concerning the 7500*l.*, 4*l.* per cent. bank annuities." A. died, leaving two sons, the only children of the marriage, both of whom had attained twenty-one, married, and had issue each three children, all infants. On a bill to obtain a declaration as to the construction of the covenant to settle the after-acquired property:—Held, that the word "issue" in the covenant must be restricted to children, and that the two sons, having survived their mother, and attained twenty-one, were entitled to her after-acquired property absolutely between them. *Marshall* v. *Baker*, 11 W. R. 78; 7 L. T., N. S., 303.

7. A. having, in his marriage settlement, conveyed leasehold estates, of which he was possessed, to trustees, to hold to his own use during his life, and after his decease to the use that his intended wife should receive thereout a jointure, covenants to charge all the lands of which he was seised at the time of his execution of the settlement, or of which he should at any time thereafter become seised, with the payment of the jointure, the settlement proceeded: "And, further, that the said land, after the decease of the survivor," should be to the use of the children of the marriage:—Held, that the words "the said lands" referred to the lands then conveyed to the trustees, and that the children of the marriage did not, under the settlement, acquire any interest in the after-acquired property. *Re Hammersly, Exp. Smith*, 12 Ir. Ch. R. 319.

8. An order was, in 1855, on the application of the father as next friend, made, directing a trustee to pay certain dividends to the father for the maintenance and education of an infant daughter during her minority, or while unmarried. Previously to the marriage of the daughter, the draft of a proposed settlement, which contained a covenant by the intended husband to settle after-acquired property of the wife, but no provision as to the children by a future husband, was sent to the intended husband, and returned by him without any

objection thereto. The marriage took place before the draft was ingrossed. A post-nuptial settlement, which contained no covenant to settle after-acquired property, and no provision for children of the wife by a future husband, was executed. Trustees subsequently paid funds of the wife, who was still a minor, into court. The husband and wife presented a petition for a transfer of the funds to them, and certain inquiries were directed. The chief clerk certified that the settlement ought to contain both provisions. The Court directed only that the after-acquired property of the wife should be made subject to the trusts of the settlement. *Re Hoare*, 9 Jur., N. S., 167.

1. A settlement of personal estate contained a power to alter and vary, and a covenant to settle future acquired real and personal estate on similar trusts:—Held, that a power of sale might be introduced into a settlement of subsequently acquired real estate. *Elton* v. *Elton*, 27 Beav. 634.

2. On the marriage of S. and his wife, in 1870, three deeds were executed. By the first, freeholds were settled for the benefit of husband and wife during their joint lives, in moieties; the wife's moiety for separate use with restraint on anticipation. By the second, husband and wife covenanted that personal property coming to the wife during coverture should be settled on trust for husband and wife during their joint lives in moieties, the wife's moiety for her separate use with restraint on anticipation. By the third, the wife's father covenanted to pay an annuity to the trustees on trust for the husband and wife during their joint lives, in moieties, the wife's moiety for her separate use with restraint on anticipation. In 1874 S., for value received from the wife's father, and by his direction, assigned his interest in the annuity to the same persons who were trustees of the settlements, on trust for the wife, for her separate use for life, and after her decease on the trusts of the settlements. In this deed the two settlements were recited, but not the deed of covenant as to after-acquired property, and there was no clause restraining anticipation. In 1878 the wife, with the concurrence of the husband, purported to assign to a mortgagee all her interest in the annuity under the deed of 1874:—Held, that the intention of the deed of 1874 was that the husband's interest in the annuity thereby assigned should be treated as if it was property originally settled, and that therefore the wife was restrained from anticipation, and no part of the annuity passed by the mortgage deed. *Scholfield* v. *Spooner*, 48 L. T. 159.

V. OTHER MATTERS.

3. Effect of an agreement to settle present and future property. *Coke* v. *Bishop*, 3 Swan. 401.

4. Validity of covenant to settle all future acquired property. *Hardey* v. *Green*, 12 Beav. 182; 18 L. J., N. S., Ch., 480; 13 Jur. 777.

5. Execution decreed of a contract on marriage by bond, with condition to settle all the personal estate that the husband should at any time, during the coverture, be possessed of. *Lewis* v. *Madocks*, 8 Ves. 150. See this case further, 17 Ves. 48.

6. A marriage settlement recited an agreement that the after-acquired property of the wife should be settled, but the covenant to settle was on the part of the husband only:—Held, that the wife was not bound by it. *Young* v. *Smith*, 35 Beav. 87; 11 Jur., N. S., 963.

7. An agreement by husband and wife, in an ante-nuptial settlement, for the settlement by the husband and wife of the wife's after acquired property, is a covenant by the wife as well as by the husband, whether the wife is a minor or of full age. *Smith* v. *Lucas*, 18 L. R., Ch. D., 531; 45 L. T. 460; 30 W. R. 451.

8. By their marriage settlement the intended husband and wife each covenanted to assign and settle any personal estate which should, during the coverture, vest in the wife or in the husband in her right. At that time the wife was entitled, as one of two joint tenants, to personal estate in expectancy on the death of a person who died during the coverture:—Held, that the marriage and the covenant to settle each operated to sever the joint tenancy. *Baillie* v. *Treharne*, 17 L. R., Ch. D., 388; 50 L. J., Ch., 295; 44 L. T. 247; 29 W. R. 729.

9. A husband and wife, under an erroneous idea that they were performing a covenant to settle the after acquired property of the wife, directed a sum of money, to which she had become entitled, to be paid to the trustees of their marriage settlement upon the trusts thereof. They executed a release, which recited these facts. After the decease of the husband, and the subsequent marriage of the wife:—Held, that the money was appropriated to the trusts of the settlement; that the direction to pay to the trustees was, in effect, a declaration of trust; and that the transaction must be supported against the second husband, who claimed the money by virtue of his marital right. *Spicer* v. *Dawson*, 3 Jur., N. S., 1161; 26 L. J., Ch., 704.

10. By a post-nuptial and voluntary settlement, a husband and his wife assigned to trustees all their present or future acquired property, in trust for the wife for life, with remainder to the husband for life, with remainder over. A bequest was afterwards made to the wife. The Court refused to compel the husband to perform the trusts of this voluntary settlement. *Ellis* v. *Nimmo* (Ll. & G. *temp.* Sugd. 333) observed on. *Holloway* v. *Headington*, 8 Sim. 324; 6 L. J., N. S., Ch., 199.

11. In contemplation of a marriage between an alien and an English lady, certain real estates were conveyed to trustees in trust for sale, and to stand possessed of the sale moneys in trust for the mother of the lady for her life, and after her death upon the trusts expressed in the deed of settlement executed before the marriage, by which the dividends of certain stocks were declared to be held by the trustees in trusts for the husband and wife, and the survivor for life, and then in trust for the children of the marriage absolutely; and by the deed of settlement the husband covenanted that, in case any property should during the intended coverture vest in the wife, he would do all acts necessary for settling the same upon the trusts of the marriage settlement. The marriage took effect, and there were issue

six children, of whom the eldest had attained twenty-one years. The two eldest were born in France, and were aliens, the others were born in England and were English subjects. After the marriage the lady became entitled to certain real estates:—Held that the clause in which the covenant was contained was executory, that the parties had one common object in view, and that the Court would imply that all lawful means necessary for the complete accomplishment of the common object were intended to be done by the parties to the deed; and that the subsequently acquired real estates ought to be sold, and the proceeds invested upon the trusts contained in the settlement and declared of the stocks. *Master* v. *De Croismar*, 11 Beav. 184; 17 L. J., N. S., Ch., 466; 12 Jur. 762.

1. The trusts of a post-nuptial settlement of a wife's present and future property were declared to be for the husband and wife for life, with remainder to the issue of the marriage. Some property came into possession during the marriage, which the husband paid over to the trustees upon the trusts of the settlement. After his death other property belonging to the wife fell into possession, which she refused to settle:—Held, that the widow was not bound to perform the covenants of the settlement, but that, electing to take against the settlement, she must recoup, for the benefit of the children, the moneys which she had received under the settlement. *Anderson* v. *Abbott*, 3 Jur., N. S., 833; 23 Beav. 457.

2. By an ante-nuptial settlement a trader covenanted with the trustees of it to pay them 3,000*l.* out of the first capital moneys, or real or capital personal estate, or capitalised income, of or to which he should be or become possessed or in any wise entitled after the solemnisation of the marriage, within six months after he should "have become" so possessed or entitled. The trader was at the time possessed of stock in trade and effects exceeding in value 3,000*l.*, and so continued for more than six months after the date of the settlement, but did not after the marriage acquire additional property to that amount. He became bankrupt after the expiration of the six months:—Held, that the event contemplated by the covenant had happened before the bankruptcy, and that there was a breach of the covenant entitling the trustees to prove. *Exp. Evans*, 2 De G. M. & G. 948; 22 L. J., Bky., 5.

3. In a settlement made between persons severally entitled to interests under a will, the settlor, who took a life interest under the settlement, covenanted that if he became entitled to any property exceeding in value the sum of ——, he would assign the same to the trustees. He afterwards became entitled to a reversionary interest, and filed a bill to have the settlement rectified, or that it might be declared that the covenant was void. Stuart, V.-Ch., dismissed the bill without costs:—Held, on appeal, that this decision was correct, as the Court would not make a declaration of right beforehand, and that the covenant could not be considered insensible, as it must apply to capital, and not income. *Fyfe* v. *Arbuthnot*, 3 Jur., N. S., 651; 26 L. J., Ch., 646.

V. Covenants to Insure and Settlement of Policies.

I. *In General*, 6216.
II. *Premiums and Duty of Trustees*, 6217.
III. *Right to Policy Moneys.* See INSURANCE, II. VII. 5 & 6.
IV. *Right to Bonus.* See IX. V. *post.*

I. IN GENERAL.

4. Principles on which the Court proceeds in putting a construction upon inconsistent clauses in a settlement. *Bush* v. *Watkins*, 14 Beav. 425.

By the terms of a marriage settlement, 1,000*l.*, secured by policy of insurance on the life of the intended wife's father, was to be paid to the intended husband, provided he had previously effected an insurance on his own life for a similar amount; if not, it was to be paid to the wife. It then directed that, if the insurance should not have been effected, or if the husband and wife should be both dead when the 1,000*l.* should be received by the trustees, it should be paid to the issue of the marriage. The husband covenanted to effect an insurance within six months after the decease of the wife's father, to secure the payment of the said sum of 1,000*l.* at his decease. By a clause at the end of the settlement, it was directed that in default of the husband effecting the insurance, the 1,000*l.* should be invested and the interest paid to the husband until he effected it, and then he was to receive the principal. The insurance was not effected within the time mentioned:—Held, that the husband might effect the insurance at any time during his life; that the trusts in favour of the wife did not arise till the close of the life of the survivor of her father and husband, and that the trusts in favour of the children did not arise till after the death of all three—viz., the father, the husband, and the wife. *Ib.*

The dividends of the 1,000*l.* were therefore directed to be paid, during the life of the husband, to his mortgagees, or until he should effect the insurance; and if he effected an insurance, the principal was to be applied in payment of the mortgage debt, and the residue to be paid to the husband, or the parties claiming under him. *Ib.*

5. A husband covenanted to insure his life for 1,200*l.* and assign the policy to trustees, and confessed a judgment to them to same amount, which was to be called in if policy not kept up. Another sum of 800*l.* in the same settlement was lent by the trustees to the husband on the security of a policy to that amount on husband's life. No other policy was assigned, and no steps taken to enforce the judgment and covenant:—Held, that the proceeds of the policy were not necessarily to be considered as obtained in pursuance of the husband's obligation, and that the trustees' liability in not compelling payment depended on the husband's ability *Ball* v. *Ball*, 11 Ir. Eq. R. 370.

6. In a suit against trustees by a husband, who covenanted to effect a policy of insurance with a respectable insurance company and to assign the same to trustees, but who insured

father gave 15,000*l.* to trustees to pay 200*l.* per annum, for the maintenance of the son till twenty-five, and then to pay him the principal; and if he should marry between twenty-two and twenty-five, and die, to pay the whole to the issue; but if he died unmarried before twenty-five, the whole over; the devise is not a satisfaction of the bond. *Peacock* v. *Falkener*, 1 Bro. C. C. 295.

1. Bond upon marriage to secure 300*l.*, the wife's fortune, to the wife within one month after husband's decease; by will the husband gave her 500*l.* payable within six months after his decease, together with other legacies; the bequest of 500*l.* is not a satisfaction for the 300*l.* secured by the bond. *Haynes* v. *Mico*, 1 Bro. C. C. 129. *Semble*, overruled; see 1 M'Clel. & Y. 41. See also Romilly's Notes of Cases, 41.

2. Gift of a residue by will, is a satisfaction for money secured to be paid by marriage articles. *Pearson* v. *Morgan*, 2 Bro. C. C. 388.

3. One gives a bond on his marriage, either within four months to settle lands of 100*l.* per annum on his wife, or that his heirs, etc., shall pay her 2,000*l.* within four months after his death; husband, after this, devises to his wife lands of 80*l.* per annum: this shall not be taken in part of the 100*l.* per annum, but only as a benevolence. *Eastwood* v. *Vinke*, 2 P. W. 614.

4. Wife entitled, under bond by the husband upon the marriage, to the sum payable three months after death for her for life, then for the children, if none for her absolutely. By will he gave all real and personal estate he then had, or might die possessed of, upon trust, to pay her the rents and interest for life, then the whole equally to the children; if none, over; and revoked all former settlements and wills. There were no children:—Held, the widow entitled to both. *Forsight* v. *Grant*, 1 Ves. J. 298; 3 Bro. C. C. 242.

5. Gift of an equal sum by will is a clear performance of a covenant in the settlement. The provision in the settlement is not a debt, in the ordinary sense of the word, so as to come under direction in will to pay debts. *Wathen* v. *Smith*, 4 Madd. 236. S. C. *id.* 325.

Covenant in settlement to leave by will, satisfied by legacy to amount: though followed by general direction for payment of debts. *Ib.*

6. A. agrees to settle 100*l.* per annum on intended wife; falling sick, devises 100*l.* per annum to her; recovering, marries her, and the settlement is carried into execution: she can take but 100*l.*, and parol evidence admitted to prove the intent. *Mascal* v. *Mascal*, 1 Ves. 323.

7. An annuity of 40*l.* per annum devised to wife is no satisfaction of bond for 1,000*l.* settled on her at marriage; but held she was entitled to both. *Jobson* v. *Pelly*, 9 Mod. 437.

8. Lands settled in jointure are covenanted to be of the yearly value of 1,000*l.*; the husband by his will gives his wife 1,000*l.*, and other legacies. The jointure lands prove deficient 300*l.* per annum:—Held, that the legacies, which were admitted to be of greater value than the defect of jointure, ought to be taken in satisfaction of such deficiency. *Mountague* v. *Maxwell*, 4 Bro. P. C. 598.

9. E. K., by marriage articles, agreed to settle 50*l.* a year upon his wife in the event of her becoming a widow, payable out of the lands of C. E. K. subsequently made his will, in which was the following passage: "I bequeath to my wife during her life the sum of 50*l.* yearly (50*l.* yearly being settled on her by me in our intermarriage), payable out of the lands of C.":—Held, that the widow took only one annuity of 50*l.* *Re Power*, Fl. & K. 282.

10. Covenant in marriage articles by the husband, to pay his wife, if she should survive, 200*l.* as jointure, and 50*l.* to provide herself with a house, yearly for life; afterwards by will, he gave her for life an estate and house, above the yearly value of 100*l.* a year, with the household goods, etc., and an annuity of 100*l.*, commencing and payable at different times from those in the articles:—Held, not a performance, nor intended as a satisfaction, no such intent being expressed. *Richardson* v. *Elphinstone*, 2 Ves. J. 462.

11. Devise of residue of real and personal for life, not a satisfaction for a sum to be laid out in lands in fee by articles. *Alleyn* v. *Alleyn*, 2 Ves. 409.

12. One, on the marriage of his daughter, gives a bond to the husband for the daughter's portion, and afterwards, by will, devises land of much greater value to the husband and the wife, and their heirs. The devise no satisfaction of the bond, though there be a defect of assets to pay the testator's debts. *Goodfellow* v. *Burchett*, 2 Vern. 298.

13. Bond by husband to pay to trustees in his lifetime or immediately after his death, 500*l.* in trust (subject to their own charges, etc.) for his wife for life, and after her death to issue, and in default of issue for wife absolutely. Bequest after payment of debts of 1,000*l.* to wife absolutely within six months of death:—Held, not a satisfaction of bond. *Adams* v. *Lavender*, 1 M'Clel. & Y. 41.

14. By a marriage settlement, a rent charge of 200*l.* a year was secured to the wife for life, payable quarterly, with powers of distress, etc. To enable the husband to mortgage, the wife relieved her rent charge to the mortgagee. The equity of redemption was reserved to the husband, who covenanted to convey other land on the trusts of the settlement. The husband by his will gave his real and personal estate to his brother, on condition that he would allow his wife 300*l.* a year for life:—Held, that the 200*l.* a year remained a valid charge on the equity of redemption; and, secondly, that it was not satisfied by the 300*l.* a year. *Wood* v. *Wood*, 7 Beav. 183.

15. A testator on his marriage covenanted that his representatives should, within three months after his decease, pay 2,000*l.* to trustees to be held for his wife, for life. By his will, after directing all his debts to be paid, he gave his widow an annuity of 200*l.* a year, payable quarterly, and other benefits:—Held, that the provision for the wife, under the settlement, was not satisfied by the provision made for her by the will. *Cole* v. *Willard*, 25 Beav. 568; 4 Jur., N. S., 988.

16. A testator, by his marriage settlement, covenanted to secure his wife a life annuity of 100*l.* a year if she survived him. By his will, he gave her a life annuity of 100*l.* a year:—Held, that this was in addition, and not in satisfaction, on three grounds; first,

1. A husband covenanted to insure his life for 1,200*l.*, and assign the policy to trustees, and confessed a judgment to them for that amount to be called in if the policy was not so assigned and kept up. Another sum of 800*l.* vested in them by same settlement on similar trusts, was lent by trustees to husband on security of assignment of a policy for 800*l.* on his life. No other policy was assigned to them, and no steps taken to enforce judgment or covenant:—Held, that proceeds of policy might be applied to purpose for which policy was really assigned, and that liability of trustees for not compelling husband to insure depended on his ability. *Ball* v. *Ball*, 11 Ir. Eq. R. 370.

2. A trustee, having a duty to keep up a policy, and the means of procuring funds for that purpose, can himself acquire no lien on the policy for premiums paid out of his own moneys, nor can he give any lien thereon to a third party who advances money for that purpose, and which is so applied. *Clack* v. *Holland*, 19 Beav. 262; 18 Jur. 1007; 24 L. J., Ch., 13.

If a trustee has no funds properly applicable for keeping up a trust policy, he may advance or borrow money to pay the premiums, and the amount will be a lien on the policies. *Ib.*

A policy was held on trust; the trustee assigned it to A. B. to secure some premiums. It being held that A. B., under the circumstances, had no lien on the policy, it was also held that he had obtained no priority over the *cestui que trust*, by first giving notice of the assignment to the assurance office. *Ib.*

Where it is the duty of a trustee or executor to obtain payment of a sum of money, he is exonerated, and never required to make good any loss if he has done all he could to obtain payment, but his efforts have not proved successful; nay, more, if he has taken no steps at all to obtain payment, but it appears that if he had done so they would have been, or there is reasonable ground for believing they would have been, ineffectual, he is exonerated from all liability. *Ib.*

In the case of a chose in action, which is not assignable at law, the transferee, taking only an equitable interest, can obtain no greater benefit in it than the transferor himself possessed. *Ib.*

Trust funds were lent to A. B. (the tenant for life), with the assent of his wife and children, who were entitled in remainder. A. B. secured the repayment to the trustees by a life policy and a charge on his living. The trustees for seventeen years, with the assent and concurrence of A. B., paid over the surplus proceeds of the living to A. B.'s family, from whom he was living separate:—Held, that the debt was not thereby satisfied. *Ib.*

VI. Performance and Satisfaction of Covenants.

I. *General Principles*, 6218.
II. *Actual Discharge of Liability. What Amounts to*, 6218.
III. *Covenants to Purchase or Settle Land*, 6219.
IV. *By Legacy*, 6222.
V. *By Share under Statute of Distributions*, 6224.
VI. *By Other Provisions or Property of Covenantor*, 6225.
VII. *Satisfaction by Legacy of Portions and Covenants by Parents to Settle Property on their Children, and of Legacy by Portions.* See PORTION, XI.

I. GENERAL PRINCIPLES.

3. Distinction between satisfaction and performance. *Goldsmid* v. *Goldsmid*, 1 Swan. 219.

4. Where a husband, by settlement before marriage, was obliged to do a particular act for his wife's benefit, and he does a thing equally satisfactory, the Court will presume a satisfaction by implication. *Weyland* v. *Weyland*, 2 Atk. 632.

The presumption of a satisfaction is stronger in the case of a deed than of a will, where a bounty is supposed to be intended. *Id.* 634.

II. ACTUAL DISCHARGE OF LIABILITY. WHAT AMOUNTS TO.

5. A father, on the marriage of his daughter, agreed to pay, by way of portion, a sum of money to trustees, to be held in trust for the husband, daughter, and children of the marriage in succession: the trustees named in the settlement having refused to act, the father paid the money to the husband:—Held, that the payment was wrongful, and, the money having been lost, the father was held liable at the suit of a child of the marriage to pay it a second time. *Evans* v. *John*, 4 Beav. 35.

6. Money by marriage articles to be laid out in land, to uses of husband and wife of life, then to the children as they should appoint; in default of appointment, equally; but if one, to that one in tail; reversion to husband in fee. There is one daughter: the trustee pays it to her and her husband, she not being *sui juris*, not separately examined; the payment not sufficient to make it considered as money, and sister of the half-blood may claim the reversion in fee from the father; but the husband of the other sister, who was tenant in tail, will be tenant by curtesy. *Cunningham* v. *Moody*, 1 Ves. 174.

7. By a marriage settlement executed in 1797, reciting that S., the intended husband, was entitled to real estate on the decease of his father, and to certain sums in the English funds, as residuary legatee of his grandmother, S. covenanted with the trustees that he would, as soon as he could after the execution of the settlement, transfer to them the money, and invest in such funds as should be thought most advisable, in the names of the trustees, such further sums, the interest of which should amount to 600*l.* a year, free from all deductions, in trust for S. for his life, and after his death upon trust to pay the interest to A., his intended wife, as a jointure, with a power to S. to revoke the trust of the fund so to be invested, on conveying to the trustees real estate of the value of 600*l.* a year, to be held on the

father gave 15,000*l.* to trustees to pay 200*l.* per annum, for the maintenance of the son till twenty-five, and then to pay him the principal; and if he should marry between twenty-two and twenty-five, and die, to pay the whole to the issue; but if he died unmarried before twenty-five, the whole over; the devise is not a satisfaction of the bond. *Jeacock* v. *Falkener*, 1 Bro. C. C. 295.

1. Bond upon marriage to secure 300*l.*, the wife's fortune, to the wife within one month after husband's decease; by will the husband gave her 500*l.* payable within six months after his decease, together with other legacies; the bequest of 500*l.* is not a satisfaction for the 300*l.* secured by the bond. *Haynes* v. *Mico*, 1 Bro. C. C. 129. *Semble*, overruled; see 1 M'Clel. & Y. 41. See also Romilly's Notes of Cases, 41.

2. Gift of a residue by will, is a satisfaction for money secured to be paid by marriage articles. *Pearson* v. *Morgan*, 2 Bro. C. C. 388.

3. One gives a bond on his marriage, either within four months to settle lands of 100*l.* per annum on his wife, or that his heirs, etc., shall pay her 2,000*l.* within four months after his death; husband, after this, devises to his wife lands of 80*l.* per annum: this shall not be taken in part of the 100*l.* per annum, but only as a benevolence. *Eastwood* v. *Vinke*, 2 P. W. 614.

4. Wife entitled, under bond by the husband upon the marriage, to the sum payable three months after death for her for life, then for the children, if none for her absolutely. By will he gave all real and personal estate he then had, or might die possessed of, upon trust, to pay her the rents and interest for life, then the whole equally to the children; if none, over; and revoked all former settlements and wills. There were no children:—Held, the widow entitled to both. *Forsight* v. *Grant*, 1 Ves. J. 298; 3 Bro. C. C. 242.

5. Gift of an equal sum by will is a clear performance of a covenant in the settlement. The provision in the settlement is not a debt, in the ordinary sense of the word, so as to come under direction in will to pay debts. *Wathen* v. *Smith*, 4 Madd. 236. S. C. *id.* 325.

Covenant in settlement to leave by will, satisfied by legacy to amount: though followed by general direction for payment of debts. *Ib.*

6. A. agrees to settle 100*l.* per annum on intended wife; falling sick, devises 100*l.* per annum to her; recovering, marries her, and the settlement is carried into execution: she can take but 100*l.*, and parol evidence admitted to prove the intent. *Mascal* v. *Mascal*, 1 Ves. 323.

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12. One, on the marriage of his daughter, gives a bond to the husband for the daughter's portion, and afterwards, by will, devises land of much greater value to the husband and the wife, and their heirs. The devise no satisfaction of the bond, though there be a defect of assets to pay the testator's debts. *Goodfellow* v. *Burchett*, 2 Vern. 298.

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14. By a marriage settlement, a rent charge of 200*l.* a year was secured to the wife for life, payable quarterly, with powers of distress, etc. To enable the husband to mortgage, the wife relieved her rent charge to the mortgagee. The equity of redemption was reserved to the husband, who covenanted to convey other land on the trusts of the settlement. The husband by his will gave his real and personal estate to his brother, on condition that he would allow his wife 300*l.* a year for life:—Held, that the 200*l.* a year remained a valid charge on the equity of redemption; and, secondly, that it was not satisfied by the 300*l.* a year. *Wood* v. *Wood*, 7 Beav. 183.

15. A testator on his marriage covenanted that his representatives should, within three months after his decease, pay 2,000*l.* to trustees to be held for his wife, for life. By his will, after directing all his debts to be paid, he gave his widow an annuity of 200*l.* a year, payable quarterly, and other benefits:—Held, that the provision for the wife, under the settlement, was not satisfied by the provision made for her by the will. *Cole* v. *Willard*, 25 Beav. 568; 4 Jur., N. S., 988.

16. A testator, by his marriage settlement, covenanted to secure his wife a life annuity of 100*l.* a year if she survived him. By his will, he gave her a life annuity of 100*l.* a year:—Held, that this was in addition, and not in satisfaction, on three grounds; first,

because he directed his debts to be paid; secondly, because he expressed it to be given as an addition to her own property, and thirdly, because he gave it in full satisfaction of her dower, freebench, and thirds upon his property. *Glover* v. *Hartcup*, 34 Beav. 74.

1. Bequest held, under the circumstances, not to be intended in satisfaction of a liability to pay, contracted by covenant in a marriage settlement. *Milligan* v. *Hardwicke* (*Earl*), 1 Jur., N. S., 793.

2. A., having a power under his marriage settlement to appoint a fund amongst his children, and which was limited to them in default of appointment, became a party to his son's marriage settlement, by which he covenanted with the trustees to bequeath to his son or daughter-in-law 2,500*l.* upon the trusts of the settlement. By his will A. appointed to his son 2,500*l.* (part of the trust funds) in full discharge of his covenant:—Held, that the bequest was not a performance of his covenant, and that the parties claiming under the son's settlement were entitled to both. *Graham* v. *Wickham*, 31 Beav. 447; 9 Jur., N. S., 702; 11 W. R. 1009; 8 L. T., N. S., 679; 2 N. R. 410; 1 De G. J. & S. 474.

3. Where a testator was indebted to the trustees of his marriage settlement, which contained a power of appointment which had not been exercised, in consequence whereof certain of his legatees became interested in the fund:—Held, that the legacies were not satisfied, *pro tanto*, out of the debt due to the trustees. *Smith* v. *Smith*, 7 Jur., N. S., 1140; 5 L. T., N. S., 302; 2 Giff. 263.

But a legacy to the *cestui que trust* of a settlement, by which the testator had covenanted with trustees to settle certain funds:—Held, not a satisfaction of the covenant. *Ib.*

4. A testator being, by virtue of his marriage settlement, under an obligation to pay the trustees 5,000*l.* for his wife for life, by his will bequeathed 10,000*l.* to other trustees for his wife for life; and he also directed the payment of all his just debts:—Held, that the bequest was not a satisfaction of the 5,000*l.*, and that the widow was entitled to both provisions. *Pinchin* v. *Simms*, 30 Beav. 119.

5. A person who has covenanted to bequeath or otherwise provide that a share of his estate shall go to the covenantee, fulfils his covenant by bequeathing the share to the covenantee, who then stands in the same position as any other legatee. *Jervis* v. *Wolferstan*, 18 L. R., Eq., 18; 43 L. J., Ch., 809; 30 L. T. 452.

A testator had covenanted to leave by will or otherwise provide for his daughter, one-third of the residuary estate; he bequeathed one-third to her, which was settled on her marriage and paid to the trustees of her marriage settlement:—Held, that the testator had satisfied his covenant; that the daughter took her share, not as a creditor, but as a residuary legatee, and that her trustees must refund the amount with the other residuary legatees. *Ib.*

V. BY SHARE UNDER STATUTE OF DISTRIBUTIONS.

6. Covenant to leave his wife 620*l.*; party dies intestate, and wife's share comes to above 620*l.*; this is a satisfactio *more*, 1 P. W. 324.

7. Proviso in a settle should not be barred of a should give or leave by intestate, and a freeman o by the statute and custon tion of the covenant. *Ki* Bro. C. C. 95.

8. Husband covenants deed or will 1,000*l.* at his him, but dies intestate; s her distributive share in under the covenant. *Lee* 1; 3 Atk. 419.

9. Covenant to leave a is not done, but personal to descend, so that an e would go according to the performance. *Richardso* Ves. J. 463.

10. G. having by marriag that, if he died in the life executors should within his decease pay to her 3, his will given all his prop in trust, after payment expiration of three year to divide it "in such ways tions as to them shall a death, during the life of hi having died or renounce divisible according to the tions; and the widow's exceeding 3,000*l.*, is a covenant in the marriage v. *Goldsmid*, 1 Swan. 211;

11. A bond for marriage life interest to the wife, a distributive share of the a larger amount. *Wright* 681.

12. Settlement previous wife's fortune on herself, the husband in considerat etc., and for making som wife and her issue, to pay after his death 6,000*l.* to t if the wife should survive no issue (which was the e to the wife, her executors, interest of the remaining life, she is entitled to do under the Statute of Dis satisfaction or performan *Couch* v. *Stratton*, 4 Ves. 3

13. Covenant in settlem event of his death leavin and children, within six to pay, etc., one full and such real and personal es seised, etc., of at his deat ciple of part performance, entitled, in addition to th covenant, to a third of the estate, by intestacy of hu v. *Chalie*, 10 Ves. 1.

14. L., previously to his covenanted that he would good assurance, grant to her executor, etc., in trust paid to her after his decea use; and in case he shou will, assure the same, ther

should pay the 1,000*l.* L. died without such deed or will:—Held, that D. was not entitled to the 1,000*l.* and her distributive share of L.'s personal estate also, it being meant by L. not as a debt, but a security only for his wife's provision. *Lee* v. *Cox*, 3 Atk. 419; 1 Ves. 1.

1. By a settlement in contemplation of marriage, made at the Mauritius, where the laws of France were in force, drawn up in the French language, and executed according to the French form, it was agreed, that there should be no community of goods between the husband and wife; and it was stated to be the intention of the parties to marry according to the laws and customs of England, the benefit of which they reserved to themselves the right to claim. The husband then acknowledged the receipt of 4,000*l.* belonging to the wife, which he covenanted to invest for her benefit, and for her separate use during the marriage, either in land or in the French funds, or other securities which the wife should approve. The 4,000*l.* was never paid to the husband, nor did he invest such a sum during the marriage. His domicil was in England:—Held, that upon his death intestate, the wife was entitled to receive 4,000*l.* out of his estate, and also a distributive share of his personal estate remaining after payment of that sum. *Lang* v. *Lang*, 8 Sim. 451; 6 L. J., N. S., Ch., 324; 1 Jur. 472.

2. A covenant by the husband in marriage articles to provide a jointure of 200*l.* sterling per annum, such jointure to be levied on the lands of D. and B., though the jointure be paid, will not bar the wife's right to her distributive share of the personal estate. *Creagh* v. *Creagh*, 8 Ir. Eq. R. 68.

3. Where a husband covenanted by his marriage settlement to give, devise, bequeath, and secure to his widow an annuity for her life after his decease, to be levied, raised, and paid to her by his heirs, executors, or administrators, and the husband afterwards died intestate:—Held, on the authority of *Couch* v. *Stratton* (4 Ves. 391), that the widow's share of the husband's personal estate, under the Statute of Distributions, was not to be taken by her as a performance of his covenant either wholly or *pro tanto*. *Salisbury* v. *Salisbury*, 6 Hare 526; 17 L. J., Ch., 480; 12 Jur. 671.

4. When a husband covenanted on his marriage that, for the purpose of making a further provision for his intended wife, in case she should survive him, a trustee should stand possessed of all his personal property at the time of his death, in trust for the use and benefit of the intended wife and the issue of the marriage, with power to her to distribute the same as she might think proper among such issue, and the husband died before her intestate, and there was no issue:—Held, that the wife, besides taking a life interest in such personalty, was, in the absence of express words to the contrary, entitled to her share of the corpus under the Statute of Distributions. *Young* v. *Young*, 5 Ir. R., Eq., 615.

5. Personal estate belonging to an intended husband was settled in trust for him for life, with successive trusts for the wife *durante viduitate* and the children (if any) of the marriage, in the usual form, with an ultimate limitation to the husband, his executors, administrators, or assigns, for his and their own use and benefit. The wife survived and married again. The first husband died intestate, and on the ultimate limitation taking effect, the wife claimed her share in his assets under the Statute of Distributions:—Held, though she had by her second marriage forfeited her life estate, she had not forfeited her claim to a distributive share in the husband's assets, and that his personal representatives took in trust for his next of kin under the statute, and not beneficially. *O'Brien* v. *Hearn*, 18 W. R. 514.

6. Real estate was settled, on marriage, upon trust to sell, with the consent of the husband and wife, or the survivor of them, and hold the proceeds on the trusts of an indenture of even date. The trustees had power to lease, to concur in a partition of the lands of which the settled estate formed part, and to let or work the minerals, it being declared that all royalties should be considered as income, and all moneys received from working minerals as capital. The trusts of the deed of even date were for the benefit of the husband and wife during their lives, and after their death for the issue of the marriage. This deed also contained a covenant by the husband that he or his representatives would, during his lifetime, or within twelve months after his death, pay to the trustees 1,200*l.* to be held upon the trusts of the settlement. There was no issue of the marriage; the husband died intestate without having paid the 1,200*l.*, and the widow's net distributive share considerably exceeded that sum:—Held, that the real estate had been converted out and out by the settlement; and that the husband's covenant to pay the 1,200*l.* was not satisfied by his intestacy. *James* v. *Castle*, 33 L. T., N. S., 665.

Provision for Satisfaction of Distributive Share by Settlement.] See DISTRIBUTION OF ESTATE, III. iii. 4.

VI. BY OTHER PROVISIONS OR PROPERTY OF COVENANTOR.

7. Members of a society covenanted mutually that their widows should receive annuities from the society. Payment from the society is not a satisfaction for a covenant in the settlement by the husband, to pay her an annuity in lieu of all claim on his personal estate. *Rhodes* v. *Rhodes*, 1 Ves. J. 96.

8. S. had an estate in B. by his first wife, by whom also he had a daughter, M. By the marriage articles it was agreed that S. should leave his daughter M. 2,500*l.*, if the trustees demanded it within one year after his death. A., the father of S., was then living. S. married again, and had several daughters. By deed in his lifetime, he gave the estate in B. to M. and her heirs; and by deed also, he charged his reversionary lands in D. with 5,000*l.* to each of his daughters, and died. M. demanded the 2,500*l.* interest. Harcourt, Ld. K., decreed that M. should have the 2,500*l.*, with interest from the death of S.; that the estate in B. could not be an equivalent, because it moved from the mother of M., and was the condition of the marriage agreement; and that the reversion of the

lands in D. could not be so, because they were not then in being, and the father of S. was then living, and to make it an equivalent, it ought to be in being and in view at the time of giving the equivalent. *Anon.*, 5 Vin. Abr. 292, pl. 38.

1. One, on marriage, gives bond to settle an estate of inheritance of clear 100*l.* a year to the use of himself for life, remainder to his wife for life, remainder to the heirs of their bodies, remainder to his own right heirs; he afterwards settled a rent-charge, which he was entitled to, payable out of the customs at Hull:—Held, a performance of the agreement. *Middleton* v. *Pryor*, Ambl. 391.

2. A. being indebted, as his father's executor, to the trustees of his sister's marriage settlement, settled on her and her children a sum to a large amount, in consideration of the natural love and affection he bore them:—Held, that this was not a satisfaction of the debt. *Drewe* v. *Bidgood*, 2 Sim. & S. 424; 4 L. J., Ch., 33.

3. A bond for the performance of a covenant to pay an annuity, until a person should be in the enjoyment of a benefice, which he might hold during his life, of the yearly value of 600*l.*:—Held, to be satisfied by his induction to a living of that value, accompanied by a bond to resign in favour of either of two sons of the patron, when qualified to take it; but liberty was given to take the opinion of a court of law. *Exp. Rainer*, 1 Jac. & Walk. 280.

4. By a marriage settlement the husband covenanted with the trustees that he would forthwith effect a policy of assurance upon his life with some respectable assurance company, for the sum of 1,000*l.*, and assign the same to the trustees. A policy of assurance effected with a friendly society, if it be not assignable, or if it be less beneficial than a policy effected with an ordinary insurance company, is not within the meaning of the covenant, and a reference was directed on the subject. *Courtenay* v. *Courtenay*, 3 J. & L. 519; 9 Ir. Eq. R. 329.

A friendly society is not an assurance company within the meaning of such a covenant; and that, if the covenantor rely upon an assurance with a recently established friendly society (supposing such to be an assurance company within the covenant), as a performance of his covenant, he ought to show that the society is possessed of capital, and is solvent. *Ib.*

5. J., in 1810, by his marriage settlement, covenanted with the trustees of that settlement, that all the property of which he should die seised or possessed should be charged with 1,300*l.* for the issue of the marriage. There was but one child, E., issue of that marriage. On the marriage of E., in 1847, J. conveyed certain freehold property to trustees, for the benefit of E., and the children of her marriage, and covenanted to make up the amount of the produce of that property to 300*l.* per annum. J., by will, dated in 1852, devised real estate to the separate use of E., for life, with remainder for her children, and declared that devise to be in satisfaction of the covenant in the deed of 1847. In 1852, J., by deed, assigned railway shares upon trust for E., for life, for her separate use, in case she should survive him, with remainder for her chil
made in 1853, J. bequeathe
personal to E. for her s
bequeathed to trustees 1,
upon trust for the husban
remainder to E. for life, r
children. The will and c
the entire of the testator's e
the 1,300*l.* secured by the
deed of 1810 was satisfied
benefits conferred by J. *G*
Ir. Ch. R. 469.

6. The father, by his will
contained in his own marri
appointing 10,000*l.* among h
sum, in default of appointm
equally, appointed 2,500*l.*
marriage in full discharge o
a year after the father's dea
paid to the trustees of t
settlement by the son's dir
years afterwards he took fr
ment of the benefit of the
that in the absence of evid
the son directed the payme
the trustees, with the intent
the father's estate from its
covenant, it was not so dis
v. *Wickham*, 1 De G. J. &
447; 9 Jur., N. S., 702; 11 W
N. S., 679; 2 N. R. 410.

7. A marriage settlement
nant by the husband to pay
tees upon the same trusts a
settled by the deed; and
the trustees, with the conse
and wife, to invest any part
in real estate. The truste
vested the sum of 17,000*l.*
husband paid the expense
and laid out a large sum u
and permanent improveme
purchased property. In a s
against the executors to
formance of the covenant
Held, that neither the mon
land, nor the expenses o
could be allowed in satisfa
nant, or on any other gr
Smith, 2 W. R. 117; 17 B
Ch., 962.

VII Marriage

I. *Enforcing by the Co*
II. *Post-nuptial Settlem*
of. Validity, 6228
III. *Rectification of.* Se
IV. *Construction of and*
ment in Pursuance
(EXECUTORY).

I. ENFORCING BY

8. Spoliation of marriage
by decree. *Bates* v. *Hear*

9. A marriage is treated
tiff and defendant's daught
are signed by the plainti
defendant, who tears the

of being dissatisfied, though not on material objections; defendant permitting the plaintiff to court his daughter, and not declaring his dislike to the marriage, and permitting the young couple to live with him, decreed to pay the plaintiff the portion according to the articles. *Halfpenny* v. *Ballet*, 2 Vern. 373.

1. Bond having been cancelled by obligor, lands settled according to bond by decree. *Arnold* v. *Barrington*, Dick. 5.

2. A. covenanted by articles to convey lands, but did not covenant for his heirs; yet the heirs shall be bound. *Gell* v. *Vermeden*, 2 Freem. 199.

3. The specific execution of articles being the most adequate justice in general, the Court will not leave it to an action at law. *Jenkins* v. *Keymis*, 1 Lev. 150, 237, 238; 1 Ch. Ca. 103.

4. Specific performance of marriage articles decreed after marriage. *Haymer* v. *Haymer*, 2 Vent. 343.

5. Specific performance of marriage articles refused, on the ground of their being inconsistent, uncertain, and unintelligible. *Franks* v. *Martin*, 1 Eden 309.

6. Equity will not decree specific execution of an article which is contrary to the powers in a settlement. *Stratford* v. *Aldborough*, 1 Ridgw. P. C. 281.

7. Agreement on marriage to settle stock and other property of the wife, to the use of the wife, husband having by fraud made her transfer the stock to him; decreed upon a bill for performance, to transfer the stock and assign the rest, under the direction of the Master, to trustees for her use, who should receive the dividends due and to become due till the transfer and assignment: costs on account of fraud. *Lampert* v. *Lampert*, 1 Ves. J. 21.

8. Where marriage articles limited a joint estate to the intended husband and wife, and, after the death of the survivor, to the use of the heirs of the body of the husband, begotten on the wife, and the settlement after marriage pursued the words of the articles, husband and wife levy a fine, and first mortgage, and then agree to sell; the articles not being produced, the Court would not decree them to be carried into execution by strict settlement against the purchaser, who had notice of them. *Cordwell* v. *Mackrill*, Ambl. 515; 2 Eden 344.

9. The breach of covenant in articles for a settlement was held not to deprive the covenantor of the estate he was to take under them. *Wallace* v. *Wallace*, 2 Dr. & War. 452; 1 Con. & L. 491.

10. In executory articles, a provision made for a class of persons, shall not merge while any one person of the class remains. *Hynes* v. *Redington*, Ll. & G. *temp.* Plunk. 41.

11. A., before marriage, covenants to settle lands, in consideration of 2,000*l.* portion, on himself for life, remainder to the first and other sons in tail, remainder to the daughters in tail, remainder to himself in fee, with a power of revocation reserved to the wife's father, then beyond sea. The marriage is had and a daughter born, and the husband, being taken sick, devises 1,500*l.* to his daughter, and, if his wife (being *enciente*), should have a posthumous daughter, she to have 500*l.* of the 1,500*l.*, and if either should die before twenty-one, or marriage, the survivor to have the whole; and gives all his lands to his wife and her heirs, and the surplus of his personal estate, after debts paid, to his wife, her executors, etc., and makes his wife executrix; then another daughter is born, and the husband dies without any alteration of his will, or any settlement made:—Decreed, that a settlement be made, with a power of revocation to the father, and the legacies be likewise paid the children, the youngest daughter being a posthumous child, within the intent of the will. *Jaggard* v. *Jaggard*, Pre. Ch. 175.

12. In articles, there was to be a covenant in the conveyance, that certain lands were free from incumbrances. Lord Chancellor said this is not a covenant that the lands are free, and if any incumbrance is discovered between the execution of the articles and sealing the conveyance, whereof the party had no notice, that incumbrance shall be discharged before the sealing of the conveyance; as the concealment of it would be a fraud; though against all incumbrances discovered afterwards, there is only the party's own covenant to protect a purchaser. *Vane* v. *Bernard* (*Lord*), Gilb. Eq. Rep. 6.

13. Where the parents of the intended husband and wife by marriage articles unskilfully drawn covenanted to settle estates respectively in terms expressed to be dependent, but the whole instrument taken together, and also the covenant for title, tended to show the intention of the parties that the covenants were not dependent:—Held, in favour of the issue of the marriage, to be independent, and decreed to be conveyed accordingly. *Lloyd* v. *Lloyd*, 8 Sim. 7; 2 Myl. & C. 192; 6 L. J., N. S., Ch., 135; 1 Jur. 69. Affirming 8 Sim. 7; 5 L. J., N. S., Ch., 191.

Marriage articles recited that L., the father of the intended husband, had agreed, in case the marriage should take effect, to pay 200*l.*, and also to settle the lands of T. upon the trusts thereinafter mentioned; and that S., the father of the intended wife, who was an infant, had agreed to convey the lands of G., in the like manner, and also to pay to the intended husband 100*l.* upon the marriage. It was then covenanted by L. that, in case the marriage should take effect, and S. should, as soon as the intended wife came of age, settle the lands of G. to the uses thereinafter expressed, he, L., would settle the lands of T. to his own use for life, with remainder upon certain trusts for the benefit of the husband and wife, and the issue of the marriage; and it was covenanted by S., that, in case the marriage should take effect, and L. should perform his covenant, he, S., would settle the lands of G. to the use of himself for life, with remainder upon certain trusts for the benefit of the husband and wife, and issue of the marriage. The marriage took effect, and the wife came of age, but S. failed to settle the lands of G.:—Held, nevertheless, that L. was bound to perform the covenant on his part. *Ib.*

14. A pre-nuptial agreement to settle property on a wife will be enforced even though the letters which constituted such agreement have been lost, if the loss can be proved to have occurred through an unforeseen and an inevitable accident, and if the existence and substance of the letters can be clearly established by

the evidence. *Gilchrist* v. *Herbert*, 26 L. T. 381; 20 W. R. 348.

A wife who in ignorance of her right in equity to enforce a pre-nuptial agreement for a settlement, accepted a settlement of a far inferior sum, is not by doing so debarred from enforcing her claim to the full amount of property agreed to be settled upon her. *Ib.*

1. Marriage articles entered into between an intended husband and the father of the wife, whereby each party covenanted to settle funds on the usual trusts, were enforced by the husband against the father's estate after death of the wife without issue, although the husband had always neglected and refused to fulfil his part of the agreement. *Jeston* v. *Key*, 6 L. R., Ch., 610; 40 L. J., Ch., 503; 25 L. T. 522; 19 W. R. 864. Affirming 24 L. T. 10; 19 W. R. 342.

2. Immediately before a marriage the intended husband signed a memorandum agreeing that certain bonds (in the memorandum called stocks), which were part of the wife's property, should be transferred to her and her son by a former marriage in trust for her, "neither party having power to dispose of the stocks without consent of both parties to such disposal." After the marriage the husband obtained possession of part of these bonds without the consent of the son, and disposed of them:—Held, that the husband was liable to make good the amount of the bonds so disposed of by him, and that the wife and her trustee were entitled to a lien for the amount upon all her other property which remained in specie, and that the amount must be settled. *Hastie* v. *Hastie*, 2 L. R., Ch. D., 304; 24 W. R. 564; 34 L. T., N. S., 747. Affirming 24 W. R. 242.

Adultery of Wife. Effect.] See HUSBAND AND WIFE, V. II.

See also III. & IV. *ante.*

II. POST-NUPTIAL SETTLEMENT IN PURSUANCE OF. VALIDITY.

3. Settlement after marriage held to be voluntary, proof of its having been made in pursuance of a parol promise before marriage failing, and Court of opinion that even if such promise had been proved to have existed, it would not have supported a settlement made after marriage. *Spurgeon* v. *Collier*, 1 Eden 54.

4. A post-nuptial settlement was made by A. and his wife of a share of real and personal estate of the wife, in the hands of trustees. No notice was given to the trustees, and no fine was levied. The deed recited the ante-nuptial agreement, but it was proved that there never was any. The effect of the settlement was to give the husband a life estate, with remainder absolutely to the survivor, and there was no provision for children:—Held, both husband and wife desiring it, that this deed was a nullity; that as against the husband it was voluntary; and that it was not such a settlement as the Court would enforce against the wife. The property was therefore treated as if it had never been settled. *Hogarth* v. *Phillip*
L. J., Ch., 195; 4 Jur., N. S.

5. Where, prior to a ma
transfer a fund to trustees
on by parol only, and
declaring the same trusts is
marriage, it is perfectly vali
for valuable consideration.
27 Beav. 266.

A. and B. were trustees o
and the widow were the
widow, previous to her
transferred a sum standing
to A. and B. upon certain
between her and her secon
the marriage the trustees of
the trusts accordingly. Th
the testator's assets, but th
had no notice of that fact:—
B. held it on the trusts of t
not on those of the will. *I*

6. Before marriage, a hu
bond to trustees, the condit
him to settle the property
and her issue, in such mann
in their discretion, shou
After the marriage a settl
which part of the property
payment of his debts, and
in life; another part is sett
life, remainder to the issu
and, in case there should no
to the husband absolutely;
the property is given to the
after her decease, in case t
issue of the marriage, as sh
—Held, that this settlemen
to the condition of the bond
the rights of the wife. *We*
Ch., 172.

7. Articles before marria
estates of the husband, and
his personal estate of wh
soever; a proper executio
covenant, that real estate
purchased with the pers
respect to the objects of
considered personal: the set
made after marriage co
covenant, and being in
defective execution, real es
the husband, according to
order to defeat the right
decreed to be conveyed by h
to the articles. A gift by
consideration of service,
but under the particul
attending the marriage, an
infant, the Court appeare
validity. *Randall* v. *Willi*

8. One, by articles previou
covenants, in consideration
and on his intended wife's c
to him and his heirs, when
to settle certain lands of h
Neither the wife nor her tru
articles. After marriage,
his lands mentioned in the
the settlement to be in p
articles, and in consideratio
and for a provision for the
dower) and their issue, but
to convey her lands to hi
party to and executes this

the husband's death, she enters on the settled lands. This settlement is a waiver by the husband of the proposed conveyance by the wife, and she shall hold as well her own estate as also the lands settled. *Lucy* v. *Moore*, 4 Bro. P. C. 343.

Rectification of.] See XIII. *post.*

VIII. Executed Settlements. Validity, Consideration, and Execution.

I. *In Case of Particular Persons*, 6229.
II. *Consideration. Validity of*, 6230.
III. *Purchase and Limitations. Supported by*, 6231.
IV. *Non-execution. Effect*, 6236.
V. *Presumption of*, 6237.

I. IN CASE OF PARTICULAR PERSONS.

1. *Marriage Within Prohibited Degrees of Affinity*, 6929.
2. *Infants and Wards of Court.* See INFANT, II. v. & IV.
3. *Lunatics.* See LUNATIC.
4. *Roman Catholics.* See ROMAN CATHOLIC.
5. *Creditors.* See BANKRUPTCY, VIII.—XVII. XIX.—XXII.—XXIV. XXVII.—FRAUDULENT CONVEYANCES.
6. *Purchasers for Value.* See FRAUDULENT CONVEYANCES.

1. Marriage within Prohibited Degrees of Affinity.

1. A deed, executed in consideration of a future cohabitation between two persons who are incapable of contracting a legal marriage, is invalid. *Ford* v. *De Pontès*, 30 Beav. 572.

In July 1853, A., a widow, married N., the widower of her deceased sister. By a deed in October purporting to be a post-nuptial settlement, and to be made between N. and A. his wife, of the one part, and a trustee of the other part, they, N. and A. (described as his wife), assigned to the trustee real and personal estate belonging to A., in trust for N. absolutely. A. and N. lived together until 1859, when A. left N.'s house, and from that time ceased to reside with him. Shortly after A. assigned the property to her brother C. for value. N. having threatened to sell the property, C. and A. filed a bill for the purpose of having the deed of October 1853 set aside. A. deposed that it was not until 1859 that she became fully aware of the invalidity of her marriage. The Court declared that the deed ought to be set aside, and ordered the same to be delivered up to be cancelled, on the ground that the benefit of the relation of husband and wife, to obtain which the deed had been executed by A., had failed. *Ib.*

2. Where a widower married a sister of his deceased wife:—Held, that the relation thus constituted imposed upon the widower claiming the benefit of a settlement made on him by his wife's sister the onus of showing, that at the time of entering into the transaction she was fully, fairly, and truly informed of its character, and of her legal status. *Coulson* v. *Allison*, 2 De G. F. & J. 521; 3 L. T., N. S., 763; 2 Giff. 279.

Such a marriage, and consequent cohabitation, held not a sufficient consideration to support a conveyance by the wife's sister of her property to the widower absolutely. *Ib.*

3. A domiciled Englishman, a widower with six children, went through the ceremony of marriage with his deceased wife's niece in Neufchâtel, in Switzerland, where such a marriage is valid. The parties were under the impression that the marriage, being good in Switzerland, would also be good here. On this occasion a settlement of reversionary personal estate belonging to the husband was executed by him and the lady, the consideration for which was expressed to be the intended marriage, the natural love and affection which the settlor bore for his children by his late wife, and divers other good considerations, and under which the trustees were to hold the property in trust for the settlor, his executors, administrators, or assigns, until the intended marriage should be solemnized, and afterwards upon trusts for the settlor and his intended wife for their lives, or as to the latter her widowhood, with remainder in trust for such of the settlor's children, whether by his former marriage or by the intended marriage, as being sons should attain twenty-one, or being daughters should attain that age or marry:—Held, that the word "solemnized," as used in the settlement, meant "validly and effectually solemnized," and that inasmuch as there never had been a valid and effectual solemnization according to English law of the intended marriage, and the settlor was dead, without having changed his domicil, the whole beneficial interest in the property comprised in the settlement was vested in him at the time of his death, and that neither the second wife nor any child of the settlor or of the second wife acquired any interest in such property. *Chapman* v. *Bradley*, 4 De G. J. & S. 71; 12 W. R. 140; 9 L. T., N. S., 495; 10 Jur., N. S., 5; 33 L. J., Ch., 139; 3 N. R. 1 Varying 9 Jur., N. S., 1046; 12 W. R. 14; 33 Beav. 61; 2 N. R. 477.

4. In 1854 A. went through the marriage ceremony, in Prussia, with C., his deceased wife's sister. After the marriage, and in consideration thereof, C. settled property upon certain trusts, reserving to herself, however, a power of appointment. Subsequently by her will C. confirmed the trusts of the settlement. On the death of C. both the will and settlement were admitted to probate:—Held, that the settlement was valid. *Seale* v. *Lowndes*, 17 L. T., N. S., 555.

5. H. transferred shares into the names of trustees, and by a deed, which, on the face of it, was voluntary, declared trusts of the shares for the immediate and absolute benefit of the sister of his deceased wife, with whom he shortly afterwards went through the form of marriage. Upon a bill filed ten years after the death of H. by his legal personal representative against the lady, a husband whom she subsequently married, and the surviving trustee, praying for a re-transfer of the shares:—Held, that the transfer having been complete, a court of equity would not have interfered on behalf of the settlor, who was a *particeps criminis*, and

that his personal representative stood in no better position. *Ayerst* v. *Jenkins*, 42 L. J., Ch., 690; 21 W. R. 878; 29 L. T., N. S., 126.

A court of equity will not at the instance of a settlor or his legal personal representative, adversely set aside a settlement by which the settlor confers on a stranger the absolute beneficial interest in property legally vested in trustees, although such settlement may have been made for an illegal consideration not appearing on the face of the instrument. S. C. 16 L. R., Eq., 275.

1. A trader lived with his deceased wife's sister as her husband. In 1858 she received a legacy of 3,000*l.*, which she handed over to him upon an agreement that the money should be advanced to and used by him in his business, but that as to 2,000*l.* he should be a trustee for her, and a settlement should be executed to carry out that agreement. The money was accordingly used by him in his business, but no settlement was ever executed. The trader having gone into liquidation in 1876:—Held, that inasmuch as by its primary destination under the agreement the fund was to be and was used in the business, no trust could be imposed upon it to the disadvantage of the creditors, and the wife could not prove in the liquidation for any part of it. *Exp. Corbidge, Re Beale*, 46 L. J., Bky., 17; 4 L. R., Ch. D., 246; 35 L. T., N. S., 768; 25 W. R. 324.

2. J. P., previously to going through the ceremony of marriage with his deceased wife's sister, executed a settlement reciting the intended marriage, by which certain property was assigned to trustees in trust for the settlor until the solemnization of the marriage, and after the solemnization thereof, and after the decease of J. P., to pay the interest to the intended wife for life, and then for the benefit of his two children by his former wife and such children as he should have by his intended marriage; but if there should be no such child or children, then for J. P., his executors, administrators, and assigns:—Held, that as no valid marriage could take place between J. P. and his deceased wife's sister, the trust in favour of himself until the solemnisation of such marriage continued, and the subsequent trusts never having arisen, the property remained in J. P., and formed part of his general estate. *Pawson* v. *Brown*, 13 L. R., Ch. D., 202; 49 L. J., Ch., 193; 41 L. T. 339; 28 W. R. 652.

3. B., by his first wife C., who died in 1847, had one son and one daughter. In 1851, he, being then a domiciled English subject, intermarried in Denmark with E., the sister of his deceased wife (such marriage being valid according to the *lex loci contractûs*), by whom he had one son and two daughters. By his will, dated in 1855, he gave all his real and personal estate among the children of his two marriages in certain proportions. Both B. and E. died in 1855, and the son of their marriage in 1857. Upon the question as to whether the share of the latter in B.'s estate went, as to the realty, to B.'s son by his first marriage, and as to the personalty, among all B.'s children equally; or whether such share, both of realty and personalty, passed to the Crown by reason of the invalidity of B.'s second marriage, and consequent illegitimacy of the issue:—Held, that the second marriage was invalid, and the issue consequently illegitimate, and the real and personal estate vested

Brook v. *Brook*, 6 W. R. 110
Giff. 481; 27 L. J., Ch., 401
317.

II. CONSIDERATION. VA

1. *Marriage*, 6230.
2. *Other Considerati*

1. Marriage.

4. Marriage is alone a suff
tion for an agreement. *Exp. M*

5. Marriage is a valuabl
Churchman v. *Harvey*, Ambl.

6. The Court of Equity wi
cording to strict rules of law o
causâ matrimonii prælocuti. L
2 Atk. 202.

7. Where marriage is one c
tions, the amount of pecunia
is immaterial. *Prebble* v. *B*
319; 1 Wils. 161.

8. Consideration of marria
the whole settlement, and es
every provision with regard
wife; she is interested in provi
enabling him to provide for h
and it is not affected by su
as death of wife without chi
Prowse, 6 Ves. 752.

9. The consideration of m
port a settlement, even of
and neither the joint possess
nor the want of an invent
that the settlor was indebted
that his wife knew it, will
ment. *Champion* v. *Cotton*, 1

10. A settlement after a m
land not supported again
bankruptcy, as upon valuab
by a re-celebration of the m
land; but it was sustained as
of an agreement, to settle by
other party. *Exp. Hall*, 1
Rose 30.

11. The consideration of m
support a settlement made on
ruptcy, where there is clea
intention to withdraw the p
claims of creditors and to m
tion of a marriage part of a
and avoid their rights. *Colo*
Penhall v. *Miller*, 1 W. R. 27

12. A., in 1829, bequeathed
personal estate in trust for
on attaining twenty-four,
marriage, with consent, abs
her marriage in 1848, the
settled, part of it for the be
band for life, remainder for
remainder for the children
and the other part was settle
of the separate use of the w
remainder, in case she shoul
band, for herself absolutely.
first time, a claim in respec
covenant in a lease which h
to the plaintiff's father, and
to A., was made against the

representative of the original lessor. Thereupon the plaintiff instituted a suit for the purpose of having the damages in respect of the breach made good by the husband of B., or out of the fund settled to the separate use of B.:—Held, that the consideration of marriage protected the whole fund from the plaintiff's claim. *Dilkes* v. *Broadmead*, 2 Giff. 113; 6 Jur., N. S., 289; 29 L. J., Ch., 310; 8 W. R. 318.

2. Other Considerations.

1. *Semble*, the mutual concurrence of a husband and wife in the levying of a fine of land in which they were jointly interested, and in the declaration of the uses for the benefit of their issue, constitutes a valuable consideration to support the deed declaring such uses. *Parker* v. *Carter*, 4 Hare 409.

2. A., in consideration of marriage, and of 500*l.* portion, which he is to have with his wife, by settlement empowers his wife to dispose of 200*l.* by her will; they live together fifteen years, the wife gives the 200*l.* away by her will. The husband at this distance of time, not admitted to say he had not 500*l.* with his wife, but shall pay the money. *North* v. *Ansell*, 2 P. W. 618.

A settlement or jointure on a marriage, though made very unequally and in favour of the wife, *in statu quo*. *Ib.*

3. Natural love and affection is very sufficient to create a use, and will amount to a covenant to stand seised, though no other consideration appear. *Lloyd* v. *Spillet*, 2 Atk. 149.

4. A charge created by C. S. upon his estates, to secure the payment of a sum of money borrowed for S. H. S., is a good consideration, not only for a collateral charge upon the estates of S. H. S. to indemnify C. S. and his estate from the payment of the money borrowed, but also for a settlement of the S. estates upon his family. *Ford* v. *Stuart*, 21 L. J., Ch., 514.

Consideration for Contracts Generally.] See CONTRACT, III.

As Against Creditors or Purchasers.] See FRAUDULENT CONVEYANCES, I. III.—II. III.

See also XVII. 1. *post.*

III. PURCHASE AND LIMITATIONS. SUPPORTED BY.

1. *In General*, 6231.
2. *Children. Of what Marriage*, 6233.
3. *Collaterals*, 6233.
4. *Limitations to Next of Kin*, 6235.
5. *Strangers*, 6235.
6. *Purchase by Husband of Wife's Portion*, 6235.
7. *Settlement in Bar of Dower.* See DOWER, IV.

1. In General.

5. In marriage settlements, etc., on good or valuable consideration, as between the immediate "parties," such considerations will run through all the limitations for the benefit of the remotest persons, even of those in respect of whom the deeds would otherwise have been voluntary. *Ithell* v. *Beane*, 1 Ves. 215; Dick. 213.

6. In marriage articles, and settlements on good and valuable consideration, such consideration will run through all the limitations in favour of the remotest remainderman—*Stephens* v. *Truman*, 1 Ves. 73.

7. Husband and wife are purchasers by the marriage for their children. *Parkes* v. *White*, 11 Ves. 228.

8. Husband, by making settlement on wife after marriage, considered as purchaser of mortgage of wife, though he did not reduce it into possession. *Sykes* v. *Meynal*, Dick. 368.

9. Marriage agreements differ from all others, for as soon as the marriage is had the principal contract is executed, and the state and capacity of the parties are altered; the children are purchasers under both parents, and may compel a performance of the agreement from the relations of either; therefore, if the marriage contract could be rescinded, it would affect their interest. *Harvey* v. *Ashley*, 3 Atk. 610.

10. By a marriage settlement, lands were conveyed to trustees to the separate use of A., the wife, for life, and in case B. should survive her, to him for life, and after the death of the survivor of A. and B., in trust to convey to the child or children of the marriage, as A. and B. should by deed or will appoint, and, in default of appointment, to the children equally, and in default of issue, to the survivor of A. and B. There was issue; and, by deed, reciting that A., in order to further the prospects in life of the children, had consented to assign her life estate for the benefit of the children, and that B., for the like purpose, agreed to assign his reversion, in case he should survive his wife A., for the considerations aforesaid and ten shillings, conveyed her life interest to trustees to receive the rents during the life of A. and B., and apply them for the benefit and maintenance of the children in such manner as the trustees might deem sufficient. And it was agreed that the trustees should have full power and control over the property during the life of A. and B., free from the control or intermeddling or debts which at any time might have affected the estate of A. and B., and B. covenanted that if he should survive his wife he would be called on by the trustees to assign his estate and interest to the trustees on the same trusts:—Held, that the children were not within the consideration, and could not enforce a specific performance of B.'s covenant to assign his interest. *Joyce* v. *Hutton*, 11 Ir. Ch. R. 123.

11. A bond before marriage to settle a jointure, and afterwards a settlement, is made which settles the estate on the wife, and the issue of the marriage. This settlement is good as to the jointure, but fraudulent as to the children in respect of a purchaser. *Jason* v. *Jervis*, 1 Vern. 286.

Where parents did not make so beneficial a bargain for a daughter as they might have done, that is no reason to set aside the marriage agreement; for the law has entrusted them with the marriage of their children, and

there are many proper considerations that may induce a parent to agree to a match, besides a strict equality of fortune. There never yet has been an objection to a father's disposing of his daughter in marriage, on what terms he pleases; and though most portions arise under settlements, the daughter is as much a purchaser as if her portion came from a collateral relation. *Ib.*

1. Consideration of marriage runs through the whole settlement, and especially supports every provision with regard to the husband and wife; she is interested in the provision for husband, enabling him to provide for her and children, and it is not affected by subsequent events, as death of wife without children. *Nairn* v. *Prowse*, 6 Beav. 752.

2. In an ordinary marriage settlement, where the lands settled are the property of the husband, the latter cannot be considered a purchaser, for valuable consideration, of the life estate in those lands limited to him by the settlement. *Re Brown*, 13 Ir. Ch. R. 283.

Therefore, where A., by a settlement, executed in contemplation of his marriage, settled lands, of which he was owner in fee, to himself for life, remainder to provide a jointure for his widow, remainder to the children of the marriage:—Held, that a judgment which was, previously to the execution of the settlement, a charge on the lands, was still a subsisting charge upon the husband's life estate, notwithstanding that the judgment had not been registered pursuant to 7 & 8 Vict., c. 90, within the time (viz., five years) required by 13 & 14 Vict., c. 29, s. 3, for keeping it in force against purchasers under the settlement. *Ib.*

3. A father, tenant for life, with remainders to his son, joined with the son in executing a post-nuptial settlement, by which the father and the son assigned the lands to a trustee in trust for the father for life, subject to an annuity for the son; and after the father's death in trust for the son, subject to a jointure (charged by the pre-existing deed), and charged with a sum for portions of the younger children of the father. The father and son afterwards joined in a mortgage which did not notice this settlement: it contained covenants for title, but not against incumbrances:—Held, that the settlement as regarded the provisions for the younger children was not voluntary or void as against the mortgagee, nor revocable by the father and son; and, even if it was revocable, was not revoked by the mortgage. *Bennett* v. *Bernard*, 10 Ir. Eq. R. 584.

4. If in consideration of marriage, an estate be limited in fee to A., by his father, or other persons interested in making provision for the marriage: A. is a purchaser for valuable consideration in respect of the marriage. *O'Gorman* v. *Comyn*, 2 Sch. & Lef. 147.

5. Parties entitled to an estate confirming a jointress's settlement, are purchasers of her interest in incumbrances paid off by her fortune, which had been assigned for the better securing her rights under the settlement. *Portsmouth* (*Earl*) v. *Suffolk* (*Lady*), 1 Ves. 31.

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7. A second marriage, in contemplation of which a father executes a deed providing for children by a former marriage, is not a valuable consideration. *Re Greer*, 11 Ir. R., Eq., 502.

8. The performance of a covenant by a widow on her second marriage to convey property for the benefit of her children by a former marriage, if made in pursuance of an agreement between her and her intended husband, will be enforced at the suit of those children, and is an exception to the general rule that the performance of a covenant cannot be enforced by volunteers. *Gale* v. *Gale*, 6 L. R., Ch. D., 144; 46 L. J., Ch., 809; 25 W. R. 772; 36 L. T., N. S., 690.

9. By a post-nuptial settlement a settlor in 1837 granted lands to trustees, after the death of the survivor of the settlor and his wife, to such persons and for such uses as the settlor should by will appoint, and in default of appointment for all the children of the settlor. The deed contained an ultimate limitation, if there should not be any child of the existing marriage, for the settlor absolutely. In 1841 the wife died, leaving four children of the marriage. By a re-settlement in 1848, to which the same trustees were parties, after reciting that it had been proposed that the settlor should give up his life estate in the premises, and forego the power given to him of appointing by will, the settlor granted the rents and profits during his life to the trustees for the benefit of his four children. He also covenanted with the trustees that he would not make any will whereby the trusts thereby declared should be impeached or defeated, and released the trustees from all the trusts of the former settlement. Shortly afterwards he married again, and had seven children by the second marriage. He died in 1866, having devised and bequeathed all his real and personal estate upon trust for his wife for life, and after her death upon trust to sell, and divide the proceeds among the children of the second marriage:—Held, that the ultimate limitation in the deed of 1837 did not cut down the meaning of the word "children" of the settlor to children of the first marriage; and that the children of both marriages were entitled to the benefit of the deed of 1837. *Isaac* v. *Hughes*, 9 L. R., Eq., 191.

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specific limitations. *Hale* v. *Lamb*, 2 Eden 292.

1. Limitations to collaterals in a marriage settlement, made by tenant in tail, are voluntary against subsequent purchaser for a valuable consideration, in the same manner as if the settlor had had the fee. *Cormick* v. *Trapaud*, 6 Dow 86.

2. J. S., in consideration of marriage. covenants to settle lands of 380*l.* per annum upon himself and wife, and the issue male of the marriage, with remainder to his brother in tail; equity will compel a specific performance of this covenant in favour of the brother, although he was no party to the articles, without putting him to an action of covenant in the trustee's name. *Vernon* v. *Vernon*, 1 Bro. P. C. 267.

3. Articles on marriage whereby money is agreed to be laid out in land, and settled, in default of the issue male of the marriage, on the husband's brother, shall, if the husband dies without issue male, and leaving only daughters, be performed in favour of the brother, though they were voluntary. *Lechmere* v. *Carlisle*, 3 P. W. 223.

4. Father and son on the marriage of the son article to settle lands on the intended husband for life, remainder to the issue male of the nephew, remainder to the nephew in fee; on the death of the husband and wife without issue. *Quære*, whether the nephew shall compel a specific performance of the covenant. *Osgood* v. *Strode*, 10 Mod. 533; 2 P. W. 245.

A. seised in fee, on his marriage covenants to settle the premises on himself and his wife, and on the issue of the marriage, remainder to his nephew in fee; the remainder in fee is voluntary, and not supported by the consideration of that marriage or of the marriage portion. *Ib.*

A., the father, and B. the son, on the marriage of B., articled to settle land on B. and his wife for their lives, remainder to their issue, remainders to the nephew in fee; if A. had the sole interest, the limitation to the nephew is voluntary. *Secus*, if the father and son had each some interest. *Ib.*

5. By articles between A. and B. his son, on the son's marriage, an estate was limited to the son for life, and after divers limitations to plaintiff, a daughter of A., and her heirs male, unless A. should appoint other uses, then to his other daughters in tail, then to B. his son, and then to the right heirs of A. A. died; B., who married, directed a draft to be prepared according to the articles, and then he died, some of the lands descending to his four sisters in fee: decreed the articles to be executed, and plaintiff's entail of the estate settled. *Goring* v. *Nash*, 3 Atk. 186.

6. By a marriage settlement, an estate, the property of the wife, was limited, in default of children of the wife, to trustees in trust to sell and divide the proceeds amongst the brothers and sisters of the wife. The husband agreed to sell the estate; and he and his wife joined in conveying it to the purchaser, by deed and fine. The wife died without issue:—Held, that the limitation in favour of her brothers and sisters was voluntary, and, therefore, void as against the purchaser. *Cotterell* v. *Homer*, 13 Sim. 506; 7 Jur. 544.

7. The consideration of m
operate to support limitatio
in a marriage settlement, wh
against subsequent purchase
voluntary and void. *Stackpo*
2 Con. & L. 489; 4 Dr. & Wa
R. 18.

8. The Lord Chancellor or
opinion (agreeing with the
that limitations in a marria
the brothers of the settlor and
voluntary; but thought, un
stances, that a purchaser cou
to take the title, depending o
those limitations, and dismis
creditors of the vendor afte
specific performance, there h
sequent dealings with the est
have confirmed the settlement
for purchase being suspiciou
doubtful whether the creditor
a bill. *Johnson* v. *Legard*,
Madd. 283. And see 6 M. & S

9. The cases in which col
within the consideration of a
ment, proceeded upon the g
wife cannot be considered to
part of the relations of the hu
tations in favour of collateral
if there be any party to the
purchases on their behalf. *I*
Hare 104; 29 L. J., N. S., Ch.,

10. Trustees of a marriage
in case each of the children
marriage, being a son, sh
twenty-one without leaving i
daughter, should die under t
being or having been married,
vey and assign the freehold
estates, and to pay the ren
brothers and sisters of the
There was no issue of the m
that the six brothers and siste
to the estates. *Osborn* v. *I*
N. S., 1325; 9 W. R. 11; 3 L.

11. A lady being indebted
at the time of marriage, sett
and personal property (with t
jewels and furniture exceedi
amount of her debt), upon fa
the marriage, in favour of c
relatives, including a niece
adopted as her daughter. Th
her husband, and died withou
no assets:—Held, that the se
as it was made in favour of
voluntary, and must be set asi
of the plaintiff's debt. *Smit*
L. R., Eq., 390; 36 L. J., Ch.,
919; 16 L. T., N. S., 517.

12. Residuary estate, consist
the funds, was bequeathed t
daughter in trust for the mot
afterwards for the daughter
a settlement made in conte
daughter's marriage, the da
her interest under the will t
trust for the issue of the inte
and for a niece of the daughte
of the niece. The daughter'
soon after the marriage, of w
no issue. The mother was no
settlement, but had notice o
husband's death:—Held, tha

settlement was voluntary as regarded the trusts in favour of the niece, it was a complete alienation, so as to be capable of enforcement at the instance of the trustees of the settlement against the daughter and the trustees of another settlement, which she made upon a second marriage, inconsistent with the former settlement. *Kekewich* v. *Manning*, 1 De G. M. & G. 176; 21 L. J., N. S., Ch., 577; 16 Jur. 625.

Whether the first settlement was voluntary as regarded the trust for the niece, *quære*. *Ib.*

1. A limitation to a second son in remainder in tail, on a settlement made on the marriage of the first son, and in consideration of the wife's portion, makes not the second son a purchaser. *Webster* v. *Bishop*, Pre. Ch. 224.

2. Trusts in a marriage settlement in favour of the children of a future marriage and of collaterals are purely voluntary. *Woollaston* v. *Tribe*, 9 L. R., Eq., 44.

The trusts of a marriage settlement of property of the wife were such that upon the death of the husband in her lifetime, without leaving issue of the marriage, she had a mere life interest in the property, the subsequent trusts being in favour of her nephews and nieces, and being irrevocable. She had no power to control the investment of the property or the appointment of trustees:—Held, that as the position in which she was had not been fully explained to her before she executed the settlement, she was entitled to a decree for rectification, and as the marriage consideration had failed, and did not support any of the existing trusts, the existing trusts must be declared void as in the case of a purely voluntary deed. S. C. 18 W. R. 83; 21 L. T., N. S., 449.

4. Limitations to Next of Kin.

3. By a marriage settlement, some property, to the principal part of which the intended wife was entitled for life, was conveyed to trustees for her separate use; and it was agreed that the trustees should effect an insurance on her life, and pay the premium out of the trust money, and should invest the amount assured when received, and pay the dividends to the intended husband for life; and after his decease, pay as the wife should appoint, and, in default, to the persons entitled under the Statute of Distribution of Intestates' Estate. The wife survived her husband:—Held, that she had then a right to refuse to keep up the policy; and that this Court would not consider her bound to perform the agreement for the benefit of mere volunteers. *Godsal* v. *Webb*, 2 Keen 99; 7 L. J., N. S., Ch., 103.

4. In a marriage settlement (the intended wife being an infant) the husband covenanted that one-half of the wife's personal and of the proceeds of her real property, when sold, should be settled upon trust for himself for life, then for her for her life, and then, in default of issue, upon trust for her next of kin. The property was duly vested in the trustees. The husband died, and there was no issue of the marriage:—Held, that the trust for the next of kin was not binding against the wife, and that she had absolute power to deal with the trust funds. *Gibbs* v. *Grady*, 41 L. J., Ch., 163; 20 W. R. 257.

5. By a marriage settlement of the wife's property, consisting of money in the funds, a general power of appointment by will was given to the wife, in the event of her dying before her husband without children, and in default of appointment there was a trust for the next of kin of the wife excluding the husband. But if the wife survived, then, in default of children, in trust for the wife absolutely. The father of the wife joined in the settlement, and covenanted to pay an annuity to his daughter. During the life of the husband and wife debts were contracted by the wife. There were no children, and the impossibility of there being any was not questioned:—Held, upon the application of the wife, and with the approbation of the husband, that the next of kin being mere volunteers, and not within the marriage consideration, the corpus of the trust funds might be applied in payment of debts. *Paul* v. *Paul* (No. 1), 15 L. R., Ch. D., 580; 50 L. J., Ch., 14; 43 L. T. 239; 29 W. R. 281.

6. By a marriage settlement the wife's property was settled, after life estates in the husband and wife and in default of children, in the event of the wife surviving, on her, and in the event of the husband surviving, as the wife should by will appoint, and in default, on her next of kin, excluding the husband:—Held, that the trust in favour of the next of kin could not be revoked, and that although there was no possibility of issue, the husband and wife together were not entitled to the corpus of the settled fund. *Paul* v. *Paul* (No. 1), (15 L. R., Ch. D., 580) overruled. *Paul* v. *Paul*, 20 L. R., Ch. D., 742; 51 L. J., Ch., 839; 47 L. T. 210; 30 W. R. 801. Affirming 19 L. R., Ch. D., 47; 51 L. J., Ch., 5; 45 L. T. 437; 30 W. R. 314.

5. Strangers.

7. Covenant in marriage articles in favour of a stranger, held merely voluntary, and not to be supported by the marriage consideration. *Sutton* v. *Chetwynd*, 3 Meriv. 249.

8. If two parties for a valuable consideration enter into a contract, of which one of the stipulations is for the benefit of a third person, who is a stranger to the consideration, the Court will not enforce the contract without securing his interest under it. *Davenport* v. *Bishopp*, 2 Y. & Coll. C. C. 451; 12 L. J., N. S., Ch., 492; 7 Jur. 1077. Affirmed 1 Ph. 98.

9. Where feme covert, having power to dispose of her separate estates, grants annuity to A. on her marriage, A. is not be considered as a volunteer. *Power* v. *Bailey*, 1 Ball & B. 49.

10. Parties entitled to an estate confirming a jointress's settlement are purchasers of her interest in incumbrances paid off by her fortune, which had been assigned for the better securing her rights under the settlement. *Portsmouth* (*Earl*) v. *Suffolk* (*Lord*), 1 Ves. 31.

6. Purchase by Husband of Wife's Portion.

11. Settlement by husband in consideration of portion of fortune which he would have

or receive on his marriage, limited to the portion received upon the marriage, not extending to make him a purchaser of future accession, unless clearly the intention. *Carr* v. *Taylor*, 10 Ves. 574.

1. When a man makes a settlement equivalent to his wife's portion, it shall be intended that he was to have the portion, though there is no particular agreement for that purpose. *Blois* v. *Hereford* (*Viscountess*), 2 Vern. 502.

2. Settlement on consideration of wife's fortune confined to her fortune at the time, unless expressed to comprehend future accessions. No claims can be maintained by husband, or in his right, while the terms are not fulfilled on his part. *Mitford* v. *Mitford*, 9 Ves. 87.

3. Where there was an agreement on marriage to settle a jointure in consideration of 50*l.* portion, and the husband dies before portion paid or jointure settled, and the wife takes administration to her husband:—Held, she shall not have the portion as administratrix, and the jointure also. *Sed quære. Meredith* v. *Jones*, 1 Vern. 463.

4. Where the wife's portion is charged by will on certain lands, pursuant to a power in settlement, it shall go to the administrator of the husband, and not to the administrator of the wife, though the husband and wife are both dead, and the portion not raised. *Meredith* v. *Wynn*, Pre. Ch. 312; Gilb. Eq. Rep. 70.

5. Provision by marriage settlement not held a purchase of all the property of wife, unless that is expressed or clearly imported. *Druce* v. *Denison*, 6 Ves. 385.

6. Woman's portion falling short of husband's expectations, is not a reason for setting aside marriage agreement. *Exp. Marsh*, 1 Atk. 159.

7. By a marriage settlement, after reciting that the intended wife was possessed of 1,500*l.* which the husband was to have for his own use as soon as the marriage should take effect, and that she had also a vested interest in the real and residuary personal estate of the testator, amounting to the sum of 32,000*l.* and upwards, which would be equally divided amongst eight children, of whom she was one, on the death of a tenant for life it was witnessed, that in consideration of the intended marriage, and of the sum of 1,500*l.* then in the possession of the intended wife, and also of the said vested interest of the value of 4,000*l.* and upwards, the husband covenanted that his heirs, executors, and administrators should immediately after his decease pay to the trustees of the settlement 4,000*l.*, to be held upon certain trusts for the wife and children of the marriage, but the deed contained a proviso that the heirs, executors, or administrators of the husband should pay all other debts which he should owe at his death, in preference to the 4,000*l.*, and that they should not be bound to pay the 4,000*l.* unless the assets of the husband should be more than sufficient to pay all his other debts. The husband became a bankrupt before the death of the tenant for life, whom he survived, but he died before the wife's share was actually paid. *Semble*, the husband's covenant did not operate as a purchase of the wife's reversionary share under the will, but:—Held, that at all events the husband's assignees were not entitled to receive the share ing the covenant. *Corsbie* 64; 5 Jur. 790.

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V. PRESUMPTION OF.

1. The existence and execution of a settlement by indentures of lease and release, presumed from circumstances, principally the existence of the drafts; a statement in an abtract of the title, and the existence of the lease, for a year, of other estates, appearing to have been included in the same plan of settlement. *Ward* v. *Garnons*, 17 Ves. 134.

2. A settled estate is sold, but no part of the money is laid out in the purchase of other lands; yet this Court will, under certain circumstances, presume an agreement between the parties interested, that it should be so laid out; and, upon such presumption, will decree the money to that person who would have been entitled to the land if any purchase had been made. *Newton* v. *Newton*, 6 Bro. P. C. 408.

3. A suit was instituted for the appointment of new trustees of a marriage settlement. The settlement was lost, but the husband and wife swore directly to the circumstances under which it was executed; to the execution of it by them; and to the contents of it. The solicitor who prepared the settlement was dead, but, in addition to the evidence of the husband and wife, there was the indirect testimony of several other parties to the same effect:—Held, that there was sufficient evidence for the Court to assume that the settlement was actually executed and to the effect contended for. *Hall* v. *Dawson*, 7 L. T., N. S., 519.

The husband had become insolvent after the marriage, and his assignee subsequently objected that no sufficient notice of the settlement had been given to the proper party. That party was the trustee of the husband's father's settlement, and the family solicitor; but he was dead. The husband made an affidavit, stating that certain verbal communications had passed, both before and after his marriage, between him, his father, and the solicitor, as to the settlement:—Held, sufficient evidence of due notice had been given. *Ib.*

4. In 1860 a husband, through the intervention of his wife, obtained possession of their marriage settlement from the trustee. The husband, in order to raise money upon the property comprised in it, destroyed the settlement, mortgaged part of the settled property, and was proceeding to sell other parts of it. In 1864 the trustee filed a bill to restrain the intended sale, and prayed a declaration that the cancelled settlement should be established, and the trusts of it carried into effect. The husband did not deny the fact of his having destroyed the settlement; but the trustee and the wife denied many of his allegations, especially those with respect both to the circumstances under which the settlement was obtained by her from the trustee, and the precise contents of it. No draft or other copy of the settlement was produced to the Court; but there was the evidence of the trustee and the wife on the one side, and that of the husband and other persons who were not parties to the settlement, but who had subsequently read it, on the other. There was also the evidence of the solicitor who had prepared the settlement, and who had acted as solicitor to the husband in the mortgage transaction, and in the proposed sale of part of the settled property:—Held, that, upon a full consideration of all the evidence in the case, the trustee was entitled to the relief which he sought. *Brandon* v. *Barlow*, 13 L. T., N. S., 6.

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7. A marriage settlement recited that the intended wife was absolutely entitled, under a will of S., to one-sixth part of certain funds, and might become thereafter entitled to other shares under the trusts of the same will, and that it had been agreed that all her shares in the trust funds under such will should be settled. By the operative part of the deed she assigned to the trustees of the settlement all the one-sixth part or share, and all other the parts or shares, vested or contingent, to which she was then or might become entitled, by accruer, survivorship, "or otherwise," in such trust funds, and also all the shares and interest, whether vested or contingent, or in expectancy, and which she was then or might become entitled to, in any property whatsoever under the will of S.:—Held, that the words "or otherwise" must be construed as relating to a mode of acquisition *ejusdem generis* with accruer and survivorship, and did not include a share in the trust funds which the wife derived under the will, or as one of the next of kin of her father, who became entitled thereto. *Parkinson* v. *Dashwood*, 7 Jur., N. S., 854; 9 W. R. 493; 5 L. T., N. S., 44; 30 Beav. 49.

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4. In 1860 a husband, through the intervention of his wife, obtained possession of their marriage settlement from the trustee. The husband, in order to raise money upon the property comprised in it, destroyed the settlement, mortgaged part of the settled property, and was proceeding to sell other parts of it. In 1864 the trustee filed a bill to restrain the intended sale, and prayed a declaration that the cancelled settlement should be established, and the trusts of it carried into effect. The husband did not deny the fact of his having destroyed the settlement; but the trustee and the wife denied many of his allegations, especially those with respect both to the circumstances under which the settlement was obtained by her from the trustee, and the precise *contents* of it. No draft or other copy of the settlement was produced to the Court; but there was the evidence of the trustee and the wife on the one side, and that of the husband and other persons who were not parties to the settlement, but who had subsequently read it, on the other. There was also the evidence of the solicitor who had prepared the settlement, and who had acted as solicitor to the husband in the mortgage transaction, and in the proposed sale of part of the settled property:—Held, that, upon a full consideration of all the evidence in the case, the trustee was entitled to the relief which he sought. *Brandon* v. *Barlow*, 13 L. T., N. S., 6.

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8. The rule that recitals may control general words is applicable to all deeds, and not only

to releases. *Jenner* v. *Jenner*, 1 L. R., Eq., 361; 12 Jur., N. S., 138; 35 L. J., Ch., 329; 14 W. R. 305.

A marriage settlement recited that, by virtue of certain specified instruments, certain specified hereditaments, "and all other the freehold hereditaments in the county of York thereinafter expressed to be appointed and released," were limited as the settlor should appoint, and, subject thereto, to him in fee. The settlement then recited that, upon the treaty for the marriage, it was agreed that the several hereditaments and estates in the county of York, thereinafter mentioned and intended to be thereby conveyed," should be assured to the uses thereinafter mentioned. The deed then contained an appointment and a conveyance by the settlor of the specified hereditaments mentioned in the recital, and of "all other the freehold hereditaments, if any, in the county of York, of or to which the grantor was seised or entitled for an estate of inheritance." The settlor, at the date of the conveyance, was seised of a fee-simple estate in Yorkshire, called the L. estate, which was not comprised in the above specified instruments, and was not recited nor mentioned in the conveyance:—Held, that the general words must be restricted by the recital, and that the L. estate did not pass. *Ib.*

See also IV. 1. *ante.*

II. WHAT PROPERTY INCLUDED.

1. Every deed is to be taken most strongly against the grantor; but where an owner of an estate, on his marriage, settles it upon himself for life, with remainders over, and is, therefore, in one sense, both grantor and grantee, his interest under the deed is to be construed as if a stranger had been the grantor. *Vincent* v. *Spicer*, 22 Beav. 380; 2 Jur., N. S., 654; 25 L. J., Ch., 589.

2. A deed purporting to settle a sum of money, "portion of moneys to which the settlor was entitled under the Statute of Distributions," passes chattels real coming to the settlor in the manner described. *Newitt* v. *Robinson*, 15 W. R. 77.

3. A marriage settlement recited an agreement to convey a certain estate, save and except the lands of Ballyhenry, and its subdenominations; but the operative part of the deed purported to convey by name, as a separate denomination, the lands of Kilahan, which it was proved were reputed a subdenomination of Ballyhenry:—Held, that there was not sufficient evidence of mistake to justify the Court in striking Kilahan out of the settlement. *Alexander* v. *Crosbie*, Ll. & G. *temp.* Sugd. 145.

4. *Primâ facie*, when a person conveys or settles an estate, he means to include in the conveyance every interest which he can part with and which he does not except. *Johnson* v. *Webster*, 4 De G. M. & G. 474; 1 Jur., N. S., 145; 24 L. J., Ch., 300.

When the owner of an estate has also a charge upon it, and there is some intermediate charge or estate between his own charge and his ownership in fee, it may be reasonable to say, that without some special act, no presumption can be made of merge the charge in the fee, against the interest of the o the intermediate estate; bu mediate estate is created owner himself, this reasoni tion. *Ib.*

5. Lands were settled at m that if wife survived she then profits. Husband ma vanced the rent:—Held, h to advanced rent. *Lawley* v.

6. Settlement of "all th of all my property, etc., bel devised unto me by M.":— two-thirds of such property and did not extend to such as had been spent previou *Cotteen* v. *Missing*, 1 Madd.

7. *Semble*, that by an appo of a whole estate to the settlement by a party the also granted and released a estate to the same uses, t estate passed. *Farmer* v. 724.

8. By marriage articles, A for his wife by way of joint dower, etc.: proviso, that n tained should bar or hinder any legacy or bequest w might give to her, nor shou any the household goods, o hold stuff, rings, plate, jewe husband at the time of his London, but had a large h Gosport, which he let out to hospital. On his death int claimed to be entitled, und the furniture in both hous she was only entitled to th house in London. *Pratt* v. C. 222; 2 P. W. 302.

9. Household furniture d the description of "fixture *Simmons* v. *Simmons*, 6 Har

10. By marriage articles, t and plate of the wife were a the husband to have the u life only, afterwards to the and administrators; but if vived, then the absolute pro A., having got judgment ag takes the goods in execu friends give security to the s *nulla bona*, whereupon A. against the sheriff, and re the same goods are taken i another creditor of the sheriff, on the like security wife's friends, returns *nulla* B. also brings an action a wife's trustees bring bill, b relief, it being all at law in of the goods are. *Under* 2 Vern. 238.

11. By a marriage settlem Irish currency was vested in out of the interest and divi third parts of it, together and dividends of the remai make up the annual sum of annual sum to the husband the life of A.:—Held, that

wife were entitled during the life of A. to the income of the remaining third part, whether it did or did not exceed 500*l.* per annum. *Davis* v. *Morier*, 2 Colly. 303.

1. The sole proprietor of a recipe for a medicine assigned it, on marriage of his daughter, to trustees for her and her husband for their lives, and then to their children. The mother destroyed the recipe, but verbally communicated contents to A., the eldest, for the benefit of B. and C., the younger children. Upon bill filed against A. by B. and C., A. was declared to hold the secret on trusts of the settlement, and was decreed to account for profits since the mother's death; and as a sale was impracticable, an issue was directed to ascertain value of secret. *Green* v. *Folgham*, 1 Sim. & S. 398. S. C. *nom. Green* v. *Church*, 1 L. J., Ch., 203.

2. By a marriage settlement, after reciting that the lady was entitled to real and personal property, and that it had been agreed that she should settle it, and also all other property to which she might become entitled during the coverture, upon the trusts thereinafter mentioned, all her then property was vested in trustees in trust, during her life, to pay and apply the income to such person or persons as she from time to time, by any writing or writings signed by her, should appoint; and, in default of such appointment, to her for her separate use; and, after her death, to pay 500*l.* a year to her husband for his life; and the settlement declared that, subject to those trusts, all the trust property, and all the annual produce of it which might remain unapplied at her death, should remain upon the trusts thereinafter mentioned, none of which were for the benefit of her husband. The trustees received the income of the settled property, and, with the lady's privity and acquiescence, paid it into a bank in their own names, and made remittances to her from time to time as she required money. She and her husband separated soon after their marriage, and she died in his lifetime; at her death 888*l.* were in her house, and a balance of 2,049*l.*, arisen from the income of the settled property received by the trustees, was standing to their credit in the books of the bank:—Held, that the husband was entitled to the 888*l.*, but that the 2,049*l.* were subject to the ultimate trusts of the settlement, as being annual produce remaining unapplied at the wife's death. *Johnstone* v. *Lumb*, 15 Sim. 308; 15 L. J., N. S., Ch., 386; 10 Jur. 699.

3. By a marriage settlement the personal estates of the husband and wife were assigned to trustees, to permit the husband and wife to enjoy the use during their joint lives, and the whole to go to the survivor. The husband had farming stock, and the wife had money. Soon after the marriage the husband took a lease for lives of a piece of land, and built houses on it. The husband died first:—Held, that the presumption was that these houses were built out of capital, and not out of income, and that the representatives of the wife were entitled to a charge on them for the amount of personal estate which had been expended on them. *Williams* v. *Thomas*, 2 Dr. & Sm. 29; 8 Jur., N. S., 250; 31 L. J., Ch., 674; 10 W. R. 417; 7 L. T., N. S., 184.

4. By a marriage settlement, after reciting that the husband was absolutely entitled, by virtue of an appointment made under the marriage settlement of his father and mother, to 10,000*l.*, a moiety of the trust funds comprised therein; and reciting also that he was contingently entitled, in the event of his sister dying under twenty-one and unmarried, to the other moiety of the trust funds; and reciting that upon the contract of marriage it was agreed that he should settle as well the moiety as also all other his part, share, and interest, as well vested as contingent, of and in the trust funds; it was witnessed that the husband assigned the 10,000*l.*, and all other the part, share, and interest, as well vested as contingent, in the trust property, upon certain trusts therein declared; and it was provided that if the moiety of the trust funds, to which he was contingently entitled as aforesaid, should by the death of his sister under the age of twenty-one, without having been married, or otherwise, devolve upon or vest in him, 2,000*l.*, part thereof, should belong to the plaintiff for his own benefit. The sister attained twenty-one, but died without having been married. The mother, in pursuance of a power in the settlement in that behalf contained, appointed the sister's share in trust for the plaintiff absolutely:—Held, that the share so appointed did not pass to the trustees of the plaintiff's marriage settlement. *Childers* v. *Eardley*, 6 Jur., N. S., 690; 8 W. R. 1698.

5. A marriage settlement recited an intention that 3,000*l.* should be settled in the testatum; it was agreed that 1,000*l.* should be paid to the husband, and the remaining 2,000*l.* was settled in the usual way:—Held, that the 2,000*l.* only could be treated as settled. *Hughes* v. *Young*, 1 N. R. 166; 9 Jur., N. S., 276; 32 L. J., Ch., 137.

6. By marriage settlement in 1842, T., being seised of the equity of redemption in fee of lands subject to a mortgage for 4,000*l.*, 2,000*l.* of which had been paid off, but kept alive for the benefit of the persons who paid off the same, and having also become entitled to the benefit of such last-mentioned charge, and contemplating the possibility of paying off the balance, conveyed the lands in question, and assigned the charge as to the 2,000*l.* already existing, "and also all sum or sums of money which he or any person in trust for him then was or should at any time thereafter be entitled to receive, whether principal or interest, as a mortgagee, or by purchase or assignment from the said then existing mortgagee, of all the lands in question." The trusts were substantially for T. for life, remainder to the children of former marriages absolutely. In 1846 T. paid off the remaining 2,000*l.*, and took a conveyance of the debt and mortgaged securities to a trustee for himself. In 1849 T. became insolvent:—Held, as between the assignees in insolvency and the trustees of the marriage settlement of 1842, that the 2,000*l.* thus paid in 1846 was bound by the settlement. *Cochrane* v. *St. Clair*, 1 Jur., N. S., 302.

7. B., previously to marriage, agreed to settle after marriage all of his household furniture on his wife for her sole use and benefit. At the time of the marriage he had some furniture, his wife had some, and some

was purchased subsequently. Three years after the marriage he, when in debt, settled on his wife and children all of the furniture then in his possession. Shortly afterwards he became bankrupt, and on the assignee in bankruptcy claiming the furniture on behalf of the creditors, a suit was instituted by the trustees of the settlement for a declaration that the furniture had been validly settled on the wife and children:—Held, that the whole of the furniture was subject to the trusts of the settlement, and that the trustees were entitled to a declaration to that effect with costs. *Brasher* v. *Wyatt*, 16 L. T., N. S., 275.

1. By the testator's first marriage settlement a sum of 14,000*l.* was settled upon the testator for life, remainder to the first wife for life, remainder to the children of that marriage who should attain twenty-one. There were four children who lived to attain twenty-one. The first wife died, and the testator made his will, giving all his property to his children equally. The testator then married again, on which occasion 5,000*l.* was settled, after his decease, to the second wife for her life, remainder to the children of that marriage. There was but one child. After the birth of that child the testator executed a codicil giving certain annuities to his second wife, and in other respects confirming his will, except that he directed that previous to the equal division among his children the trustees were to take into consideration what each class of children would be entitled to under the marriage settlements of their respective mothers; and whichever family should be individually least provided for, they should, in the first place, be severally entitled to receive out of the general estate so much as would make his or her share equal in amount to what each child of the other family would be entitled to under his or her mother's marriage settlement. The testator died, leaving his second wife surviving, and one child of of the second marriage:—Held, that the subject of the settlement being nothing but money, the reversionary nature of the provision for the child of the second marriage was not to be regarded, although the provision for the children of the first marriage took effect in possession immediately on the testator's decease; but, *semble*, that this might be otherwise in case the subject-matter had been anything else than money. *Williamson* v. *Jeffreys*, 18 Jur. 1071.

2. By a marriage settlement, after reciting that the lady was entitled to 10,000*l.* in possession, the sum was settled on herself, her intended husband, and the children of the marriage. There was also a covenant to settle all her after-acquired property. At the date of the settlement she was not entitled to any money in possession, but was entitled to a contingent interest in trust funds under the marriage settlement of her father and mother, and the 1,000*l.* was, in fact, advanced by the father out of his own moneys. After his death a bill was filed by his representatives to have it declared that his estate was entitled to be recouped the 10,000*l.* advanced by him on his daughter's marriage, to the extent of her portion in the trust funds:—Held, that the settlement did not show that the 10,000*l.* was meant to be an accelerated advance of the daughter's share in the trust fur
(*Earl*) v. *Romney* (*Earl*), 8 J
31 L. R., Ch., 497; 10 W. R.
N. S., 208.

III. DEFICIENCY IN SETTLE

3. By a marriage settlement that the settlor was absolute 7,000*l.*, part of a distributiv estate which was being ad Chancery, and an agreement th of the 7,000*l.*, should be settle nessed that 5,000*l.* (part of belonging to the settlor as bef was settled upon certain trust the parties claiming under t were not entitled, the distributi to realise the 5,000*l.*, to have made up out of the general settlor. *Evans* v. *Wyatt*, 8 Ju 10 W. R. 813; 7 L. T., N. S., 86

See also III. VI. *an*

IV. REBATE.

4. A., on the marriage of he settled lands to the separate us without anticipation, remainde appoint generally by deed or to her children. After the s prepared, A. thought it compri but, to save the expense of alte ment, it was executed as it stoo her intended husband made a jo promissory note for 1,000*l.*, p executors at her death, with a to which it did not appear t party, stating that the within tended to be charged on the The husband kept the note, a communicated to A.'s executor years after her death:—Held, th was personally liable on the no *Baker*, 2 Jur. 637.

V. AUGMENTATION OF PROPERTY.

1. *In General*, 6240.
2. *Bonuses on Insurance P*
3. *Bonuses on Stock and Sh*

1. In General.

5. By a post-nuptial settle settled savings of her separate trusts for herself and her husban for life, with remainder to their a proviso that in the event of either under twenty-five, with share should go to the survivo also a proviso that the husband be at liberty to add any part of to the sum invested, and that t so added should be subject to as the original fund. The wife i names of the trustees, but without

ing the fact to them, various sums arising partly from accumulations of the dividends and partly from funds derived from other sources, and after the death of the husband and of both of the sons without issue, the executor of the survivor of the sons instituted a suit to have the trusts of the settlement executed:—Held, that it was not a sufficient defence on the part of the settlor as to the additions to the fund that she had invested them under a misapprehension as to the effect of the settlement. *Muggeridge* v. *Stanton*, 1 De G. F. & J. 107.

Held, also, that all the additions were subject to the trusts of it, and there not appearing sufficient probability of establishing in a cross-suit a case of mistake, the Court refused to give an opportunity to institute such a suit. *Ib.*

1. Consols were vested in the trustees of a marriage settlement for the husband and wife successively for life, with remainder for the benefit of the children. The husband directed the bankers who received the dividends and paid them to him under a power of attorney from the trustees, to invest an additional sum of 2,000*l.* consols in the names of the same trustees, so that they might receive the dividends as before. The bankers invested the sum as directed, and paid the dividends of the aggregate fund to the husband during his life. No notice was given to the trustees of the fresh investment:—Held, that there was no resulting trust of the 2,000*l.* for the husband, but that it became subject to the trusts of the settlement, as an augmentation of the trust fund. *Re Curteis*, 14 L. R., Eq., 217; 26 L. T., N. S., 863.

A fund was vested in trustees on the usual trusts of a marriage settlement. The husband added a further sum as an augmentation of the trust fund. Four years afterwards the husband and wife, under a power in the settlement, appointed the original fund, "or the trust fund and property representing the same," to two of their children:—Held, that the appointment passed only the original fund, and not the augmentation. *Ib.*

2. Settlement by husband in consideration of portion of fortune which he would have, or receive on his marriage, limited to the portion received upon the marriage, not extending to make him a purchaser of future accessions, unless clearly the intention. *Carr* v. *Taylor*, 10 Ves. 574.

3. Where A. B. invested some of the funds, subject to the trusts of his settlement, in the purchase of real estate, and added some money of his own:—Held, that it was an advancement to the parties entitled under the settlement. *Ouseley* v. *Anstruther*, 10 Beav. 461.

4. By a settlement, trustees were directed to be possessed of 1,760*l.* in trust for a daughter, and her sons at twenty-one, and daughters at twenty-one or marriage. Like trusts of two other sums of 1,760*l.* were declared for two other daughters and their children. Benefit of survivorship and accruer between the three daughters and their children, in default of children, was declared, with a declaration, that the provisions applicable to the original shares should apply to such surviving or accrued shares; and it was provided, that if either of the three daughters should die without having or leaving any child who should attain a vested interest, she might dispose of any part of "her share," not exceeding one-third, by deed or will. On the death of one of the three daughters, her share accrued among the survivors. One of the survivors then died without a child, and appointed, by will, "one-third of her share or shares, as well accrued as original, in the said sum of 5,280*l.*" The trustees paid so much of the share of the testatrix as had accrued into Court, under the Trustee Relief Act:—Held, that the previous provisions of the settlement consolidated the accrued with the original shares, and that the power to appoint overrode the whole share thus consolidated. *Re Hutchinson's Settlement*, 5 De G. & Sm. 681; 17 Jur. 59.

2. Bonuses on Insurance Policies.

5. Where by his marriage settlement the husband covenanted to insure his life for 3,000*l.*, and "that the said 3,000*l.* under the policy should be settled, etc., and that the trustees should stand possessed of the policy and of the said sum of 3,000*l.* upon certain trusts for the benefit of the wife and children of the marriage:—Held, after the bankruptcy and death of the husband, that the bonuses payable on the policy belonged to the trustees and not to the assignees. *Parkes* v. *Bott*, 9 Sim. 388; 8 L. J., N. S., Ch., 14.

6. A policy of insurance for 3,000*l.* on A.'s life was assigned to trustees, and by a deed of even date trusts were declared of it by the description of "the sum of 3,000*l.* for which A.'s life was insured," and power was given to B. to dispose of it by will. B., after reciting the settlement, bequeathed 1,000*l.*, part of the sum of 3,000*l.*, to A., and the remaining sum of 2,000*l.* to C. At A.'s death 9,000*l.* was received under the policy:—Held, that the whole fruits of the policy were subject to the trusts of the settlement, and passed by the bequests to A. and C. in proportion to their legacies. *Courtney* v. *Ferrers*, 1 Sim. 137; 5 L. J., Ch., 107.

7. The trustees of a marriage settlement were directed to keep up the premiums of a policy "to be taken out from some office in England or Ireland" on the life and in the name of W., the husband, out of the annual income of the property in the settlement. They were then directed to stand possessed of the policy, and a sum of 4,000*l.* thereby to be raised or secured upon certain trusts, after the decease of W., for the wife and the children of the marriage. W. covenanted to execute a regular assignment of the policy, "together with the said sum of 4,000*l.* sterling, to be insured upon the trusts and for the purposes aforesaid." W. did actually assign to the trustees an Irish policy for 4,000*l.*, Irish currency, which he had effected before the date of the settlement. Some time after, the trustees allowed the policy so assigned to drop, and effected an English policy on the life of W., but in their own names, for 3,666*l.* 13*s.* 4*d.*, which sum of English currency they were advised was equivalent to 4,000*l.* Irish currency. This policy they purported to hold on the trusts of the settlement in substitution for the Irish policy

of 4,000*l.*, and they paid the premiums out of W.'s life income, as directed by the settlement. He afterwards died, having bequeathed the bonuses, which, with the 3,666*l.* 13*s.* 4*d.*, amounted to nearly 5,000*l.*, on certain trusts:—Held, that the bonuses belonged to the trustees of the settlement, and did not pass by the will of W. *Warren* v. *Wybault*, 12 Jur., N. S., 639; 15 L. T., N. S., 155.

1. A life policy of assurance was settled on the marriage of A. and B. on B., the wife, for life, with remainder to A., the husband, for life, with remainder to the children of the marriage at twenty-one, with remainder, in default of children, as B. should appoint. B. appointed her interest to A., and died, leaving one child. After B.'s death a bonus became payable on the policy. A petition was presented by the trustees and A., stating that A. was unable to support his child, and was going to emigrate, and praying that the sum receivable in respect of the bonus might be paid to the trustee, and applied for the maintenance of the child. The prayer of the petition was granted, on condition that A. gave up his life interest under the settlement. *Exp. Hays*, 18 L. J., N. S., Ch., 441; 13 Jur. 762.

2. A marriage settlement recited that the settlor, the husband, had in pursuance of agreement effected insurances on his life for the sums of 2,000*l.* and 5,000*l.*, and had given a bonus to secure the sum of 7,000*l.*, and provided that the trustees should stand possessed of the said sums of 2,000*l.* and 5,000*l.*, so assured on the trusts of the settlement:—Held, that the bonuses did not pass. *Domville* v. *Lamb*, 1 W. R. 246; 9 Hare (App.) xxxii.

3. Bonuses on a policy held to be subject to the trusts of a marriage settlement. *Gilly* v. *Burley*, 22 Beav. 619; 2 Jur., N. S., 897.

Upon the construction of a settlement:—Held, that the policy effected in the names of trustees was itself settled; but that, under the covenant of the husband and the rules of the company, the husband was entitled to an option to have any bonus applied in reduction of the premiums. *Ib.*

Bonuses having been declared, the husband continued to pay the full premiums:—Held, on his death, that the bonuses were accretions to the trust, and did not belong to his executors. *Ib.*

By a marriage settlement the husband covenanted to effect a policy of insurance on his life, in the names of trustees, for the sum of 2,500*l.*, and to settle "the said sum of 2,500*l.*" upon certain trusts:—Held, that the trustees were entitled to the bonuses which accrued upon the policy. S. C. 2 Jur., N. S., 897.

4. A policy of assurance on the life of H. was taken in the names of trustees, and a settlement was executed by virtue of which the bonuses payable on the policy were to be held upon trust for H., and the money assured, on the trusts of the settlement. H. obtained possession of and misappropriated a portion of the trust funds:—Held, that the trustees were not entitled as against H.'s executrix to impound or retain the bonuses to make good the trust funds misappropriated by H., not as being settled property, because there was a prior resulting trust of them for H., not by way of set-off, because they were not payable till after H.'s death. *Hallett* v. *Hallett*, 13 L. R., Ch. D., 232; 49 L. J., Ch 723; 28 W. R. 321.

3. Bonuses on Stock and

5. A sum of 7,500*l.* bank st in trustees upon trust out o thereof to pay an annuity of life, and invest the residue or Government security; and after the decease of I. the 7,50 and the savings of the divider thereof, be divided into five share to be transferred to persons therein named. On 7,500*l.* bank stock was, upon of one of the persons entitled t the trust fund in the lifetime o made the subject of settlemen the intention of the parties, from the nature of the instru its construction, that one-fifth by way of bonus, subsequently original capital sum, and al the surplus dividends, were trusts of the settlement. *Plunk* 2 J. & L. 344.

6. By a marriage settlement in the London Assurance Compa on the husband and wife for after their deaths on their child provided that, if any bonus shou way of increase of the capita funds, it should be added to the should be given by way of inter it should be paid to the pers receive the dividends of the the time being. At a meeting the usual dividend of 1*l.* per sh and it was resolved that a certa be taken out of the profits of th divided amongst the proprietor to their shares:—Held, that the in pursuance of the resoluti considered as part of the capit fund. *Ward* v. *Combe*, 7 Sim. 6

7. A. being entitled to beneficial interest in 12,000*l* standing in the names of tru "during the life of the tenant description, 3,000*l.* part of the stock, subject to the life inte therein," for a money conside was given to the trustees:—H carried to the assignee all the b subsequently to the assignment, life of the tenant for life. *A* Kay & J. 486; 3 Jur., N. S., Ch., 658; 5 W. R. 699.

8. Where a party was entitle life, to the dividends of stock o change Company, which had previously declared half-yearly the stock, but in 1840 declared the ordinary dividend, that a di per cent. out of the accumulated be paid:—Held, that the tena entitled to the whole, and not interest on the bonus when inve *Anderson*, 15 Sim. 473.

9. Stock stood in the nam upon trust, under a marriage pay the dividends "of the

with such bonuses as should from time to time be allowed thereon, when and as the same should become payable," to A. and his wife, and the survivor, for life:—Held, that A. was absolutely entitled to a bonus declared pending his life estate. *Re Mittam*, 4 Jur., N. S., 1077.

A. did not possess himself of the bonus, but allowed the same to be added to the capital, and received the dividends on the whole. On his death:—Held, that the wife, as survivor, was entitled to receive the bonus. *Ib.*

1. On the marriage of H. and D. sixteen shares in a company were vested in trustees to pay the interest, dividends, and yearly proceeds to D., the wife, for her life, or such persons as she should appoint, for her separate use, and there was a proviso, that if any bonus should be declared in respect of the shares, they should be invested in augmentation of the settlement. The company, being their own insurers, carried over 5*l.* per cent. on their floating stock to the insurance fund, and declared a dividend out of the surplus, if any, year by year among the shareholders, and carried forward small sums left out of such surplus to the following year, and so on *de anno in annum*:—Held, that these additional payments were not bonuses, and that the wife was entitled to them for her life. *Hollis* v. *Allan*, 12 Jur., N. S., 638; 14 W. R. 980.

2. Five shares in a company were settled upon trust for J. for life, with remainder to her children. During the life of J., in pursuance of resolutions passed by general meetings of the company, the capital of the company was on several occasions increased by converting into shares a portion of the half-yearly profits of the company, and distributing such shares among the shareholders ratably according to the number of their shares. In this manner several new shares were allotted to the trustees of the settlement. After J.'s death, these new shares were claimed by her personal representative:—Held, that the new shares formed part of the capital of the settlement fund. *Re Burton*, 37 L. J., Ch., 194; 5 L. R., Eq., 238; 16 W. R. 392; 17 L. T., N. S., 594.

3. A., on her marriage, assigned 1,000*l.* in trust to pay all interest, dividends, and other profits to M., her intended husband, for life or until bankruptcy, and, after his death or bankruptcy, to permit A. to receive them; and, after the death of A. and M., principal and all interest to go amongst the children of the marriage; but in case there should be no children living at A.'s death, then as she should appoint, and, in default of appointment, for the persons entitled as her next-of-kin, as if she had died intestate and unmarried. M. became bankrupt in A.'s lifetime; she died in 1865, and M. in 1871; there were no children of the marriage, and A. executed no appointment; the trustees retained the dividends after her death, and, on the death of M., paid the accretions into court:—Held, that the dividends which had accrued between the death of A. and the death of M. were undisposed of by the settlement; that they *did* not follow the corpus as accessory; and that the administrator of A. was *entitled* to receive them in trust for the personal representative of M. *Frank* v. *Mackay*, 7 Ir. R., Eq., 287.

X. Executed Settlements. Limitations and Interests Created by.

I. *Construction. General Principles*, 6243.
II. *Particular Words*, 6244.
III. *For Children*, 6244.
IV. *For Executors and Administrators*, 6245.
V. *For Heirs. Heir-at-Law*, 6247.
VI. *For Issue*, 6248.
VII. *For Next of Kin*, 6251.
VIII. *For Personal Representatives*, 6253.
IX. *For Survivors*, 6254.
X. *On Dying Unmarried*, 6255.
XI. *Life Estates in Realty*, 6257.
XII. *Life Interests in Personalty*, 6258.
XIII. *Estates in Fee or in Tail*, 6259.
XIV. *Other Limitations and Interests*, 6260.
XV. *Failure of Limitations. Resulting Trust*, 6263.
XVI. *Covenants for Title*, 6264.
XVII. *Limitations under the Rule in Shelley's case.* See SHELLEY'S CASE. RULE IN—TRUSTS (EXECUTORY).
XVIII. *Limitations in Joint Tenancy or Tenancy in Common.* See JOINT TENANCY—TENANCY IN COMMON.
XIX. *Powers of Appointment, Leasing, or Sale.* See POWER.
XX. *Powers of Charging.* See PORTION—POWER.
XXI. *Powers and Trusts for Management, Maintenance, Advancement, and Other Power given to Trustees.* See TRUSTS.
XXII. *Provisions for Wife's Jointure.* See JOINTURE.
XXIII. *Provisions for Younger Children.* See PORTION.
XXIV. *Perpetuity and Remoteness.* See PERPETUITY—ACCUMULATION.
XXV. *Shifting Clauses, Contingent Interests, and Executory Uses.* See VESTED CONTINGENT AND FUTURE INTERESTS.

I. GENERAL PRINCIPLES.

4. The intention of parties appearing in a deed always governs the Court in constructions. *Hodgson* v. *Bussey*, 2 Atk. 91.

The Court will make a favourable exposition in words in marriage settlements to support the intention of the parties; the same as to voluntary settlements. *Ib.*

5. Articles previous to settlement cannot, in general, be read to construe the settlement, unless the bill is brought to rectify the settlement, or the settlement refers to them. *Pritchard* v. *Quinchant*, Ambl. 147.

6. The Court will, from the general frame of a settlement, collect the intent, contrary to the express words of a particular clause. *Northumberland* (*Earl*) v. *Egremont* (*Earl*), 1 Eden 435.

7. In the construction of marriage settlements, courts of equity will not act upon any views of expediency or inexpediency of their provisions. *Smyth* v. *Foley*, 3 Y. & Coll. 142; 7 L. J., N. S., Exch. Eq., 34.

8. Where parties to a deed of settlement contemplate several states of circumstances, and there is found on the face of the instrument a clear and distinct expression of in-

tention to provide for one event which has precisely happened, the terms of gift so expressed are not to be superseded, nor their effect destroyed, by any ambiguity of terms used solely in reference to other events or states of circumstances which have not happened. *Dill* v. *Haddington* (*Earl*), 8 Cl. & F. 168.

1. Though there may not be any different rule of construction applicable to wills and settlements, yet the different character of the instrument is a circumstance to be weighed in determining the effect of the disposition it contains: shares under a settlement being held not to be vested, might create a resulting trust for the settlor, whilst in a will the residuary legatee might take. *Farrer* v. *Barker*, 9 Hare 744.

2. Of the intention which is necessary for the efficacy of a deed. *Hughes* v. *Wells*, 16 Jur. 927.

3. Principles on which the Court proceeds in putting a construction upon inconsistent clauses in a settlement. *Bush* v. *Watkins*, 14 Beav. 425.

II. PARTICULAR WORDS.

"*Then living.*"] 4. By a marriage settlement trustees were to stand possessed of 2,000*l.* in trust for T. E. for life or until he should become bankrupt; remainder to his wife for life; remainder "if she should survive T. E., or in case of her dying in his lifetime, then from and immediately after his decease, or sooner, becoming bankrupt" to the children "then living":—Held, that all the children living at the death of the wife were entitled. *Re Edgington's Trusts*, 3 Drew. 202.

"*Entitled.*"] 5. "Entitled" means entitled in possession. A gift over the shares of children in a settlement on death "before they become entitled," does not prevent the shares from vesting at birth. *Jopp* v. *Wood*, 28 Beav. 53. Affirmed *sub. nom Jopp* v. *Wood*, *Smith* v. *Jopp*, 6 N. R. 359.

6. By a post-nuptial settlement—reciting that A. had a large family, and was anxious to make a provision for it in the case of his death or of the death of his wife, and, for that purpose, had determined to execute the settlement—leaseholds were assigned to trustees upon trust, in case the wife should survive A., to permit her to take one-third of the profit rents, the other two-thirds to go to the maintenance, etc., of such of their children as should require it; and after the death or second marriage of the wife the entirety to be expended on the education and putting to trade or business of such of the children as should require it; and in case A. should survive his wife, upon trust to permit him to receive the entirety of the rents during his life, one-half to be expended on the maintenance, etc., of such of the children as should require it; and in case A. should neglect so to apply the one-half of the rents, the trustees should receive it and so apply it, and after the death of A. the property to go and become the property of the children of A. and B. as A. shall appoint; and in case of the death of any of the children before they should become entitled to
then his or her share to be e
among the survivors of such
if but one, the whole to go to
appointed a share to a child w
lifetime:—Held, that the chil
vived the father took the shar
—the word "entitled" being c
titled in possession." *Beale*
Ir. R. Eq., 412.

Sale.] 7. In a marriage s
word "sole" may, from the cir
the case, have a particular
meaning attached to it. *Mass*
L. R., H. L., 288.

Insolvent.] 8. Meaning of
when used in a settlement. *I*
29 L. J., Ch., 288.

Words "or," "and."] 9. Wh
strument in which the words
or a deed, "or" may be const
"and," and "and" may be con
"or," if such a construction i
give effect to the intention of
whom the word is used. *Whi*
Dr. & War. 471; 1 Con. & L. 52
10. A power of sale and of
given to trustees of a settlement,
of the person for the time being
freehold and inheritance of t
Held, that reading the word "
tively, the power could not b
the request of a tenant for lif
to intervening limitations) ha
remainder in fee. *Malmesb*
Malmesbury (*Countess*), *Phillip*
31 Beav. 407.

Held, also, that the word "a
be read disjunctively as "or."

In Construction of Deeds Ge
DEEDS.

III. FOR CHILDRE

1. *Of Future Marriage*, 6244.
2. *Children to be Begotten*, 6245
3. *Afterborn Illegitimate Child*
4. *As Purchasers within the*
sideration. See VIII. 1
5. *Ascertaining Class of and Vest*
See VESTED CONTINGEN
INTERESTS.
6. *As Objects of Special Powers.*
XVII.
7. *Portions for.* See PORTION.
8. *Fluctuation, Younger and*
YOUNGER CHILDREN.
9. *Posthumous.* See POSTHUMO

1. Of Future Marria

11. A. devises several leasehol
trustees in trust, if his grandda
without their consent, to conve
to two other trustees in trust fo
use during her life, and after
the use and benefit of her issu
has no children by the first
she married without the conse

trustees, she has only a right for her life, for the issue of any husband are provided for by this settlement. *Champion* v. *Pickax*, 1 Atk. 472.

1. By a marriage settlement, certain stocks, the property of the lady, are assigned to trustees, upon certain trusts, for the benefit of the intended wife and husband, during their joint lives; and if the wife should survive the husband, having children by him, upon trust for her during her life; and after the death both of her and her husband, upon trust for all her children by her then intended or any future husband, as she should appoint; and, in default of appointment, upon trust for the children of the then intended marriage; and it was provided, that, if the lady should survive her intended husband, and there should be no children of that marriage who should acquire a vested interest in the property, the stocks should be upon trust for her, and assigned to her: the lady having outlived her husband, and there being no child of that marriage who had acquired a vested interest, it was held that the lady was entitled to the stocks absolutely, without regard to the possibility of there being children of a future marriage. *Hanson* v. *Cook*, 4 L. J., Ch., 45.

2. Children to be Begotten.

2. Provisions for daughters to be born shall extend to daughters then begotten. *Hewet* v. *Ireland*, 1 P. W. 426; Gilb. Eq. Rep. 145.

3. The words "begotten" and "to be begotten" are the same, as well on constructions of wills as settlements. *Cook* v. *Cook*, 2 Vern. 545.

4. A settlement of money to be paid to such children "as shall be begotten, etc.," but "that if the husband shall die without any children, then the said money shall be paid to A.," extends to a child *in esse* at the time the settlement was made. *Slingsby* v. ——, 10 Mod. 398.

5. The third section of the 33 Geo. 2, c. 14 (Bankers Act), applies to a conveyance made in favour of a child or grandchild unborn, as well as to a conveyance made in favour of a child or grandchild in existence at the time of its execution. *Spearing* v. *Delacour*, 1 Dr. & Wal. 591.

3. Afterborn Illegitimate Children.

6. Where there was a settlement of personalty in trust for afterborn illegitimate children, the property was, on the bill of the settlor, ordered to be re-transferred to him. *Wilkinson* v. *Wilkinson*, 1 Y. & Coll. C. C. 657; 6 Jur. 921.

7. The objection to the validity of a limitation to unborn illegitimate children, is not founded exclusively on the uncertainty of description, nor *semble*, is there any distinction between the validity of a limitation in favour of such persons, whether described as the children of a man or the children of a woman. *Dover* v. *Alexander*, 2 Hare 275; 12 L. J., N. S., Ch., 175; 7 Jur. 124.

8. Where a married woman, having legitimate children, and one illegitimate child, separated from her husband, and being *enceinte* with a second illegitimate child, appointed a fund in favour of her first illegitimate child, reserving a power of revocation as to a moiety in favour of any afterborn children of her body:—Held, that the latter clause was to be construed in its legal sense, and was applicable only to legitimate children, and that afterborn illegitimate children could not take under a subsequent appointment as to the moiety in favour of both the illegitimate children. *Ib.*

9. Where by deed an estate was limited to an afterborn illegimate son in fee, and if he should die before he attained twenty-one, then in fee to a living illegimate child, who died an infant, and an afterborn illegitimate son attained the age of twenty-one, it was held that the last limitation failed, and that the devised estate resulted to the heir of the grantor. *Lomas* v. *Wright*, 2 Myl. & K. 769; 3 L. J., N. S., Ch., 68.

10. The ultimate limitation in a settlement was to all the children, as well those already born as hereafter to be born of A. and B. his wife. B. was the settlor's sister, who had been married to A. five years before the date of the settlement. They never had any legitimate children, but before their marriage, B. had several children still living, who were reputed to be children by A.:—Held, that these children were entitled to the property under the limitation. *Gabb* v. *Prendergast*, 1 Kay & J. 439; 1 Jur., N. S., 900; 24 L. J., Ch., 431; 3 W. R. 395; 3 Eq. Rep. 648.

Semble, the construction of these words in a will would exclude illegitimate children born at the date of the will, because of the possibility that legitimate children might have been born before the testator's death. *Ib.*

11. A husband by his will gave his property in trust for the use of his wife for life, with power to dispose of it by will at her death "among our children," and if she died intestate the property to be divided equally between "my children by her." The testator was twice married. By his first wife he had two children, both of whom died in his life, one of them leaving an only child. By his second wife he had two children, both born before the marriage:—Held, that the two illegitimate children did not take. *Dorin* v. *Dorin*, 7 L. R., H. L., 568; 45 L. J., Ch., 652; 33 L. T. 281; 23 W. R. 570. Reversing 17 L. R., Eq., 463; 43 L. J., Ch., 462; 29 L. T. 731; 22 W. R. 217.

As Objects of Special Powers.] See POWER, XVII. III.

IV. FOR EXECUTORS AND ADMINISTRATORS.

12. The effect of a settlement by deed, limiting property to the executor or administrator of the settlor, is to make such property subject to the disposition of the settlor by will, or to be dealt with under the Statute of Distributions. *Mackenzie* v. *Mackenzie*, 3 Macn. & G. 559; 21 L. J., N. S., Ch., 465; 15 Jur. 1091.

13. Limitation in a deed of personal property to the executors, administrators, and assigns of A., after the death of B. and C., does not fail by the death of B. and C. in the lifetime of A. *Horseman* v. *Abbey*, 1 Jac. & Walk. 381.

1. By a marriage settlement, stock was assigned to trustees, upon trust to pay the interest and dividends to the husband for life, and, in case he should survive the wife, upon trust to transfer the said stock to the husband, "his executors, administrators, or assigns, to and for his or their own use and benefit," but in case the wife should survive the husband upon trust, during her life, to pay the interest and dividends as she should appoint, and, after her decease, upon trust to transfer the stock "unto the executors or administrators of the said G. M. (the husband) to and for their own use and benefit." The wife survived the husband, and took out administration of his effects, and claimed an absolute interest in the whole corpus of the stock:—Held, that she was not entitled. *Semble*, that a limitation in a settlement "to the executors and administrators of A. for their own use and benefit," unconnected with any other limitation showing more specifically who are to take, is void for uncertainty. *Marshall* v. *Collett*, 1 Y. & Coll. 232.

2. Construction on settlement; ultimate limitation "to use of executors or administrators for their lives, and assigns for ever," as to what benefit they take. *Wellman* v. *Bowring*, 1 Sim. & S. 24. Affirming 2 Russ. 374; 1 L. J., Ch., 27.

3. By a marriage settlement, the ultimate trust declared of a copyhold estate (the property of the husband) was for his executors or administrators, and a similar trust was declared with respect to the executors or administrators of the wife, as to a copyhold estate, which was her property. The wife survived, and took out administration to her husband:—Held, that she was not entitled to hold the former estate for her own exclusive benefit, but for the benefit of herself and her husband's next of kin. *Wellman* v. *Bowring*, 3 Sim. 328.

4. By a marriage settlement, stock, the property of the husband, was settled on trust for the separate use of the wife during her life, and after her death for the husband, if he survived her; but if he died in her lifetime, then for such persons as he should, by deed or will, appoint; and in default of appointment, for his executors and administrators. The husband died in the wife's lifetime, having appointed her executrix, but without exercising his power:—Held, that the executrix was not entitled to the stock beneficially, but that it was to be administered by her as part of his general personal estate. *Collier* v. *Squire*, 3 Russ. 467.

5. Trust in a marriage settlement to raise a sum of money charged on the settled estate at the end of twelve months from the decease of the survivor of the husband and wife, and to pay the same to the executors or administrators of the wife:—Held, upon the whole scope and context of the instrument, a trust for the next of kin of the wife, although she died in the husband's lifetime. *Bulmer* v. *Jay*, 3 Myl. & K. 197. Affirming 4 Sim. 48.

6. The ultimate trust in a settlement of a fund, in default of and subject to the appointment by will of the lady, was "for her executors and administrators." The lady, having survived her husband, assigned the fund; it was:—Held, that the assignee had a good title, and the fund was ordered to be transferred to him. *Bulmer* v. *Ja* 197) not followed. *Page* v. 518; 1 Eq. Rep. 540.

7. A sum of money was beq for several tenants for life in reversion to such person or p them, who was a married wo will appoint, and in default ment, "to and for the benefit or administrators." There w ment:—Held, that the husban *jure mariti*. *Att.-Gen.* v. *Ma* 10 Jur. 955.

8. The ultimate limitation marriage settlement, after husband and wife, was to the survived his wife; but if the then, after her death, to such husband should appoint, and his executors, administrators, o wife survived, and the husban pointment:—Held, that his res and not his next of kin, were e v. *Gayler*, 5 Beav. 157; 11 L. J

9. Upon a limitation of fu ment, "to the executors, etc., and for his and their own use Held, that the executors did ficially, but only in their character. *Hames* v. *Hames*, L. J., N. S., Ch., 123.

10. A man settles personal e self and his wife for their lives their children, and, in default o himself, his executors, admi assigns, and afterwards direct be settled upon the same trust be as affect the personalty. of the settlor without children subject to the life interest of to his heirs. *Ford* v. *Ruxton*,

11. By a marriage settlemen perty was vested in trustees, i separate use for life, independe or any future husband, witho with remainder (in the events w as she should, notwithstanding appoint by will, and, in default in trust for her executors and —Held, that the lady and an s band were entitled to a transfe fund. *Malcolm* v. *O'Callagha* Ch., 137.

12. In a marriage settlemer trust of the wife's chattels v ecutors or administrators of t own family, and the ultimate t band's chattels was for his ex ministrators of his own fami though the same words wer *mutandis* in both limitations was justified in holding that, the wife's chattels, they meant at her death; and with respect chattels, his executors or admin *Smith* v. *Dudley*, 9 Sim. 125; 2

13. An obligation to make a s wife, by deed, expressed to be to make such provision, convey trustees in trust to permit him to receive the dividends "to their own entire use and ben joint lives of himself and his case A. B. survived his wife the

her death, to assign it to him, "his executors, administrators, and assigns, to and for his and their own use and benefit;" but if his wife should survive him then to her for life, and afterwards to assign it "unto the executors or administrators of A. B. to and for his and their own use and benefit." The wife survived:—Held, that, subject to her life interest, the fund belonged to the next of kin of A. B. and not to his administrator. *Meryon* v. *Collett*, 8 Beav. 386; 14 L. J., N. S., Ch., 369; 9 Jur. 459.

1. By a marriage settlement the reversion in real estate was conveyed to trustees in trust, at the request of the husband and wife, or of the survivor, to sell, and the proceeds were settled on the husband and wife for life, with remainder to the children, and in default thereof to such person as the wife should appoint, and in case of no appointment to the use of the heirs, executors, and administrators of the wife, according to the nature and property of the premises. The wife died without issue, and without having exercised the power. The husband took out administration to his wife, and required the trustees to sell the reversion:—Held, that he was entitled to have it sold, and to have the proceeds as administrator to his wife. *Warburton* v. *Hadfield*, 6 L. J., N. S., Ch., 203; 1 Jur. 164.

2. The ultimate trust in a marriage settlement of a fund belonging to the wife was to her executors or administrators:—Held, first, that the surviving husband, who was her administrator, and not her next of kin, was entitled; and, secondly, that if by those words her next of kin were intended, then that the next of kin at the death of the wife, and not of the husband (who was tenant for life), were entitled. By marriage settlement, a fund belonging to the wife was settled on the husband and wife for their respective lives, with remainder to the children of the marriage, to be vested at twenty-one or marriage; and in case no children should attain vested interests (which happened), then as the wife should appoint; and in default, unto the executors or administrators of the wife. The wife predeceased the husband, and made no appointment. There was one child only of the marriage, who survived her mother, but died without attaining a vested interest:—Held, that the ultimate limitation was in favour of the wife's administrator, and not of her next of kin. *Allen* v. *Thorp*, 7 Beav. 72; 13 L. J., N. S., Ch., 5.

3. By an ante-nuptial settlement, money, the property of the wife, was settled in trust for her separate use for life, for her husband for life, and for the children of the marriage, equally subject to her appointment by deed or will, and in default of children, for such persons as she should appoint by deed or will, and in default of appointment, that the trustees should pay and transfer the same to her executors or administrators; and the husband covenanted, that in case he should die without issue in his life, and make no appointment, the same should remain for the use and benefit of her executors, administrators, and assigns:—*Held*, that by the "executors or administrators" of the wife, her next of kin were meant. This case was appealed, and the appeal was heard, but before judgment was given it was compromised, the Lord Chancellor having expressed his dissent from the decree below. *Daniel* v. *Dudley*, 11 Sim. 163. See S. C. on appeal 1 Ph. 1.

4. J. by settlement assigned an annuity to trustees upon trust to pay the same to his wife during their joint lives for her separate use, and after her decease to sell and invest and stand possessed of the proceeds upon trusts for children, in default as he should by deed or will appoint, and in default of appointment upon trust to pay, assign, and transfer the same to the executors or administrators of J. to and for their own use and benefit. J. by his will gave the whole residue of his property to trustees upon trust to convert and invest and to pay the interest to his wife for life, with remainders over. The wife died, and her personal representative claimed to have the reversion of the annuity sold, and the executors of J. claimed for their own benefit under the limitation in the settlement:—Held, that they took only in their representative character, and that the reversion of the annuity must be sold. *Johnson* v. *Routh*, 6 W. R. 6; 27 L. J., Ch., 305; 3 Jur., N. S., 1048.

V. FOR HEIRS. HEIR-AT-LAW.

5. In a deed the extensive and ordinary signification of the word "heirs" will be limited where the intention of the parties to the deed is perfectly apparent. Therefore, where by a deed of settlement after marriage certain premises were conveyed to trustees to the use of A. the husband for life, remainder to trustees to preserve contingent remainders, remainder to the use of B. (the eldest son of A.) and the heirs of the said B., and for default thereof to the use of C. the second son, and all and every the other sons successively in tail male, remainder to the use of the daughters, share and share alike as tenants in common in tail male, with remainders over: B. having died without issue:—Held, that B. having been only tenant in tail under the limitation in the settlement on his decease without issue male, C., the second son, was only entitled to an estate in tail male, and did not take as heir-at-law to his brother B. *Wall* v. *Wright*, 1 Dr. & Wal. 1.

6. As to where the words "heirs of the body" have been held words of purchase in the same sense as "issue." *Theobridge* v. *Kilburne*, 2 Ves. 233.

Personalty.] 7. Upon settlement of lands to be sold in trust for several purposes, the residue is given to B. and his heirs, reserving only 200*l.* to be paid to such person as settlor should appoint. Settlor died without appointment; the 200*l.* shall go to his heir, and not to B., or his assigns. *Anon.*, 1 Com. 345.

8. Under a limitation in a marriage settlement of certain personal property of the wife after the death of the survivor, and in default of issue of the marriage, to the right heir or heirs of the wife:—Held, that the husband, by the death of his wife without issue, was not entitled as her administrator to an absolute interest in the settled property. *Newenham* v. *Pittar*, 7 L. J., N. S., Ch., 300.

9. Personal estate was settled on a husband and wife successively for life, with remainder

1. By a marriage settlement, stock was assigned to trustees, upon trust to pay the interest and dividends to the husband for life, and, in case he should survive the wife, upon trust to transfer the said stock to the husband, "his executors, administrators, or assigns, to and for his or their own use and benefit," but in case the wife should survive the husband upon trust, during her life, to pay the interest and dividends as she should appoint, and, after her decease, upon trust to transfer the stock "unto the executors or administrators of the said G. M. (the husband) to and for their own use and benefit." The wife survived the husband, and took out administration of his effects, and claimed an absolute interest in the whole corpus of the stock:—Held, that she was not entitled. *Semble*, that a limitation in a settlement "to the executors and administrators of A. for their own use and benefit," unconnected with any other limitation showing more specifically who are to take, is void for uncertainty. *Marshall* v. *Collett*, 1 Y. & Coll. 232.

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3. By a marriage settlement, the ultimate trust declared of a copyhold estate (the property of the husband) was for his executors or administrators, and a similar trust was declared with respect to the executors or administrators of the wife, as to a copyhold estate, which was her property. The wife survived, and took out administration to her husband:—Held, that she was not entitled to hold the former estate for her own exclusive benefit, but for the benefit of herself and her husband's next of kin. *Wellman* v. *Bowring*, 3 Sim. 328.

4. By a marriage settlement, stock, the property of the husband, was settled on trust for the separate use of the wife during her life, and after her death for the husband, if he survived her; but if he died in her lifetime, then for such persons as he should, by deed or will, appoint; and in default of appointment, for his executors and administrators. The husband died in the wife's lifetime, having appointed her executrix, but without exercising his power:—Held, that the executrix was not entitled to the stock beneficially, but that it was to be administered by her as part of his general personal estate. *Collier* v. *Squire*, 3 Russ. 467.

5. Trust in a marriage settlement to raise a sum of money charged on the settled estate at the end of twelve months from the decease of the survivor of the husband and wife, and to pay the same to the executors or administrators of the wife:—Held, upon the whole scope and context of the instrument, a trust for the next of kin of the wife, although she died in the husband's lifetime. *Bulmer* v. *Jay*, 3 Myl. & K. 197. Affirming 4 Sim. 48.

6. The ultimate trust in a settlement of a fund, in default of and subject to the appointment by will of the lady, was "for her executors and administrators." The lady, having survived her husband, assigned the fund; it was:—Held, that the assignee had a good title, and the fund was ordered to be transferred to him. *Bulmer* v. [illegible] 197) not followed. *Page* v 518; 1 Eq. Rep. 540.

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to their children; and, in failure of children, "then to the right heirs" of the survivor of the husband and wife:—Held, that, under the last limitation, the heir-at-law of the survivor, and not the next of kin, was entitled. *Hamilton* v. *Mills*, 29 Beav. 193; 3 L. T., N. S., 766.

Real Estate.] 1. R. M., being seised to him, his heirs, and assigns, according to the custom of the manor of Taunton Deane, of certain premises within the manor, in pursuance of articles made in contemplation of marriage, surrendered the premises to trustees, upon trust to permit the settlor, his heirs and assigns, to hold and enjoy the premises till the marriage, and after the solemnisation thereof upon trust for the settlor for life, and after his decease upon trust for the intended wife for life in bar of all dower and thirds, and after the death of the survivor of the husband and wife upon trust to surrender the premises into the hands of the lord, to the use of the children of the marriage, their heirs and assigns, according to the custom, as tenants in common, such surrenders to be made at the costs and charges of the children who should be entitled to take the same by virtue thereof; and in default of issue of the marriage, that should be living at the death of the survivor of the husband and wife, then upon this special trust and confidence, to surrender the premises into the hands of the lord of the manor for the time being, to the use and behoof of the right heirs of the settlor for ever, according to the custom of the manor; such surrender or surrenders last mentioned to be made at the costs and charges, in all things, of the person or persons who, by virtue of the last-mentioned condition or limitation, should be entitled to take the same. The only issue of the marriage was a daughter, who survived the settlor, but died in the lifetime of the widow, her mother. The widow continued in possession of the premises till her death. It being admitted that the widow was, according to the custom, the heir of the settlor, at the time of his death, and that his youngest sister was such heir at the time of the widow's death, it was held, that by virtue of the ultimate limitation in the articles, the youngest sister was entitled to call for a conveyance of the customary premises, from a party in whom the legal estate had become vested, and who also claimed the equitable interest through the widow and the daughter. *Locke* v. *Southwood*, 1 Myl. & C. 411. Affirmed *sub. nom. Bush* v. *Locke*, 3 Cl. & F. 721; 9 Bli. N. S. 1.

2. A., in a conveyance to uses reciting that he was desirous that certain estates derived from his mother's family should remain in the family and blood of S. R., his maternal grandfather, in consideration of his natural love and affection to his relations, the heirs of S. R.; and to the intent that the said estates might continue in the family and blood of his late mother on the side of her father, settles them to the use of himself for life, remainder to heirs of his body, for default of such issue, as he should appoint, and for default of appointment to use of right heirs of S. R., with power of revocation and new appointment. The ultimate remainder is contingent, and will vest in the person who happens to be the right heir of S. R. at the expiration of the estate previously limited. *Clinton*, 2 Jac. & Walk. 1; 2 I

3. Lands were limited by de the settlor for life; remainder wife for life; remainder to the female of the body of the sett of his wife already begotten, or which may be begotten he default of such issue, to the male of the body of the settl of his wife to be begotten; r right heirs of the settlor. At this deed was executed, the wife had issue four daughter male; but at his death the same and also several sons of the m him:—Held, that under the " heir female," the daughters t in the lands as purchasers. *Cha* 2 Myl. & C. 376; 6 L. J., N. S.

4. By a voluntary settleme cousin limited certain gavell relative, C., for life, with re issue, and for default of such use of the right heirs of E., dec who was then living—"the tw said A., their heirs and assign common for ever":—Held, the to read the limitation as a lin right heirs of E., deceased, an herself took a vested remaind in a moiety of the property e death of C. without issue; a that on the death of C., who died without issue, the moiet co-heirs in gavelkind. *Hawe* L. R., Ch. D., 614; 43 L. T. 28

5. R. S., by deed, conveyed estate in the Isle of Man, up first instance to permit him, receive the rents and profits his life, and upon his death, out of the rents accruing fro annuity of 40*l.* to H. A. during pay the residue of such rent heirs or assigns; and upon E trust to convey the said lands heirs, if then living, or if she dead, unto the heirs at law o and the heirs and assigns of s R. S., the settlor, died int married; J. A. died, leaving H law; then H. A. died, leaving at-law, and who then becam J. A. Upon a bill filed by J. surviving trustee under the de veyance of the estate:—Held, Committee, affirming the decr of Chancery of the Isle of Ma took by purchase under the tion, as the person answering of heir-at-law of J. A. at the and a conveyance decreed. Moo. P. C. 249; 7 Jur. 567.

Under Rule in Shelley's Ca LEY'S CASE, RULE IN.

VI. FOR ISSU

6. Where there is an ambi sions of settlement regarding presumptions are taken in fav dren. *Perfect* v. *Curzon*, 5 Ma

her death, to assign it to him, "his executors, administrators, and assigns, to and for his and their own use and benefit;" but if his wife should survive him then to her for life, and afterwards to assign it "unto the executors or administrators of A. B. to and for his and their own use and benefit." The wife survived:—Held, that, subject to her life interest, the fund belonged to the next of kin of A. B. and not to his administrator. *Meryon* v. *Collett*, 8 Beav. 386; 14 L. J., N. S., Ch., 369; 9 Jur. 459.

1. By a marriage settlement the reversion in real estate was conveyed to trustees in trust, at the request of the husband and wife, or of the survivor, to sell, and the proceeds were settled on the husband and wife for life, with remainder to the children, and in default thereof to such person as the wife should appoint, and in case of no appointment to the use of the heirs, executors, and administrators of the wife, according to the nature and property of the premises. The wife died without issue, and without having exercised the power. The husband took out administration to his wife, and required the trustees to sell the reversion:—Held, that he was entitled to have it sold, and to have the proceeds as administrator to his wife. *Warburton* v. *Hadfield*, 6 L. J., N. S., Ch., 203; 1 Jur. 164.

2. The ultimate trust in a marriage settlement of a fund belonging to the wife was to her executors or administrators:—Held, first, that the surviving husband, who was her administrator, and not her next of kin, was entitled; and, secondly, that if by those words her next of kin were intended, then that the next of kin at the death of the wife, and not of the husband (who was tenant for life), were entitled. By marriage settlement, a fund belonging to the wife was settled on the husband and wife for their respective lives, with remainder to the children of the marriage, to be vested at twenty-one or marriage; and in case no children should attain vested interests (which happened), then as the wife should appoint; and in default, unto the executors or administrators of the wife. The wife predeceased the husband, and made no appointment. There was one child only of the marriage, who survived her mother, but died without attaining a vested interest:—Held, that the ultimate limitation was in favour of the wife's administrator, and not of her next of kin. *Allen* v. *Thorp*, 7 Beav. 72; 13 L. J., N. S., Ch., 5.

3. By an ante-nuptial settlement, money, the property of the wife, was settled in trust for her separate use for life, for her husband for life, and for the children of the marriage, equally subject to her appointment by deed or will, and in default of children, for such persons as she should appoint by deed or will, and in default of appointment, that the trustees should pay and transfer the same to her executors or administrators; and the husband covenanted, that in case he should die without issue in his life, and make no appointment, the same should remain for the use and benefit of her executors, administrators, and assigns:—Held, that by the "executors or administrators" of the wife, her next of kin were meant. This case was appealed, and the appeal was heard, but before judgment was given it was compromised, the Lord Chancellor having expressed his dissent from the decree below. *Daniel* v. *Dudley*, 11 Sim. 163. See S. C. on appeal 1 Ph. 1.

4. J. by settlement assigned an annuity to trustees upon trust to pay the same to his wife during their joint lives for her separate use, and after her decease to sell and invest and stand possessed of the proceeds upon trusts for children, in default as he should by deed or will appoint, and in default of appointment upon trust to pay, assign, and transfer the same to the executors or administrators of J. to and for their own use and benefit. J. by his will gave the whole residue of his property to trustees upon trust to convert and invest and to pay the interest to his wife for life, with remainders over. The wife died, and her personal representative claimed to have the reversion of the annuity sold, and the executors of J. claimed for their own benefit under the limitation in the settlement:—Held, that they took only in their representative character, and that the reversion of the annuity mus be sold. *Johnson* v. *Routh*, 6 W. R. 6; 27 L. J., Ch., 305; 3 Jur., N. S., 1048.

V. FOR HEIRS. HEIR-AT-LAW.

5. In a deed the extensive and ordinary signification of the word "heirs" will be limited where the intention of the parties to the deed is perfectly apparent. Therefore, where by a deed of settlement after marriage certain premises were conveyed to trustees to the use of A. the husband for life, remainder to trustees to preserve contingent remainders, remainder to the use of B. (the eldest son of A.) and the heirs of the said B., and for default thereof to the use of C. the second son, and all and every the other sons successively in tail male, remainder to the use of the daughters, share and share alike as tenants in common in tail male, with remainders over: B. having died without issue:—Held, that B. having been only tenant in tail under the limitation in the settlement on his decease without issue male, C., the second son, was only entitled to an estate in tail male, and did not take as heir-at-law to his brother B. *Wall* v. *Wright*, 1 Dr. & Wal. 1.

6. As to where the words "heirs of the body" have been held words of purchase in the same sense as "issue." *Theebridge* v. *Kilburne*, 2 Ves. 233.

Personalty.] 7. Upon settlement of lands to be sold in trust for several purposes, the residue is given to B. and his heirs, reserving only 200*l.* to be paid to such person as settlor should appoint. Settlor died without appointment; the 200*l.* shall go to his heir, and not to B., or his assigns. *Anon.*, 1 Com. 345.

8. Under a limitation in a marriage settlement of certain personal property of the wife after the death of the survivor, and in default of issue of the marriage, to the right heir or heirs of the wife:—Held, that the husband, by the death of his wife without issue, was not entitled as her administrator to an absolute interest in the settled property. *Newenham* v. *Pittar*, 7 L. J., N. S., Ch., 300.

9. Personal estate was settled on a husband and wife successively for life, with remainder

to their children; and, in failure of children, "then to the right heirs" of the survivor of the husband and wife:—Held, that, under the last limitation, the heir-at-law of the survivor, and not the next of kin, was entitled. *Hamilton* v. *Mills*, 29 Beav. 193; 3 L. T., N. S., 766.

Real Estate.] 1. R. M., being seised to him, his heirs, and assigns, according to the custom of the manor of Taunton Deane, of certain premises within the manor, in pursuance of articles made in contemplation of marriage, surrendered the premises to trustees, upon trust to permit the settlor, his heirs and assigns, to hold and enjoy the premises till the marriage, and after the solemnisation thereof upon trust for the settlor for life, and after his decease upon trust for the intended wife for life in bar of all dower and thirds, and after the death of the survivor of the husband and wife upon trust to surrender the premises into the hands of the lord, to the use of the children of the marriage, their heirs and assigns, according to the custom, as tenants in common, such surrenders to be made at the costs and charges of the children who should be entitled to take the same by virtue thereof; and in default of issue of the marriage, that should be living at the death of the survivor of the husband and wife, then upon this special trust and confidence, to surrender the premises into the hands of the lord of the manor for the time being, to the use and behoof of the right heirs of the settlor for ever, according to the custom of the manor; such surrender or surrenders last mentioned to be made at the costs and charges, in all things, of the person or persons who, by virtue of the last-mentioned condition or limitation, should be entitled to take the same. The only issue of the marriage was a daughter, who survived the settlor, but died in the lifetime of the widow, her mother. The widow continued in possession of the premises till her death. It being admitted that the widow was, according to the custom, the heir of the settlor, at the time of his death, and that his youngest sister was such heir at the time of the widow's death, it was held, that by virtue of the ultimate limitation in the articles, the youngest sister was entitled to call for a conveyance of the customary premises, from a party in whom the legal estate had become vested, and who also claimed the equitable interest through the widow and the daughter. *Locke* v. *Southwood*, 1 Myl. & C. 411. Affirmed *sub. nom. Bush* v. *Locke*, 3 Cl. & F. 721; 9 Bli. N. S. 1.

2. A., in a conveyance to uses reciting that he was desirous that certain estates derived from his mother's family should remain in the family and blood of S. R., his maternal grandfather, in consideration of his natural love and affection to his relations, the heirs of S. R.; and to the intent that the said estates might continue in the family and blood of his late mother on the side of her father, settles them to the use of himself for life, remainder to heirs of his body, for default of such issue, as he should appoint, and for default of appointment to use of right heirs of S. R., with power of revocation and new appointment. The ultimate remainder is contingent, and will vest in the person who happens to be the right heir of S. R. at the expiration of the estate previously limited. *C*
Clinton, 2 Jac. & Walk. 1; 2 M

3. Lands were limited by de
the settlor for life; remainder
wife for life; remainder to the
female of the body of the settl
of his wife already begotten,
or which may be begotten he
default of such issue, to the
male of the body of the settl
of his wife to be begotten; re
right heirs of the settlor. At
this deed was executed, the
wife had issue four daughters
male; but at his death the same
and also several sons of the ma
him:—Held, that under the li
"heir female," the daughters to
in the lands as purchasers. *Cha*
2 Myl. & C. 376; 6 L. J., N. S.,

4. By a voluntary settleme
cousin limited certain gavelki
relative, C., for life, with re
issue, and for default of such
use of the right heirs of E., dece
who was then living—"the tw
said A., their heirs and assign
common for ever":—Held, the
to read the limitation as a limi
right heirs of E., deceased, an
herself took a vested remainde
in a moiety of the property ex
death of C. without issue; an
that on the death of C., who s
died without issue, the moiety
co-heirs in gavelkind. *Hawes*
L. R., Ch. D., 614; 43 L. T. 280

5. R. S., by deed, conveyed t
estate in the Isle of Man, upo
first instance to permit him,
receive the rents and profits
his life, and upon his death, i
out of the rents accruing from
annuity of 40*l.* to H. A. during
pay the residue of such rents
heirs or assigns; and upon H.
trust to convey the said lands t
heirs, if then living, or if she
dead, unto the heirs at law of
and the heirs and assigns of su
R. S., the settlor, died inte
married; J. A. died, leaving H.
law; then H. A. died, leaving J
at-law, and who then became
J. A. Upon a bill filed by J. E
surviving trustee under the de
veyance of the estate:—Held,
Committee, affirming the decre
of Chancery of the Isle of Man
took by purchase under the u
tion, as the person answering t
of heir-at-law of J. A. at the
and a conveyance decreed. *C*
Moo. P. C. 249; 7 Jur. 567.

Under Rule in Shelley's Cas
LEY'S CASE, RULE IN.

VI. FOR ISSUE.

6. Where there is an ambig
sions of settlement regarding
presumptions are taken in favo
dren. *Perfect* v. *Curzon*, 5 Mad

1. Courts will avoid a construction leading to a perpetuity and void devise, if possible. So they will, in marriage settlements, consider the general intent as in favour of the issue described, and not let property revert or go to a father as the representative of one child to the prejudice of the rest, if no positive reason for it be clearly inferred. *Exel* v. *Wallace*, 2 Ves. 118.

2. In a marriage settlement, "issue" is construed "children." *Marshall* v. *Baker*, 9 Jur., N. S., 396; 11 W. R. 78; 7 L. T., N. S., 303.

The word "issue" in a deed construed "children," in regard to personalty. S. C. 31 Beav. 608.

3. "Issue" in a deed is always a word of purchase. *Bagshaw* v. *Spencer*, 2 Atk. 582.

4. F., in order to make some provision for his daughter M., the wife of T. S., and for her issue, by deeds, in 1799 and 1802, assigned premises to trustees, upon trust, after keeping the premises in repair, etc., to pay to or otherwise permit or suffer M. to receive and take the residue of the rents for life; and upon her decease, leaving issue of her body by T. S., upon trust to stand possessed of the premises for such issue, to be a vested interest as they should attain twenty-one. M. survived F., and died in 1854, leaving by T. S. seven children, one of whom intermarried with R. S., and died leaving three children, two of whom who survived claimed to be entitled to a share of, and in the premises comprised in the deeds of 1799 and 1802:—Held, that the word "issue" was not confined to the children of M., but included grandchildren. *South* v. *Searle*, 2 Jur., N. S., 390; 4 W. R. 470.

5. Estates were vested in trustees for sale, and after the death of W. to pay the proceeds amongst the twelve children of W., as described in the settlement, or such of them as should be living at the time of the decease of D. and J., and the issue of such as might be then dead, to be equally divided between them, the issue to take the parent's share; but if any of such twelve children should die in the lifetime of D. and J., or the survivor of them, without leaving issue living at the decease of such survivor, then in trust to pay the share of the child who should die without such issue unto the survivors and survivor of them, and the issue of such as should be dead. Ten of the children survived D., but died in the lifetime of J. G.; one of the ten children left six children, one of whom, by bill, prayed that the trusts might be carried into execution. B., another of the ten children, left two children, one of whom died four months previously to J., leaving four children, and the question was, whether these four children were entitled to the share of their deceased parent:—Held, that the word issue being used in conjunction with that of parent, more remote descendants than children were not included in the word issue, and therefore the grandchildren were not entitled to their parent's share. *Anderson* v. *St. Vincent* (*Viscount*), 2 Jur., N. S., 607; 4 W. R. 304.

6. By marriage settlement a fund was settled upon trust after the death of the survivor of husband and wife, for their child or children then living, to be paid at his or their respective ages of twenty-one; and in case both husband and wife should die without leaving any lawful issue, then according to the husband's appointment; and in default, in case there should be no such child or children, as aforesaid, then over. The wife survived her husband, and all her children, two of whom attained twenty-one, left issue surviving the wife:—Held, that "lawful issue" was to be restricted to children, and that the gift over took effect. *Re Heath's Settlement*, 23 Beav. 193.

7. The word "issue" includes all remote descendants of the person whose issue is referred to, and the burden of proof lies upon him who contends the contrary; but when the word "parent" is used in reference to his "issue," it is confined to his "children." The word "issue" in reference to the word "parent" in a substitutional gift:—Held, from the context of the will, not limited to "children." *Ross* v. *Ross*, 20 Beav. 645.

8. Settlement in trust for children living at death of survivor of husband and wife; but if any child should die in the lifetime of the husband and wife, leaving issue, the share of the child should go equally between his issue:—Held (following *Ross* v. *Ross*, 20 Beav. 645), that although issue is *nomen generallissimum*, yet that on a *quasi* representative principle the children only of a child whose share fails take that child's share, the grandchildren not being admitted to take in competition with the children. *Robinson* v. *Sykes*, 2 Jur., N. S., 895; 23 Beav. 40; 26 L. J., Ch., 782.

9. Limitation of the trust fund in a marriage settlement, to the husband for life, and after his decease for the wife for life, and after the decease of the survivor the fund to go to the issue of the marriage, in case there should be any living at the death of the husband and wife, in such manner as the father should appoint, and in default of appointment then to such issue in equal shares, and if but one then the whole to go to such only child; and in case there should not be any issue of the marriage living at the death of the survivor, then to go to such person as the husband should appoint:—Held, that the word "issue" was to be construed "child," and that an appointment made by the father, upon the death of the only child of the marriage, in his lifetime, although leaving a child, was valid. *Swift* v. *Swift*, 8 Sim. 168; 5 L. J., N. S., Ch., 376.

10. By a marriage settlement, a sum of money was settled upon trusts for the husband for life, then for the wife for life, and, after the death of the survivor, upon trust to pay the principal among all the children and issue of the intended husband, to be by him begotten on the body of the intended wife; and if there should be no child or issue of the marriage, or, being such, they should all die in the lifetime of the survivor of the husband and wife, upon other trusts:—Held, that the children of the marriage, including those dying in the lifetime of the survivor of the husband and wife, took the fund, and that no other issue were entitled. *Gordon* v. *Hope*, 3 De G. & Sm. 351; 18 L. J., N. S., Ch., 228; 13 Jur. 382.

11. Plate was limited by settlement to trustees for R. E. of C. for life, and then for T., his eldest son, for life, and after his death for the first son of his body and the executors, administrators, and assigns of such son; and if the eldest son of T. should die under twenty-one without leaving issue male of his body living, at his death in trust for the second,

third, and other sons of T. Then followed similar limitations to the second, third, and other sons of R. E. of C.; and there was a gift over "if there shall not be any son of R. E. of C. or of T. who shall live to attain twenty-one, or shall die under that age leaving issue male of his body living at his death":—Held, that the word "issue" in the gift over meant "such issue," and there was no implied gift to T., and that, on the death of T. without issue, there being no other son of R. E. of C., the gift over took effect. *Cardigan* v. *Curzon Howe*, 18 W. R. 878; 9 L. R., Eq., 358; 22 L. T. 640.

1. By a post-nuptial instrument executed in pursuance of a marriage contract, a fund was directed to be vested in trustees, in trust to pay the interest to the wife for life to her separate use; after her death to the husband for life, and after the death of the survivor to pay the principal to the issue of the marriage in such proportions as the wife might appoint, and failing such appointment, to and among the child or children of the marriage equally among them, and to the issue of any of them who might have died leaving lawful issue, *per stirpes*. There were five children of the marriage. In 1853 the wife appointed the fund among them. In 1861, after her death, the husband appointed the fund among the same five children. One of these children, a girl, had married, and was, at the time of her father's death, *enceinte* of a child, which was subsequently born:—Held, that issue in the agreement was used in its extended sense, and therefore, as the power did not authorise an exclusive appointment, both appointments were invalid, and the fund was divisible among the five children in default of appointment. *Donoghue* v. *Brooke*, 9 Ir. R., Eq., 489.

2. The words "issue of the intended marriage," uniformly used in a settlement made on the occasion of a marriage, in the absence of any indication in the context of an intention that they should include all descendants, are to be construed to mean "children." *Re Denis*, 10 Ir. R., Eq., 81.

By a marriage settlement, reciting an agreement to make a provision for the issue of the intended marriage, property of the wife was vested in trustees after the deaths of the husband and wife, in case there should be issue of the intended marriage, for the use and benefit of such issue, as the husband should appoint, and in default of appointment among such issue share and share alike; but, in case there should be no issue of the intended marriage, or, if issue, in case all such issue should die before attaining the age of twenty-one, or days of marriage, in trust for the use and benefit of the survivor of the husband and wife. Property real and personal of the husband was limited upon precisely similar uses and trusts, save that the ultimate trust was for the husband, his heirs, executors, etc.:—Held, that the word "issue" was to be construed "children." *Ib.*

3. By a deed of 1828, B., on the marriage of his son E. with V., in order to provide for their "issue," conveyed a chattel real upon trust for E. for life; and after his death, if there should be no issue then living, for V. for life; but if there should be "children" living at E.'s death, as to one-half or one-third of the premises, acc
should be one or more of su
V. for life, as to the resid
tenance, etc., of such "chi
and after the death of the
in trust for the "issue" as E
in default of appointment,
alike; if but one "child,"
only child; and if "no issue
the surviving parent, in trust
E. died in 1877, without h
leaving V. and several childr
tracted to sell the premises
sonal representative of B.
in the conveyance. The t
objected to by G.'s counsel
that it was doubtful whethe
be construed as "children,"
ants," and the Vice-Chancell
under s. 9 of the Vendor an
1874 (37 & 38 Vict., c. 78),
the objection:—Held, on app
more remote than children
under the limitations of the
that the order below should
Re Biron, 1 L. R., Ir., 258.

4. By a post-nuptial settle
a time when one child of t
alive, after reciting that it
provide for the present and fu
wife by A., her husband, a
upon trust to apply the int
death of the wife, to and amo
and future issue of the ma
maintenance during the life o
he should direct; and, after
husband and wife, to and am
as the husband and wife, o
them, should appoint; and in
appointment then to be divide
share and share alike, with be
ship: proviso, that, in case the
survive the wife, and that
marriage should happen to d
being married, should die
issue in the lifetime of the h
fund should go to the husban
administrators, or assigns:—
word "issue" meant children
that the children of the ma
fund, in default of appointme
sion of the grandchildren. *R*
Eq., 1. Reversing 3 Ir. Eq. R

5. By articles relating to lea
and for years, and to money, it
said leases for lives and for
conveyed to trustees, in trust
life estates to D. and J.). "Aft
J., to the issue of J. and A., in
proportions as the said J. shou
for want of such appointmen
children equally, share and
for default of such issue, to
tors, and administrators of sa
leases; the money or the lan
purchased therewith, to go to
and A., in such shares and
And for want of such app
equally divided among such
and share alike; and if no
marriage, or all should die bef
then a power to dispose of said
that "issue" is to be construe
that the issue of J. and A. to

interest in the chattel property, and a *quasi* fee in the freehold property; that a *quasi* estate tail cannot be barred by will, *semble*. *Campbell* v. *Sandys*, 1 Sch. & Lef. 281. S. P. *Williams* v. *Jekyl*, 2 Ves. 681.

1. By a voluntary settlement personal property was assigned to trustees upon trust to pay the interest to T. during his life, and on his decease to pay the principal to his lawful issue, if then of age or married, share and share alike, if more than one, and if only one the whole to be paid to such only child, or in case such child or children should be an infant or infants on the death of the said T., then the principal was to be paid to him, her, or them as aforesaid on their attaining twenty-one if sons, or if daughters on their marriage, respectively. By his will the settlor bequeathed certain other funds to the same trustees upon similar trusts. T. died, leaving an infant daughter his sole surviving child:—Held, that the daughter would become absolutely entitled to the bonds in question, either on her attaining twenty-one or on her marriage under that age. *Lang* v. *Pugh*, 1 Y. & Coll. C. C. 718; 6 Jur. 939.

2. By settlement, personal estate was limited, after the death of the husband and wife, on trust for all the children as tenants in common, and the several issue of the body of such children; and failing issue of any such children, their shares to the use of the surviving children, as tenants in common, and the issue of their bodies. There was a gift over, in case there should be no issue of the marriage, or any issue of such issue, or, being such, all should die before their shares should become payable:—Held, that the children of the marriage took absolute interest, and that the representatives of a child who died an infant, without issue, in the life of his parents, were entitled to a share. *Mount* v. *Mount*, 13 Beav. 333.

As Objects of Special Powers.] See Power, XVII. IV.

Under Rule in Shelley's Case.] See Shelley's Case, Rule in.

See also Trusts (Executory).

VII. FOR NEXT OF KIN.

1. *Who are Entitled*, 6251.
2. *Time for Ascertaining*, 6253.
3. *Gift on dying Unmarried.* See X. *infra.*
4. *Purchase by.* See VIII. III. 4 *ante.*

1. Who are Entitled.

3. Limitation by settlement of personal property to next of kin, in equal degree, passes the property to a surviving sister, in exclusion of children of deceased brother. *Anon.*, 1 Madd. 36.

4. On limitation by settlement to next of kin of said A. P. of her own blood and family, as if she had died sole and unmarried, the next of kin take as under the Statute of Distributions. *Cotton* v. *Scaranoke*, 1 Madd. 45.

5. Under a limitation, in a marriage settlement, of the wife's property, in default of her appointment, for her next of kin or personal representative, the husband, taking a prior partial interest, is not entitled. *Bailey* v. *Wright*, 1 Swan. 39; 18 Ves. 49; 1 Wils. 15.

6. J. S. M. being entitled to the dividends of 4,300*l.* for life, with a power to appoint by any deed or writing the principal after his death, and in default of appointment to his next of kin, and being in prison for debt, and in great distress, is prevailed upon by H. C. to enter into an agreement for sale of the principal after his death, in consideration of 1,000*l.* and other sums therein stated to have been previously lent and advanced to him by H. C. By a subsequent deed, in consideration of 1,854*l.* therein stated to be due from J. S. M. to H. C., and of 1,000*l.* paid by J. S. M. and others, J. S. M., by the direction of H. C., appointed that the principal should, on his death, be transferred to J. S. M. and others, with a proviso that they should assign the same to H. C. on payment of 1,000*l.* and interest, and all further advances. The 1,854*l.* or any part of it, had not, in fact, been advanced by H. C.:—Held, that this was a clear fraud. Held, that the appointment was well executed; that the next of kin of J. S. M. had no claim; that H. C. was a trustee for the personal representatives of J. S. M., for the excess beyond the money received by J. S. M. *Miller* v. *Minet*, Taml. 481.

7. By an ante-nuptial settlement moneys, the property of the wife, were settled in trust to pay the interest to her during her life, and in the event of her death in the lifetime of her husband, then as to the principal as she should appoint; and in the event of her dying without appointing and without issue surviving her, then "in trust for the persons legally entitled thereto as the next of kin of the wife," free from the control or debts of her husband. The wife died in the lifetime of her husband, without leaving any issue her surviving. She was survived by a brother, a sister, and niece (the only child of a deceased brother):—Held, that the niece was entitled to one-third part of the moneys. *Kidd* v. *Frasier*, 1 Ir. Ch. R. 518.

8. By a marriage settlement, a fund, the property of the wife, was settled on her, and her husband and their issue, and in default of issue on the wife's next of kin. The wife, who was illegitimate, died without issue, and her husband administered to her:—Held, that the Crown was not entitled to the fund, but that it belonged to the husband as administrator to his wife. *Hawkins* v. *Hawkins*, 7 Sim. 173.

9. By the settlement made on the marriage of E. M., the ultimate limitation of personal property was, "to such person or persons as at the time of the death of E. M. should be her next of kin." E. M. died, leaving a father, mother, and a child:—Held, that, under this limitation, the father, mother, and child took as her next of kin in joint tenancy. *Withy* v. *Mangles*, 10 Cl. & F. 215; 8 Jur. 69. Affirming 4 Beav. 358; 10 L. J., N. S., Ch., 391; 5 Jur. 717.

By a marriage settlement, the wife's portion was limited to the wife for life, with remainder to the husband for life, with remainder to the children of the marriage, to be vested at twenty-one or marriage; and in case none should attain that age or marry, then in trust for the brothers and sisters of the wife or their issue, as she should appoint, and in default of appointment in trust for her next of kin:—Held, that the children of the marriage were

not excluded from taking under the ultimate limitation. *Ib.*

1. In a marriage settlement, the ultimate limitation of a fund provided by the husband was, "for his next of kin or personal representatives in a due course of administration according to the Statute of Distributions." There was a similar limitation, *mutatis mutandis*, of the fund provided by the wife. The Court, rejecting the claims of the husband's executors and of his residuary legatee, and excluding his widow:—Held, that the next of kin were entitled to the fund provided by the husband. *Kilner* v. *Leech*, 10 Beav. 362; 16 L. J., N. S., Ch., 503; 11 Jur. 859.

2. A. assigned a fund to trustees, upon trust to pay the interest to B. for his life, and after his decease to pay, transfer, and assign the same among B.'s children; and if no child of B. from and immediately after the decease of B., upon trust to pay, transfer, and assign the same as A. should appoint; and in default of appointment, to pay, transfer, and assign the same to such person or persons as should at the time of the decease of A. be A.'s next of kin. A. died in the lifetime of B., without having made any appointment, and B. died without issue. B. is not excluded from the benefit of the limitation to A.'s next of kin. *Elmsley* v. *Young*, 2 Myl. & K. 780; 4 L. J., N. S., Ch., 200. And see S. C. 2 Myl. & K. 82; 3 L. J., N. S., Ch., 57.

B. was the only surviving brother of A., and there were children of a deceased brother of A.:—Held, by the Lords Commissioners (overruling *Phillips* v. *Garth*, 3 Bro. C. C. 64; *Hinckley* v. *Maclarens*, 1 Myl. & K. 27, and the decision in the present case at the Rolls), that the words "next of kin," used *simpliciter*, are to be taken to mean "nearest of kin," and that, consequently, B.'s personal representatives were entitled to the whole fund. *Ib.*

3. Trust, under marriage settlement, for the next of kin of the wife, subject to her appointment by will, with two witnesses, appointment in favour of the husband by an unattested will being void; the children are entitled, not the husband, who is next of kin to his wife, and whose claim to her personal property is not, in that character, under the statute, but *jure mariti*, and in this case, according to the plan of the settlement, he was not intended. *Watt* v. *Watt*, 3 Ves. 244.

4. Proposals for a settlement of a lady's property, to be executed before marriage, were prepared in England, and sent out to the parties abroad. Before they reached their destination the parties married. The husband and wife then signed the proposals. The proposals were for a settlement on the wife for life, remainder to the husband for life, remainder to the children of the marriage; in default of children, as the wife should dispose by will; in default of such disposition, to the wife's next of kin. Part of the property (which was all personalty) was standing in her own name and right at the time of her marriage; part consisted of her share of a fund vested in the names of trustees of her mother's marriage settlement, and in which the lady had only a reversionary interest, her mother being still alive. The wife shortly after the marriage died intestate, and without issue. The husband took out letters of administration to her estate:—Held, that he was personal estate for his own to any trust. *Pownall* v. N. S., 857.

5. An ultimate limitati settlement was "for the wife, as if she had not bee including the husbands o her sisters":—Held, that t her next of kin, took as joi v. *Brandreth*, 28 Beav. 274.

6. By a marriage settle perty of the intended wif ultimate trust being for suc as at the time of the de should be her next of kin ing to" the Statute of Dis that the next of kin of the in common, and not as *Ranking*, 6 L. R., Eq., 601.

7. By a marriage settle settled upon such trusts a notwithstanding coverture, appoint: and in default case (which happened) th issue of the marriage, in tru as should at the death of t husband and wife be the wife. By her will, which exercise of the power, the bequeathed all her real an over which she had any d her executors therein name several legacies, which did fund, and appointed execut her husband's lifetime:—H was by the appointment all wife's general personal estat the unexhausted portion husband, and not to the p default of appointment und *Brickenden* v. *Williams*, 7 W. R. 441.

8. Under a limitation in a event of the wife dying wit dren in the lifetime of the hus such persons as at the death have become entitled thereto for the Distribution of the Intestates, the husband doe v. *Lyon*, 33 L. T., N. S., 199.

9. A fund was settled on after a life interest to the limitations, for the wife if s her husband, but if she shou time, in trust for the husban he should marry again, and or marriage as aforesaid, in t sons as at the time of his d should be the next of kin marriage was dissolved by band and wife married aga died:—Held, that the next at her death were entitled words "his death or marriag meaning the determinatio interests. *Re Mathew*, 24 W

Held, also, that the husba destroyed by his second mar time of the wife. *Ib.*

10. A father gave his re trustees upon trust for his and after her death among grandchildren, or other issu

by deed or will appoint, and in default of appointment as she should by deed or will generally appoint, and in default of appointment under that power to her nearest of kin, according to the Statute of Distributions. The daughter made a testamentary appointment under the general power in favour of her husband, reciting, as the fact was, that she had then no children. She afterwards had children, but died without revoking the appointment:—Held, first, that there was an implied gift to the objects of the first power in default of appointment. *Re Jeffrey*, 14 L. R., Eq., 136; 42 L. J., Ch., 17; 26 L. T. 821; 20 W. R. 667.

Held, secondly, that if not, the appointment was conditional on there being no children, and they took as nearest of kin as in default of appointment. *Ib.*

2. Time for Ascertaining.

1. By a marriage settlement a fund was settled on the wife, if she should survive her husband, for her life, remainder to her children, who, being sons, should attain twenty-one, or being daughters should attain that age or marry; and the trustees were directed to apply a portion of the income of the children's expectant shares for their maintenance, and to accumulate the surplus for the benefit of such person or persons as should be entitled thereto, by virtue of the settlement: provided that, if no son should attain twenty-one, nor any daughter should attain that age or marry, then the fund should be in trust for such person or persons as the husband should by deed or will appoint: and, in default of appointment, in trust for his next of kin, according to the Statute of Distributions, and as if he had died intestate. There was issue of the marriage one son only. The husband died first, without having exercised the power reserved to him; then the son died under twenty-one; and lastly, the wife died:—Held, that the fund vested in the son, as his father's next of kin at the father's death, and not in the persons who were the father's next of kin at the son's death. *Smith* v. *Smith*, 12 Sim. 317.

2. By a marriage settlement, personal estate of the wife was settled in trust for the husband and wife for their lives, and afterwards for the children of the marriage, and in default, for the wife, if she survived her husband, but if she predeceased him, then (subject to his life interest) for such person as, at the death of the wife, would, under the statute, have been entitled to her personal estate, as her next of kin, in case she had survived her husband and had afterwards died intestate. The husband survived the wife:—Held, that her next of kin, ascertained at the husband's death, were entitled. *Chalmers* v. *North*, 28 Beav. 175; 6 Jur., N. S., 490; 8 W. R. 426.

3. By a marriage settlement certain personal property was settled upon trust for the husband and wife for their respective lives, and after their death for the issue of the marriage, and in case of failure of issue, and of the wife dying in the lifetime of the husband (which events happened), upon trust for such person or persons, other than and except the husband, as should then be the next of kin of the wife, and would have been entitled thereto under the Statute of Distributions:—Held, that the next of kin of the wife living at her death were entitled. *Wheeler* v. *Addams*, 1 W. R. 473; 17 Beav. 417.

In a limitation in a deed, on a particular event, to the "then" next of kin of A., the word "then" was held to refer to the event, and not to the time of its happening. *Ib.*

4. A limitation to the next of kin of a wife, after the death of the surviving husband and failure of children:—Held, to be an exception to the general rule, and to mean not the wife's next of kin at her death, but at the death of the surviving husband. *Pinder* v. *Pinder*, 28 Beav. 44; 29 L. J., Ch., 539.

By a marriage settlement, moneys belonging to the wife were limited to the husband and wife successively for life, with remainder to the issue of the marriage; but if there should be no issue of the marriage who should acquire a vested interest, then, in case the husband died in the lifetime of the wife, in trust for the wife absolutely; but if the wife should die in the lifetime of the husband, then, after the decease of the husband (in default of appointment by the wife), in trust for the persons who, under the Statutes for the Distribution of Intestates' Effects, would then be entitled to the personal estate of the wife, in case she had survived her husband, and had died possessed of the same intestate. The husband survived the wife:—Held, that the period when the class of next of kin was to be ascertained was the death of the husband, and not the death of the wife. S. C. 6 Jur., N. S., 489.

5. By a marriage settlement a sum of 500*l.* was settled upon trust to pay W. the interest for her life, and in the event of there being no issue of the marriage, and of H. dying in her lifetime without having executed the power of appointment reserved to him, "then upon trust immediately upon the death of W. without leaving H., or any child or children, grandchild or grandchildren, her surviving, to, pay the principal and all interest which may be then due thereon to such person or persons as, under the Statute of Distributions, would then be entitled to the same as the next of kin of H. in case H. shall have died intestate":—Held, that the next of kin of H. at the time of his death were the parties entitled to the fund, and not his next of kin at the death of W. *Day* v. *Day*, 18 W. R. 417; 4 Ir. R., Eq., 385.

VIII. FOR PERSONAL REPRESENTATIVES.

6. The words "legal representatives" used in a deed cannot be acted upon by the Court unless some context be found in the deed to explain them. *Tipping* v. *Howard*, 15 Jur. 911.

7. By an incorrectly framed settlement, a sum of money was settled on trusts for A. for life, with trusts in remainder for her children; and if she should die without issue, in trust to pay a portion of the fund to B. or her legal representatives:—Held, that the words legal representatives were either words of limitation, so as to give B. an absolute interest, or were intended to provide for her being dead at the

date of the settlement, or were void for uncertainty. *Topping* v. *Howard*, 4 De G. & Sm. 268.

1. Under a limitation in a marriage settlement of the wife's property, in default of her appointment, for her next of kin or personal representative, the husband, taking a prior partial interest, is not entitled. *Bailey* v. *Wright*, 1 Swan. 39; 1 Wils. 15; 18 Ves. 49.

2. In a settlement the words "to pay to legal representatives in a due course of administration," amount to a direction to pay to next of kin, and not to executors or administrators. *Briggs* v. *Upton*, 7 L. R., Ch., 376; 41 L. J., Ch., 519; 21 W. R. 30; 27 L. T., N. S., 62. Affirming 20 W. R. 89; 25 L. T., N. S., 626.

By an ante-nuptial settlement real and personal estate was vested in trustees, for sale and investment of the proceeds; and after the marriage, for payment of the income to the husband and wife during their joint lives, and the life of the survivor, and then for the benefit of the children and issue of the wife, as she should by deed appoint, and in default for her children and issue. If there were no children of the marriage, the whole of the trust moneys and premises were to be held by the trustees for such person and persons as the wife should, notwithstanding any coverture by deed or will, appoint; and in default of appointment, then "to pay or transfer the trust moneys and premises unto the legal representatives of the wife in a due course of administration":—Held, that the words "legal representatives in a due course of administration," denoted the next of kin of the wife according to the statutes, and not the husband. *Ib.*

3. A fund was settled on A. for life, then on any husband she might leave for life, then on her children, and in default of children on the person or persons who should happen to be her legal personal representative or representatives at the time of her death:—Held, that legal personal representatives meant next of kin according to the Statute of Distributions. *Robinson* v. *Evans*, 43 L. J., Ch., 82; 22 W. R. 199; 29 L. T. 715.

4. By a marriage settlement, the wife's real and personal estate was assigned to trustees on trust to pay the annual income to the husband for life, remainder to the wife for life, remainder as she should by deed or will appoint; and in default for her personal representatives. The wife predeceased her husband, intestate and without issue. After the husband's death, his executors took out administration of the wife's estates:—Held, that they were entitled to the fund. *Re Best*, 18 L. R., Eq., 686; 43 L. J., Ch., 545; 22 W. R. 599.

IX. FOR SURVIVORS.

5. When an estate was settled to A., B., and C., as tenants in common for life, with successive remainders to their issue male and female in tail, remainder "in case one or two of the said A., B., and C. should happen to die without issue of her or their bodies, then, as to the share or shares of such one or two so dying without issue, to the use of all and every the daughter and daughters of such survivor or survivors, as tenants in
Held, that the word "
construed "others," and
one of the tenants for li
vive, were entitled under
v. *Sewell*, 2 Con. & L. 34
Ir Eq. R. 66.

6. The word "surviv
clauses of a settlement r
in order to effectuate th
the parties, notwithstan
may require to be read i
other clauses of the set
the same fund. *Re P*
320; 32 L. T., N. S., 9; 4

By a deed dated in 182
settled funds in trust fo
shares for life, and after
of them without issue in
of the income for the su
case either or both died
dren, then as to the inco
trust for the survivor o
mainder to her childre
leaving two children. S.
having been married:—
"survivor" in the gift ov
tingent on her dying with
might be read as "othe
dren of E. were entitled

7. In construing limita
life, and afterwards to
provision relating to s
whether occurring in wil
rule for determining both
take, and the contingen
vivorship refers, is to lea
which will include as
gift as possible, consisten
purpose of the author
Bouverie v. *Bouverie*, 2 Ph
Ch., 411; 11 Jur. 661.

8. A fund was settled
A. for life, and then for
default of children to B,
in case of B.'s death be
"the surviving children"
husband:—Held, that th
reference to the death of
Beav. 388.

9. On the marriage of
was settled by deed up
death, and failure of issu
transfer the same unto, a
J. F., R. F., W. F., and E.
that if either of them, J.
E. F., should depart this
acquired a vested intere
share of such person so
such issue; but in case e
die without having law
share of him, her, or th
belong to the survivors
There was no issue of the
R. F. died in the lifetim
leaving issue. W. F. sur
in the lifetime of R. F.
survived both J. A. and
F. F. was entitled by su
share in the fund. *Re*
383.

10. "Survivor" read as
Osborne, 6 W. R. 21; 6 H
N. S., 1181.

1. A post-nuptial settlement, executed when at least one child of the marriage was alive, recited an intention to provide for the present and future issue of the marriage, and directed that, after the death of the wife, the trustees should pay and apply the interest of a certain sum of money amongst the present and future issue according to appointment, and in default of appointment share and share alike, with benefit of survivorship; proviso, that if the husband survived the wife, and that the issue of the marriage died unmarried, or, being married, died without leaving issue, in the lifetime of the husband, the sum should be paid to him, his executors, etc. The wife survived her husband:—Held, that the words "with benefit of survivorship" referred to the date at which the fund became distributable, and that that date was the death of the wife. *Re Dixon*, 3 Ir. R., Eq., 22. But see S. C. on appeal 4 Ir. R., Eq., 1.

In Case of Powers.] See POWER.

X. ON DYING UNMARRIED.

2. Where there is a gift over in the event of a person, who is not married at the time, dying "unmarried," it means without even having been married. *Heywood* v. *Heywood*, 29 Beav. 9; 7 Jur., N. S., 228; 30 L. J., Ch., 155; 3 L. T., N. S., 429.

In a limitation in a marriage settlement, giving the whole fund, after the death of the parents, to an only child, if but one should have died "unmarried and without issue," the word "unmarried" was construed "without having been married," and one having married:—Held, that the clause became inoperative. *Ib.*

Trust funds were directed to be paid, after the death of the survivor of husband and wife, in the event of there being only one child of the marriage, or, there being more than one, if all but one should have died unmarried and without issue, to such only child; but if there should be more than one child, in default of appointment by the husband and wife, to all the children equally, the shares to be vested at twenty-one or marriage. There were several children of the marriage; some had attained twenty-one, and two of them were married, of whom one had issue:—Held, that the contingency contemplated by the settlement could not happen, and that an appointment in favour of one of the children was valid. *Ib.*

3. The 3 & 4 Will. 4, c. 106, s. 3, does not apply to the ultimate limitation in a marriage settlement by a woman to the persons who would have been entitled if she had died intestate, and without having been married. *Heywood* v. *Heywood*, 5 N. R. 441.

By a marriage settlement real estate, of which the lady was seised as heir to her maternal grandfather, was conveyed to trustees, upon trust for the lady and her heirs until the marriage, and after the marriage upon trust for the lady for life; with remainder, in default of issue of the marriage, in trust for the lady and her heirs, if she survived her husband; but if she predeceased him, then in trust for the person or persons who would at her death have become entitled to the property if she had died intestate, and without having been married. The lady died without issue in her husband's lifetime:—Held, that the ultimate trust being for the benefit neither of the settlor nor of the heirs of the settlor, was unaffected by 3 & 4 Will. 4, c. 106, s. 3, and that the persons intended to take thereunder were those who would have been entitled if the settlement had never been executed; and, consequently, that the heir *ex parte maternâ* took the property, by purchase, under the settlement. S. C. 11 Jur., N. S., 633; 34 L. J., Ch., 317; 13 W. R. 514.

Limitations to Next of Kin.] 4. Upon the construction of a covenant in a marriage settlement, whereby the lady's personal estate was to be limited in the events which happened, in trust for her next of kin, by force of the Statute for Distribution of Intestates' Estates, in case she had died a *feme sole* and unmarried; her next of kin (excluding the husband) were held entitled. *Grafftey* v. *Humpage*, 1 Beav. 46; 8 L. J., N. S., Ch., 98; 3 Jur. 622.

5. A widow, as such, cannot take under a limitation to the next of kin of her husband, according to the Statute of Distributions. In a marriage settlement, the ultimate limitation of a fund was to such persons "as would, at the decease of the husband, be entitled to his personal estate, as his next of kin, according to the Statute of Distributions of personal estate of persons dying intestate, if the husband had died intestate without having been married to A." his wife. The wife died, and the husband married again and died:—Held, that his widow took nothing under this limitation. *Cholmondeley* v. *Ashburton* (*Lord*), 6 Beav. 86; 12 L. J., N. S., Ch., 337.

6. By marriage articles, the personal property of the intended wife was agreed to be settled for her separate use for life; and after her death, in case she died before her husband, in trust for such persons as would be entitled as her next of kin, in case she had died intestate and unmarried:—Held, that the children of the marriage, and not the persons who would have been her next of kin if she had died without having ever been married, were entitled. *Maugham* v. *Vincent*, 9 L. J., N. S., Ch., 329; 4 Jur. 452.

7. In a marriage settlement a sum of stock was given to trustees, after the death of husband and wife, upon trust, in case the wife died first, "for such person or persons as at the time of the death of the husband should be the next of kin of the wife and would be entitled to her personal estate and effects, his, her, and their executors, administrators, and assigns, as if she had died sole and unmarried." On the death of the husband only one brother was living, but there were children of the other brothers:—Held, that the brother surviving at the death of the husband took the whole fund as the next of kin designated in the settlement. *Re Webber's Settlement*, 19 L. J., N. S., Ch., 445; 17 Sim. 221.

8. On the marriage of a widow who had an illegitimate daughter, funds belonging to her

trust, for her separate use for life, with remainder in trust for her children as tenants in common (omitting the limitation to their heirs): —Held, that they took life estates only. *Holliday* v. *Overton*, 15 Beav. 480; 16 Jur. 346; 21 L. J., Ch., 769. Affirmed 16 Jur. 751.

The rule that the estate of the *cestuis que trustent* is commensurate with that given to the trustees, is inapplicable to limitations in a deed; therefore, where an estate was limited to trustees in fee, but the trust in favour of the *cestuis que trustent* wanted the ordinary words of inheritance:— Held, that they took life estates only. *Ib.*

1. A marriage settlement vested freehold leases in trustees "to hold to the use of A. and his heirs and assigns, from the perfection of these presents, for and during the term of his natural life, without impeachment of waste," with a power to lease, remainder to the trustees to preserve, and from the decease of A. to secure a jointure to B. (A.'s wife). Then followed a covenant by A., charging the jointure on after-acquired estate, with power of distress; "and further that the lands, after the decease of the survivor of A. and B., in case there should be but one child of the marriage, to the use of such only child, and the heirs of his or her body lawfully issuing; and in case there should be more than one such child, then to such children in such shares and proportions as A. shall by deed or will appoint; and in default of such appointment, then to the use of all the children, as tenants in common, share and share alike":—Held, that the words "and his heirs" should be rejected, and that A. took a life estate. *Re Hammersley*, 11 Ir. Ch. R. 229.

Held also, that the clause beginning "and further," is a limitation in continuation of, and direct sequence upon, the limitations to trustees to preserve. *Ib.*

2. Under a limitation of real estate in a marriage settlement, after the death and failure of issue of the husband and wife, "in trust for nephews and nieces then living, and the several and respective heirs of nephews and nieces then dead, having left lawful issue living at the time of the failure of issue of the marriage, as tenants in common":—Held, that nephews and nieces took life estates, and that the eldest son of a nephew deceased at the time of such failure of issue took in fee. *Marshall* v. *Peacock*, 2 John. & H. 73.

3. Real estate was conveyed to trustees upon an ultimate trust to convey and divide the trust estate to and among all the children of the settlor, and the issue of such children who should be living at the death of the wife of the settlor, as tenants in common:—Held, that the children took life estates only. *Tatham* v. *Vernon*, 7 Jur., N. S., 814; 9 W. R. 822.

4. By a marriage settlement, real estates were conveyed to trustees "and their heirs," upon trusts for the parents for life, and afterwards for the children; and in default, as the wife should appoint; and in default, for her next of kin. The gift to the next of kin contained no words of inheritance:—Held, that they took for life only. *Lucas* v. *Brandreth*, 28 Beav. 274.

5. A., by a voluntary settlement, in 1838 conveyed freeholds to trustees upon trust (together with a sum of stock a for himself for life, and a trust for his reputed son, case he attained twenty-on maintenance if he should be at the settlor's death. And die under twenty-one, or d lifetime, without leaving i decease, then over. There limitation in the trust for power of sale in the settle to invest the proceeds in 1849, having made his wi recited the settlement and c as to the stock which h attained twenty-one, and di that W. took a life estate o under the settlement, and resulting trust for the set *Barker*, 29 L. T., N. S., 643.

XII. LIFE INTERESTS I

6. A term settled to th remainder to the wife, her strators, etc., for the residue jointure; and for the bette on her "for life" for her j to renew and insert her na of those words will not rei for life. *Clarke* v. *Hacku*

7. Settlement by a *feme* tion of marriage, of part of to pay the dividends to her use for life, and after her de husband; and after the de to transfer the capital accor ment by will; and in case out appointment, and he sh in trust for her next of k etc., according to the Statu An interest for life only in power of disposition by *Dawson*, 15 Ves. 532.

8. It is declared by a m that a trustee is to lay ou which the husband had the purchase of any publ or annuities for the life of in his own name, in trust f was during her life to pay h other produce of the stock purchased, to her separate —Held, that the wife is en a sum of 3 per cent. stock money, and not merely to *Smith* v. *King*, 1 Russ. 363

9. By a marriage settle which the wife was entitl trust, for her separate use ture, and in case she sho band's lifetime, then in tr his life, and after the dea in trust for the issue of the the death of the survivor, appoint, and in default of for such persons as the or will appoint. The wife band:—Held, that she w interest of the portion for *Case*, 3 Sim. 312.

10. Settlement of sum o to be transferred to surviv

1. By a marriage settlement the trust funds were, in the event of the husband surviving, to go as if the wife had died without having been married. She died, leaving her husband and one child surviving:—Held, that the trust funds went to the child. *Re Ball's Trust*, 11 L. R., Ch. D., 270; 48 L. J., Ch., 279; 27 W. R. 409; 40 L. T. 880.

2. By a settlement made on the second marriage of a widow of her property, a life estate for her separate use was given to the wife, followed by an estate to the husband for his life or until his bankruptcy. Provisions were then made for the children of the marriage and a son of the wife's former marriage. And it was declared that, if the son of the former marriage should die under twenty-one, and if there should be no child of the marriage who should attain twenty-one or marry under that age, then, subject and without prejudice to the trusts before declared, and after the death of the husband, and of the son of the former marriage under twenty-one, and the default or failure of children of the marriage, "which shall last happen," the trustees should hold the property, if the wife should survive the husband, in trust for her absolutely, but, if the husband should have survived the wife, in trust for such persons as the wife should by will appoint, and, subject thereto, in trust for her next of kin as if she had died intestate and "without having been married." The wife died first, without having exercised the power of appointment. There was no issue of the marriage. The son of the former marriage survived his mother, but died under twenty-one. Before the wife's death the husband had filed a liquidation petition:—Held, that the infant son was entitled, as sole next of kin of his mother, to the trust fund. But held, that the trust for the next of kin did not arise until after the death of the husband, and that consequently he was entitled to the income of the trust fund for his life, and that this interest had vested in the trustee under his liquidation. *Upton* v. *Brown*, 12 L. R., Ch. D., 872; 48 L. J., Ch., 756; 41 L. T. 340; 28 W. R. 38.

3. By a settlement on the marriage of a widow, containing a recital that she had three children by her former marriage, but no other reference to such children, the trust property was settled, in the events which happened, in trust, subject to her life interest, for the persons who would have been entitled thereto if she had died possessed thereof "without ever having been married." She died leaving the said children surviving:—Held, that the property went to the persons who would have been entitled thereto, if she had died a spinster. *Emmins* v. *Bradford*, *Johnson* v. *Emmins*, 13 L. R., Ch. D., 493; 49 L. J., Ch., 222; 42 L. T. 45; 28 W. R. 531.

Wilson v. *Atkinson* (4 De G. J. & S. 455) explained. *Ib.*

Re Ball's Trust (11 L. R., Ch. D., 270), and *Upton* v. *Brown* (12 L. R., Ch. D., 872), disapproved. *Ib.*

4. Personal estate brought into settlement by B. stood limited on trust for the person or persons (exclusively of A. and his representatives) who under the Statute of Distributions would have become entitled, if B. had died possessed thereof, a feme sole and intestate. A. was B.'s brother. At B.'s death her statutory next of kin included three daughters of A.:—Held, that the term representatives meant those who represented A. as statutory next of kin of B.; and that A.'s daughters were therefore excluded from taking under the settlement. *Lindsay* v. *Ellicott*, 46 L. J., Ch., 878.

XI. LIFE ESTATES IN REALTY.

5. Remainder in a settlement, after successive estates tail in the sons to the daughters as tenants in common, and not as joint tenants, and in default of such issue to the right heirs of the father, admitted, without argument, an estate for life only in the daughters. *Snell* v. *Silcock*, 5 Ves. 469.

6. Surrender of copyhold to the use of surrenderor for life, remainder to the use of A. for life, remainder to the use of the child or children of A., and for want of such issue to the use of B. *Semble*, A. takes an estate for life. *Widdowson* v. *Harrington* (*Earl*), 1 Jac. & Walk. 532.

7. On marriage, the husband executes a deed-poll, whereby he purports to settle all his real and personal estate on the wife, and the heirs of her body by him begotten, obliging her to give each of her children by him begotten 100*l.* a-piece at twenty-one, and to divide the residue equally amongst them at her death. This gives an estate for life only to the wife, with remainder in fee to the children, as tenants in common. These marriage articles so far tied up the property of the settlor, that a real estate purchased by him in his lifetime with part of his personal estate, shall be considered as personal estate, and be disposed of accordingly. *Lowther* v. *Westmoreland*, 1 Cox 64.

8. By a marriage settlement estates were limited to the wife and the husband for their lives, with remainder to the heirs of the body of the husband on the body of the wife and their heirs; and if more children than one, equally to be divided among them as tenants in common; and, for default of such issue, to the wife and her heirs:—Held, that the husband did not take an estate in tail special, but for life only, and that the children took by purchase as tenants in common in fee in remainder. *North* v. *Martin*, 6 Sim. 266.

9. Lands were limited by deed to the use of the settlor for life; remainder to the use of his wife for life; remainder to the use of the heir female of the body of the settlor, on the body of his wife already begotten and now living, or which may be begotten hereafter; and in default of such issue, to the use of the heir male of the body of the settlor on the body of his wife to be begotten; remainder to the right heirs of the settlor. At the time when this deed was executed, the settlor and his wife had issue four daughters, and no issue male; but at his death the same four daughters, and also several sons of the marriage survived him:—Held, that under the limitation to the "heir female," the daughters took a life estate in the lands as purchasers. *Chambers* v. *Taylor*, 2 Myl. & C. 376; 6 L. J., N. S., Ch., 193.

10. By a settlement made on the marriage of a widow, having children, real estate was conveyed by her to a trustee and his heirs upon

5,000*l.* equally to be divided at their ages of twenty-one, or days of marriage, which should first happen; and if only one daughter, she to have the yearly sum of 100*l.* to be paid her half-yearly for her maintenance: if two or more, the like sum to be paid them half-yearly in equal shares, until their respective portions paid; if the portions not paid, the trustees to raise them out of the rents, or by sale or mortgage of premises, or of part; provided that if the father should in his life-time prefer them in marriage, with portions equivalent, or the remainderman should, after the father's death, or that there should be no daughter who should attain the age of twenty-one or be married, then the term to cease. B. died in the lifetime of A., leaving no son, but three daughters, who are all unmarried: C. took an estate tail under this settlement, and the portions may be raised for the daughters in the lifetime of A. their father. *Hebblethwaite* v. *Cartwright*, Forrest 30.

1. By a marriage settlement, estates were limited to the wife and the husband, for their lives, with remainder to the heirs of the body of the husband on the body of the wife, and their heirs, and, if more children than one, equally to be divided among them as tenants in common; and, for default of such issue, to the wife and her heirs:—Held, that the husband did not take an estate in tail special, but for life only, and that the children took, by purchase, as tenants in common in fee in remainder. *North* v. *Martin*, 6 Sim. 266.

2. An Act of Parliament reciting a will by which estates were decreed to A. for life, remainder to his first and other sons in tail, remainder to B. in tail, and that B. had suffered a recovery to the use of A. in fee, directed the estates to be sold, and other estates to be purchased and conveyed to such of the uses of the will as at the time of the sale should be existing undetermined, and capable of taking effect. The estates were sold, and the proceeds invested in other estates, which were conveyed to such of the uses of the will as were then existing, etc.:—Held, that B. did not take an estate tail in the purchased estates. *Wortham* v. *Mackinnon*, 4 Sim. 483.

See also FEE SIMPLE—FEE TAIL—SHELLEY'S CASE, RULE IN.

XIV. OTHER LIMITATIONS AND INTERESTS.

3. Settlement after marriage of stock, which had been the wife's property, in trust for the husband for life, then to the wife for life, and then to the heir male of the body of husband and wife; in default of heir male, to the heirs female, etc., with a clause that if the husband should settle lands of equal value to the like uses, the stock should be re-assigned to him; a son being afterwards born, who died in the lifetime of the father, without issue and under age:—Held, that the property vested in the father, and passed by his will. *Le Rousseau* v. *Rede*, 2 Eden 1.

4. Covenant, that wife shall be at liberty to dispose of her personal estate, does not extend to property acquired after ma*ton* v. *Cuthbertson*, 2 Bro. P. C

5. By a settlement trustee 2,000*l.* for A. for life, with r children, with powers for m vancement, "or otherwise," a children the fund was given t was given to B. for life, with r children, with the like pro maintenance "and otherwise pressed, in respect to the 2,0 and her children, "and oth manner, to all intents and pur trusts and provisions were peated:—Held, that this inclu to C., and that on the death children, C. was entitled to th *Re Shirley*, 32 Beav. 394.

6. A husband, by post-nuptia granting an annuity to his w self, his heir, and executors, to person appointed by her, in her life, with or without the sent, or whether she should decease him, and have issue of 3,000*l.*, or other lesser sum direct, at the first term of Martinmas next after the hus case he should survive or without leaving issue of the the first of those terms afte issue, in case she should survi of the marriage, or at any of after any of these events; so the said sum should be raised of the husband, or the joint wife and the issue of the mar viso, that in case the wife sh husband and the issue of th recover payment of the said of it, her annuity should s equal to the interest of the The wife survived the hus without having had issue, s covering or disposing of any pa —Held, by the Lords, that, in happened, the 3,000*l.* belong estate, and her personal rep entitled to it against the h *Dill* v. *Haddington*, 8 Cl. & F.

7. Limitation in an article A. for life, subject to annuities B. and C. and a charge for a if she should survive A., and of said B. and C., A. and D., of the issue, etc. The limitat is not to await the deaths of A but they are to take upon t subject to the charges for *Bushell* v. *Bushell*, 1 Sch. & L

8. By the terms of the banl settlement, the wife's prope upon her in case of the banl the parties being divorced, b was entitled to the interest in case he survived his wife l certain share of this proper the wife might, in the name make such proof as the comm think she was entitled to. Dea. & Ch. 568.

9. A settlor settled 1,000*l.* u illegitimate daughter. The tained a proviso that if at

daughter should not be under coverture (which event happened), the money should be held in trust for her, her executors, administrators and assigns. Then followed a clause, that if any interest in the fund would, but for that proviso, be held in trust for the Crown, or belong to the trustees of the settlement, then this money was to be held upon trusts in favour of the settlor and his widow:—Held, that the gift over after the absolute gift was void for repugnancy, and that the Crown took. *Re Wilcocks*, 33 L. T., N. S., 719; 45 L. J., Ch., 163; 24 W. R. 290.

1. By the testator's first marriage settlement a sum of 14,000*l.* was settled upon the testator for life, remainder to the first wife for life, remainder to the children of that marriage who should attain twenty-one. There were four children who lived to attain twenty-one. The first wife died, and the testator made his will, giving all his property to his children equally. The testator then married again, on which occasion 5,000*l.* was settled, after his decease, to the second wife for her life, remainder to the children of that marriage. There was but one child. After the birth of that child the testator executed a codicil giving certain annuities to his second wife, and in other respects confirming his will, except that he directed that previous to the equal division among his children the trustees were to take into consideration what each class of children would be entitled to under the marriage settlements of their respective mothers; and whichever family should be individually least provided for, they should, in the first place, be severally entitled to receive out of the general estate so much as would make his or her share equal in amount to what each child of the other family would be entitled to under his or her mother's marriage settlement. The testator died leaving his second wife surviving, and one child of the second marriage:—Held, that the subject of the settlement being nothing but money, the reversionary nature of the provision for the child of the second marriage was not to be regarded, although the provision for the children of the first marriage took effect in possession immediately on the testator's decease. But, *semble*, that this might be otherwise in case the subject matter had been anything else than money. *Williamson* v. *Jeffreys*, 18 Jur. 1071.

2. When either in a settlement or a will there is an absolute gift to children followed by a direction that the daughters' shares shall be settled on themselves for life, with remainder to their children, the daughters' interests are only cut down for the sake of the children, and any daughter who dies without issue takes her share absolutely. *Re Sidway Hall Estate*, 37 L. T., N. S., 457.

3. By a marriage settlement a fund was settled by the husband in favour of the husband and wife during their respective lives, and after the decease of the survivor for the children. Another fund was settled by the husband's mother for herself for life, and after her decease upon such of the trusts thereinbefore declared concerning the first fund in favour of the children as should be then subsisting or capable of taking effect:—Held, that the trust of the second fund in favour of the children arose at once upon the death of the tenant for life in the lifetime of the husband and wife. *Hare* v. *Hare*, 24 W. R. 575.

A general reference in a gift to the terms of a former disposition does not determine the time when the gift is to take effect. *Ib.*

4. Property was assigned to trustees, upon trust, after the death of the settlor, in the meantime, and until his eldest son should attain twenty-one, to pay the rents to the settlor's wife, to be applied by her for and towards the maintenance of herself and all the then present and future born children of the settlor; and the settlor declared, that if and when his eldest son should attain twenty-one, the trust property should be in trust for such eldest son, but so that the wish and desire of the settlor thereby declared, that the then present and future born children of the settlor and his wife should participate with him in the same, should be particularly observed:—Held, that a valid trust was created in favour of the younger children to participate, and that it was not void for uncertainty. *Liddard* v. *Liddard*, 6 Jur., N. S., 439; 29 L. J., Ch., 619.

5. A settlement directed the trustees, immediately after the decease of the survivor of the husband and wife, to transfer a fund unto and amongst all and every the son and sons, daughter and daughters, of the husband and wife, and the children of such son and sons, daughter and daughters, in case any of them should be dead leaving issue, share and share alike; but the child or children of such of the said sons and daughters as should be then dead were to be entitled only to a parent's share; and in case there should be no child or children of the husband and wife living at the death of the survivor of them, then in trust to transfer the fund to the survivor, his or her executors, etc. There were three children of the marriage, but they all died before either of their parents; two of them left children, some of whom survived both their grandfather and grandmother:—Held, that the surviving grandchildren were entitled to the fund. *Green* v. *Bailey*, 14 Sim. 635; 9 Jur. 636.

6. A trader, on his marriage, received a fortune of 5,000*l.* with his wife, and settled a sum of stock in trust for himself for life, with limitations over for the benefit of his wife and children, in the event of his becoming bankrupt or insolvent. And it was provided that if he should survive his wife, and the issue of the marriage should fail, and he should then be or have been a bankrupt, fifteen sixty-sixths of the stock should belong to the wife's next of kin in blood. No part of the 5,000*l.* was settled, but the whole of the settled fund was the husband's property, and it did not appear from any of the expressions in the settlement what was the consideration for the provision as to fifteen sixty-sixths of the stock:—Held, that the limitations over in the event of the bankruptcy of the husband were good as to fifteen sixty-sixths of the trust fund, that being the proportion of the trust fund which the wife's fortune would have purchased, but were void as to the remainder. *Lester* v. *Garland*, 5 Sim. 205.

7. By a voluntary deed a settlor gave pro-

perty to A., B., C., and D. in equal shares. He provided that if any of the four should die in his lifetime leaving specified issue, the share of him or her so dying should be in trust for the children of him and her so dying; and that if any of the four should die in his lifetime, without leaving such issue, the share of him or her so dying should go over and accrue and be added to the other shares. A. and B. were dead at the date of the settlement, the former leaving issue, the latter without issue:—Held, that the gifts over of the shares of A. and B. did not fail by reason of their being dead at the date of the settlement. *Barnes* v. *Jennings*, 2 L. R., Eq., 448; 35 L. J., Ch., 675; 14 W. R. 831.

1. Leaseholds were, by deed, conveyed to trustees, in trust for the settlor for life, and after her decease in trust to assign them to Thomas, his executors, administrators, and assigns absolutely. But if Thomas should die without leaving any child living at the time of his decease, then in trust to assign to Philip:—Held, that the death referred to was not confined to a death in the life of the tenant for life, and that Thomas did not, upon the death of the settlor, become absolutely entitled to the leaseholds. *Milner* v. *Milner*, 34 Beav. 276.

2. By a marriage settlement, property belonging to the intended wife was conveyed to trustees, upon trust (after the death of the husband and wife) for the children of the marriage. It was declared that the children should convey the property to A., B., and C. There never was any issue of the marriage:—Held, that although the language of the deed only provided for death of issue, the gift over took effect. *Osborn* v. *Bellman*, 2 Giff. 593.

3. By a marriage settlement lands were limited to the use of the first son of the body of B. on the body of P. (his future wife) lawfully to be begotten, and the heirs male of the body of such son, with remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of B. to be begotten severally and successively, one after another, as they and every of them should be in seniority of age and priority of birth, in tail male:—Held, that the eldest son of B. by his second marriage (there being no issue of his marriage with P.) was entitled to the lands as a tenant in tail in preference to the second son of such marriage. *Re Blake*, 19 W. R. 765.

4. A settlor conveyed real estate to trustees in fee, to the use of A., B., C., and four others successively for life, and afterwards upon trust to convey to all and every the sons and daughters of the eight tenants for life, "who should be then living, and to the heirs male and female of his, her, and their body and bodies respectively, in a course of entail," the sons and daughters of A., and their heirs, to take before all the other persons named, and the sons and daughters of B., and their heirs, to take next after the sons and daughters of A. and their heirs (and similarly as to the five others in succession). And the sons of all and every the persons last above named, and the heirs, etc., to take before the daughters and their heirs:—Held, that the daughters of A. took in priority of the sons of B. *Randall* v. *Daniel*, 24 Beav. 193.

5. On the 2nd August 1826, Scotchman, married the plainti a domiciled Englishwoman), t days previously both executed writing in the Scotch form, wh himself, his heirs, executors, to pay, after his decease, an an his promised spouse, for her li portions for the children of t be divisible amongst them in mentioned. The settlement th follows:—"For which causes other part, H. G. I. assigns c favour of herself and A., her p in conjoint fee and life rent, a children that shall be procre tended marriage, divisible as a failing, H. G. I., her heirs and soever, in fee, all estate, func heritable and movable, real an longing or due to her, or that by her during the subsistence marriage." It was provided visions in favour of H. G. I. a of the marriage should be in from A. of all claim competen his decease. Upon the death, father, a domiciled Englishma became entitled, under his v sionary interest, expectant o her mother, in one-fourth part estate. In 1841, A. and the p their domicil, which had co since the marriage, to Englan plaintiff's mother died, and between that event and the b in 1848, S., the executor and testator's will, paid, in vario nearly the whole of the funds the will to the plaintiff to A., receipt of himself and the p that the marriage contract was by the law of Scotland, or w that law, and that, when s effect was to give a life intere property coming to the plai father's will, remainder to expectant upon A.'s deceas *successionis* only to the child riage; and that, during the jo husband and wife, the corpus was payable to the husband receipt. *Duncan* v. *Cannan*, 78; 1 Jur., N. S., 291; 24 L. J

Held, also, that the plaint titled, as against the assignee of her husband, to have his under the settlement impou good her contingent annuity t

One of the instalments wa cash and partly by setting off ledged by A. to be owing testator's estate:—Held, th which was for the cash only scription of "balance due to for the whole amount. *Ib.*

6. A fund settled on the hu "during their joint and naturs to be construed "during thei the life of each of them." *Si* Sim. 122.

7. Settlement to permit "a children to take rents, etc., to heirs for ever." They are jo

tenants in common. *Stratton* v. *Best*, 2 Bro. C. C. 233.

1. Lands are settled to the use of the husband and wife for their lives, remainder to the heirs of both their bodies. The children of this marriage are joint tenants, and if any one dies before severance, his share shall survive to the others. There is nothing hard, severe, or unreasonable in the law of joint tenancy, there being always an equal chance of survivorship in all the joint tenants. If any of them have a bad opinion of their own lives, they may sever; but if the joint tenancy be not severed, it is an evidence of intention in the party to submit to the chance of survivorship, or of that supineness and neglect to which the law affords no assistance. *Staples* v. *Maurice*, 4 Bro. P. C. 580.

2. A sum of money was remitted to England to be secured for the benefit of a married woman and her children, so that the same might not come to the hands of her husband:—Held, that they took as joint tenants. *Bustard* v. *Saunders*, 7 Beav. 92; 7 Jur. 986.

XV. FAILURE OF LIMITATIONS. RESULTING TRUST.

3. Settlement upon marriage, of wife's property, only upon certain trusts for husband, wife, and children, in one event for husband absolutely; but making no provision for the event that happened, a resulting trust for the wife. *Langham* v. *Nenny*, 3 Ves. 467.

4. Lands were settled at marriage on trustees, that if wife survived, she should receive the then profits. Husband made leases and advanced the rent:—Held, heir entitled to advanced rent. *Lawley* v. *Lawley*, 9 Mod. 32.

5. Property agreed to be settled consisted of leaseholds in possession and of money to be received on the husband's death, which was to be invested in the usual securities, and the trustees were to stand possessed of the leaseholds in trust for the husband for life, and after his death of one moiety of the leaseholds, stocks, funds, and securities, for the wife for life in case she survived her husband, and of the other moiety of the leaseholds, stocks, funds, and securities after the husband's death, and of the whole of the stocks, funds, and securities after the wife's death, in trust for the children. The wife died in the husband's lifetime:—Held, that there was a resulting trust as to the leaseholds for the husband, the settlor. *Wilson* v. *Paul*, 7 Sim. 620.

6. By marriage articles agreed that 500*l.* the wife's portion should be invested in a purchase of lands to be settled on husband and wife for their lives, remainder to the heirs of their two bodies, remainder to the heirs of the body of the wife, remainder to the plaintiff, the wife's brother, in fee. The wife dies without issue and then the husband dies; the 500*l.* not to be laid out. Whether this money is to be taken as land and go to the plaintiff, to whom the fee is limited, or as money, and go to the executor of the husband. *Symons* v. *Rutter*, 2 Vern. 227; Pre. Ch. 23.

7. Money, part of which is the husband's, and other part the wife's, is on marriage to be laid out in land, and settled to the husband for life; remainder for the wife for life; remainder to the heirs of their two bodies, and the uses go no further. The heir of the husband shall have the whole. *Lechmere* v. *Carlisle*, 3 P. W. 217.

8. A father, on the marriage of his daughter M., covenanted with the intended husband to pay a sum of 500*l.*, "the marriage portion of his daughter," to be vested in trustees upon trust to pay the said M. 30*l.* a year (the interest thereof) during her life, and, after her death and that of her husband, to hold the same to the use of the issue of the marriage. The husband died in the lifetime of his wife, and there was no issue of the marriage:—Held, that as to so much of the 500*l.* as was not exhausted by the uses of the settlement, there was a resulting trust for M. *Ward* v. *Dyas*, Ll. & G. *temp.* Sugd. 177.

9. In 1773 A. married B., who was seised in fee of estates in Denbighshire. By their marriage articles they covenanted that M. and N. should stand seised of B.'s estates (which were mentioned by their names), to the use of A. and B. for their lives, and the life of the longer liver of them, remainder to the use of their first and other sons in tail. B. had an estate in Denbighshire called Plas Madoc, which was not mentioned in the articles. A. and B. had two sons. In 1802 they and their eldest son conveyed all their estates, including Plas Madoc, to a tenant to the præcipe, and afterwards suffered recoveries of them for the purpose of barring all estates tail, reversions, and remainders in the estates, and resettling them to such uses as A. and B. and their elder son should appoint, and in default to A. B. for their lives, and the life of the longer liver of them, remainder to such uses as the elder son should appoint, and in default, to such uses as the said estates were and stood limited to by the articles:—Held, that the ultimate limitation was wholly inoperative at law, and that it had no effect in equity upon Plas Madoc, and that, subject to the powers and life estates, there was a resulting use as to it for B. in fee. *Youde* v. *Jones*, 14 Sim. 131. S. C. 8 Jur. 547. And see S. C. at law, 13 Mees. & Welsb. 534.

10. Though there may not be any different rule of construction applicable to wills and settlements, yet the different character of the instrument is a circumstance to be weighed in determining the effect of the disposition it contains. Shares under a settlement being held not to be vested, might create a resulting trust for the settlor; whilst in a will the residuary legatee might take. *Farrer* v. *Barker*, 9 Hare 744.

See also Rochford v. *Hackman*, 9 Hare 475; 16 Jur. 212; 21 L. J., Ch., 511.

11. A. is entitled in remainder, under the marriage settlement of her father and mother in 1767, to a share of certain real estates as tenant in common in tail. A settlement is executed upon her first marriage in 1790, she being then an infant. A second marriage is contracted by her while still an infant. A fine is levied in 1808, and the settled property conveyed to a purchaser. A deed is executed declaring the trusts of the purchase-money, which as to A.'s share is to be held upon the trusts of the settlement in 1790. A. and her husband, though named as parties, do not

execute this deed, nor is there any evidence of their assent to it:—Held, that A.'s interest was unaffected by this deed of 1808, and remained upon the trusts of the original settlement of 1767, so that she was entitled absolutely to her share of the purchase-money. *Re Fozard's Trusts*, 3 W. R. 219; 1 Kay & J. 233. And see S. C. on appeal, 3 W. R. 341; 24 L. J., Ch., 441.

1. By the marriage settlement of A. and the daughter of B., to which B. was a party, after reciting that B. had agreed to "give" 3,000*l.* "as a marriage portion or fortune with his daughter," and that it had been agreed that 500*l.* should be paid to the husband for his own use and the residue invested, it was declared that the 2,500*l.* should be held in trust for the husband for life, remainder to the wife for life, remainder to children of the marriage according to appointment, and in default of children attaining twenty-five or marrying, to the representatives of the wife as therein mentioned. The father died. The husband survived the wife and died. No appointment was made, and the remainders in default being void for remoteness, the husband's executors claimed the 2,500*l.* on the ground that the settlement showed an absolute gift to the wife:—Held, that there was a gift by the father for the purposes of the settlement only, and that the trusts having failed, his representatives were entitled. *Re Nash's Settlement*, 51 L. J., Ch., 511; 46 L. T. 97; 30 W. R. 406.

2. A., by a settlement, covenanted with the trustees that, in the event of his dying in the lifetime of his daughter, C., before she should have attained twenty-one or married, his heirs, executors, or administrators should, within six months after his death, pay to the trustees 10,000*l.*, with interest thereon, from the day of his death; and it was declared that, in the event of C. having no child who should attain twenty-one or marry, then the fund, after her death, should form part of A.'s personal estate. By the same deed, A. charged all his real estate with this sum. A. afterwards, in consequence of a requisition made by persons who were advancing him money on mortgage, paid the 10,000*l.* to the trustees, who released the estate from it. The trustees subsequently lent part of this sum to A. himself, on mortgage of part of the estates originally subject to the charge, and the rest of it to other persons. A. died, leaving a will, by which he bequeathed his personal estate to B., and his real estate to D. C. died an infant, and unmarried, within five months after his death:—Held, that no part of the 10,000*l.* belonged to the devisees of the real estate, but that the whole belonged to the legatees of the personalty. *Tucker* v. *Loveridge*, 2 De G. & J. 650; 6 W. R. 786; 4 Jur., N. S., 939; 27 L. J., Ch., 231. Affirming 1 Giff. 377.

Voluntary Settlements.] 3. If in voluntary deeds and wills there is no declaration of trusts of term, it results to donor; but, *secus*, if for valid consideration, and in nature of contract for benefit of wife and issue. *Brown* v. *Jones*, 1 Atk. 190.

4. A., by a voluntary settlement, in 1838, conveyed freeholds to trustees upon trust (together with a sum of stock already transferred) for himself for life, a death in trust for his reputed s and in case he attained twent trust for maintenance if he sh twenty-one at the settlor's de case W. should die under twen in the settlor's lifetime, without living at his decease, then over no words of limitation in the There was a power of sale in t but no trust to invest the proc A. died in 1849, having made hi which recited the settlement an except as to the stock which W. attained twenty-one, and di Held, that W. took a life estat freeholds under the settlement, was a resulting trust for the settl v. *Barker*, 29 L. T., N. S., 643.

See also CONVERSIO

XVI. COVENANTS FOR

5. In articles, there was to be the conveyance, that certain la from incumbrances. Lord Chan is not a covenant that the lands if any incumbrance is discovere execution of the articles and se veyance, whereof the party had incumbrance shall be discharg sealing of the conveyance; as th of it would be a fraud; though cumbrances discovered afterw only the party's own covenant purchaser. *Vane* v. *Bernard* (*L* Rep. 6.

6. Where a settlor, in the s ecuted on the marriage of his s absolute covenants for title wit the lady, and lower down in t enters into qualified covenants f same lands with the trustees of t *Semble*, that the latter covenan generality of the former, althoug with different persons. *Martyn* 2 Con. & L. 541; 4 Dr. & War. 4

7. A father, seised of lands for three lives, by a deed re was seised in fee, or of some o estate of inheritance, conveye the marriage of his son, in stri by words applicable to lands simple; and the father and s that the lands should continue be for ever thereafter to the us tlement, and that free from al grants, titles, and incumbrance fered by the father and son, or e —Held, first, that these two quiet enjoyment and freedom brances, were so connected, that the general words of the limited and contracted by the pressions in the latter. *Thompso* 6 Ir. R., Eq., 113. And see *Robi ney*, 23 L. R., Ch. D., 285; 52 I 49 L. T. 19; 31 W. R. 525.

Held, secondly, that, in th evidence of fraudulent intentio of the settlor, the error in the

amount to such misrepresentation as would entitle the eldest son of the marriage to compensation out of his grandfather's assets. *Ib.*

1. A., seised of an undivided moiety of Whiteacre, conveyed it on his marriage in 1775, to the use of his first and other sons, reserving to himself a power of leasing for three lives. A. having subsequently purchased the other undivided moiety of Whiteacre, in 1785 leased the entire of Whiteacre to B. for lives renewable for ever. In 1797, on the marriage of G., A.'s eldest son, Whiteacre was conveyed by A., to the use of A. for life, remainder to the use of G. for life, remainder to the use of such of the sons of G. as G. should appoint to; and A. in his covenant against incumbrances excepted leases *bonâ fide* made by him. G. having appointed Whiteacre to his son, W., died in the lifetime of A., leaving W. his eldest son him surviving. On the death of A., W. filed his bill to set aside the lease of that moiety of Whiteacre comprised within the settlement of 1775, as contrary to A.'s leasing power:—Held, that W., as claiming under the settlement of 1797, was bound by the lease of 1785, and could not set it aside. *Steele* v. *Mitchell*, 2 Dr. & Wal. 568; 3 Ir. Eq. R. 11.

XI. Executed Settlements. How Enforced.

2. No party to a marriage settlement can take anything under its provisions, who is himself a contracting party, and has failed to fulfil his part of the contract. *Houston* v. *Barry*, 5 Ir. Eq. R. 294.

3. The rule of equity which prevents a party from receiving any interest under a settlement until he has discharged more obligations or covenants, to which he is liable under it, applied to the case of a policy of assurance assigned to the trustees as a security for the payment of the sum which the husband had covenanted that his representative should pay after his death, and against a purchaser of the husband's interest under the settlement from his assignees under a fiat in bankruptcy. *Burridge* v. *Row*, 1 Y. & Coll. C. C. 183, 583; 11 L. J., N. S., Ch., 369; 6 Jur. 121, 499. Affirmed 13 L. J., N. S., Ch., 173; 9 Jur. 299.

4. Default of payment of the consideration on one part does not vitiate a marriage contract. But the defaulting party cannot enforce the contract against the party injured by his default. *Compton* v. *Ormsby*, 2 Sch. & Lef. 602.

5. Trusts of marriage settlement decreed to be carried into execution. *Clarendon* (*Earl*) v. *De Clifford* (*Lady*), 6 Jur. 962.

6. Where the plaintiff in his original bill made out title to an estate, and prayed relief as heir-at-law; but afterwards, and after all the defendants had answered, discovered a marriage settlement, by which the estate stood limited to a trustee for the use of the plaintiff, his brother, and sister, in equal shares; and it being doubtful, upon the construction of the settlement, whether the plaintiff, his brother, and sister, were entitled to vested or merely to contingent interests:—Held, that the estate being limited to the heir of the settlor in case the supposed contingency should never arise, and the trustees having refused to become plaintiffs, the plaintiff might, in the character of heir-at-law, maintain a suit for the purpose of protecting the property. *Reed* v. *Cussen*, Sau. & Sc. 161.

7. By a proviso in a marriage settlement, the deed was to be void if the marriage was not had in ten months. The heir cannot set up this settlement to defeat a mortgage made by his father, after his father had sworn that he was not married within the ten months. *Jones* v. *Purefoy*, 1 Vern. 45.

8. Where several estates are settled upon children, the children may recover part of those estates without showing title to the rest of the settled property. *Thompson* v. *Simpson*, 1 Dr. & War. 459.

But when estates and other property forming a mixed fund are settled, subject to a power of appointment, there the Court, where the parties entitled to this mixed fund are numerous, will not, as against a purchaser of part of the mixed fund in which purchase one of its objects acquiesced, act as against that purchaser without knowing all the dispositions of that mixed fund. *Ib.*

9. The assignees of a bankrupt who had covenanted for the payment, after his death, of 4,000*l.* to the trustees of his marriage settlement, were held not entitled to a share in a sum to which his wife was entitled in reversion at her marriage, without performing the covenant, notwithstanding a proviso in the settlement that the heirs, executors, or administrators of the husband should pay all other debts which the husband should owe at his death in preference to the 4,000*l.*, and that they should not be bound to pay it unless his assets should be more than sufficient to pay all his other debts. *Corsbie* v. *Free*, Cr. & Ph. 64; 5 Jur. 790.

Semble, the husband's covenant did not operate as a purchase of the wife's reversionary share under the will, but:—Held, that at all events the husband's assignees were not entitled to receive the share without performing the covenant. *Ib.*

10. A wife has a lien upon the estate of her husband and his father, where they are parties to the marriage contract, and the wife's fortune is paid to the son; so if the fortune is paid to the father, or to clear incumbrances. *Probert* v. *Morgan*, 1 Atk. 440; Ambl. 6; 2 P. W. 544.

11. No means of enforcing a settlement on marriage of an adult, unless the husband seeks to obtain her property in court; but, if the marriage is contempt, the Court, vindicating its jurisdiction by imprisonment, compels a settlement. *Ball* v. *Coutts*, 1 Ves. & B. 300.

12. A. assigned choses in action and other personal chattels to a trustee in trust for himself for life, and after his death for his nephew and niece. Some years afterwards he made a will, bequeathing the settled property to other persons. After his death the trustee and *cestuis que trustent* filed a bill against the executors and the legatees, praying that the deed might be established, and an account might be taken of A.'s personal estate, and praying that the executors might deliver over the residue to the trustee. The bill was dis-

missed. But *semble*, if the bill had been filed by the trustee alone for indemnity against conflicting claims, or by the *cestuis que trustent* alone to have the benefit of the deed, the Court would have granted relief. *Ward* v. *Audland*, 8 Sim. 571; C. P. C. 146; 2 Jur. 652.

1. *Semble*, the Court of Chancery will not assist persons claiming under parties to a marriage settlement, where the effect of such interference will be to defeat the scope and object of the settlement. *Duberly* v. *Day*, 16 Jur. 581.

XII. Executed Settlements. Revocation and Discharge of.

I. *Revocation*, 6266.
II. *Discharge of*, 6267.
III. *Powers of Revocation*. See POWER, XVIII.
IV. *Of Voluntary Settlements*. See XVII. v. *post*.

I. REVOCATION.

2. A proviso in a settlement, if the wife survive her husband, they not having issue between them, then she may revoke the settlement. Husband dies, leaving a son, who dies in the life of his mother; she may revoke the settlement. *Holt* v. *Burley*, 2 Vern. 651; Pre. Ch. 293.

3. A., on marriage, settled lands to himself for life, remainder to wife for jointure, remainder to first, etc., sons in tail male, reserving power of charging with 3,000*l.* for younger children, on payment of debts, and covenanted to lay out 6,000*l.*, part of wife's portion, in lands to same uses; the 6,000*l.* is not laid out. After eldest son came of age, it was agreed, in consideration of his advancing 3,000*l.* for purchase of commission in army, to make a new settlement more beneficial for younger children, by which lands were limited to former uses, but A. was empowered to charge 3,000*l.* for each of younger children, and covenant to lay out 6,000*l.* was released; Court refused to set aside last settlement. *Kerry* (*Earl*) v. *Fitzmaurice* (*Lord*), 2 Bro. P. C. 384.

4. Upon a marriage contemplated between A. and B., the lady's fortune, vested in C. her former guardian, was on the 14th March, after treaty and agreement with C., vested in trustees for the lady, "her executors and administrators and assigns," until the marriage, and afterwards for her, her husband and children. On the 27th March, and before the marriage, the husband and wife, without the intervention of C., revoked the settlement, and married the next day. A bill by the husband, claiming the fund unaffected by the trusts of the settlement, was dismissed with costs, the Court holding that a revocation, under such circumstances, could not be maintained. *Page* v. *Horne*, 11 Beav. 227; 17 L. J., N. S., Ch., 200; 12 Jur. 340. And see S. C. 9 Beav. 570.

5. Settlement of personal estate upon a second marriage, upon trust to pay to such persons, etc., as the settlor shall by deed or will appoint, and in default thereof to his issue. Construction upon the whole, that it was to operate unless a subse should be executed; a prio revoked. *Leigh* v. *Norbury*, 1

6. On marriage, a sum of 9, in trustees upon trust to pa the husband for life, and afte wife for life, and after th survivor to pay the principal as the survivor should direct having occasion for money, him in executing a deed-pol appointed the money imm husband; but the trustees without the directions of the was filed; and upon perso of the wife, the Court direc to pay the money to the deliver up the settlement t *Macarmick* v. *Buller*, 1 Cox 3

7. A father, by deed, settle holds upon his son, D., ab certain rent-charge and stoc funds upon D. for life, with r children. The settlor afterw poll, which he had reserved t to make, revoked all the use etc., of the settlement, so f related to his son, D., and d estates, shares, right, intere whatever given by the settle favour of the said D., should to the use of trustees, their and administrators in trust, d lives of D., and his wife M., to income to M. for her sole an and for the support of her c and if D. should die in the in trust, to pay the same to widowhood, for the support of said children, with a limitation of such children, in case of her marriage. D. died in the l leaving several children by h the deed-poll was not to merely as a revocation of I but that the trusts of the sec to be substituted for the trus the first deed in favour of D. that M. took an estate for life widowhood, in the rent charge well as in the leaseholds. *A* 3 Y. & Coll. 308; 8 L. J., N. 50.

8. In contemplation of mar A. and B., settlements were estate belonging to B., the inte of personalty belonging to A. husband, upon uses and trusts solemnisation of the marriage, for the benefit of the husband their issue. The marriage performed and the parties liv husband and wife; but after th than a year, and before the p children, the marriage was di void, and they executed deeds revoke the former settlement afterwards, a new settlement, in of marriage, was made, inclu property as the former, but diff former in the interest given as well as in other provisions then intermarried, and there wa marriage:—Held, that the fi

being founded on mistake and misapprehension, was not binding on the parties, and that the rights of the issue, both as to the real estate and the personalty, were regulated by the second settlement. *Robinson* v. *Dickenson*, 3 Russ. 399; 7 L. J., Ch., 70.

1 A post-nuptial settlement was made by A. and his wife of a share of real and personal estate of the wife, in the hands of the trustees. No notice was given to the trustees, and no fine was levied. The deed recited the ante-nuptial agreement, but it was proved that there never was any. The effect of the settlement was to give the husband a life estate, with remainder absolutely to the survivor, and there was no provision for children:—Held, both husband and wife desiring it, that this deed was a nullity; that as against the husband it was voluntary; and that it was not such a settlement as the Court would enforce against the wife. The property was therefore treated as if it had never been settled. *Hogarth* v. *Phillips*, 4 Drew. 360; 27 L. J., Ch., 195; 4 Jur., N. S., 1093.

Where Ultimate Limitations to Next of Kin.] See VIII. III. 4 *ante*.

II. DISCHARGE OF.

2. *Quære*, how far marriage agreement discharged by death of intended wife's father before marriage, as to his estate. *Glengal* (*Earl*) v. *Barnard*, 1 Keen 769; 6 L. J., N. S., Ch., 25. And see S. C. *nom. Thynne* (*Lady*) v. *Glengall* (*Earl*), 2 H. L. Ca. 131; 12 Jur. 805.

3. When a settlement is made void by non-performance of a condition, yet a re-conveyance held necessary. *Hunt* v. *Hunt*, Pre. Ch. 387.

4. Settlement, in contemplation of marriage, of an annuity, secured by bond to N. (the intended wife), together with arrears then due, upon trust for her separate use, the receipt of N., her appointees or assigns, to be good discharges for the annuity, and all arrears, and all future and growing payments; and after her decease, upon trust to pay the trust moneys, or such of them as should be unpaid or undisposed of at the time of her decease (in the events which happened), to her children, nominatim, with provisions for their maintenance, education, and advancement. Subsequently, the annuity being in arrear to an amount exceeding 3,000*l*., N. and her trustee released the annuity and all arrears and future payments, and in consideration of such release the obligor conveyed hereditaments to trustees, upon trust to sell, and out of the proceeds to pay 3,000*l*. to N., her executors or administrators, and the surplus to himself, N. being a party to such conveyance:—Held, that upon N.'s death the 3,000*l*. passed to her husband, and was not impressed with any trust for the benefit of her children. *Calvert* v. *Johnston*, 3 Kay & J. 556.

5. Estates are settled on A. and B. on their marriage, in strict settlement; provided, that if the wife should, when requested by her husband, refuse to settle her estates in a particular manner, the settlement of the other estate should be void; the husband and wife join in a different settlement of her estate, proceeding, however, on the foot of the former covenant, as if it had been performed; this is no avoidance of the settlement. *Mathews* v. *Jones*, 2 Anstr. 506.

6. Woman's portion falling short of husband's expectations, is not a reason for setting aside marriage agreement. *Exp. Marsh*, 1 Atk. 159.

7. A court of equity will not, at the instance of a settlor or his legal personal representative, adversely set aside a settlement by which the settlor confers on a stranger the absolute beneficial interest in property legally vested in trustees, although such settlement may have been made for an illegal consideration not appearing on the face of the instrument. *Ayerst* v. *Jenkins*, 16 L. R., Eq., 275; 42 L. J., Ch., 690; 21 W. R. 878; 29 L. T., N. S., 126.

Where Marriage does not take Place.] 8. By an indenture, made in contemplation of the marriage of A. and B., certain leasehold property belonging to B., the intended wife, was conveyed to trustees on certain trusts; and the trusts of a sum of stock, also belonging to B., which had been transferred into the names of the trustees, were declared. The marriage did not take effect, and soon after the date of the indenture B. married C. In a suit instituted by C. and B. against the trustees, it was ordered that the leasehold property should be conveyed to C., and the stock transferred into his name. *Thomas* v. *Brennan*, 11 Jur. 95.

9. A feme sole, in contemplation of marriage with A. B., conveyed a certain fund to trustees, upon trust for herself, her executors, administrators, and assigns, until her marriage (if any) should be solemnised, or in case no such marriage should be solemnised; and from and after the solemnisation (if any) of the same marriage, upon trust for herself for her life, for her separate use, exclusive of the said A. B., or any other husband whom she might happen to marry; and after her death, upon certain trusts for her children. The fund was duly transferred to the trustees, but the intended marriage never took place, and the woman subsequently married another man. In the meantime the trustees, at her request, sold out and paid to her 200*l*., part of the trust fund:—Held, that the settlement applied to her marriage with any husband, and not merely to the intended marriage with A. B., and that the trustees committed a breach of trust in selling out any part of the fund which had been transferred to them. *M'Donnell* v. *Hesilrige*, 16 Jur. 1148; 16 Beav. 346; 1 W. R. 71; 22 L. J. 342.

See also XVII. v. 3 *post*.

XIII. Rectification of Articles and Settlements.

I. *Mistake in Settlements*, 6268.
II. *Mistake in Articles*, 6273.
III. *Variation between Articles and Settlements*, 6274.
IV. *Evidence and Onus of Proof*, 6276.
V. *Construction of Articles and Form of Settlements in Pursuance of.* See TRUSTS (EXECUTORY).
VI. *Of Voluntary Settlements.* See XVII. IV. *post*.

I. MISTAKE IN SETTLEMENTS.

1. No advantage to be taken of a scrivener's mistake in settlement. *Hunburn* v. *Curtis*, Fitzg. 118.

2. Parol evidence admitted to prove mistake of solicitor in settlement. *Rogers* v. *Earl*, Dick. 294.

3. Under the circumstances, a settlement could not be rectified in the suit as constituted. *Barron* v. *Barron*, 2 Jones 226.

4. Settlement after marriage reformed in favour of the issue against the devisee of the husband, claiming under the reversion by his letter of instructions for drawing the settlement, but this equity did not prevail against creditors. *Jenkins* v. *Quinchant* cited, 5 Ves. 596.

5. Marriage settlement not altered in favour of the intention, the recital being too general, nothing *dehors* the words to do it by. If anything in the recital by which to correct it, it may be done. *Doran* v. *Ross*, 1 Ves. J. 57, 59.

6. Settlement reformed, according to the intention declared in recital. *Payne* v. *Collier*, 1 Ves. J. 171.

7. Where a settlement shall be good and take effect, though not according to the intent of the parties. *Marshall* v. *Frank*, Pre. Ch. 480; Gilb. 143.

8. An elder daughter, where there is a son, is considered a younger child by a court of equity, and the Court would rectify the mistake in the settlement; as it has done, where term for raising portions is placed after estate tail, which should have been before. *Heneage* v. *Hunloke*, 2 Atk. 457.

9. Where a mistake in placing a trust term is rectified. *Worsley* v. *Granville* (*Earl*), 5 Ves. 333.

10. In a marriage settlement a term for years for securing younger children's portions is, by mistake, made subsequent to the estate tail limited to the sons; this helped in equity. *Uvedale* v. *Halfpenny*, 2 P. W. 151; 9 Mod. 56.

11. Where children under marriage settlement have obtained a contingent advantage, the Court will not, after the marriage, vary it to the prejudice of the issue. *O'Keefe* v. *Calthorpe*, 1 Atk. 17.

12. Bill by husband to have wife's property, part of which was invested in stock, made up money, on ground either of express contract or a representation, upon which the marriage took place, dismissed; the description by articles, though generally "the sum of 4,000*l.*," referring to that sum in settlement, and the representation under circumstances not amounting to warranty and proceeding on a common mistake. *Ainslie* v. *Medlycott*, 9 Ves. 13.

13. Settlement reformed in favour of the younger children against the heir of the mother claiming the reversion by a letter from her on the marriage of her daughter, stating the intention. *Barstow* v. *Kilvington*, 5 Ves. 593.

14. Feme seised of a copyhold on marriage of her daughter to J., surrenders it to the use of J. and his intended wife, and the heirs of their bodies; remainder to J. in fee. The marriage takes effect, the husband signs a writing, whereby he owns that the limitation of the remainder in fee to him was a mistake, and that it was intended to be to his wife; and accordingly covenants to the remainder in fee in trust fee; this is not a mere volu and equity will compel the p *Randall* v. *Randall*, 2 P. W. 4

15. Husband having a po jointure of any part of the esta 400*l.* per annum, covenants or settle lands of the yearly val of taxes and reprises; he afte settlement of lands, with a they should fall short of 400 would make up deficiency:- settlement was intended as an power, and the making the taxes and reprises in the articl *Londonderry* (*Countess*) v. *Wa* Ambl. 424.

16. A. being seised of estate ing proposed to settle a certai his marriage, a settlement wa estates in C., which were inte fied and described in the sche written, "but which schedule i abridge or affect the generalit tion hereinbefore contained":- proposal and other evidence, quoted were inserted by mis *Trevanion*, 16 Sim. 178; 12 J

17. In contemplation of m A. and B., settlements wer estate belonging to B., the int of personalty belonging to husband, upon uses and trusts solemnisation of the marriage the benefit of the husband an issue; the marriage ceremony and the parties lived together wife; but after the lapse of n and before the parties had a marriage was discovered to b executed deeds purporting to r settlement; some time afterwa ment in contemplation of mar including the same property a differing from the former in t to the issue, as well as in other parties then intermarried, and of the marriage:—Held, that ment being founded on mistak hension, was not binding on that the rights of the issue, real estate and the personalty by the second settlement. *Rob son*, 3 Russ. 399; 7 L. J., Ch.,

18. Mrs. D., by her marriag citing her title, as devisee, to c and copyholds, and her intent freeholds and copyholds therei conveyed and settled certain and copyholds at B., omitting c freeholds at B., which belon under the will. Evidence c preparation of the settlement the Court held, that there w of intention to include the *Chapman* v. *Chapman*, 1 Jur.

19. Construction of a clause settlement. A court of equity payments made under a mistak of a doubtful clause, in a se refunded after many years of all parties, and after the deat authors of the settlement, e

subsequent family arrangements have proceeded on the footing of that construction. *Clifton* v. *Cockburn*, 3 Myl. & K. 74.

1. The Court being satisfied, upon the evidence, that a general description of property had been inserted inadvertently in a settlement, and not for the purpose of passing an estate, which the general description would in terms comprise, made a declaration that the general description had been inserted by mistake, so far as regarded the estate in question, and gave the parties liberty to apply as they might be advised. *Exeter* (*Marquis*) v. *Exeter* (*Marchioness*), 3 Myl. & C. 321; 7 L. J., N. S., Ch., 240; 2 Jur. 535.

2. By a marriage settlement certain lands were conveyed to A. (the intended husband), his heirs and assigns; and in case A. should die, leaving one or more son or sons on the body of his intended wife to be begotten, the elder of such sons, and the heirs male of his body, being always preferred to take place before the younger, with full liberty for A. "to make such reasonable provision as he should think fit for such "younger child or children;" and, in case A. should die leaving no son, and there should be one or more daughters, then to such daughter or daughters (if more than one) on their attaining their respective ages of twenty-one years, their heirs and assigns, share and share alike. There was issue of the marriage eight children, four sons and four daughters; and A., by his last will and testament, in pursuance of the power contained in the marriage settlement, charged the lands with the sum of 1,500*l.* to be divided amongst the younger children of the marriage, in manner therein mentioned. The first taker having disputed the right to charge in favour of daughters, on a bill filed by one of the daughters to raise a portion of the 1,500*l.*:—Held, that the power was well exercised, and as the intention of the settlement was evidently to provide for all the children as well daughters as sons, that the Court would effect that intention, and support the appointment by transposing the clause creating the power, and that containing the limitations to the daughters in the event of there being no son, whereby the words "such younger children" would include both sons and daughters. *Fenton* v. *Fenton*, 1 Dr. & Wal. 66.

3. Marriage settlement of trader not securing the wife's fortune in the event of bankruptcy, the intention appearing to be so, amended accordingly. *Higginson* v. *Kelley*, 1 Ball. & B. 252.

4. Marriage settlement not providing for a bond by husband to trustee for wife's fortune being provable in the event of his bankruptcy amended accordingly, such being the intention of the parties. *Exp. Verner*, 1 Ball. & B. 260.

5. By a marriage settlement the father of the intended wife covenanted with the intended husband to pay to him, his executors, administrators, and assigns, during the life of the father, an annuity of 200*l.* The husband died insolvent, and his assignees claimed the annuity. The Court, being satisfied that it was the intention of the parties that it should be paid as a provision for the wife and her children, ordered the settlement to be amended, and decreed that the assignees of the husband had no claim to any part of it. *Pearce* v. *Verbeke*, 2 Beav. 333; 9 L. J., N. S., *Ch.*, 203; 4 Jur. 117.

6. A settlement of stock, which proceeded on a clear mistake as to the party in whom the property vested:—Held, not to affect the rights of the party really interested, no attention appearing on his part, although joining in the deed, to deal otherwise with the property than on the footing of the mistaken statement of the title contained in the recitals. *Ashurst* v. *Mill*, 12 Jur. 1035. Affirming *id.* 693.

7. Under a proviso in a settlement, to which A. and his eldest son B. were parties, a use which was limited to a younger son, P., and his issue was made to shift to B. in the event of P. becoming entitled in possession to the manor of S. under certain limitations, which, in the settlement, were described as being contained in the will of A., bearing even date therewith. The will of A. contained the limitations mentioned in the settlement, but bore a later date, which was written upon an erasure not to be accounted for:—Held that, inasmuch as, under the circumstances of the case, the variance between the real date of the will and that mentioned in the settlement did not affect the substantial intention of the parties, the arrangement between them could, in equity, be carried into execution, notwithstanding such variance. *Honywood* v. *Honywood*, 2 Y. & Coll. C. C. 471.

8. A settlement of a trust fund, whereby no legal estate was affected, reformed by a declaration in the decree without a reference, or the execution of any fresh instrument, in the form of such order. *Tebbitt* v. *Tebbitt*, 1 De G. & Sm. 506.

9. By marriage settlement lands of the husband were, by mistake, and contrary to the intention of the parties, settled upon the issue of the marriage. Form of decree to rectify the settlement, the contingent limitations to the unborn issue not being capable of destruction. *Hamil* v. *White*, 3 J. & L. 695.

10. By a marriage settlement, after the death of the husband and wife, the trustees were to pay, assign, and transfer the capital to the children of the wife equally, the shares to be paid at twenty-one. There was a subsequent proviso, that if there should be no such child living at the decease of the survivor of the parents, then the fund was to go over to S. C. There was only one child of the marriage:—Held, that though she had attained twenty-one, her interest was defeasible by her death before the survivor of her parents:—Held, also, that the settlement could not, on the evidence, be reformed. *Lloyd* v. *Cocker*, 19 Beav. 140; 1 Jur., N. S., 174; 24 L. J., Ch., 84.

11. Trust funds were limited, after the death of the husband and wife, to the children of the marriage, to be vested interests at their respective ages of twenty-five or day of marriage if daughters, which should first happen, with benefit of survivorship in the event of any dying under that age, or before marriage if daughters. The settlement contained powers of maintenance and advancement:—Held, that the language of the settlement being unambiguous, its legal effect could not be controlled, and that the limitations were void for remoteness; but leave was given to the children to adduce evidence that the settlement was not in accord-

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13. Settlement reformed in favour of the younger children against the heir of the mother claiming the reversion by a letter from her on the marriage of her daughter, stating the intention. *Barstow* v. *Kilvington*, 5 Ves. 593.

14. Feme seised of a copyhold on marriage of her daughter to J., surrenders it to the use of J. and his intended wife, and the heirs of their bodies; remainder to J. in fee. The marriage takes effect, the husband signs a writing, whereby he owns that the limitation of the remainder in fee to him was a mistake, and that it was intended to be to his wife; and accordingly covenants to the remainder in fee in trust fee; this is not a mere volu and equity will compel the pe *Randall* v. *Randall*, 2 P. W. 4

15. Husband having a po jointure of any part of the est 400*l*. per annum, covenants on settle lands of the yearly val of taxes and reprises; he afte settlement of lands, with a they should fall short of 400 would make up deficiency:- settlement was intended as an power, and the making the taxes and reprises in the articl *Londonderry* (*Countess*) v. *Wa* Ambl. 424.

16. A. being seised of estate ing proposed to settle a certain his marriage, a settlement wa estates in C., which were inte fied and described in the sche written, "but which schedule i abridge or affect the generalit tion hereinbefore contained":- proposal and other evidence, quoted were inserted by mis *Trevanion*, 16 Sim. 178; 12 Ju

17. In contemplation of m A. and B., settlements wer estate belonging to B., the int of personalty belonging to husband, upon uses and trusts solemnisation of the marriage the benefit of the husband an issue; the marriage ceremony and the parties lived together wife; but after the lapse of m and before the parties had a marriage was discovered to b executed deeds purporting to r settlement; some time afterwa ment in contemplation of mar including the same property a differing from the former in t to the issue, as well as in other parties then intermarried, and of the marriage:—Held, that ment being founded on mistak hension, was not binding on that the rights of the issue, real estate and the personalty, by the second settlement. *Rob son*, 3 Russ. 399; 7 L. J., Ch.,

18. Mrs. D., by her marriag citing her title, as devisee, to c and copyholds, and her intent freeholds and copyholds therei conveyed and settled certain and copyholds at B., omitting c freeholds at B., which belon under the will. Evidence c preparation of the settlement the Court held, that there w of intention to include the *Chapman* v. *Chapman*, 1 Jur.

19. Construction of a clause settlement. A court of equity payments made under a mistak of a doubtful clause, in a se refunded after many years of all parties, and after the deat authors of the settlement, e

subsequent family arrangements have proceeded on the footing of that construction. *Clifton* v. *Cockburn*, 3 Myl. & K. 74.

1. The Court being satisfied, upon the evidence, that a general description of property had been inserted inadvertently in a settlement, and not for the purpose of passing an estate, which the general description would in terms comprise, made a declaration that the general description had been inserted by mistake, so far as regarded the estate in question, and gave the parties liberty to apply as they might be advised. *Exeter* (*Marquis*) v. *Exeter* (*Marchioness*), 3 Myl. & C. 321; 7 L. J., N. S., Ch., 240; 2 Jur. 535.

2. By a marriage settlement certain lands were conveyed to A. (the intended husband), his heirs and assigns; and in case A. should die, leaving one or more son or sons on the body of his intended wife to be begotten, the elder of such sons, and the heirs male of his body, being always preferred to take place before the younger, with full liberty for A. "to make such reasonable provision as he should think fit for such "younger child or children;" and, in case A. should die leaving no son, and there should be one or more daughters, then to such daughter or daughters (if more than one) on their attaining their respective ages of twenty-one years, their heirs and assigns, share and share alike. There was issue of the marriage eight children, four sons and four daughters; and A., by his last will and testament, in pursuance of the power contained in the marriage settlement, charged the lands with the sum of 1,500*l.* to be divided amongst the younger children of the marriage, in manner therein mentioned. The first taker having disputed the right to charge in favour of daughters, on a bill filed by one of the daughters to raise a portion of the 1,500*l.*:—Held, that the power was well exercised, and as the intention of the settlement was evidently to provide for all the children as well daughters as sons, that the Court would effect that intention, and support the appointment by transposing the clause creating the power, and that containing the limitations to the daughters in the event of there being no son, whereby the words "such younger children" would include both sons and daughters. *Fenton* v. *Fenton*, 1 Dr. & Wal. 66.

3. Marriage settlement of trader not securing the wife's fortune in the event of bankruptcy, the intention appearing to be so, amended accordingly. *Higginson* v. *Kelley*, 1 Ball. & B. 252.

4. Marriage settlement not providing for a bond by husband to trustee for wife's fortune being provable in the event of his bankruptcy amended accordingly, such being the intention of the parties. *Exp. Verner*, 1 Ball. & B. 260.

5. By a marriage settlement the father of the intended wife covenanted with the intended husband to pay to him, his executors, administrators, and assigns, during the life of the father, an annuity of 200*l.* The husband died insolvent, and his assignees claimed the annuity. The Court, being satisfied that it was the intention of the parties that it should be paid as a provision for the wife and her children, ordered the settlement to be amended, and decreed that the assignees of the husband had no claim to any part of it. *Pearce* v. *Verbeke*, 2 Beav. 333; 9 L. J., N. S., *Ch.*, 203; 4 Jur. 117.

6. A settlement of stock, which proceeded on a clear mistake as to the party in whom the property vested:—Held, not to affect the rights of the party really interested, no attention appearing on his part, although joining in the deed, to deal otherwise with the property than on the footing of the mistaken statement of the title contained in the recitals. *Ashurst* v. *Mill*, 12 Jur. 1035. Affirming *id.* 693.

7. Under a proviso in a settlement, to which A. and his eldest son B. were parties, a use which was limited to a younger son, P., and his issue was made to shift to B. in the event of P. becoming entitled in possession to the manor of S. under certain limitations, which, in the settlement, were described as being contained in the will of A., bearing even date therewith. The will of A. contained the limitations mentioned in the settlement, but bore a later date, which was written upon an erasure not to be accounted for:—Held that, inasmuch as, under the circumstances of the case, the variance between the real date of the will and that mentioned in the settlement did not affect the substantial intention of the parties, the arrangement between them could, in equity, be carried into execution, notwithstanding such variance. *Honywood* v. *Honywood*, 2 Y. & Coll. C. C. 471.

8. A settlement of a trust fund, whereby no legal estate was affected, reformed by a declaration in the decree without a reference, or the execution of any fresh instrument, in the form of such order. *Tebbitt* v. *Tebbitt*, 1 De G. & Sm. 506.

9. By marriage settlement lands of the husband were, by mistake, and contrary to the intention of the parties, settled upon the issue of the marriage. Form of decree to rectify the settlement, the contingent limitations to the unborn issue not being capable of destruction. *Hamil* v. *White*, 3 J. & L. 695.

10. By a marriage settlement, after the death of the husband and wife, the trustees were to pay, assign, and transfer the capital to the children of the wife equally, the shares to be paid at twenty-one. There was a subsequent proviso, that if there should be no such child living at the decease of the survivor of the parents, then the fund was to go over to S. C. There was only one child of the marriage:—Held, that though she had attained twenty-one, her interest was defeasible by her death before the survivor of her parents:—Held, also, that the settlement could not, on the evidence, be reformed. *Lloyd* v. *Cooker*, 19 Beav. 140; 1 Jur., N. S., 174; 24 L. J., Ch., 84.

11. Trust funds were limited, after the death of the husband and wife, to the children of the marriage, to be vested interests at their respective ages of twenty-five or day of marriage if daughters, which should first happen, with benefit of survivorship in the event of any dying under that age, or before marriage if daughters. The settlement contained powers of maintenance and advancement:—Held, that the language of the settlement being unambiguous, its legal effect could not be controlled, and that the limitations were void for remoteness; but leave was given to the children to adduce evidence that the settlement was not in accord-

ance with the intention of the parties, with a view to its being rectified. *Re Morse*, 2 Jur., N. S., 6; 25 L. J., Ch., 192; 21 Beav. 174; 4 W. R. 148.

1. A woman's fortune was settled on her marriage to her separate use, except a sum of 10,000*l*., which had been settled on her marriage with a former husband, and which the woman understood to be still standing upon trust for her separate use. This was, however, a mistake, as the trusts of the former settlement did not extend to future covertures. Shortly after the marriage the parties separated, and were ultimately divorced on the ground of the husband's adultery:—Held, that whether the wife was or was not entitled to a rectification of the settlement, she was entitled in equity to a settlement; and the Court settled the whole fund upon her, although she had other property sufficient for her support. The husband's conduct ought to be taken into account in considering the question of the wife's equity to a settlement. The omission in the settlement having arisen from the mistake of the lady's solicitor who prepared the deed, and who was also a trustee under it, the Court refused to allow him his costs in the suit. *Barrow* v. *Barrow*, 19 Beav. 529. S. C. on appeal 3 W. R. 122; 24 L. J., Ch., 267; 3 Eq. Rep. 149.

2. A female ward of court being entitled to funded property carried to her account in certain suits, in possession and reversion, a marriage is proposed, and certain proposals for a settlement taken in before the Master, not on a reference: the Master objects, as the intended husband is to settle nothing, and the ward's property is not to be settled so that children of a second marriage by her can take. The ward being on the eve of attaining twenty-one, the marriage is postponed, and a settlement according to the former proposals, with the addition of a provision that in the event of there being no children all the property settled and all after-acquired property shall go over absolutely to her brothers and sisters, is executed a few days after she attains twenty-one, and the marriage takes place. A few months after, a petition to transfer the funds to the trustees is presented, stating the settlement, and an order is taken by consent upon it without discussion. Thirty-one years elapse, and the husband dies, and there is no issue of the marriage. Eight years after she became a widow, a bill is filed by the lady, alleging that she had only then discovered the true nature of the settlement, and praying that it might be set aside or reformed, and such a settlement made as ought to have been made upon her marriage. It is contended for the plaintiff that, the settlement being executed so immediately after she was of age, she was still under the protection of the Court; and that, as she distinctly swore that although the matter was discussed she knew nothing before the period alleged of its true nature, she was entitled to such a settlement as the Court would have insisted upon at the time of the marriage, she being then under the influence of her mother, who managed the whole matter. The defendant's contention was, that lapse of time was a complete bar to the relief asked, even if the settlement was inequitable, which it was not, inasmuch as it was natural that the mother should wish to provide for —Held, that the settleme formed so as to give the lad in the events which had reference to chambers as t arising. Costs by arran fund. *Money* v. *Money*, 3 256; 3 Eq. Rep. 996.

3. By a marriage settle limited to such uses as the should appoint by deed, appointment to the uses the husband and wife taki ject to which the wife had appointment by will. In 1 wife appointed the estate should by deed appoint; a appointment, to such uses should by deed or will app of appointment, to the uses In February 1827 the wife ing the estate to her husba observed, that by mistake the husband and wife had by the deed of 1825, an wife directed their solicito a deed as might be nec to correct the mistake." tions he prepared a deed, and wife executed, with remedying the omission of this deed the husband and joint power over the entire estate to such uses as th appoint; and in default of upon uses and trusts, duri husband and wife, simila settlement; and after the vivor of the husband and the wife should by deed o in default of appointment, to tical purposes were the sa uses limited by the deed died in 1854. In a suit to held, by Romilly, M. R., th by the deed of 1840:—He assuming the deed of 184 such as to revoke the will, to have it rectified on the as it went beyond the instr tention of the parties, which the life estates, and to do that the will must therefo *Walker* v. *Armstrong*, 2 J L. J., Ch., 738; 8 De G. M. 770. Varying 4 W. R. 280; 2 Jur., N. S., 221.

4. In 1848 estates were, in appointed to the use of Ja the same estates were, on th W. with John Wright, vested and invest the proceeds for Jane W., for life, for her a power to her of appointme children of the said intende Wright died, leaving his wi surviving. In 1856 Mrs. Ja with John Whitham, and s bill, praying that the settle former marriage might be ground that it was not fra with her intention. On Court directed the settlem by striking out the word "

serting the words "the said Jane W., by the said intended or any future husband." *Naylor* v. *Wright*, 3 Jur., N. S., 1090; 5 W. R. 770.

1. Property was settled on John Garner, Sambourn, and Elizabeth his wife and her children. There was a person named John Garner of Sambourn, whose wife was Hannah, but they were not related to the settlor. There was also a William Garner, of Beoley, whose wife was Elizabeth, and she was a niece of, and intimate with, the settlor:—Held, that the latter were intended. *Garner* v. *Garner*, 29 Beav. 114; 7 L. T., N. S., 182.

2. A memorandum by a solicitor of verbal instructions will not be treated as a written instruction so as to prevent a decree for a rectification of a settlement made in accordance with the memorandum. *Henry* v. *Naghten*, 14 W. R. 814.

3. On clear evidence of mistake, a marriage settlement of a lady's fortune reformed, by striking out a proviso against anticipation of her separate estate, she having executed it on a representation that the most unlimited control, both over principal and interest, was secured to her, it having been agreed before the marriage that she should continue to possess the same power of disposition which she then had. *Torre* v. *Torre*, 1 Sim. & G. 815; 1 W. R. 490; 1 Eq. Rep. 364.

4. Where a marriage settlement is prepared pursuant to the intention of one of the parties, but under a mistake as to the other, it cannot be rectified. *Sells* v. *Sells*, 1 Dr. & Sm. 42; 29 L. J., Ch., 500; 8 W. R. 327.

5. Real estate was settled on A. for life; remainder to B., his eldest son in tail. B., at A.'s request, joined with him in opening the entail to let in a charge. The estates were resettled, and several years afterwards B. discovered that his estate tail had been cut down to an estate for life. B. stated that he had joined in opening the entail on the understanding that, subject to the charge and to certain modifications in A.'s power of jointuring and charging portions, the estates should be settled precisely as they had previously been. A. stated that he had been under the same impression. On evidence that the persons who prepared the resettlement had explained the limitations to A. and B., a bill filed by B. to rectify the settlement was dismissed with costs. *Jenner* v. *Jenner*, 2 Giff. 232; 6 Jur., N. S., 668; 8 W. R. 537. Affirmed 6 Jur., N. S., 1314.

6. A marriage settlement gave the income of the trust funds to the husband, in the event of his surviving the wife, until death or bankruptcy. There was a maintenance clause only applicable after the death of the husband. The wife was dead, and the husband had become bankrupt. The settlement was ordered to be rectified by making the maintenance clause applicable upon the bankruptcy of the husband, upon the oath of the husband and of the solicitor who prepared the settlement, that such had been the intention of the parties at the time of the marriage. *Tomlinson* v. *Leigh*, 11 Jur., N. S., 962; 14 W. R. 121.

7. On the settlement of a ward, no clause against anticipation was attached to her separate life estate. She encumbered her interest:—Held, that the settlement could not be rectified to the prejudice of her encumbrancers. *Blackie* v. *Clark*, 15 Beav. 595; 22 L. J., Ch., 377.

8. Where a clause in a marriage settlement was framed in a form which did not carry out correctly the intention of the intended wife, and the whole clause was objected to by the intended husband, but the objection ultimately waived, and it appearing that the husband's attention had not been called to the variance between the form of the clause and the intention of the wife:—Held, that this was not a case of mutual error, and a bill for rectification was dismissed. *Thompson* v. *Whitmore*, 1 John. & H. 268.

9. Where, under a marriage settlement, a sum was directed to be raised, to which, under the limitations of the settlement, the plaintiff would be entitled, if not barred by a fine levied by the husband and wife (there being no issue), and which was declared to be inoperative to that effect; and by a deed of covenant, a similar sum was charged upon the husband's estate:—Held, that he could not be relieved from such second charge upon the ground of mistake, although clearly intended to be substituted in lieu of the former. *Farr* v. *Sheriffs*, 4 Hare 512; 15 L. J., N. S., Ch., 89; 10 Jur. 630.

10. Three estates belonging to A., two of them being subject to mortgages amounting to 2,400*l.*, and the third being subject to a mortgage for 3,000*l.*, were settled for valuable consideration upon A. for life, remainder to his wife for life, remainder as they should jointly appoint, "for the purpose of raising money, by way of mortgage or otherwise"; and in default of appointment, and subject thereto, to a trustee for a term of years, to raise such a sum, not exceeding 600*l.*, as should be owing by A. in respect of two sums of 300*l.* each, with remainder to the use of the wife for life, with remainder to the husband and wife, in equal moieties. A. and his wife exercised the joint power for the purpose of raising 600*l.* and 400*l.* A. died insolvent:—Held, this was no mortgage of the wife's estate, and, consequently, that she was not entitled to have her moiety exonerated out of the estate of the husband. *Scholefield* v *Lockwood*, 9 Jur., N. S., 1258; 33 L. J., Ch., 106; 12 W. R. 114; 9 L. T., N. S., 1258; 4 De G. J. & S. 22. Affirming 32 Beav. 434; 9 Jur., N. S., 738; 11 W. R. 555; 8 L. T., N. S., 409.

The settlement was expressly made subject to the subsisting mortgage; but it was stated to be 1,200*l.* instead of 1,400*l.* There was clear evidence of this being a mistake:—Held, that the parties claiming under A. were not estopped by the statements in the settlement, and that it was not necessary in institute formal proceedings to have the mistake rectified. *Ib.*

11. Lands stood limited, subject to certain powers vested in the plaintiff, and to certain charges for his own benefit and for the jointure of his wife, and for portions for his younger children, to his use for life, with remainder to his sons successively in tail male, with remainder to trustees for 1,500 years, in trust, in the event of failure of his male issue, to raise 100,000*l.* for additional portions for his daughters. In contemplation of the marriage of his only son, the plaintiff

and his son entered into an agreement for resettlement, whereby the son should disentail the reversion and limit the estates after the plaintiff's decease, and subject to his life interest and powers, and to the exercise thereof, and all subsisting charges, to such uses as he and his son should then appoint the lands, in remainder, and subject as aforesaid, to the use of the son for life, with remainder to the plaintiff's first and other sons successively in tail male, with remainder to a nephew of the plaintiff and certain other nephews successively for their lives, with remainders to their first and other sons successively in tail, with remainders over. A deed of resettlement was made in pursuance of this agreement, and thereby the lands were appointed, after the plaintiff's death and subject to his life estate and to the powers thereto annexed, and of the jointure and any other charges upon the estates to which he might be entitled, to the use of his son for life, with remainder to his first and other sons successively in tail male, with remainder to his nephews successively, and remainder over. The plaintiff and his solicitor deposed that neither of them intended by the agreement or settlement to displace the terms of 1,500 years or the portions of 100,000*l.* thereby secured, except so far as was necessary for the benefit of his son and issue, but it did not appear that any discussion took place on the subject, or that it was mentioned:—Held, not a case for reforming the resettlement. *Elwes* v. *Elwes*, 3 De G. F. & J. 667; 7 Jur., N. S., 747; 9 W. R. 820; 4 L. T., N. S., 500.

1. A marriage settlement was drawn, as the intended husband alleged, in a manner contrary to the agreement; but before the marriage he knew its contents and executed it under protest, and reserving his right to set it aside:—Held, that he could not, after the marriage, sustain a suit to rectify the settlement. *Eaton* v. *Bennett*, 34 Beav. 196.

2. No order will be made on petition to reform a settlement, though, by mistake, it included a fund not intended to be settled. Neither can any order be made in contravention of its provisions so long as the settlement is unreformed. *Re Malet*, 8 Jur., N. S., 226; 31 L. J., Ch., 455.

3. By a marriage settlement made in 1858, property belonging to the lady was invested in trustees for the benefit of the wife and husband during their respective lives, and the children of the wife by the then intended or any future marriage, and in default of such children for the wife's nephews and nieces absolutely. The settlement contained no power of revocation, and gave the wife no power of appointment amongst her nephews and nieces, and no power to lease, to appoint new trustees, or to change investments. The husband died in 1865, leaving no issue. On a bill by the wife to set aside the settlement:—Held (on the ground that she had executed the deed in ignorance of its effect, which had not been sufficiently explained to her, and that the nephews and nieces were mere volunteers, and not within the consideration of the marriage), that the trusts of the deed must be declared void, and the trustees be ordered to retransfer to her the property comprised in the settlement. *Wollaston* v. *Tribe*, 21 L. T., N. S., 449; 18 W. R. 8 44.

4. In a settlement made b severally entitled to interests the settlor, who took a life int settlement, covenanted that entitled to any property exce the sum of ——, he would assi the trustees. He afterwards t to a reversionary interest, and have the settlement rectified, c be declared that the coven Stuart, V.-Ch., dismissed the costs:—Held, on appeal, tha was correct, as the Court wou declaration of right beforehan covenant could not be consid as it must apply to capital, a *Fyfe* v. *Arbuthnot*, 3 Jur., N. S. Ch., 646.

5. By a marriage settlement that the lady was entitled possession, the sum was sett her intended husband, and the marriage. There was also a co all her after-acquired property of the settlement she was not money in possession, but was contingent interest in trust f marriage settlement of her fath and the 10,000*l.* was, in fac the father out of his own mon death a bill was filed by his to have it declared that his est to be recouped the 10,000*l.* ad on his daughter's marriage, to her portion in the trust fund the settlement did not show t was meant to be an accelera the daughter's share in the trus *ford* (*Earl*) v. *Romney* (*Earl* 403; 31 L. J., Ch., 497; 10 W. N. S., 208.

Held, also, that the evidence that its provisions were at var real intention of the parties, that the settlement could no *Ib.*

6. By a marriage settlement the intended wife was settled for life for her separate use wi anticipation, and after her deat notwithstanding coverture, by appoint, and in default of appo next of kin. After the death c and upon the unsupported te wife that it was only intended trust property during her cover deprive her of the control of i mination of the coverture:—I settlement ought to be rectifi property should be held in trus her executors, administrators, absolutely. *Cook* v. *Fearn*, 48 39 L. T. 348; 27 W. R. 212.

7. By a marriage settlement terest in real estate was grante to trustees, their executors, and assigns, upon the usua settlement, with the omission "heirs" in every case in which was evidently intended to be that the deed must be rectified tion of the word "heirs" in

the intention of the parties. *Re Bird*, 3 L. R., Ch. D., 214.

1. Under a marriage settlement trust funds, in the events which had happened and by virtue of an appointment, stood limited upon trusts for A. for life, for her separate use without power of anticipation, remainder to B. absolutely. The trust funds had been paid into court in a suit instituted to carry out the trusts of the settlement. On B. attaining twenty-one, A. and B. executed a resettlement by which the trust funds were limited upon trusts for A. for life, remainder to B. absolutely. On a petition for payment out of the trust funds to the trustees of the resettlement, the Court made the order subject to the insertion in the resettlement of a clause, similar to that contained in the original settlement, restraining A. from anticipating her life interest. *De Martana* v. *De Martana*, 33 L. T., N. S., 685; 24 W. R. 200.

2. A court of equity will reform a settlement upon parol evidence alone, and after a long lapse of time, if on due deliberation it arrives at the conclusion that the actual contract made between the parties differs from that expressed in the instrument. *M'Cormack* v. *M'Cormack*, 1 L. R., Ir., 119; 11 Ir. R., Eq., 130.

By a post-nuptial settlement of 1841, after reciting that in consideration of 352*l.*, a share of residue to which E., the wife, had become entitled under a will taking effect a few days before the marriage, C., the husband, in order to provide for her after his death, and for their issue, had proposed to settle a freehold house and field upon the trusts therein mentioned, the freehold premises were conveyed to T. upon trust for C. for life, or until he should become bankrupt, or assign, or charge "the rents, issues, and annual produce of the trust estate moneys," etc., then upon trust for E. for life; "it being the true intent and the meaning of these presents, and the parties thereto, that the tenements, hereditaments, and premises" should, in the event of any such charge, etc., be for the separate maintenance of E. for life, then, "as to the rents, issues, and annual profits arising off the house and premises," for children, in the usual form, with an ultimate "trust to pay the rents, issues, and annual produce" to C.'s next of kin. The settlement provided, that on the appointment of any new trustee, "all the trust estate moneys and premises" should be assigned to him. T., who was also the trustee of the will, had paid part of the 352*l.* to C. before the execution of the deed, and the rest immediately after. The solicitor who prepared the settlement, on T.'s verbal instructions, had died in 1848, and there were no papers to show what the instructions were; but C., E., and T. all deposed that it had not been intended to settle any part of the 352*l.*, and their bill, filed in 1876, to reform the deed accordingly, was not opposed by the adult children:—Held, that the plaintiffs were entitled to a decree declaring that the word "moneys" had been introduced by mistake into the settlement, which should be construed and take effect as if that form had been omitted. *Ib.*

3. In a marriage settlement, the property of the wife was assigned on trust to pay the income to the wife for life for her separate use, and after her decease to pay an annuity of 200*l.* a year to the husband, remainder to the issue of the marriage, and in default of issue the trustees were directed to invest the trust money in land, to be held on similar trusts as were subsisting in respect of the family estate of the wife's family under the family settlement. There was no issue of the marriage, and the wife now claimed to have the settlement rectified, on the ground that her attention had not been called to the fact that under the settlement she had no power of disposing of the property in the event of there being no issue of the marriage:—Held, that the settlement must be rectified by inserting a general testamentary power of appointment by the wife during coverture, and a general power of appointment by deed or will on discoverture, in priority to the ultimate trusts. *Cordeaux* v. *Fullerton*, 41 L. T. 651; 28 W. R. 320.

Liability of Solicitor.] 4. When a suit for the rectification of a marriage settlement has been rendered necessary by the neglect of the solicitor employed to prepare it, the Court has no jurisdiction to make the solicitor pay the costs of the suit, when he has not been guilty of any fraud. *Clark* v. *Girdwood*, 37 L. T., N. S., 614; 7 L. R., Ch. D., 9; 25 W. R. 575.

The remedy against the solicitor in such a case is by action for damages. *Ib.*

See also XVII. IV. *post.*

II. MISTAKE IN ARTICLES.

5. A man articled on the marriage of his eldest son, to settle lands on the son for life, remainder to the wife for jointure, remainder to the first and other sons in tail, remainder to the right heirs of the son. The father brings a bill to be relieved against the articles, alleging that he was surprised, and intended that, upon failure of issue male of his eldest son, the remainder should have been limited to his younger son, charged with portions for the daughters of the marriage. Bill dismissed. *Seymour* v. *Fotherly*, 1 Vern. 320.

6. Articles, executed before a marriage, having stipulated that estates should be limited to the first and other sons of the marriage in tail, but, it being proved that the intention was to limit the estates to the first and other sons in tail male, the Court, after the marriage had taken place, directed, in the settlement to be executed in pursuance of the articles, limitations to the first and other sons in tail male should be inserted. *Bedford* (*Duke*) v. *Abercorn* (*Marquis*), 1 Myl. & C. 312; 5 L. J., N. S., Ch., 230.

7. Articles executed before the marriage of a widow, with seven children, gave the husband the first life interest in the settled property, the whole of which belonged to the lady. The husband acted as the wife's agent in the preparation of the articles:—Held, that the articles must be rectified so as to give the wife the first life interest. *Clark* v. *Girdwood*, 25 W. R. 575; 37 L. T., N. S., 614; 7 L. R., Ch. D., 9.

and his son entered into an agreement for resettlement, whereby the son should disentail the reversion and limit the estates after the plaintiff's decease, and subject to his life interest and powers, and to the exercise thereof, and all subsisting charges, to such uses as he and his son should then appoint the lands, in remainder, and subject as aforesaid, to the use of the son for life, with remainder to the plaintiff's first and other sons successively in tail male, with remainder to a nephew of the plaintiff and certain other nephews successively for their lives, with remainders to their first and other sons successively in tail, with remainders over. A deed of resettlement was made in pursuance of this agreement, and thereby the lands were appointed, after the plaintiff's death and subject to his life estate and to the powers thereto annexed, and of the jointure and any other charges upon the estates to which he might be entitled, to the use of his son for life, with remainder to his first and other sons successively in tail male, with remainder to his nephews successively, and remainder over. The plaintiff and his solicitor deposed that neither of them intended by the agreement or settlement to displace the terms of 1,500 years or the portions of 100,000*l.* thereby secured, except so far as was necessary for the benefit of his son and issue, but it did not appear that any discussion took place on the subject, or that it was mentioned:—Held, not a case for reforming the resettlement. *Elwes* v. *Elwes*, 3 De G. F. & J. 667; 7 Jur., N. S., 747; 9 W. R. 820; 4 L. T., N. S., 500.

1. A marriage settlement was drawn, as the intended husband alleged, in a manner contrary to the agreement; but before the marriage he knew its contents and executed it under protest, and reserving his right to set it aside:—Held, that he could not, after the marriage, sustain a suit to rectify the settlement. *Eaton* v. *Bennett*, 34 Beav. 196.

2. No order will be made on petition to reform a settlement, though, by mistake, it included a fund not intended to be settled. Neither can any order be made in contravention of its provisions so long as the settlement is unreformed. *Re Malet*, 8 Jur., N. S., 226; 31 L. J., Ch., 455.

3. By a marriage settlement made in 1858, property belonging to the lady was invested in trustees for the benefit of the wife and husband during their respective lives, and the children of the wife by the then intended or any future marriage, and in default of such children for the wife's nephews and nieces absolutely. The settlement contained no power of revocation, and gave the wife no power of appointment amongst her nephews and nieces, and no power to lease, to appoint new trustees, or to change investments. The husband died in 1865, leaving no issue. On a bill by the wife to set aside the settlement:—Held (on the ground that she had executed the deed in ignorance of its effect, which had not been sufficiently explained to her, and that the nephews and nieces were mere volunteers, and not within the consideration of the marriage), that the trusts of the deed must be declared void, and the trustees be ordered to retransfer to her the property comprised in the settlement. *Wollaston* v. *Tribe*, 21 L. T., N. S., 449; 18 W. R. 83
44.

4. In a settlement made bet
severally entitled to interests
the settlor, who took a life inter
settlement, covenanted that if
entitled to any property excee
the sum of ——, he would assign
the trustees. He afterwards be
to a reversionary interest, and f
have the settlement rectified, or
be declared that the covenan
Stuart, V.-Ch., dismissed the
costs:—Held, on appeal, that
was correct, as the Court would
declaration of right beforehand,
covenant could not be consider
as it must apply to capital, and
Fyfe v. *Arbuthnot*, 3 Jur., N. S.,
Ch., 646.

5. By a marriage settlement,
that the lady was entitled t
possession, the sum was settle
her intended husband, and the c
marriage. There was also a cove
all her after-acquired property.
of the settlement she was not e
money in possession, but was
contingent interest in trust fun
marriage settlement of her fathe
and the 10,000*l.* was, in fact,
the father out of his own money
death a bill was filed by his re
to have it declared that his estat
to be recouped the 10,000*l.* adv
on his daughter's marriage, to
her portion in the trust funds
the settlement did not show tha
was meant to be an accelerate
the daughter's share in the trust f
ford (*Earl*) v. *Romney* (*Earl*),
403; 31 L. J., Ch., 497; 10 W. R.
N. S., 208.

Held, also, that the evidence f
that its provisions were at varia
real intention of the parties,
that the settlement could not
Ib.

6. By a marriage settlement th
the intended wife was settled u
for life for her separate use with
anticipation, and after her death
notwithstanding coverture, by w
appoint, and in default of appoin
next of kin. After the death of
and upon the unsupported test
wife that it was only intended t
trust property during her covertu
deprive her of the control of it
mination of the coverture:—He
settlement ought to be rectified
property should be held in trust
her executors, administrators,
absolutely. *Cook* v. *Fearn*, 48 L.
39 L. T. 348; 27 W. R. 212.

7. By a marriage settlement t
terest in real estate was granted
to trustees, their executors, ad
and assigns, upon the usual
settlement, with the omission
"heirs" in every case in which t
was evidently intended to be pa
that the deed must be rectified
tion of the word "heirs" in or

the intention of the parties. *Re Bird*, 3 L. R., Ch. D., 214.

1. Under a marriage settlement trust funds, in the events which had happened and by virtue of an appointment, stood limited upon trusts for A. for life, for her separate use without power of anticipation, remainder to B. absolutely. The trust funds had been paid into court in a suit instituted to carry out the trusts of the settlement. On B. attaining twenty-one, A. and B. executed a resettlement by which the trust funds were limited upon trusts for A. for life, remainder to B. absolutely. On a petition for payment out of the trust funds to the trustees of the resettlement, the Court made the order subject to the insertion in the resettlement of a clause, similar to that contained in the original settlement, restraining A. from anticipating her life interest. *De Martana* v. *De Martana*, 33 L. T., N. S., 685; 24 W. R. 200.

2. A court of equity will reform a settlement upon parol evidence alone, and after a long lapse of time, if on due deliberation it arrives at the conclusion that the actual contract made between the parties differs from that expressed in the instrument. *M'Cormack* v. *M'Cormack*, 1 L. R., Ir., 119; 11 Ir. R., Eq., 130.

By a post-nuptial settlement of 1841, after reciting that in consideration of 352*l.*, a share of residue to which E., the wife, had become entitled under a will taking effect a few days before the marriage, C., the husband, in order to provide for her after his death, and for their issue, had proposed to settle a freehold house and field upon the trusts therein mentioned, the freehold premises were conveyed to T. upon trust for C. for life, or until he should become bankrupt, or assign, or charge "the rents, issues, and annual produce of the trust estate moneys," etc., then upon trust for E. for life; "it being the true intent and the meaning of these presents, and the parties thereto, that the tenements, hereditaments, and premises" should, in the event of any such charge, etc., be for the separate maintenance of E. for life, then, "as to the rents, issues, and annual profits arising off the house and premises," for children, in the usual form, with an ultimate "trust to pay the rents, issues, and annual produce" to C.'s next of kin. The settlement provided, that on the appointment of any new trustee, "all the trust estate moneys and premises" should be assigned to him. T., who was also the trustee of the will, had paid part of the 352*l.* to C. before the execution of the deed, and the rest immediately after. The solicitor who prepared the settlement, on T.'s verbal instructions, had died in 1848, and there were no papers to show what the instructions were; but C., E., and T. all deposed that it had not been intended to settle any part of the 352*l.*, and their bill, filed in 1876, to reform the deed accordingly, was not opposed by the adult children:—Held, that the plaintiffs were entitled to a decree declaring that the word "moneys" had been introduced by mistake into the settlement, which should be construed and take effect as if that form had been omitted. *Ib.*

3. In a marriage settlement, the property of the wife was assigned on trust *to pay the income to the wife for life for her separate use*, and after her decease to pay an *annuity* of 200*l.* a year to the husband, remainder to the issue of the marriage, and in *default of issue* the trustees were directed to *invest the trust money* in land, to be held on similar trusts as were subsisting in respect of the family estate of the wife's family under the family settlement. There was no issue of the marriage, and the wife now claimed to have the settlement rectified, on the ground that her attention had not been called to the fact that under the settlement she had no power of disposing of the property in the event of there being no issue of the marriage:—Held, that the settlement must be rectified by inserting a general testamentary power of appointment by the wife during coverture, and a general power of appointment by deed or will on discoverture, in priority to the ultimate trusts. *Cordeaux* v. *Fullerton*, 41 L. T. 651; 28 W. R. 320.

Liability of Solicitor.] 4. When a suit for the rectification of a marriage settlement has been rendered necessary by the neglect of the solicitor employed to prepare it, the Court has no jurisdiction to make the solicitor pay the costs of the suit, when he has not been guilty of any fraud. *Clark* v. *Girdwood*, 37 L. T., N. S., 614; 7 L. R., Ch. D., 9; 25 W. R. 575.

The remedy against the solicitor in such a case is by action for damages. *Ib.*

See also XVII. IV. *post.*

II. MISTAKE IN ARTICLES.

5. A man articled on the marriage of his eldest son, to settle lands on the son for life, remainder to the wife for jointure, remainder to the first and other sons in tail, remainder to the right heirs of the son. The father brings a bill to be relieved against the articles, alleging that he was surprised, and intended that, upon failure of issue male of his eldest son, the remainder should have been limited to his younger son, charged with portions for the daughters of the marriage. Bill dismissed. *Seymour* v. *Fotherly*, 1 Vern. 320.

6. Articles, executed before a marriage, having stipulated that estates should be limited to the first and other sons of the marriage in tail, but, it being proved that the intention was to limit the estates to the first and other sons in tail male, the Court, after the marriage had taken place, directed, in the settlement to be executed in pursuance of the articles, limitations to the first and other sons in tail male should be inserted. *Bedford* (*Duke*) v. *Abercorn* (*Marquis*), 1 Myl. & C. 312; 5 L. J., N. S., Ch., 230.

7. Articles executed before the marriage of a widow, with seven children, gave the husband the first life interest in the settled property, the whole of which belonged to the lady. The husband acted as the wife's agent in the preparation of the articles:—Held, that the articles must be rectified so as to give the wife the first life interest. *Clark* v. *Girdwood*, 25 W. R. 575; 37 L. T., N. S., 614; 7 L. R., Ch. D., 9.

1. Marriage articles for settling lands varied by decreeing the estate to one for life, with remainder in tail to his issue instead of an estate tail to him. *Griffith* v. *Buckle*, 2 Vern. 13.

2. Marriage settlement rectified by a strict settlement agreeably to the ordinary course, notwithstanding it agreed with the articles verbatim, and both made before marriage, the plaintiff having however taken a benefit under the will which he disputed:—Held, to have made his election, and decreed to give up part of the settlement estate in satisfaction. *Roberts* v. *Kingsly*, 1 Ves. 238.

3. Articles before marriage to settle were so expressed, that the husband would have had an estate tail; a settlement copying the very words of the articles was reformed, estate for life only being intended. *Randall* v. *Willis*, 5 Ves. 275.

Inserting Hotchpot Clause.] 4. The Court of Chancery will not insert a hotchpot clause in executory marriage articles in the absence of any words therein indicating the intention of the parties to introduce such clause. *Lees* v. *Lees*, 5 Ir. R., Eq., 549.

III VARIANCE BETWEEN ARTICLES AND SETTLEMENTS.

5. Settlement, after marriage, purporting to be pursuant to articles before, but differing, not supported. But, *secus*, if both before marriage, except where the settlement purports to be pursuant to such articles. *Legg* v. *Goldwire*, Forrest 20.

6. Articles, and a settlement mentioned to be made in pursuance thereof, were both made before the marriage, but the settlement varied from the uses in the articles. Decreed to go according to the articles. *Honour* v. *Honour*, 2 Vern. 658; 1 P. W. 123.

7. The Court will not rectify a settlement which varies the interest of an adult from what it appears to be under the articles, to his disadvantage, unless where it was clearly intended that the settlement should pursue the articles. *Partyn* v. *Roberts*, Ambl. 315.

8. Articles previous to settlement cannot, in general, be read to construe the settlement, unless the bill is brought to rectify the settlement, or the settlement refers to them. *Pritchard* v. *Quinchant*, Ambl. 147.

9. Articles, on marriage, to settle land on husband and wife for life; remainder to heirs male of body of wife by husband; remainder to heirs male of husband by other wife; remainder to heirs female by wife. A settlement is made before marriage, and said to be in pursuance of articles whereby lands are limited to husband for life, without waste, and with power of making leases; remainder to first, etc., sons of marriage in tail male; remainder to first, etc., sons in tail by other marriage; remainders to heirs of body of husband. There are issue two daughters. Husband suffers recovery and devises premises to his sister: daughters may compel a re-conveyance to them. *West* v. *Erisey*, 1 Com. 412; 2 P. W. 349. S. C. on appeal 1 Bro. P. C. 225.

10. Plaintiffs file a bill to compel the execution of a settlement, which was prepared but never executed, by reason of the the parties. On the hearing it the settlement so prepared diffe from the articles on which it w the prejudice of the plaintiff will direct a settlement accordi cles, notwithstanding the pla pray relief so beneficial to them v. *Durant*, 1 Cox 58.

11. A., being seised of an esta remainder in tail to B. in sev tions of lands, entered into a v ment with B. to re-settle the A. should be made tenant for tion X. as of his former estate, in tail therein to B. The set prepared, supposed to embody and executed, the lands of X. w mistake limited to B. for life mainder to his heirs male in st The mistake being some time covered after the death of A., birth of any issue of B., on a bi have the mistake corrected:— Court could not bind the rights issue so as to divest them of a thereunder, or amend or corre self, but declare only the right according to their original inte tract. *Richards* v. *Fitzgerald* 486.

12. Where the articles and t settlement bear date on the this case, they must be conside the same act, and a differer ought not to be put upon the *Hunloke*, 2 Atk. 457.

13. Articles are considered equity as minutes only, which may explain more at large. *Marlborough*, 2 Atk. 545.

No difference between artic *in toto* or in part; for the gr goes upon is, what is covenant considered as done. *Ib.*

14. Trust money in marriage a of the Court, and construed ag for sake of the intent, by suppl "if wife should die without iss *Puget*, 2 Ves. 194.

15. Settlement set right accor *Langley* v. *Furlong*, Dick. 315 Dick. 513.

Settlement under articles fr viated set right; and what est fied by tenant for life not uphol specialty debt, and to be answ assets. *Ib.*

16. On the proposed marria daughter of one who was *non* petition was presented to the under the stat. 4 Geo. 4, c. 76, s sent, in order to obtain a licen was referred to the Master; a husband, by affidavit, stated agreed to make a certain s Master reported in favour of and the report was confirme did not avail themselves of th Lord Chancellor, but shortly ried, under the Act 6 & 7 Will. license. The settlement me affidavit was not made, the entered into articles for a

ment:—Held, that the proposal laid before the Master amounted to a contract, which, in the absence of any settlement properly substituted for it, the Court would enforce. *Semble*, it was not incompetent to the parties before the marriage to vary *bonâ fide* the terms of the contract, notwithstanding it had been approved by the Court. *Cook* v. *Fryer*, 1 Hare 498; 11 L. J., N. S., Ch., 284; 6 Jur. 479.

1. A post-nuptial settlement of money recited an ante-nuptial contract. By the settlement, those children who survived their parents alone took, but by the contract, as recited, all the children took vested interests at their birth. The recital being the only proof of the contract:—Held, that the Court must act on the settlement. *Mignan* v. *Parry*, 31 Beav. 211; 8 Jur., N. S., 364; 31 L. J., Ch., 819; 10 W. R. 812; 7 L. T., N. S., 88.

2. A marriage settlement recited that upon the treaty for the intended marriage it was agreed, in order to make a suitable provision for the intended wife and the issue of the marriage, that the estate should be settled in manner thereinafter mentioned. There were ante-nuptial articles, under which, according to their true construction, portions were to be raised for a daughter or daughters, under the general designation of younger children. The settlement did not expressly refer to those articles, but there was evidence to show that there was no other agreement between the contracting parties. By the settlement, the estates were limited strictly to the male issue of the marriage, subject to a term, the trusts of which were, "in case there should be issue of the intended marriage an eldest or only son, and also one or more other child or children," to raise a portion or portions for such child or children, of different amounts, according to their number, corresponding with the amounts and numbers of the younger children mentioned in the articles. There was issue of the marriage but one child, a daughter:—Held, that the trusts of the term should be reformed, so as to provide for her a portion of the amount stated in the articles for one younger child. *King* v. *King-Harman*, 7 Ir. R., Eq., 446.

3. By a marriage settlement executed in pursuance of articles made under the order of the court on the marriage of a lady, an infant and a ward of court, personalty of the wife was limited on death of the husband and in default of children, both which events happened, to the wife, as she should by will appoint, and in default to her next of kin. Upon her uncontradicted evidence that this was not in accordance with her intention:—Held, that she was entitled to have the settlement rectified by limiting the property, in the events which had happened, to herself, her executors and administrators, absolutely; and declaration to that effect was ordered to be indorsed on the settlement. *Smith* v. *Iliffe*, 20 L. R., Eq., 666; 23 W. R. 851; 44 L. J., Ch., 755; 33 L. T. 200.

4. An order was, in 1855, on the application of the father as next friend, made, directing a trustee to pay certain dividends to the father for the maintenance and education of an infant daughter, during her minority, or while unmarried. Previously to the marriage of the daughter, the draft of a proposed settlement, which contained a covenant by the intended husband to settle after-acquired property of the wife, but no provision as to the children by a future husband, was sent to the intended husband, and returned by him without any objection thereto. The marriage took place before the draft was ingrossed. A post-nuptial settlement, which contained no covenant to settle after-acquired property, and no provision for children of the wife by a future husband, was executed. Trustees subsequently paid funds of the wife, who was still a minor, into court. The husband and wife presented a petition for a transfer of the funds to them, and certain inquiries were directed. The chief clerk certified that the settlement ought to contain both provisions. The Court directed only that the after-acquired property of the wife should be made subject to the trusts of the settlement. *Re Hoare*, 9 Jur., N. S., 167.

5. A lady possessed of about 12,000*l.* consols, being engaged to be married, a draft settlement in the usual form was submitted to the intended husband, who objected to some of its provisions, and insisted that if there should be no children and he should survive his wife, the fund should belong to him. Articles embodying this provision were hastily signed before the marriage; and after the marriage, the fund having been transferred to the trustees, a draft settlement, in execution of the articles, was prepared, but objected to by the husband, and as ultimately executed, contained limitations to the husband and wife and the survivor for their lives, and as to the capital to the children of the marriage absolutely, not to such as should attain twenty-one or marry, and without any limitation over, in the event of the death of a son or of an unmarried daughter under twenty-one. There was also a provision that if there should be no child of the husband and wife, and the husband should survive the wife, the fund should belong to him; but the deed contained no alternative limitation in the events of their being no child, and of the wife surviving the husband. The husband brought no property into settlement. In the event, one child was born, but died an infant in the lifetime of both parents. The husband died; and his representative claiming the fund, subject to the widow's life interest—upon bill by the widow for rectification of the settlement, and for a declaration that she was entitled to the fund:—Held, that the transfer of the fund to the trustees was not a reduction into possession by the husband. *Cogan* v. *Duffield*, 20 L. R., Eq., 789; 45 L. J., Ch., 74. Affirmed 2 L. R., Ch. D., 44; 45 L. J., Ch., 307; 24 W. R. 905; 34 L. T., N. S., 593.

Held, also, that the settlement was not in accordance with the articles, and that it ought to be rectified; and that, in the events which had happened, she was entitled to the fund. *Ib.*

Held, also, that she was entitled to the arrears of income due at the death of the husband. *Ib.*

6. Where a settlement made before marriage purports to be in pursuance of the articles, but is not in conformity therewith, that is conclusive ground for correcting the settlement without further evidence, and though the articles

and the settlement were both before the marriage, and the settlement does not purport to be made in pursuance of the articles, yet if it be clearly established that it was intended to be made in pursuance of the articles, and is not in conformity therewith, the Court will rectify the mistake. *Bold* v. *Hutchinson*, 5 De G. M. & G. 558; 2 Jur., N. S., 97; 25 L. J., Ch., 598; 4 W. R. 3. Affirming 20 Beav. 250; 1 Jur., N. S., 365; 24 L. J., Ch., 285.

Upon a treaty of marriage, the father of the intended wife said to the plaintiff, the intended husband, "I pledge you my word that after the death of my wife and myself, my daughter will have 10,000*l.* at the very least." Heads of articles, which were subsequently drawn up under the sanction of and approved by the father, and intended as instructions for a settlement, contained the following passage: "A covenant is to be drawn up by which Sir W. H. (the father) guarantees that his daughter shall, at the decease of both parents, have a property of not less than 10,000*l.*" In the settlement which was afterwards executed, before the marriage, there was a recital to that effect, but there was no express covenant by the father to make good that sum. On a bill filed by the husband, who had survived his wife, against the executor of the father:—Held, that although the settlement, if it stood alone, could not have been rectified, yet that, having regard to the articles and representation made by the father, there was sufficient evidence of mistake to authorise the Court to make the settlement conformable to the articles, and that the estate of the father was bound to make up the portion of his daughter to the stipulated sum. *Ib.*

Held, also, that the representation of the father, though not afterwards fulfilled, yet being of intention merely and not of fact, did not amount to such a misrepresentation as would entitled the husband to relief in equity on the ground of fraud. *Ib.*

IV. EVIDENCE AND ONUS OF PROOF.

1. Parol evidence admitted to prove mistake by solicitor in settlement. *Rogers* v. *Earl*, Dick. 294.

2. A marriage settlement recited an agreement to convey a certain estate, save and except the lands of Ballyhenry, and its subdenominations, but the operative part of the deed purporting to convey by name, as a separate denomination, the lands of Killahan, which it was proved were reported a subdenomination of Ballyhenry:—Held, that there was not sufficient evidence of mistake to justify the Court in striking Killahan out of the settlement. *Alexander* v. *Crosbie*, Ll. & G. *temp.* Sugd. 145.

Semble, the Court will perform a settlement where the mistake is clearly established by parol evidence, even though there is nothing in writing to which the parol evidence may attach. *Id.* 150.

3. Parol evidence admitted to show mistake in settlement; also, of loss of letter, and then evidence of contents. *Noble* v. *Noble*, 2 Moll. 403.

4. Where a marriage settlement, made by the husband's father, was defective on the face of it, in omitting any limit life estate of the husband and the wife, whereby the reversion to X., the elder brother of th correction of the settlement w against a judgment creditor sought as soon as the omission v the evidence of the intended li sisting of a letter and memoran lady's father, and conversati settlor after the date of the s draft being lost, and the soli pared it being unable to ac omission. *Milner* v. *Milner*, 8 1

5. The Court will not reform on the ground of mistake, unles as to the mistake, and as to the of the parties, is perfectly clea tory. Whether the Court would a suit, on the ground of the matter constituting a new case, ject of the suit had been adj and disposed of by a foreign tr petent jurisdiction, when it d that the new matter might not available before the foreign trib to the course of proceeding *Breadalbane* (*Marquis*) v. *Char* 2 Myl. & C. 711; 7 L. J., N. S.,

6. The draft of an ante-nup conferring considerable benefi band in the property of the wi chiefly related, did not contain the husband as to an annuit given to the wife if she survive on the draft was endorsed a m the handwriting of the husba the solicitor who prepared t omitted to insert a clause, subj property he (the husband) mig of to a yearly rent-charge of 25 fit of his intended wife, during sive of such other advantage a entitled to by the foregoing death of the husband a bill party claiming under a mor estates, and of a date puisne to praying that the covenant mig in conformity with the mem widow, in answer, resisted the r denied that it ever was her u the marriage contract, that t the covenant was to be limited only as the husband might di The parol evidence of three settlement was to the same effe deposed that to him, both a marriage, the husband had sta that the estates which he the should thereafter acquire, shou the annuity of the 250*l.*:—He should be dismissed without c declaration should be inserted the annuity was well charged of which the husband was sei after marriage. *White* v. *An* R. 419.

7. In a marriage settlement, the wife was conveyed and a for the wife for life for he remainder to the husband for h to the children of the marriag of issue of the marriage to th wife and his children. Afte

the husband and wife filed their bill, charging that the brother, who was one of the trustees of the settlement, in concert with the solicitor's clerk, who took the instructions for and attended the execution of the settlement, had fraudulently omitted or erased from the deed a general power of appointment by the wife in default of issue of the marriage, and praying that the settlement might be rectified by inserting such a power. The wife did not prove the instructions for the insertion of such a power, nor the fraud in omitting or erasing it; but it appeared by the evidence that the power had been introduced in the draft settlement prepared by counsel, and also in the ingrossment; and the answer of the brother stated that the power having been noticed by him when the ingrossment was read over to him, he objected to it as not being according to his understanding of the intentions of the wife, when the solicitor's clerk admitted it was not, and struck it out: the Court held that it was the duty of the brother, as one of the trustees, not to have permitted the power to be struck out without the express directions of the intended wife on that point, and that relief might be given in the suit subject to the question, whether the wife knew, when she executed the settlement, that it did not contain that power. *Harbidge* v. *Wogan*, 5 Hare 258; 15 L. J., N. S., Ch., 281; 10 Jur. 703.

1. Parol evidence is admissible to make out a case for the rectification of a settlement, but the jurisdiction in such cases is to be cautiously exercised. *Barrow* v. *Barrow*, 18 Beav. 529. Varied on appeal, 24 L. J., Ch., 267.

The erroneous belief of both the husband and wife, on their marriage, that a particular property already stood settled, is no ground for rectifying a settlement so as to make it include it. *Ib.*

2. A post-nuptial settlement, after reciting ante-nuptial articles, and for the purpose of completing and making the same effectual, proceeded to declare the trusts of the premises, which were materially different from those contained in the articles themselves; in giving a life estate to the father, and providing that only the children who survived the father and mother, or died in their lifetime leaving issue, should take vested interests, while by the articles the children took vested interests upon birth. There was no evidence of the contents of the articles, except so far as appeared by the recital in the settlement, which did not purport to be verbatim. Upon a bill filed after the death of the father and mother:—Held, that the onus lay upon those who claimed under the articles to show that the provisions were contrary to those of the post-nuptial settlement, and that the evidence afforded by the recital itself being insufficient for that purpose, the provisions of the deed must be adopted. *Mignan* v. *Parry*, 8 Jur., N. S., 634; 31 L. J., Ch., 819; 10 W. R. 812; 7 L. T., N. S., 88; 31 Beav. 211.

3. No written instructions were given for the preparation of a marriage settlement, and it was afterwards sought to rectify an alleged error in it. Upon the evidence of the husband and the solicitor who had prepared it, as to the intention of the parties to it, and the trustees of the settlement not opposing, on a bill filed by the sole child (an infant) of the marriage, and his father, as next friend:—Held, that the rectification might be made. *Tomlinson* v. *Leigh*, 13 L. T., N. S., 516.

4. A court of equity will reform a settlement upon parol evidence alone, and after a long lapse of time, if on due deliberation it arrives at the conclusion that the actual contract made between the parties differs from that expressed in the instrument. *M'Cormack* v. *M'Cormack*, 1 L. R., Ir., 119.

By a post-nuptial settlement, executed in 1841, a fund to which the wife became entitled after the marriage, and payable prior to the date of the settlement, was assigned to a sole trustee in trust for the husband and wife for life, and, after their decease, in trust for the children of the marriage; the principal of the fund was, however, paid over to the husband by the trustee, under the impression that it was not included in the settlement. In a suit by the husband and wife and the trustee, the Court refused to reform the deed by excluding the fund from its operation, on their uncorroborated parol evidence, there being nothing repugnant, inconsistent, or improbable on the face of the settlement itself, leading the Court to believe that the words which it was sought to expunge had been erroneously introduced into the instrument. S. C. 11 Ir. R., Eq., 130.

5. By a marriage settlement the property of the intended wife was settled upon the wife for life for her separate use without power of anticipation, and after death as she should, notwithstanding coverture, by will or codicil appoint, and in default of appointment for her next of kin. After the death of the husband, and upon the unsupported testimony of the wife that it was only intended to protect the trust property during her coverture, and not to deprive her of the control of it after the termination of the coverture:—Held, that the settlement ought to be rectified so that the property should be held in trust for the wife, her executors, administrators, and assigns absolutely. *Cook* v. *Fearn*, 27 W. R. 212; 39 L. T., N. S., 348; 48 L. J., Ch., 63.

6. A pre-nuptial agreement to settle property on a wife will be enforced even though the letters which constituted such agreement have been lost, if the loss can be proved to have occurred through an unforeseen and an inevitable accident, and if the existence and substance of the letters can be clearly established by the evidence. *Gilchrist* v. *Herbert*, 20 W. R. 348; 26 L. T., N. S., 381.

7. By a marriage settlement executed in pursuance of articles made under the order of the Court on the marriage of a lady, an infant and a ward of court, personalty of the wife was limited on death of the husband and in default of children, both which events happened, to the wife, as she should by will appoint, and in default to her next of kin. Upon her uncontradicted evidence that this was not in accordance with her intention:—Held, that she was entitled to have the settlement rectified by limiting the property, in the events which had happened, to herself, her executors and administrators, absolutely; and declaration to that effect was ordered to be endorsed on the settlement. *Smith* v. *Iliffe*, 20 L. R., Eq., 666; 23 W. R. 851; 44 L. J., Ch., 755; 33 L. T. 200.

8. The Court will order rectification of a

deed on the ground of mistake upon the evidence of the plaintiff alone, where no further evidence can be obtained. *Hanley* v. *Pearson*, 13 L. R., Ch. D., 545; 41 L. T. 673.

By a post-nuptial settlement real estate belonging to the wife was conveyed unto A. and his heirs "to the use of" A., his executors and administrators, during the life of the wife, "upon trust" to pay the rents and profits to her for her separate use; and from and after her decease, in case of the death of her husband in her lifetime, "to the use of the heirs and assigns of the wife for ever: but in case of the wife predeceasing the husband, then to the use of the husband, his heirs and assigns for ever. The wife having survived her husband, she brought an action against A.'s legal personal representative to have the settlement rectified on the ground that by a technical mistake in the form of the settlement her equitable life estate and the legal estate in remainder did not coalesce within the rule in *Shelley's case*, so as to give her, as was intended in the events that had happened, an absolute estate in fee: —Held, that a conveyance of the outstanding legal estate was unnecessary. *Ib.*

Form of order for rectification. *Ib.*

Smith v. *Iliffe* (20 L. R., Eq., 666) discussed. *Ib.*

The plaintiff's case was supported by an affidavit by herself alone:—Held, that the uncontradicted affidavit was sufficient, and ordered that the settlement be rectified so as to vest the legal estate in fee simple to the plaintiff. *Ib.*

1. There is no absolute rule that in no case can a decree for the rectification of a settlement be made upon the uncorroborated evidence of an interested party; but it is the duty of the Court to act upon such evidence with extreme caution. *Lovesy* v. *Smith*, 15 L. R., Ch. D., 655; 49 L. J., Ch., 809; 43 L. T. 240; 28 W. R. 979.

An intended husband told his intended wife that he wished every farthing of her property to be settled on her. She then expressed herself willing that he should have a life interest if he survived her, upon which he said he would have counsel employed. Nothing, however, was done until the evening before the marriage, when the intended husband, who was a retired solicitor, began to prepare the settlement of all the lady's property and a small portion of his own, and brought it to her at five o'clock on the morning of the wedding. From her evidence it appeared that he did not explain the settlement to her, nor was any other solicitor employed in her behalf. There were several mistakes in the deed, and it was evident that it had been hastily prepared. The husband having died, the wife for the first time discovered that the settlement gave a moiety of her property after her death to her husband absolutely. The wife then commenced an action against the trustees of the settlement and one of the several next of kin of the husband for the rectification of the settlement by omitting the words giving the moiety to the husband:—Held, that the Court had power to decide the question between the parties then before the Court. *Ib.*

Held, also, that it made no difference in the wife's right to the rectification of the settlement of her own property that she claimed the benefit of the settlement with husband's property; that und stances the burden of proof that was good rested on those who and that upon the evidence of it being supported by the prob case, the rectification asked for r The order was suspended for order that the next of kin o other than the one who was part might have an opportunity of judgment. *Ib.*

XIV. Charges

— *Powers of Charging.* See P
— *Under Drainage Act.* See
See also FEE SIMPLE, II.—FEE VII.—JOINTURE—LIFE. V.—MERGER, II.—PORTIO

2. A charge was made raisa his issue should come into "j jointress who had an estate fo to a trustee, in order to enab tenant in tail in remainder, to su which he did, having such an int him to suffer a recovery:—Hel into possession within the tern and to make the charge rai *Broughton*, 3 Bro. C. C. 180.

3. Estates being settled sub for twenty-one years, and ce being payable thereout, the p the possession, subject to the estates being cleared of all the annuities, would be entitle ficial enjoyment during the term, keeping down the annu term would be available for th enforce payment. *Ferrand* v. 368; 15 L. J., N. S., Ch., 41; 9

4. By a marriage settlement were conveyed to the use of th settlor) for life; the remaind for life; remainder to the chil the survivor should appoint; a appointment, to the heirs of t wife by the husband; and in issue the lands to stand charg of 2,000*l.* to the wife's father assigns. In 1798 the husband deed reciting the first deed, th issue of the marriage, and tha to bar all the estates and p former settlement, and to set new uses thereby declared, cov a fine for that purpose, to en as they should appoint; and in appointment, to the use of t life; remainder to trustees for remainder to the wife for lif decease of both, to the use o assigns of the husband; and upon trust to raise 2,000*l.*, an to the wife, or as she should case of her death without appo next of kin. The fine did no charge. On a bill by the repre wife's father, who was also one kin of the wife (after the death and wife without issue or a procure both sums of 2 000*l.* t

of the settled lands:—Held, that notwithstanding the recital in the deed of 1798, of the intentions of the parties, the first charge of 2,000*l.* should be extinguished, and although such charge still remained, yet the trusts of the term for raising the second charge of 2,000*l.* were not therefore inoperative, but the same must still be carried into execution; and that both sums of 2,000*l.* must therefore be raised. *Farr* v. *Sheriffe*, 4 Hare 512; 15 L. J., N. S., Ch., 89; 10 Jur. 630.

1. By a marriage settlement, reciting that the intended husband had agreed to secure to his intended wife, in the manner thereinafter mentioned, an annuity, by way of pin-money, during his life, and another annuity, by way of jointure, if she should survive him, certain real estates were demised to trustees for a term upon trusts thereinafter mentioned. The settlor then covenanted to pay the annuities; and the indenture then declared the trusts of the term to be for the settlor, until default should be made in payment of the annuities; and then upon trust to secure the same:—Held, that, as between the real and personal representatives of the settlor, if there was no debt due at the time of the execution of the settlement, and no augmentation of the personal estate of the settlor, the real estate of the settlor was primarily liable for the payment of the annuities, unless some intention to the contrary appeared upon the face of the deed; and that the form of the deed in this case did not show any such intention. *Lonsemore* v. *Knapman*, 2 Eq. Rep. 710; 1 Key 123.

2. Part of certain estates was limited for a term of one hundred and fifty years, to secure a jointure of 400*l.* to S. E. By a deed of the same date, H. E. and G. E., in pursuance of a power in the settlement, after reciting that charge, demised the same part to P. for ninety-nine years from the death of the survivor, "in trust that the said S. E. and her assigns should, during her life, have, divide, and take the yearly surplus value and produce of the premises so charged, and the surplus issues and profits thereof over and beside the said annuity":—Held, that S. E. was entitled to the whole estate so demised, free from contribution even to charges upon the settled lands prior to the settlement. *Evans* v. *Evans*, 1 W. R. 215; 21 L. T. 14.

3. Bill by an owner of an estate, subject to a charge, against the persons claiming to be interested in the charge, supported. *Vyvyan* v. *Vyvyan*, 7 Jur., N. S., 891 Affirmed 8 Jur., N. S., 3; 31 L. J., Ch., 158; 10 W. R. 179; 4 De G. F. & J. 183.

4. A., seised of remainder in fee, expectant on estate tail in N., limited same to himself for life, remainder to trustees for ninety-nine years, in trust (amongst other things) to raise and pay such sums of money, and to such persons as A. should by deed or will appoint; and he reserved to himself general power of revocation of all uses thereby limited. A. afterwards by deed appointed that when said estate tail should be spent, and term came into possession, trustees should raise 2,000*l.* for W.; and covenanted that if estate tail should be spent in his own lifetime, then he would pay 2,000*l.* unto W.; but if not till after his death, and he should revoke said term of ninety-nine years, then that his heirs, executors, etc., should, within a year after estate tail should be spent, pay 2,000*l.* to W., with proviso that if N. should suffer recovery of premises, and bar remainder in fee, 2,000*l.* should not be payable. A. afterwards, by will, revoked all uses of first settlement, "to all intents and purposes whatsoever, as if same had never been limited;" and thereby devised all said premises, "subject nevertheless to payment of said sum of 2,000*l.* to W.," in manner therein mentioned. A. died, and afterwards N. died; 2,000*l.* remained in charge on devised premises after death of N., notwithstanding revocation of term; and personal estate of A. was not applicable to it. *Wilson* v. *Darlington* (*Earl*), 1 Cox 172; 2 P. W. 664. n.

5. A. lent B. and C. 200*l.* and took their bond for 800*l.*, payable on the marriage of either, or on the death of either's father. B.'s father died, and C. married, but his portion was vested in trustees; equity would not subject this portion to the payment of C.'s bond. *Rich* v. *Sydenham*, 3 Ch. Rep. 75.

6. A testator under covenant, on his daughter attaining twenty-one, or on marriage, to pay to trustees 10,000*l.* for her benefit, with a declaration, that in case she died, leaving no child who should attain twenty-one, or if a daughter should marry, it should form part of his personal estate; during his daughter's minority, in order to liberate his estate, borrowed 10,000*l.*, which was paid by the trustees, who released the covenant, and lent a portion of the fund to the testator, on security of his real estate. The daughter having died under age and unmarried:—Held, that the 10,000*l.* having been actually raised, passed under the testator's will, as his personal estate. *Tucker* v. *Loveridge*, 1 Giff. 377. Affirmed 2 De G. & J. 650; 6 W. R. 786; 4 Jur., N. S., 939; 27 L. J., Ch., 731.

7. A testator devised his estate upon trust during lives out of the rents to pay his debts, to keep up the mansion-house, to pay an annuity to his daughters, and subject thereto to pay the rents to his wife and daughters. There were mortgages which exhausted the rents:—Held, that one of the daughters and wife might have part of the estates sold to pay off the mortgage. *Cooke* v. *Cholmondeley*, 4 Drew. 244.

8. The debts of A. were charged on his real estates, which were limited to his widow for life, remainder to B. for life, remainder to his first and other sons in tail male, remainder to C. for life, remainder to his first and other sons in tail male, remainder to the right heirs of A., whose heir B. was. A bill was filed by the creditors of A. against his widow, and against B. and C., they having neither of them issue at that time, praying to have their debts raised by sale or mortgage; and by a decree a sufficient sum was directed to be raised by mortgage to pay the debts, and to pay 1,500*l.* to the widow, which she had agreed to take in lieu of her life estate. After the deaths of the widow of B. without issue, and of C.:—Held, that the eldest son of C. was not bound by the decree, but was let in to redeem on payment only of what was raised to pay the debts without paying the sum raised for the widow. *Blount* v. *Winterton* (*Earl*), Romilly's Notes of Cases, 169.

1. A voluntary settlement of freeholds contained a covenant for quiet enjoyment. The settlor afterwards included the settled property in a mortgage, together with other property:—Held, that the parties claiming under the settlement were entitled: 1st, to throw the mortgage primarily on the unsettled property; and 2nd, to prove on the covenant against the settlor's estate. *Hales* v. *Cox*, 1 N. R. 344; 8 L. T., N. S., 134; 32 Beav. 118.

The settlor, previously to a mortgage, had re-purchased the share taken by one of the sons under the settlement, and after the mortgage he voluntarily re-settled it:—Held, that the parties claiming under the re-settlement were entitled to throw the mortgage primarily on the unsettled property, but not to prove under the original covenant. *Ib.*

2. Where by the settlement the wife's fortune was settled in trustees, subject to a life interest in the husband and wife, as to one moiety to the eldest son, and the other amongst the younger children; and a plantation estate of the husband was conveyed to trustees for a term of 500 years, to raise a sum for the husband, if he should so appoint, and subject thereto, for a term of 1,000 years, to raise a sum for the eldest son, then a sum for younger children, and again a sum for the eldest, with proviso for raising their portions according to priority, as stated in the settlement; the husband exercising his right, the trustees borrowed the amount of the trustees of the wife's fortune, executing a mortgage of the husband's estate in the first term: on the death of the husband and wife, leaving five children, the husband, after devising other property, and directing payment of debts, appointed his eldest son his executor and residuary legatee, who entered into possession of the father's settled estate, paid the interest of the younger children's fortunes until he became lunatic, and shortly after died intestate and unmarried; no settlement was ever entered into, nor any other evidence of his intention to extinguish the charges to which he was under the settlement entitled:—Held, that, as being most for his benefit, the charges were to be deemed not extinguished, and that he was not bound to apply the rents and profits in reduction thereof, but that a sum received as compensation for slaves, as between the several charges, ought to be so applied, and that his personal representative was bound to account for interest on that sum during the life of the intestate. *Clarendon* (*Earl*) v. *Barham*, 1 Y. & Coll. C. C. 688; 12 L. J., N. S., Ch., 215; 6 Jur. 963.

3. Covenant in a marriage settlement to exonerate the estate from certain charges not created by the settlor:—Held, to entitle the settlor's heir, on whom the reversion in fee descended, to have the estate exonerated out of the settlor's personal estate. *Barham* v. *Clarendon* (*Earl*), 1 W. R. 96; 10 Hare 126; 17 Jur. 336.

4. K. being seised in fee of L. and other lands, subject to a judgment not recovered against himself, conveyed away L. by a voluntary deed, in which he covenanted to do any act required for further, better, and more effectually granting and releasing the lands to the grantee and his heirs, and he devised the other estates. The judgment was paid off by a sale of a portion of the d —Held, that the devisees ha contribution against the owne *Ker*, 3 Ir. R., Eq., 489.

5. By a marriage settlement settled by the intended wife t she should, notwithstanding cov She appointed them to herself band; they were then sold, ar invested in consols in the name The fund was afterwards app money arising from the wife's in paying off a charge of 5,0 estates also comprised in t Nothing was said or done a payment off as to keeping al Fifteen years afterwards, at h the husband set up a claim aga for the 5,000*l.*:—Held, that th a trustee for the wife as to which the 5,000*l.* was paid o payment off was in exoneration estates. *Smith* v. *Harding*, 6 H

6. T., the owner in fee of redemption of lands which we mortgage of 4,000*l.*, of which 2 paid off partly by T. and p persons, but which was kept benefit of the parties paying of T. having become possessed of the whole of such 2,000*l.* which off by articles for a settle previously to marriage, covena the land, and also to assign th charge of 2,000*l.* then paid o of money which he should at after be entitled to receive, wh or interest, from any person or soever as mortgagee or mortgag or assignment from the then m of the lands in question to certain trusts. T., having pa maining 2,000*l.* and the mort securities having been assigne for him, afterwards became in that as between the assignees i and the trustees of the settle were entitled to the benefit of paid off. *Cochrane* v. *St. Clai* 302.

7. A testator directed that of 10,000*l.*, to which he was be applied in paying off a ch estate, if established; and t should be so applied, then a ch to which his D. estate was lia be raised thereout, but out o After his death, the charge o having been established, the was applied in paying it off. his other personal estate ha sufficient for payment of his was made for refunding the 10 B. estate; but it was disput whole of it was wanted for pay —Held, that the disposition D. estate was upon a condition apportionable; and that, unle got the full benefit of the 10,0 of the D. estate had no title part of the 13,000*l.* on the B. e v. *Cresswell*, 6 L. R., Ch., 278; 564.

8. A charge created by C. S.

to secure the payment of a sum of money borrowed for S. H. S. is a good consideration, not only for a collateral charge upon the estates of S. H. S., to indemnify C. S. and his estate from payment of the money borrowed, but also for the settlement of the S. estates upon his family. A. H., being a trustee for the younger children of S. H., S., advanced a sum of 5,185*l.* 3*s.* 4*d.* upon the security of certain estates in Berkshire, which C. S., on the 20th January 1832, demised to A. H. for 300 years to secure the repayment. The money was borrowed for S. H. S., who was tenant in tail of the S. estates in remainder expectant on the death of his mother, the tenant for life; and on the 21st January 1832 S. H. S. demised the S. estates to C. S. for 2,000 years, to indemnify him and the Berkshire estates from the 5,185*l.* 3*s.* 4*d.* and interest secured to A. H.; and by deeds dated the 23rd and 24th January 1832, in further compliance with an agreement recited in this deed, he settled the S. estates upon various uses for the benefit of his family. On the death of the tenant for life, S. H. S., being greatly indebted to G. S. F., executed a disentailing deed, and conveyed the S. estates to G. S. F., giving him a power of sale over the estates as a security for the money due; this was subsequently confirmed by another deed; and in a suit instituted by G. S. F. insisting that the settlement of the 23rd and 24th January 1832 was voluntary and void against the subsequent alienation for value made to G. S. F., who had notice of the settlement:—Held, that the agreement made by S. H. S. with C. S., to indemnify him against the 5,185*l.* 3*s.* 4*d.* and to settle the S. estates, was such as this Court would specifically perform, and that it was a consideration sufficient to support the settlement; that the recital in the deed of 24th January 1832 of the agreement between S. H. S. and C. S. was sufficient evidence of the contract, and that it was doubtful if evidence to disprove it could have been entertained; that S. H. S. and C. S. were, by executing the deed, estopped from alleging that the recital was false; that the plaintiff, G. S. F., was in the same position as S. H. S.; that the deeds of the 23rd and 24th January 1832 were valid, and not voluntary and void against a subsequent purchaser for value. *Ford* v. *Stuart*, 21 L. J., N. S., Ch., 514; 15 Beav. 493.

1. By a marriage settlement stock was settled, subject to the husband's and wife's life interests therein, upon trusts for the children and issue of the marriage (except an eldest son entitled to certain settled estates), as the husband and wife, or the survivor of them, should appoint, and in default of appointment, for the children (except as aforesaid) in equal shares, the shares of sons to be vested at twenty-one, of daughters at twenty-one or on marriage; and it was provided that if the husband should die in his wife's lifetime, leaving an only child a son, such son should be entitled to the whole trust fund; but if the wife should survive the husband, and there should be only two children, or only one child (except as aforesaid) who should attain twenty-one or marry, such two only children or one only child (except as aforesaid) should not be entitled to any part of the trust fund, but it should go to the husband absolutely, as in that event such two children or one child (except as aforesaid) were otherwise provided for by a deed of even date creating a charge upon the settled real estates. There were two children of the marriage, a son who died an infant, and a daughter who married, and became, on her brother's death, entitled to the settled estates. The wife survived the husband. The deed, purporting to create a charge upon the settled estates, turned out to be invalid:—Held, upon the construction of the settlement, and without resting the decision upon the invalidity of the charge, that the daughter took an absolutely vested interest in the trust fund, and that it did not go to the husband's representative. *Carter* v. *Ducie*, 41 L. J., Ch., 153; 25 L. T. 656; 20 W. R. 228.

Semble, that if it had been otherwise, the invalidity of the charges would have been sufficient to displace the claim of the husband's representative. *Ib.*

2. A., being entitled in fee to real estates, subject to a trust to raise 6,000*l.* for B., and in the event of her death without children, for A., on his marriage, conveyed the estate to the trustees of his marriage settlement, subject to the trusts to raise the 6,000*l.* on the trusts (in the will creating it) mentioned, and died, living B. On B.'s death without children, A.'s representative filed a bill to establish the charge. The Court held that the charge was subsisting, and directed the principal, interest, and costs to be raised by a sale or mortgage of the real estate. *Johnson* v. *Webster*, 2 Sm. & G. 136; 18 Jur. 619; 23 L. J., Ch., 480. And see 4 De G. M. & G. 474; 1 Jur., N. S., 145; 24 L. J., Ch., 300.

3. On the apportionment of charges between real and personal estate, the respective values of such real and personal estate are to be taken as they are when the apportionment is made, and not on such values at any anterior time. *Robinson* v. *London Hospital* (*Governors*), 10 Hare 29; 22 L. J., Ch., 754.

XV. Fraud on Marital Rights.

— *Other Fraudulent or Collusive Agreements respecting Marriage.* See MARRIAGE.

4. It seems agreed that if a woman, on the point of marriage, charge or convey her property to a mere stranger, for whom she was not even under a moral obligation to provide, such a conveyance will be considered as a fraud on the marital rights. *Lance* v. *Norman*, 2 Ch. Rep. 79; *Howard* v. *Hooker*, *id.* 81.

A widow, before her second marriage, made a settlement without the privity of her intended husband. Set aside as fraudulent, he having married her in confidence of having her estate. *Ib.*

5. A widow, before her marriage with her second husband, assigns over the greatest part of her estate to trustees, in trust for children by a former husband. Though this was without the consent of the second husband, yet it being to provide for her children by former husband, it is good. And husband suppressing the deed, decreed to pay 800*l.*, being the sum proved to be mentioned in the

deed as the value of the estate. *Hunt* v. *Matthews*, 1 Vern. 408.

1. Settlement made by a woman before her marriage, for her separate use, without the husband's privity, will not bind the husband. *Carleton* v. *Dorset* (*Earl*), 2 Vern. 17.

2. A widow, before her second marriage, without the privity of her intended husband, assigned a term in trust for herself and child:—Held, good; but a power reserved to dispose of the remainder of the term after the decease of herself and child, held void; for not being disposed of before marriage, it vested in the husband. *Blithe's case*, 2 Freem. 91.

3. A widow made provision for her children without the privity of her intended husband, who complained of fraud on the marriage treaty, but did not pretend he could make a settlement. His bill, therefore, to avoid the provision for his wife's former children, was dismissed. *King* v. *Cotton*, Mos. 261; 2 P. W. 357. 674. n.

4. Bond by a woman about to marry without her intended husband's knowledge, but for valuable consideration in respect of an antecedent debt:—Held, the husband could not be relieved against it. Concealment, however, of such security and debts not to be encouraged. *Blanchet* v. *Foster*, 2 Ves. 264.

5. A woman pending a treaty of marriage with A., settled all her property to her separate use with his approbation. A few days afterwards B., by a stratagem, induced her to marry him the day after she first thought of it. B. had no notice of the settlement. Settlement established, and deed of revocation obtained by duress set aside. *Strathmore* (*Countess*) v. *Bowes*, 1 Ves. J. 22. See 2 Bro. C. C. 354; 2 Cox 28. Affirmed 6 Bro. P. C. 427.

Conveyance by a woman under any circumstances, and even the moment before marriage, good *primâ facie*; bad only if fraud as where made pending the treaty without notice. *Id.* 28.

6. If a woman conveys her property before marriage without the privity of the intended husband, it is fraudulent, and will be set aside. *Ball* v. *Montgomery*, 2 Ves. J. 193; 4 Bro. C. C. 339.

7. Marriage settlement of personal property in general terms; "all money, debts, bills, bonds, notes, etc.":—Held, there is not inference of fraud from cancelling a note, the only instrument of that description, during the treaty, on a fair moral consideration, the marriage not taking place on representation of particulars, or on account of such personal property. *De Manneville* v. *Crompton*, 1 Ves. & B. 354.

8. A woman a few days before her marriage, and without the knowledge of her intended husband, transferred a sum of stock to trustees upon a parol trust, as alleged by the trustees, for her separate use for life, and, after her death, for the benefit of her children. The fact of this transfer became known to the husband some time after the marriage. The dividends were received by the wife from the date of the marriage until her death, which took place seventeen years after. After her death the husband filed a bill, praying a transfer of the stock, and containing a statement that the dividends were duly p during the coveture:—Held, u stances, that the husband was asserting his claim to the stock transferred in fraud of his *Loader* v. *Clarke*, 2 Macn. & G

9. A lady, being about to ma known to her intended husban hands of a third party, to hold The marriage was solemnised, coverture, the dividends were mulate. On the death of he widow instituted a suit, and ob against the legal personal re the trustee, for the transfer her of the fund and accumul Parties interested in the dece estate thereupon filed a bill ag and the legal personal represe trustee, claiming to have the b cree, and a transfer and payme and dividends to them, on the so placing the money in the ha was a fraud on the husband's To that bill the widow filed want of equity, and the Court murrer. *Grazebrook* v. *Percival*

10. On the 16th May 1846 an improvident settlement of of her property, and marrie October following. The hus filed a bill praying that the de aside as a fraud on the marital that the Court would have gi withstanding the wife was a co engagement to marry precedi tion, and a subsequent marriage to the husband, were proved; offered the plaintiff an issue *Griggs* v. *Staplee*, 2 De G. & Sm 29.

11. Where a husband, before had sufficiently early notice t tended to settle the bulk of the property, and nothing passed t lief on the husband's part that, the marriage, no such settlen made:—Held, that the husba titled to set aside a settlem appeared had been made before although he was no party to i proved to have been actually co settlement having been made *Swainson*, *Wrigley* v. *Wrigley*, 3 458; 18 L. J., N. S., Ch., 396; 13

12. *Quære*, whether, notwithst of *Davies* v. *Thornycroft* (6 Sim N. S., Ch., 140), a trust for the a single woman is valid against husband. *Maber* v. *Hobbs*, 2 Y L. J., N. S., Exch. Eq., 12.

13. A woman ten months befor but after the commencement of acquaintance with her future h ended in marriage, made a se sum of money which he did no be possessed of. The marriage concealing from him both her money, and the existence of th ten years afterwards she died, death he filed a bill to have the him:—Held, that the settlemen being a fraud on his marital rig v. *Snow*, 1 Russ. 485.

1. A lady pending a treaty of marriage, which afterwards took effect, made a voluntary assignment of part of her property to her sister:—Held, that the husband, who was, under the circumstances, presumed to have had notice of the assignment before his marriage, was not entitled to set it aside on the ground of fraud upon his marital right. Relief against a disposition of property by the intended wife, pending a treaty of marriage, can only be given when the husband has been kept in ignorance of the transaction; and, *semble*, that, in applying the principle upon which conveyances made by the intended wife, pending a treaty of marriage, are avoided on the ground of fraud upon the marital right, the Court will take into consideration the meritorious object of such conveyances, and the situation of the intended husband in point of pecuniary means. *St. George* v. *Wake*, 1 Myl. & K. 610; Coop. *temp.* Brough. 129.

2. As a conveyance made by the woman before marriage is *primâ facie* good, it is to be impeached only by the proof of fraud. In August a widow having a second marriage in contemplation, settled her property on herself for life for her separate use, with remainder to the children of her first marriage; and in October following she married. The settlement was prepared by her direction, without the privity or assent of "her then intended husband." In a suit to carry the settlement into execution, the second husband insisted on its being a fraud on his marital rights; but it was not proved that in August he was "the then intended husband":—Held, that the evidence was insufficient to impeach the deed. *England* v. *Downs*, 2 Beav. 522; 9 L. J., N. S., Ch., 313; 4 Jur. 526.

3. *Quære*, to what extent the equity of a husband to set aside a settlement of the property of his wife, executed by her without his knowledge during the treaty of marriage, is taken away by the absence of any other settlement in favour of the wife or the poverty of the husband, or the reasonable nature or meritorious object of the impeached settlement, or the ignorance of the husband of the existence of the settled property. It is not necessary, in order to establish his title to this equity, that the husband should prove actual fraud or deception (for deception will be inferred), if after the commencement of the treaty of marriage the wife should have attempted to dispose of her property without the knowledge or concurrence of her intended husband. *Taylor* v. *Pugh*, 1 Hare 608; 12 L. J., N. S., Ch., 73; 6 Jur. 890.

A settlement made by a woman without the knowledge of her intended husband pending a treaty for a marriage, held good on the ground that the husband, by his cohabitation with her previously to the marriage, had rendered retirement from the marriage on her part impossible. *Ib.*

4. Bill by husband against the solicitor of his wife as sole defendant, alleging that the plaintiff and his wife were living separate; that the defendant had been before her marriage, and up to the present time, the wife's solicitor; that he had in that character prepared a deed, by which the wife fraudulently conveyed a sum of 300*l.* to trustees for her own benefit, in fraud of the plaintiff's marital right; and praying that the plaintiff might be declared entitled to the 300*l.*, and for discovery, and that the defendant might pay the costs. Demurrer for want of equity allowed. *Kelly* v. *Rogers*, 1 Jur., N. S., 514.

Whether such a bill will lie against the solicitor alone, *quære*. *Ib.*

5. A contract for a marriage settlement having been entered into in 1831, under which, in the judgment of the Court, the plaintiff was entitled to an annuity upon certain lives, and the contract having been varied the day before the marriage, by which an annuity on other lives was substituted, the professional adviser of the grantor, the father of the intended wife, being present, and the professional adviser of the grantee, the intended husband, being absent:—Held, on a bill filed by the grantee, in 1845, that he was a creditor on the estate of the grantor for an annuity not according to the varied contract, and that the varied contract did not bind him. *Caton* v. *Rideout*, 10 Jur. 890.

6. A. B., trustee of a fund to which C. D. was entitled in reversion, makes advances to the father of C. D. for the purposes of her education as a singer. The day before her marriage, without the knowledge of her intended husband, C. D. assigns her interest to A. B. for a consideration expressed to have been paid (the amount of the advances to the father):—Held, that the deed could not be sustained. *Lewellin* v. *Cobbold*, 1 W. R. 211.

The trustee of a fund, to which a young lady was entitled in remainder after the death of her mother, at the request of a needy father, advanced sums of money amounting to 460*l.*, to enable the father to educate her. Shortly after she came of age, being engaged to be married, she, by deed prepared by the father's solicitor, reciting a contract for sale at the price of 250*l.*, for which a receipt was indorsed, assigned the fund absolutely to the trustee, and married on the following day. The trustee was present at the wedding, but the husband was informed neither of the existence of the fund nor of the deed. On a bill by husband and wife:—Held, that the deed, falsely representing the transaction to be an actual sale, must be set aside. S. C. 1 Sm. & G. 376; 17 Jur. 448.

Held, also, that the falsehood of the recitals in the deed alone would have been sufficient to prevent the Court from supporting it as a security, to the amount of the consideration expressed, for a larger sum due from the lady's father to the trustee for money advanced for her education. S. C. 17 Jur. 448.

7. A settlement, made by a woman pending an engagement and seven weeks before her marriage, without the knowledge of her intended husband, and in favour of persons for whom she was under no legal or moral tie to provide, was set aside as a fraud on the husband's marital right. *Donnes* v. *Jennings*, 32 Beav. 290.

A lady and gentleman were engaged to be married. Pending the engagement a separation took place, at the instance of the lady's friends, but the engagement was not broken off. They afterwards married. The husband subsequently discovered that the wife had, about six weeks previously to the marriage, executed a settlement of her property, under

which he took no benefit. Upon a bill by the husband, the settlement was set aside as a fraud upon his marital rights. S. C. *nom. Downes* v. *Jennings*, 9 Jur., N. S., 1264; 32 L. J., Ch., 643; 11 W. R. 522; 8 L. T., N. S., 341.

The delay of the husband to file a bill for two years and a half after his knowledge of the settlement, was not sufficient to disentitle him to relief, it not being shown that any prejudice had been created to the parties by the delay. *Ib.*

1. A settlement made by a woman of her personal property after her engagement to be married, set aside at the suit of the husband, although he was told before the marriage that she had executed a settlement affecting her property. *Prideaux* v. *Lonsdale*, 4 Giff. 159.

Neither she herself nor her husband was accurately informed of the nature and effect of the trusts of the settlement:—Held, that the doctrine of constructive notice of the contents of an instrument was not sufficient to bind the husband on the ground of acquiescence. *Ib.*

A wife was, before her marriage, entitled to a legacy of stock. About two months before the marriage, and during the engagement which preceded it, she executed a voluntary settlement to which the intended husband was no party, and of which he had no information at the time, whereby the stock was transferred to trustees, to pay to her the dividends during her life, and after her death to hold the fund according to her appointment; and in default of her appointment, for her next of kin according to the Statute of Distributions. This instrument was prepared by the trustee of the will, and the stock was transferred by him into the names of the trustees of the settlement. No solicitor was employed. She died, leaving her husband surviving, who filed a bill to have the settlement set aside as a fraud upon his marital right; and Stuart, V.-Ch., made a decree accordingly (9 Jur., N. S., 488; 32 L. J., Ch., 317; 11 W. R. 531; 8 L. T., N. S., 109; 1 N. R. 565):—Held, on appeal, that, looking to the circumstances under which the settlement was executed, so short a time before the marriage, yet without the intended husband's knowledge, and without proper legal advice, the settlement could not be supported. S. C. 9 Jur., N. S., 507; 11 W. R. 705; 8 L. T., N. S., 554; 2 N. R. 144; 1 De G. J. & Sm. 433.

2. A voluntary conveyance to a mother by a daughter six months after she had attained twenty-one, and seven days before the daughter's marriage, but unknown to the husband, was set aside, both on the ground of the maternal influence, and of the fraud on the husband's marital rights. *Chambers* v. *Crabbe*, 34 Beav. 457.

C. had, under her marriage settlement, a power of appointing property among her children, by deed or will; and a further power, if she survived her then husband and married again, of appointing one-half the property as she might think proper. C.'s then husband died, and she married again. She had three children by her former husband. One of those children, B., attained her majority, and soon afterwards received an offer of marriage from A., which offer was accepted. After the proposal for marriage, and about seven days before it took place, B. assigned all her interest under her mot settlement to her mother, wh leave her by will one-third of property. The effect of that well known to B.; but the circu preceded it, and which accom ecution of it, were not made k after the marriage was comple a bill by A. and his wife, for a administration of the trusts o settlement of C., and delivery u tion of the assignment by entitled to the relief he prayed N. S., 277; 12 L. T., N. S., 46.

3. Under the will of her fathe was interested for life in the p A fortnight before her marriage a mortgage of her interest to s ment to her mother, Mrs. Brod of money. Mrs. M'Wade, wit was residing with her mother bill by the husband (a pauper) (he being their next friend) s the mortgage (of which he all nothing before marriage) set as account should be taken of wh was due to Mrs. Brodhurst:— bill must be dismissed so far the mortgage, there being no ev *M'Wade* v. *Brodhurst*, 34 L. Affirming 24 W. R. 232.

Settlement by Husband.] 4. a conveyance of the property o given by a woman during the marriage, without valuable con without notice to the intended be set aside as a fraud on his rests upon the peculiar right w has in his wife's property; and similar equity to have a con property of, or a security giv tended husband, set aside on *M'Keogh* v. *M'Keogh*, 4 Ir. R., W. R. 861.

But where, upon a marriage, the husband agreed to give up and stock, in consideration of tune being paid to the father, stated that the intended husba debted to any extent; and a d up and executed in pursuance of and on the same day that the ecuted, the intended husband g a promissory note for 200*l.*:— giving of this note, coupled with that the son was not indebted was a fraud upon the intended father, who gave the fortune.

XVI. Heirlooms and Se Personalty on Trusts of

I. *Heirlooms*, 6284.
II. *Leaseholds Settled on Trusts with Uses of Freeholds*, 6
III. *Directions to Settle by wa Trust. How carried out.* (EXECUTORY).
IV. *Perpetuity and Remotene* PETUITY, VIII. VI.

I. HEIRLOOMS.

1. *What are*, 6285.
2. *Chattels settled as Heirlooms without Reference to Uses of Freeholds*, 6285.
3. *Chattels settled with a Title*, 6286.
4. *Rights of Tenant in Tail*, 6287.
5. *Direction against Vesting under Twenty-one*, 6289.
6. *Rights of Other Persons*, 6290.
7. *Protection of and Security for*, 6292.
8. *Sale of*, 6292.

1. What are.

1. From construction of will family pictures held to be heirlooms. *Savile* v. *Scarborough (Earl)*, 1 Swan. 537; 1 Wils. 239.

2. Family jewels may be settled as heirlooms independently of real estate. *Shelley* v. *Shelley*, 37 L. J., Ch., 357; 6 W. R., Eq., 540; 16 W. R. 1036.

3. Books not heirlooms, and if limited to go with entailed goods they become the property of the first tenant in tail. *Bridgewater (Duke)* v. *Egerton*, 2 Ves. 122.

4. A husband who was entitled to family jewels and diamonds bequeathed to his wife all "his" jewels for life, and afterwards as heirlooms:—Held, that this bequest did not include pearl ornaments presented to her, or brilliant bracelets bought by the husband, and given to the wife, and worn with the family jewels, so as to put the wife to her election. *Jervoise* v. *Jervoise*, 17 Beav. 566; 23 L. J., Ch., 703.

5. Where a gift was to "B. and her children, of my Quendon Hall estates, provided she takes the name of and arms of Cranmer, and her children, with my mansion house, furniture, books, plate, Archbishop Cranmer's portrait, India cabinet, striking watch, and my diamond earrings, as heirlooms with my estate." *Semble*, that heirlooms here meant something which though not in its own nature heritable, is to have a heritable character impressed upon it. *Byng* v. *Byng*, 10 H. L. Ca. 171; 8 Jur., N. S., 1135; 31 L. J., Ch., 470; 10 W. R. 633; 7 L. T., N. S., 1. S. C. *nom. Webb* v. *Byng*, 26 L. J., Ch., 107; 2 Jur., N. S., 1243; 8 De G. M. & G. 633; 2 Kay & J. 669.

6. A testatrix directed that all the plate, plated articles, furniture, implements of household, linen, china, goods, chattels, and effects, except books, which should be in and about a house in her occupation and possession, should be annexed to the house as heirlooms:—Held, that plate, jewellery, and a pianoforte passed under this gift, but that money found in the house, and articles perishable in a short time, such as live stock, carriages, wines, or wearing apparel, did not pass. *Hare* v. *Pryce*, 12 W. R. 1072; 11 L. T., N. S., 101.

7. A testator directs that his household furniture, etc., and utensils in and about his mansion house at H., should go with the mansion house, and that for that purpose his trustees should make an inventory of the furniture, etc., and utensils which should be found in and about his mansion house and premises at the time of his decease. These words do not pass farming utensils on lands at H., occupied by the testator, along with the mansion house. *Fitzgerald* v. *Field*, 1 Russ. 427; 4 L. J., Ch., 170.

2. Chattels settled as Heirlooms without Reference to Uses of Freeholds.

Where of personal chattel there is a remainder, after an estate tail limited before, that remainder is void, and the person who was to have the estate tail will have the disposition of the whole. *Gower* v. *Grosvenor*, 340.

8. A direction annexed to a bequest of chattels, that they should go as heirlooms, and that the executors should make an inventory:—Held, not to make the bequest executory, or to empower the Court to modify the bequest. *Rowland* v. *Morgan*, 2 Ph. 765; 18 L. J., N. S., Ch., 78; 13 Jur. 23. Affirming 6 Hare 463; 17 L. J., N. S., Ch., 339; 12 Jur. 348.

Bequest of plate, jewels, and other chattels, by the Earl of Abergavenny, to his son, Viscount Nevill, and his heirs, Earls of Abergavenny, "to be held as heirlooms," with a direction to the testator's executors to make an inventory of all such chattels and effects; and a subsequent bequest by a codicil, declaring, that, in addition to the articles and things he had in his will made heirlooms, certain other articles should be considered and taken to be heirlooms, and bequeathing the same to his executors "as heirlooms in" his "family," directing them to make an inventory thereof, and sign the same:—Held, that the gift of the chattels was not executory; that the same vested absolutely in the first taker, Viscount Nevill, who succeeded the testator in the earldom; and that, not having been disposed of by him in his lifetime, the same upon his death passed to his executors. The addition in the codicil of the words "as heirlooms in my family," gives rise to no distinction in point of construction. If the gift had been executory, inasmuch as there were the dignity, the family estate, and the purchased estate, and it was not certain, upon the language of the bequest, to which the testator would annex the chattels, the conclusion would have been the same. *Semble*. *Ib.*

9. S. had a crotchet of diamonds belonging to his first wife, which by will he gave to his eldest son, to go to his heir in succession, as an heirloom. Afterwards he married a second wife, and then turned the crotchet into a necklace, adding new diamonds of 200*l.* value, which was more than the value of the crotchet. Upon the death of S., his heir-general claimed the crotchet of the widow. Ordered that the Master do separate the diamonds, and deliver the diamonds which were in the crotchet to the heir-at-law, as an heirloom. *Calmady* v. *Calmady*, 11 Vin. Abr. 181, pl. 21.

10. S. devised all his books, pictures, and household goods, to such male person when he should attain twenty-one, as should be then entitled to the trust, in possession of his real estate before devised, and till then he directed they should be kept at H., and be used in the meantime by such male person residing there, declaring it to be his will and desire, that they should go in the nature of heirlooms, with his estate, and be used therewith, as long as the

law would permit. The pictures, books, and household goods, ought to go as heirlooms as fully as the law will allow, for the devise is a disposition only of the use till some person, who is entitled to the inheritance, should come into possession by attaining twenty-one. *Trafford* v. *Trafford*, 3 Atk. 347.

1. A casket containing diamonds was, in 1817, sent to the plaintiff's father, Sir J. H. S., and with them a letter, in which he said the diamonds were to be considered as an heirloom in the family, and to be left to the eldest son, and his heir, after the death of his mother, as long as the family should continue. At the death of Sir J. H. S. the diamonds remained in the possession of his widow, and on her death her acting executor raised the question whether, as she had alleged they were her property, they could be disposed of for the benefit of her creditors; but the Court declared that the diamonds never formed part of her assets, but were the property of the plaintiff, Sir J. S., and that the executor must pay the plaintiff's costs. *Seale* v. *Haynes*, 9 Jur., N. S., 1338; 12 W. R. 239; 9 L. T., N. S., 570; 3 N. R. 189.

2. Testator bequeathed a bust, after his wife's death, to "J., now Duke of B.," on condition that he caused it to be placed and remain in W. Abbey, and at the time of the delivery of it to him settle it so as to be held as an heirloom by the persons who under the limitations to which the Abbey should be subject, should then be entitled to the possession thereof, with a gift over in case J. should neglect to do so for twelve months after request by the trustees. J., Duke of B., had died in 1839. F. was Duke of B. at the time of testator's will and death, and was owner in fee of W. Abbey. F. died during the lifetime of the tenant for life, and consequently never received the bust. The present Duke of B. was willing to allow F.'s executors to place the bust in the Abbey:—Held, that the condition could not be performed by the duke's executors, and that the bequest fell into the residue of the testator's personalty. *Patching* v. *Barnett*, 45 L. T. 292; 51 L. J., Ch., 74. Reversing 43 L. T. 50; 28 W. R. 886.

3. Chattels Settled with a Title.

3. A testator bequeathed personalty to trustees to pay the interest to Sir G. A., Bart., for life, and after his decease to his eldest son; but in case he should die, leaving no son, then in trust for the persons on whom the baronetcy should devolve, for life; and after the extinction of the baronetcy, to fall into the residue of his estate. At the death of the testator, Sir. G. A. and his two brothers, J. and R., on whom the baronetcy successively devolved, were living. Sir G. A. afterwards died without having had any issue:—Held, that Sir J. became absolutely entitled to the property. *Mackworth* v. *Hinxman*, 2 Keen 658; 5 L. J., N. S., Ch., 127.

4. A testatrix, after bequeathing diamonds and china to L., Baron I., declared that she made "the bequest to Lord I. as head of the existing family," and so far as she lawfully could directed that the diamonds and china should be "deemed heirlooms in the family of I., and be held and enjoyed b the time being bearing the t She then made a further bequ Baron I." L., Baron I., died i the testatrix, being succeeded E.:—Held, that, although t was not executory, L., if he h testatrix, would only have tak in the diamonds and china, w the person who should succe consequently E. was entitle chattels delivered to him, b judice to the question whethe for life or absolutely. *Mont (Lord)*, 23 W. R. 592; 32 L. T

Held, also, that the seco to L., and lapsed by his deat of the testatrix. *Ib.*

5. V., by his will, bequeath his household goods, furniture linen, etc., upon trust to permi the use of them during her lif death, to permit his son A. B. of the same goods, etc., for hi the decease of the survivor of should be possessed, etc., in person as should from time to it being his will that the goo decease of his wife, should fr go and be held and enjoyed the family as far as the rules would permit:—Held, that th was void as being too remo estate vested absolutely in t A. B., grandson of the testato at the date of his death. *Toll try (Earl)*, 8 Bli. N. S. 547; 2

6. When a trust is create devolution of chattels as heir tations which are to take e postponement or defeasance interest are subject to all govern the validity of condit Such limitations, therefore, not only in expression, but a and it is essential to their should be capable of ascert given moment of time whethe has or has not taken effect. was a peer, bequeathed chat upon trust to permit and suffe and be held and enjoyed with as the rules of law and equi by the person who for the ti be actually possessed of the ti of heirlooms, and so that no ence at the time of the testa born in due time afterwards coming to the title, should than a life interest in the sa no person should acquire an in the same till the expiratio years after the decease of al should be in existence at the tator's decease and afterwar title:—Held, that the latter c tations was void for uncertai and that the first person bor of the testator who attained an absolute interest in the c standing that there was still who was alive at the time death, and who was capable title. *Re Exmouth (Viscount*

count) v. *Praed*, 23 L. R., Ch. D., 158; 52 L. J., Ch., 420; 48 L. T. 422; 31 W. R. 545.

4. Rights of Tenant in Tail.

1. Chattels directed to go as heirlooms with an estate, "as far as the rules of law and equity will permit," vest in the first tenant in tail, who comes *in esse*. *Vaughan* v. *Burslem*, 3 Bro. C. C. 101.

2. Devise of real estate to A. for life, remainder to trustees to preserve contingent remainders, remainder to A.'s first and other sons in tail male, remainder to B. for life, remainder to trustees to preserve contingent remainders, remainder to B.'s first and other sons in tail male, remainder over; and then a bequest of plate and furniture in the house to be held and enjoyed by the several persons who should respectively and successively be entitled to the use and possession of the house in the nature of heirlooms, to be annexed to and go along with the house for ever. A. had a son who died a few days after his birth. The plate vested absolutely in A.'s son as tenant in tail, and from him was transmitted to A. his father, and in A.'s hands was liable to an execution at the suit of his creditors. *Foley* v. *Burnell*, Romilly's Notes of Cases, 1; 1 Bro. C. C. 274; 4 Bro. P. C. 319.

3. Furniture, etc., at H. bequeathed for the use of those who should enjoy the estate, to be taken care of and delivered by executors, and to remain at H., as if in his own possession, vests in the first tenant for life. *Wyth* v. *Blackman*, 1 Ves. 197.

Devise that the household stuff at H. should remain there for the use of those who enjoy the estate by a settlement, to be taken care of and delivered by executor, etc.; it goes to the representative of the first taker, who was tenant for life, and is not to be sold as heirlooms with the house, although no estate in tail vested. *Id.* 202.

4. S. devised all his books, pictures, and household goods, to such male person when he should attain twenty-one, as should be then entitled to the trust, in possession of his real estate before devised, and till then he directed they should be kept at H., and be used in the meantime by such male person residing there, declaring it to be his will and desire, that they should go in the nature of heirlooms, with his estate, and be used therewith, as long as the law would permit. The pictures, books, and household goods, ought to go as heirlooms as fully as the law will allow, for the devise is a disposition only of the use till some person, who is entitled to the inheritance, should come into possession by attaining twenty-one. *Trafford* v. *Trafford*, 3 Atk. 347.

5. Testator directed that all his plate, furniture, etc., at his mansion-house should remain there as heirlooms, and devised the same to trustees, upon trust, to permit the same to go, together with the mansion-house, to such persons as should, from time to time, be entitled to it for so long time as the rules of law and equity would permit; and devised his real estates to trustees to the use of several persons and their first and other sons, etc., successively in strict settlement. The absolute interest in the personal chattels vested in the first tenant in tail, and upon his death, under age, passed to his representative. *Carr* v. *Erroll* (*Lord*), 14 Ves. 478.

6. Where there is a limitation of realty in strict settlement, and a declaration of trust of chattels to follow the limitations of the real estate simpliciter, the interest in the chattels will vest absolutely in the first taker of an estate of inheritance. *Soarsdale* (*Lord*) v. *Curzon*, 1 John. & H. 40; 6 Jur., N. S., 209, 246; 29 L. J., Ch., 249.

An assignment or a bequest of personal estate, either immediately or by way of trust executed in favour of one or more tenants for life, with remainder in tail, vests the interest absolutely in the first tenant in tail immediately upon his birth, and this whether the limitations are direct or by way of reference to the limitations of real estate, and the expression that the property is to be treated as heirlooms will carry it according to limitations of the realty. *Ib.*

An addition of the words, "so far as the rules of law and equity will permit," or the circumstance of the legal interest being left in trustees, will not vary this. *Ib.*

Doubtful words, tending to restrict the interest of the chattels to those who come into possession of the realty, will not overrule the operation of the general canons of construction, nor suspend the interest until possession of the realty is acquired. But clear words imposing such a restriction, will overrule the ordinary construction of a bequest or settlement of heirlooms. *Ib.*

By a settlement, leaseholds were limited upon trust for the person or persons who, for the time being, should, by virtue thereof, be seised of or entitled to the freehold hereditaments thereby settled; with a proviso that they should not, for the purpose of transmission, vest absolutely in any child of a person thereby made tenant for life, who should not attain twenty-one. By the same settlement, plate and other chattels were limited upon trust for the person or persons who, for the time being, should by virtue thereof be seised of or entitled to the actual freehold of a mansion-house thereby settled, so that the chattels might, so far as the rules of law and the circumstances of the case would admit, accompany the mansion-house as heirlooms for the benefit of the person or persons who, for the time being, should under the limitations thereof be seised of or entitled to the mansion-house; with a proviso that the plate and other chattels should not, for the purpose of transmission, vest absolutely in any child of a person thereby made tenant for life, who should not attain twenty-one; but that such child should, nevertheless, during minority have the usufruct thereof. There were other clauses in the deed, where the words "actual freehold" were used in the sense of freehold in possession. C. was a tenant in tail who attained twenty-one, and died in the lifetime of a prior tenant for life. The plaintiff succeeded C. as tenant in tail, attained twenty-one, and came into possession:—Held, that the leaseholds vested absolutely in C., and the plate and other chattels in the plaintiff. *Ib.*

7. A testator devised freeholds to A. for

life, with remainder to the first son of A. in tail male, with remainders over; and he gave his residuary personal estate in trust to lay it out in the purchase of 3*l.* per cent. bank annuities, and to pay the dividends "unto such person or persons as for the time being should by that his will be entitled to the rents and profits of his freehold hereditaments thereinbefore devised," with gifts over in case of the total failure of the estates tail limited by this will. On a petition by A. and his eldest son for a transfer to them of the fund which had been paid into court:—Held, that the general intention of the testator being, not to create a perpetuity, but to give the personalty so as to go with the freeholds, the first tenant in tail was absolutely entitled to it, and an order was made as prayed. *Re Johnson*, 2 L. R., Eq., 716; 12 Jur., N. S., 616.

1. A testator possessed of leaseholds for lives, insured each of the lives. By his will he directed the insurances to be kept up, and gave his real and personal estate for a tenant for life, with remainder to her children successively in tail. The eldest child died an infant. Subsequently one of the *cestuis que vient* died:—Held, that the policy moneys did not belong to the legal personal representative of the deceased tenant in tail. *Meller* v. *Stanley*, 12 W. R. 524.

2. Chattels were bequeathed, "in the nature of an heirloom, to the person who, for the time being, shall be in the actual possession and enjoyment of my freehold estates, under the limitations of this my will":—Held, that they did not vest absolutely in a tenant in tail whose estate was defeasible, and who never came into possession. Held, also, that they did vest absolutely in the person who, in the events which happened, would have been tenant in tail in possession, if his estate had not been defeated by the execution of a disentailing deed. To destroy the right of such person to the chattels, his exclusion from possession of the freeholds must arise from some act or disposition of the testator, and not from any foreign circumstance beyond the testator's control. *Hogg* v. *Jones*, 1 N. R. 222.

If chattels are given to such person as shall be in possession of settled estates under the limitations of the settlor's will, a disruption of the limitations before the time, by an act not contemplated by the settlor, and over which he had no control, will not accelerate or affect the gift. The chattels will still devolve upon the person who but for the disruption would have been entitled to the estates. S. C. 8 L. T., N. S., 816.

A testator bequeathed plate for the use of his wife during her life, and after her death he gave the same, in the nature of an heirloom, to the person who, for the time being, should be in the actual possession and enjoyment of his freehold estates under the limitations of his will. The real estates were limited to trustees, to receive and accumulate the rents, and make payments thereout to his son during his life; and after his death, for the first and other sons of his son in tail male, remainder to the testator's daughter for life, remainder to her first and other sons in tail male, remainders over. The daughter and B., her eldest son, joined in suffering a recovery. Both died in the lifetime of the son. B. left a son, and devised his r trustees. Upon the death of son without issue, B.'s son wou limitations of the will, have be to the actual possession and enj real estates:—Held, that notwit recovery suffered, he was entitle S. C. 9 Jur., N. S., 507; 32 L. J. Beav. 45.

3. A testator by his will dir books and plate should be consi looms, and should pass with h in the same manner as if they v of inheritance at common law, continue annexed to his said long as the law would permit, t by the several persons who sh thereto; and he devised and b his real and residuary perso trustees upon trust for R. C. after the decease of R. C. for other sons successively in tail default of such issue upon trust the eldest son of J. C., for life, decease for his first and other sively in tail male, and in de issue upon trust for "the next the said J. C. who shall sur Henry C." for life, and after his trust for "the first and other so of the said next eldest son of who shall survive the said Hen sively in tail male, and in de issue upon trust for his, the t right heirs. R. C. and Henry C having married. J. C. died in time. George was the next elde who survived Henry. F. J. C. son of George, and the first under the settlement, and he d in the lifetime of R. C. and o Held, that notwithstanding t F. J. C. before it could be know father would survive Henry C there would be any issue male e or Henry C., the heirlooms a personalty vested absolutely in sonal representative of F. J. C. (32 Beav. 45) distinguished. *Parkin* v. *Cresswell*, 24 L. R., C L. J., Ch., 798; 49 L. T. 590.

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the chattels "to such person or persons as shall then become seised of the said real and freehold estates under any of the limitations aforesaid":—Held, that the chattels vested in a son of A., who was tenant in tail of the real estate, at the death of A., and did not vest in an elder son of A., a prior tenant in tail, who died in the lifetime of A., or remain in contingency until the death of the last of the successive tenants for life. *Potts* v. *Potts*, 9 Ir. Eq. R. 577; 3 J. & L. 353. Affirmed 1 H. L. Ca. 671.

1. A testatrix seised in fee of a messuage and mill, subject to the life estate of C., directed the same to be conveyed to the use of C. for life, with remainder to his first and other sons in tail, and directed her trustees to stand possessed of 2,000*l.* stock, upon trust to apply the dividends from time to time in the repairs of the messuage and mill at the request in writing of C., and after the death of C. upon the application or request in writing of the person or persons entitled under the limitations thereinbefore directed, to the end and intent that the stock, and the interest and dividends thereof, might be, and be continued as long as the rules of law and equity would permit, as a fund for keeping the messuage and mill at all times in good and substantial repair for the benefit of the person or persons who might from time to time be so in possession thereof or entitled thereto. The property was settled in accordance with the directions of the will, and the first tenant in tail died in the lifetime of C., without having barred the entail:—Held, that the person who then came into possession as tenant in tail was entitled to the fund, and not the executors of the first tenant in tail. *Cox* v. *Sutton*, 2 Jur., N. S., 733; 25 L. J., Ch., 845.

2. S., by will, gave 5,000*l.* to the eldest son of his late brother for life, with remainder upon trusts corresponding with the limitations made by A. of the C. estate in favour of his issue, but subject to an executory limitation over on the death under twenty-one, without issue then living, of any person who, under the said limitations of the C. estate, would be tenant in tail by purchase. A. had never made any settlement, but had registered according to the law of Scotland two deeds of entail of the C. estate, of which he was then tenant in tail in possession. A.'s eldest son, having executed a disentailing deed, and thereby become owner in fee of the C. estate, claimed the 5,000*l.* absolutely:—Held, that he had become absolutely entitled to the 5,000*l.* on the completion of the instrument of disentail. *Schank* v. *Scott*, 22 W. R. 513.

3. A testator devised and bequeathed real and personal estates on trust to invest the rents and profits and annual proceeds while any person beneficially interested in the real and personal estate, by virtue of the trusts afterwards declared, should be under twenty-one, for the purpose of accumulation; and subject thereto for the eldest son then living of the testator's daughter C. for life, remainder to his first and other sons in tail, with like remainders to the other living sons of C., with divers remainders over, and an ultimate remainder to the testator's right heirs and next of kin. The will then provided that such person or persons as should thereunder be entitled to an estate tail in possession in the real estate should not be absolutely entitled to the leasehold and personal estates until he, she, or they respectively should attain the age of twenty-one; and that the leasehold and personal estates should absolutely belong only to such person or persons as should first attain the age of twenty-one, and become entitled to an estate tail in possession in his real estate under the trusts therein aforesaid; and in the meantime the same leasehold and personal estates should remain subject to the trusts thereinbefore declared:—Held, that the words "in possession" in the proviso in the will did not mean the actual receipt of the rents and profits of the real estate; and that the proviso included only tenants in tail, by purchase, and was valid, and that the tenant in tail, entitled by purchase, who first attained the age of twenty-one, although in the lifetime of the tenant for life, was absolutely entitled (subject to his father's life interest) to the leasehold and personal estates. *Holloway* v. *Webber*, 37 L. J., Ch., 865; 6 L. R., Eq., 523; 17 W. R. 94; 19 L. T., N. S., 514.

5. Directions against Vesting under Twenty-one.

4. By a settlement in 1804, real estate was settled to the use of C., third Earl of Harrington, for life, with remainder to his first son, Lord Petersham, for life, remainder to the first and other sons successively of Lord Petersham, in tail male, with similar remainders in succession to the eight other sons of the third earl for life, and their respective first and other sons in tail male; remainder to the third earl in fee. By his will made in 1824 the third earl gave chattels upon trust "for the person or persons who for the time being should, under the limitations in the settlement, be in the actual possession of the estates, to the intent that the same chattels might be deemed heirlooms, to go along and for ever be enjoyed with the estates, so far as the rules of law and equity will permit, but so, nevertheless, as that the same chattels should not, as to the effect or purpose of transmission, vest absolutely in any person who under the settlement should become seised of or entitled to the estates for an estate of inheritance either in possession or reversion, or otherwise, unless such person should attain the age of twenty-one, or dying under that age should leave issue inheritable under the limitations in the settlement." The testator gave his residuary personal estate upon trusts for investment in lands to be settled to the same uses as those declared in the settlement of 1804. The first tenant in tail in possession died under twenty-one, within the period allowed by the law as to perpetuities:—Held, that the gift was not an executory bequest, and that the estate of the first tenant in tail was thereby terminated, but that there were no words which carried over the chattels in that event to any other tenant for life or tenant in tail, and that the chattels therefore passed by the residuary clause in the will. *Harrington (Earl)* v. *Harrington (Countess)*, 40 L. J., Ch., 716; 5 L. R., H. L., 87. And

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see S. C. 3 L. R., Ch., 564; 16 W. R. 742; 37 L. J., Ch., 593; 19 L. T., N. S., 38. Reversing 16 L. T., N. S., 348.

Held, also, that the proviso that no tenant in tail should take absolutely unless he attained twenty-one, was a condition inseparably annexed to the gift, so that any tenant in tail must take subject to it, and if the proviso was void the whole gift was void. *Ib.*

1. G. devised freeholds for the use of his nephew for life, with remainder to the use of his first and other sons in tail male, with successive remainders over for life, and remainders to the first and other sons of the successive tenants for life in tail male; and he bequeathed his residuary personal estate upon such trusts as were thereby declared concerning the devised freehold hereditaments, "or as near thereto as the rules of law and equity would permit; provided, nevertheless, that such residuary personal estate should not vest absolutely in any tenant in tail, unless such person should attain the age of twenty-one years":—Held, that the proviso merely narrowed the class who would have taken under the previous words of gift, and did not extend such class to tenants in tail by descent; and, therefore, the personalty vested only in tenants in tail by purchase, and the gift was not void for remoteness. *Christie* v. *Gosling*, 1 L. R., H. L., 279; 35 L. J., Ch., 667; 15 L. T., N. S., 40.

Held, also, that the words "as near as the rules of law and equity will permit," would not by their own force have controlled the construction. *Ib.*

6. Rights of Other Persons.

2. Limitation of personal chattels to go as heirloom with real estate. Chattels shall follow that estate into a contingent remainder. *Gower* v. *Grosvenor*, 5 Madd. 337.

Where testator himself refers to "the rules of law," the limitations ought to go as far as those rules will permit. *Id.* 348.

3. All limitations of personal estate may be good until one vests, carrying the whole interest. *Brown* v. *Higgs*, 4 Ves. 717.

4. Courts of equity will carry the limitation of a personal chattel, or trust of it, no further than the judges have done in the case of legal limitation of terms for years. *Beauclerk* v. *Dormer*, 2 Atk. 308.

5. Chattels devised as heirlooms to a certain house are removed by the tenant for life of that house to another, and are there taken in execution for a debt of the tenant for life. On a question whether these chattels were liable tobe so taken, it was held they were. But this was so held under the particular words of testator's will. *Foley* v. *Burnell*, 4 Bro. P. C. 319; Romilly's notes of cases, 1. Affirming 1 Bro. C. C. 274.

6. Testator, by his will, directed that certain chattels in his mansion house should be annexed thereto, and be inherited and enjoyed by the several persons who should succeed to his real estates under the limitations of his will. By a codicil, he limited his estates to certain other persons, and declared that those limitations should take effect in precedence to the limitations in his will:—Held, that the persons entitled under the limitations in the codicil were entitled to the direction respecting the chat *Evans* v. *Evans*, 17 Sim. 108;

7. Personal estate incap *Stafford (Earl)* v. *Buckley*, 2

Personal effects not to b petuity to heirs of body; void. *Id.* 181.

8. Limitation which woul tate tail, as to freehold prop an absolute interest if appl estate. *Exp. Sterne*, 6 Ves. 1

9. One settles a house on life, with remainder over, and vises the goods and furniture such persons as were to have his death. By the settlemen furniture shall go according t shall not be under the power to dispose of, nor subject to band's debts. *Offley* v. *Offley*

10. It is the duty of the Co to the intention of testator rules of law will permit; but words which, by their plain absolute estate, the circumsta the same absolute estate to legatees, in a manner incom consistent with the free en property plainly given to th authorise the Court to alter words by which that propert first legatee of a *quasi* estate takes the absolute interest, no manifest and avowed intentio cession of limited interests established, that the words o construed with reference to th and that the same words ev sentence may have one effect in to real estate, and another und stances proper for the considers in construing their effect in the personal estate. *Byng* v. *S* 5 Beav. 558; 12 L. J., N. S., 98. Affirmed S. C. *nom. Hoar* & F. 508; 8 Jur. 563.

11. A testratrix gave the H fee, with a shifting clause to should become possessed of th gave certain household goods A. and the persons possessed under the above limitations. of D., A. became possessed of Held, that the heirlooms belo sonal representative of D. *gilby*, 4 W. R. 433; 2 Jur., N. L. J., Ch., 761.

12. If a testator directs his settled on his son, his heir ap with remainder to the first a his son in tail, with remainde with remainder to his first a tail, with remainders to oth their sons in like manner, and his right heirs, and his perso settled on the same persons, in and succession, and for the s interests, so far as the nature and the rules of law and equit the Court, if a suit is institut after the testator's death for having a settlement made, wil mate limitation of the personal

to be made to the person who is the testator's heir. *Boydell* v. *Golightly*, 14 Sim. 328; 9 Jur. 2.

Testator gave his freehold and copyhold estates and his personal estate to certain persons (whom he appointed his executors), in trust, out of his personal estate, and by sale or mortgage of his freehold and copyhold estates, to raise money sufficient to pay his debts, funeral expenses, and legacies, and, out of the rents and interest of so much of his real and personal estate as should not be sold or disposed of for those purposes, to pay certain annuities and such sums as his trustees should think sufficient for the maintenance of his son John and his children (if he should have any), and to accumulate the residue of the rents and interests during the life of John, and after John's decease, to stand seised of his real estates in trust for John's first son, and the heirs of the body of such first son successively as they should be in priority of birth, and for the several and respective heirs of the body and bodies of every such son, and, for default of such issue, for A. for life, with remainder to his sons in tail, with remainder to B. and his sons, and to C. and D. and their sons, in like manner, with remainder to his own right heirs for ever; and he declared that his trustees and executors should stand possessed of his personal estate after John's death, in trust for such person and persons, in the same order and succession and for such and the same estates and interest, as were thereby declared concerning his real estates, so far as the nature of the property, the rules of law and equity, the deaths of parties, and other contingencies would admit of. The testator died in 1780; his son John was his heir-at-law and customary heir. John, and A., B., C., D., died without issue:—Held, that the trusts subsequent to the trust for the first son of John were not void for remoteness, and that the ultimate trust of the personal estate, as well as of the freehold and copyhold estates, vested on the testator's death in his son John as his heir-at-law at his death. *Ib.*

1. The devise to J. W. and C., and their heirs in due succession as named, with usual limitations, gives an estate tail to the first taker, who having a son born alive, and since dead, is, as his personal representative, entitled to the personal estate absolutely. *Stratford* v. *Powell*, 1 Ball. & B. 1.

2. Upon the construction of a settlement, containing a direction that personalty should go as nearly as might be in the same course as the realty:—Held, that that direction was not modified by a subsequent clause purporting to be explanatory with reference to the personalty and the limitation of the realty to right heirs. *Doncaster* v. *Doncaster*, 2 Jur., N. S., 1066.

A settlement, on marriage, of real estate, upon trust for the intended wife for life, remainder to the husband for life, and, after the death of the survivor, "in trust for and to be released and conveyed unto" the children, as the parents or the survivor should appoint; in default, "in trust for and to be released and conveyed unto" the children, as tenants in common in tail; and in default of issue, if the wife should survive the husband, "in trust for and to be released and conveyed unto" the wife, "her heirs and assigns for ever." By the same deed personal property was assigned to the trustees, upon trust to pay the income and principal "to such person and persons, for such uses, ends, intents, and purposes, and in such manner and form, and subject to the same powers, provisoes, contingencies, declarations, and agreements, as were expressed concerning the payment by the trustees of the rents and profits of the real estate, and concerning their release and conveyance of the same, or as near thereto as circumstances and the nature of the case would admit":—Held, that this trust of the personalty was not rendered executory by reference to the direction to release and convey the real estate, such direction being merely superadded to a distinct declaration of trust of such real estate. S. C. 3 Kay & J. 96.

This construction was not altered by a proviso immediately following the limitation of the personal estate, that the ultimate limitation in favour of the heirs of the wife should, with respect to the personal estate, be construed to be for her next of kin; the meaning of such proviso being only, that if, by the failure of the preceding limitations, the real estate should at any time become vested in possession in the heirs of the wife, the personalty, which was settled upon corresponding trusts, should belong to her next of kin. *Ib.*

There was only one child of the marriage, who died an infant, in the lifetime of his father. On the death of the father:—Held, that such child took an absolute interest in the personalty, subject to open and let in other children, if any. *Ib.*

3. A testator bequeathed all his household furniture which should be in his capital messuage at his death, unto trustees to permit the same to be held and enjoyed as heirlooms with his messuage by the person entitled to the messuage under the will. The testator, who died in 1875, was, in 1874, the occupier of a house at Bath, which he had furnished. He ceased to occupy that house in 1874, and removed the furniture with the intention of its being placed in his capital messuage, which was in the occupation of a tenant. The tenant having declined to permit the furniture to be placed therein, it was, in consequence of such refusal, stored in farm buildings belonging to the testator, where it was at his death:—Held, that the furniture passed under the bequest. *Rawlinson* v. *Rawlinson*, 3 L. R., Ch. D., 302.

4. A testator devised an estate in strict settlement; he also gave a fund in trust to keep the estate in repair for a term of years, and to pay the surplus to the person for the time being entitled to the land. The testator prohibited any trees from being cut during the term, and deprived any person so doing from any benefit of the fund. At the end of the term, the fund was to go to the person in possession of the estate, if a descendant of either of his sons; otherwise to the descendants of his brothers and sisters:—Held, that by barring the entail the persons became immediately entitled to the fund. *Re Colson's Trust*, 2 W. R. 111; 1 Kay 133; 23 L. J., Ch., 155; 2 Eq. Rep. 257.

5. A father devised all his real estate, subject to certain settlements, to his eldest son, who was also residuary legatee, in tail male, with remainders over, and bequeathed plate,

etc., "to go and remain as heirlooms, together with my estates":—Held, that the son took only a life interest in the chattels bequeathed as heirlooms. *Robinson* v. *Robinson*, 33 L. T., N. S., 663.

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1. Practice as to tenant for life giving security for heirloom. *Conduitt* v. *Soane*, 1 Colly. 285; 13 L. J., N. S., Ch., 390.

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And the second tenant for life, who had declined the property in specie:—Held, nevertheless, entitled to a life interest in the proceeds of the sale, and that without such life interest contributing to the charges on the estate which accrued since she became entitled in possession. *Ib.*

5. The Court has no jurisdiction to order a sale of heirlooms which are settled in strict settlement, simply on the ground that a sale will be for the benefit of all parties interested. *D'Eyncourt* v. *Gregory*, 3 L. R., Ch. D., 635; 45 L. J., Ch., 741; 25 W. R. 6.

But where in an administration suit a strong case was made for the sale of heirlooms settled by the will, liberty was given to take proceedings for obtaining a private Act, and to apply in the suit as to the costs of such proceedings if they should prove unsuccessful. *Ib.*

6. The Court has jurisdiction to order a sale of heirlooms apart from the land to which they are attached for the purpose of paying off mortgages, and will do so at the instance of a tenant for life where satisfied that it will be for the benefit of the parties interested that they should be sold, even where there are infant tenants in tail in remainder. *Fane* v. *Fane*, 2 L. R., Ch. D., 711; 46 L. J., Ch., 174.

II. LEASEHOLDS SETTLED ON TRUSTS CORRESPONDING WITH USES OF FREEHOLDS.

7. General rule is, that leasehold estate limited with freehold vests absolutely on birth of first tenant in tail, subject to intention declared or implied, that they shall go together as long as the rules of law and equity permit. *Southampton* (*Lord*) v. *Hertford* (*Lady*), 2 Ves. & B. 63; 2 Rose 63.

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9. A grant of an annuity to the grantor's sister, though expressed to be made for natural love and affection, may be proved to have been

made in consideration of her marriage, and will entitle her to rank as a specialty creditor of the grantor. *Tanner* v. *Byne*, 1 Sim. 160; 5 L. J., Ch., 125.

1. Settlement after marriage of a portion paid is on good consideration, and equal to one made before marriage. *Ramsden* v. *Hylton*, 2 Ves. 305.

2. Feme seised of a copyhold on marriage of her daughter to J., surrenders it to the use of J. and his intended wife, and the heirs of their bodies; remainder to J. in fee. The marriage takes effect, the husband signs a writing, whereby he owns that the limitation of remainder in fee to him was a mistake, and that it was intended to be to his wife; and accordingly covenants to stand seised of the remainder in fee, in trust for the wife in fee: this is not a mere voluntary covenant, and equity will compel the performance of it. *Randall* v. *Randall*, 2 P. W. 464.

3. Where A. agrees to make a provision for a volunteer, in consideration of B.'s doing the like, the contract is not voluntary. *Bentley* v. *Mackay*, 31 Beav. 143.

4. A contract for sale for value, which had been entered into by a vendor upwards of ninety years of age, was upon his death resisted by his devisee, first, on the grounds of his incapacity and of undue influence on the part of the purchaser (the evidence as to which, however, entirely failed); and, secondly, on the ground that the vendor had, by a deed executed by him before the date of the contract, conveyed the property in fee to the devisee, his great-nephew. The deed was expressed to be in consideration of natural love and affection, and contained a covenant by the grantee to "commence" a house upon the property according to plans to be furnished by the grantor; and that if the grantor failed to furnish such plans, then the grantee "would build such a house as he, the grantee, should think fit." No house was ever commenced, and the deed contained no proviso for re-entry or other penalties for breach of covenant. Upon a bill by the purchaser for specific performance:—Held, that the deed was purely voluntary, there being an absence of any consideration by way of payment or benefit moving from the grantee to the grantor, and specific performance decreed accordingly. *Rosher* v. *Williams*, 20 L. R., Eq., 210; 44 L. J., Ch., 419; 32 L. T. 387; 23 W. R. 561.

In deciding whether a deed is voluntary or not, the Court will anxiously lay hold of any circumstances showing a consideration moving from the grantee to the grantor. *Ib.*

5. Where property is in the hands of trustees for the parties entitled to it, and there is no adverse claim after the death of the parties in possession, a communication to one of the *cestuis que trustent* in remainder of his interest in the property, is not a consideration upon which a conveyance of a portion of the property can be sustained as the sale of a secret, for in such a case the disclosure is a nullity. *Reynell* v. *Sprye*, *Sprye* v. *Reynell*, 8 Hare 222; 21 L. J., N. S., Ch., 633.

6. Where arrears due on a voluntary deed are surrendered in consideration of a new deed, such new deed is not voluntary. *Nixon* v. *Hamilton*, 1 Ir. Eq. R. 49.

A deed of annuity by husband to wife by way of separate maintenance trustees covenant that wife sh children of the marriage, is deed. *Id.* 56.

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8. A wife, being entitled t freehold estate, joined with h post-nuptial settlement, wherel it to trustees upon trust for t for her separate use, with re uses as she should appoint b standing her coverture, and i issue of the marriage. Subsec band and wife mortgaged the plaintiff:—Held, that there sideration for the settlemen husband and wife. *Hewison* v 262; 17 Jur. 445, 567; 1 Eq. R

9. An eldest son and hei intestate made a voluntary se real estate which had descend the purpose of providing, in the intentions, as alleged, o expressed in an unexecuted w tenance, education, and suppo more of the children of the i the settlor) as for the time under the age of twenty-five, as he, his heirs and assigns s One of the daughters of the she had attained twenty-five, trusts had been concealed claimed to be paid her porti and the Court, on a bill by he was entitled to a decree, as the settlor must pay all the c *Langdon* v. *Blake*, 11 Jur., N. N. S., 202.

10. By a private Act of Pa in 1719, lands were annexed t S. so that no earl could aliena the term of his own life, with favour of Protestant earls. Act, passed in 1803, enabled sell certain outlying portions and to invest the purchase-m order and direction of the Co in the purchase of other estat to the same uses, and to be restriction from alienation authorised to be sold. In 18 of S., being desirous of anne to the title other large fee sim estates of the value of 89,000 contracted with the trustees them for 1,000*l.* part of the mo the sales authorised by the Ac petition was presented to th

sanction to the purchase, stating that the purchase-money was much less than the hereditaments were fairly worth, and that it was a very advantageous purchase whereon to invest 1,000*l.*; and by the order made on the petition, the value and the propriety of the purchase were referred to the Master, who reported in favour of the purchase. The report was confirmed by the Court, and a conveyance was executed for the purpose of carrying out the contract, which, Earl Charles being then dead, was adopted by his successor, Earl John. By this conveyance, other estates belonging to Earl John, of the value of 40,000*l.*, and not comprised in the contract, were settled to the uses of the Act:—Held, that the transaction was a fraud upon the Act of Parliament, its real nature being, not a *bonâ fide* sale and purchase for valuable consideration, but a voluntary settlement; and a succeeding earl having disentailed and devised the estates so settled, his devisees were entitled thereto on restoring 1,000*l.* to the trust fund. *Howard* v. *Shrewsbury* (*Earl*), 36 L. J., Ch., 908; 17 L. T., N. S., 358; 15 W. R. 1213; 2 L. R., Ch., 760.

Held, also, that the devisees had rightly sought their remedy in equity instead of proceeding by ejectment at law. *Ib.*

1. A person being in prison on a charge of felony, in order to avoid a forfeiture of his property in the event of a conviction, executed a voluntary deed, assigning his personal estate to his brother absolutely. He was tried, found not guilty, on the ground of insanity, and ordered to be imprisoned as a lunatic during her Majesty's pleasure:—Held, that the deed, being without consideration, and executed by an insane person under a total misapprehension, was inoperative, and that the representatives of the brother took no interest under it. *Manning* v. *Gill*, 13 L. R., Eq., 485; 41 L. J., Ch., 736; 26 L. T. 14; 20 W. R. 357; 12 Cox C. C. 274.

See also VIII. II. and III. *ante.*

II. SUCCESSIVE SETTLEMENTS.

2. Where there are two voluntary conveyances of the same estate, the first shall prevail. *Goodwin* v. *Goodwin*, 1 Ch. Rep. 173.

3. In voluntary deeds and voluntary appointments, the first is to take place. *Chadwick* v. *Doleman*, 2 Vern. 530.

4. Of two conveyances of property, the first held to be for valuable consideration, the second voluntary; and even if both were voluntary, the first held to be good and irrevocable by a subsequent voluntary settlement. *Scott* v. *Scott*, 11 Ir. Eq. R. 487.

5. A. makes a voluntary settlement on her nephew, keeping the deed in her power, in which settlement there is no power of revocation; afterwards, one secretly, and by fraud on behalf of the nephew, gets an attested copy of this settlement, and then the party who made the settlement burns it, and settles the premises on another nephew. The first nephew's bill to establish the copy of the first settlement is dismissed with costs; upon which the second nephew claiming under his settlement, brings a bill to have the attested copy delivered up, and has a decree for it; because such copy has been indirectly gained. *Naldred* v. *Gilham*, 1 P. W. 577.

6. A. made a voluntary settlement of lands (subject to an annuity of 100*l.* to his youngest son), in trust for his eldest son and his heirs, which settlement did not contain any power of revocation. The eldest son being dead, the father made another settlement of the same lands, to the use of himself for life, remainder to his younger son for life, remainder to trustees to preserve, etc., remainder to first and other sons to youngest son in tail. The first deed came into the hands of the eldest son's heir, and the other to the second son, who brought a bill to set aside the first; both sons having been otherwise provided for, it was held, that though both deeds were voluntary, yet the consideration of being a younger child was not sufficient to set aside the first deed. *Clavering* v. *Clavering*, 7 Bro. P. C. 410; 2 Vern. 473; Pre. Ch. 235.

7. Where a father by a voluntary deed conveyed to trustees upon trust to allow him the rents and profits for life, then to the use of his son. He afterwards on the marriage of his son executed another deed, by which he gave up the rents and profits to the son, and after certain other limitations reserved the ultimate reversion to himself:—Held, that there being no evidence to show that settlor considered the former deed as still subsisting after the execution of the latter, the limitation in the latter did not prevail over the former, and that the reversion belonged to those claiming under the son and not to those claiming under the settlor. *Croker* v. *Martin*, 1 Dow N. S. 15; 1 Bli. N. S. 573.

8. A single lady, having under a will a general power of appointment, to be exercised whether covert or sole, over a fund in the hands of trustees, executes an appointment upon certain trusts, and containing no power of revocation. Afterwards he executes a deed revoking the former one, and appointing the fund to trustees upon such trusts as she, whether covert or sole, should appoint. She then marries, and after the marriage she executes an appointment declaring the trusts upon which the trustees of the last preceding deed should hold the fund, being trusts for the benefit of herself, her husband, and children. The fund had remained all the while in the hands of the original trustees of the will:—Held, on a suit to establish the trusts of the last deed, that the first appointment was void as imperfect and voluntary, and the fund ordered to be transferred upon the trusts of the last deed. (*Sloane* v. *Cadogan*, Sugd. on Vendors, App. 9th edit., No. 26, commented on.) *Beatson* v. *Beatson*, 12 Sim. 281.

9. A., by voluntary deed, assigns property to B., in trust for A. for life, and then for C. and her children. Subsequently A. cancels that deed, and, assuming to be absolute owner, assigns it to D., upon trust for B. absolutely. D. marries B., both of them joining in a deed, whereby that property, together with property of D., was conveyed to trustees for D. and B. for life, remainder for their children, D. having no notice of the previous trust in favour of C. and her children:—Held, that the voluntary deed was not revocable, and that this was a breach of trust on the part of B., for which B. and her husband D. were responsible, and

that there should be a reconveyance of the property to new trustees for C. and her children. *Lanham* v. *Pirie*, 3 Jur., N. S., 704.

III. CONFIRMATION.

By Will.] 1. A father makes a voluntary settlement to trustees and their heirs in trust to receive the profits, and to put them out for the increase of the fortunes of his daughters A. and B., and also executes a bond to the same trustees, to pay them 1,000*l.* at a certain day in trust for the said daughters, but kept both deed and bond by him till his death, and received the profits; and then by will, taking notice of the bond, gives legacies to A. and B. in satisfaction thereof, and the surplus of his separate estate to his said two daughters, and his four younger children: yet A. and B., electing to have the benefit of the settlement and bond, decreed for them, and an account of the profits from the date of the settlement, and the 1,000*l.* with interest from the time it was payable by the bond. *Barlow* v. *Heneage*, Pre. Ch. 211.

2. Where will recites and refers to a voluntary deed, which does not appear after the testator's death, but is, by a verdict of jury, declared to have existed at the time of such death, this reference and recital in the will shall establish the deed, and it shall be considered as incorporated with and constituting part of the will. *Healey* v. *Copley*, 7 Bro. P. C. 496.

3. Where a settlement, incomplete as to part of the property comprised in it, is subsequently confirmed by the will of the settlor, the confirmation perfects the settlement, but as a testamentary instrument, so that the doctrines of ademption and lapse apply. *Bizzey* v. *Flight*, 3 L. R., Ch. D., 1269; 45 L. J., Ch., 852; 24 W. R. 957.

H., by a voluntary settlement, assigned to trustees several mortgage debts, shares in a bank, and some furniture, and directed the trustees to hold the premises and certain consols which had been previously transferred to them, upon trust for herself for life, and then, as to part of the trust premises, for specified beneficiaries; and as to the residue, for F. F. died in the lifetime of the settlor, who in her lifetime received some of the mortgage debts (the others being received by the trustees), and died without having duly transferred the bank shares, but having by her will confirmed the settlement. The settlement being valid as to the consols, the mortgage debts received by the trustees, and the furniture, but incomplete as to the mortgage debts received by the settlor and the bank shares:—Held, that the confirmation could not operate as to the mortgage debts received by the settlor; but that, notwithstanding that the settlement had not been admitted to probate, the confirmation of it by the will, which had been proved, perfected the settlement with regard to the bank shares as a testamentary instrument, and operated as a specific bequest of them; and that the shares therein of *cestuis que trustent* under the settlement, who predeceased the settlor, lapsed in favour of the residuary legatee under this will. *Ib.*

Ratification and Adoption Settlement by Wife.] 4. E settlement in 1805, made betv and the father and mother executed by the wife, althou named as a party to it, the a jointure for the wife, and mother appointed certain su and the husband covenanted sums to trustees, in trust to a the joint lives of husband after the death of either for life, with power of app the children, and in default equally. The husband died having exercised the power In 1815 the widow present the Lord Chancellor, for mai eldest son, and in this petitio the settlement, as showing the younger children were received her jointure, and the sums appointed during died in 1868, having executed disposition in the Scotch fo the sums appointed as her al —Held, that she must be held the settlement, and that it appointed. *Kingston* v. *Booth*

Other Cases.] 5. E. B., transferred certain stock, h the joint names of herself a and on the day of the trans trustees, without reference to her part, executed an indent was declared that the trustee property in trust to pay the d for her life, for her sole a independent of any husband marry; and, after her death, as E. B. should by will, not coverture, appoint, and, in appointment, in trust for E. administrators, and assigns. married, and by a deed, recitin and executed by her husband by the direction of her husba dividends of the stock in trust payment of an annuity granted —Held, that whether or not u settlement the wife had pow husband to make this assign the husband in the deed of confirmatory of the deed of consequently that the assign was valid. *Maber* v. *Hobbs*, L. J., N. S., Exch. Eq., 12.

IV. RECTIFICAT

6. A. B. being desirous of vo property on the female des existence of C. D., by de desire, and that certain perso were the only descendants C. D., settled a part of the persons so named, and reser power of appointing the rema property amongst such sever named, which, in default of given to those several pers

afterwards discovered that there were other descendants in existence of C. D., who had been omitted, and to remedy the omission he appointed a part of the fund to an object of the power, upon his executing bonds, for the payment to the persons newly discovered of the amount when received:—Held, that the appointment was void, and that the Court would not, in a suit to have the rights of the parties to the appointed fund declared, determine whether the case was such as to entitle the parties to have the settlement reformed according to the intention of the settlor. *Lee* v. *Fernie*, 1 Beav. 483.

1. A volunteer, under a settlement declaring the trusts of property placed in the hands of trustees, is entitled to file a bill to have an error rectified, even though the effect of the error should be to carry back the fund to the original settlor. *Thompson* v. *Whitmore*, 1 John. & H. 268.

2. If a voluntary deed fails to carry into effect the intentions of the parties, it cannot be reformed, except with the consent of the donor. *Phillipson* v. *Kerry*, 32 Beav. 628.

3. The Court will not rectify a voluntary deed, so as to carry out the alleged intentions of the parties, unless all the parties consent; if any object, the deed must wholly stand or wholly fall. *Brown* v. *Kennedy*, 9 Jur., N. S., 1163; 33 L. J., Ch., 71; 12 W. R. 224; 9 L. T., N. S., 302.

A voluntary deed cannot be reformed in equity, as against the grantor. S. C. 33 Beav. 133.

4. The circumstances under which a voluntary settlement may be rectified, considered. *Lister* v. *Hodgson*, 4 L. R., Eq., 30; 15 W. R. 547.

Where a sum of money was, without valuable consideration, placed in the hands of a trustee, to be held upon certain trusts then declared; and it was agreed that the transaction should be ratified and completed by the execution of a deed, and a deed was afterwards prepared and executed, which was wholly inconsistent with the trusts declared by parol; the Court ordered such deed to be delivered up and cancelled, and the money repaid to the settlor, who had executed the deed in ignorance of its legal effect. *Ib.*

5. A father being seised in fee of a large estate, and having a small estate for life with remainder to his son in tail male, the father and son executed a deed of conveyance to the father in fee of the small estate, and a deed of settlement of the large estate to the use of the father for life, with remainder to the son for life, with remainder to the eldest and other sons of the son successively in tail male. The deed contained no powers of jointuring widows or of raising portions for younger children. A joint power of revocation appeared in the draft as originally prepared by counsel, but had been struck out. The father and son had each a wife and a large family, and each declared that had he been aware of the effect of the deed he would not have executed it:—Held, that under the circumstances the deed must be rectified by adding a power of revocation, and with the plaintiff's consent it was directed that a new settlement, with all proper powers, should be made under the direction of the Court. *Welman* v. *Welman*, 15 L. R., Ch. D., 570; 49 L. J., Ch., 736; 43 L. T. 145.

Held, also, that the settlement was voluntary as regarded all persons other than the plaintiffs. *Ib.*

V. REVOCATION AND SETTING ASIDE.

1. *What Amounts to. In General*, 6297.
2. *Retention or Cancellation of Deed by Settlor*, 6298.
3. *Settlements contemplating a Future Marriage*, 6299.
4. *Omission of Power of Revocation*, 6299.
5. *Other Grounds*, 6300.
6. *Duty and Liability of Solicitor*, 6301.
7. *Other Matters*, 6302.

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10. Voluntary settlement, without a power of revocation, shall bind the party, and shall not be defeated by a subsequent will. *Villers* v. *Beaumont*, 1 Vern. 100.

11. Settlement of leasehold estates is not revoked by subsequent assignment by trustee to settlor entitled for life, or by the will of the latter; no intention to revoke appearing, and the terms of a power of revocation not being complied with. *Ellison* v. *Ellison*, 6 Ves. 656.

12. A father, tenant for life, with remainders to his son, joined with the son in executing a post-nuptial settlement, by which the father and the son assigned the lands to a trustee in trust for the father for life, subject to an annuity for the son; and after the father's death in trust for the son, subject to a jointure (charged by the pre-existing deed), and charged with a sum for portions of the younger children of the father. The father and son afterwards joined in a mortgage which did not notice this settlement: it contained covenants for title, but not against incumbrances:—Held, that the settlement as regarded the provisions for the younger children was not voluntary or void as against the the mortgagee, nor revocable by the father and son; and, even if it was revocable, was not revoked by the mortgage. *Bennett* v. *Bernard*, 10 Ir. Eq. R. 584.

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13. A settlement made by a person going beyond sea, though voluntary, not to be controlled by a letter written by him afterwards to the trustees. *Clavell* v. *Littleton*, Pre. Ch. 305; Gilb. Eq. Rep. 37.

2. Retention or Cancellation of Deed by Settlor.

1. W. made a secret conveyance of several estates to his daughter who was married, and had had a portion and was jointured. He kept possession of the estates, and of the deeds, and afterwards by will devised the estates:—Held, the devise good, the conveyance being kept secret, and he continuing in the possession of the estate. There was no evidence that he made the conveyance to avoid being sheriff of London, by putting the legal interest out of himself, and thinking by that means he may swear to his want of qualification, but it appeared he did not take the oath, but paid the fine for not serving the office. *Birch* v. *Blagrave*, Ambl. 264.

2. If a parent make a voluntary conveyance in trust for his children, and keep it in his own power, or in the hands of his agent, and this is got from him, it ought not to bind him; but where a feme, having issue by her first husband, makes a suitable provision for them before her treaty for a second marriage, this is good, and not liable to be avoided by a second husband. *Cotton* v. *King*, 2 P. W. 358; Mos. 259.

3. A voluntary deed in favour of younger children, though retained in the possession of the grantor, and afterwards destroyed by him, established against legatees. *Sear* v. *Ashwell*, 3 Swan. 411. n.

4. Party executing a voluntary deed, is not concluded by the legal ceremonies of formal execution. If he retains it in his custody he shows a plain intent not to divest himself of power over it, but to hold it just as revocable as a will; and whatever words he uses, that intent must determine its character. *Uniacke* v. *Giles*, 2 Moll. 268.

A voluntary deed, if perfect, will be executed after the death of the grantor, because, between the executor and the donee, there is no preferable equity. *Id.* 265.

If a voluntary deed is regularly executed, and delivered over to a trustee, and so put out of the control of the party, showing the design to divest the power of revocation, the party is bound, and the person intended to be benefited by that deed would have a right to come into this court against the trustee, to call upon him to secure the deed, and deposit it so as to be available for him. *Id.* 267.

A. executes a voluntary deed, assigning a chose in action to a trustee for her nephew, to take effect at her death, which she retains in possession. Her nephew, knowing of the disposition, borrows 400*l.* from her, and arranges with the trustee that so much is to be deducted from the sum assigned by the deed upon the death of A.; but there was no evidence that A. was privy to that arrangement. Upon a bill filed against the personal representative of A., who was the trustee in the deed, by the nephew, to set it up, A. having afterwards destroyed the instrument, and executed a new one, giving over the interest to another person, the wife of the trustee:—Held, that whether it contained a power of revocation or not, and however formally executed, the retention of the deed in the custody of the donor made it revocable, and the bill was dismissed, reversing a former decree in favour of the nephew, but without costs. An equity general question might be 400*l.* if it could have been s privy to the arrangement tou ment of that sum. *Id.* 257.

5. The testator, by a covenanted with trustees ths B., his two natural sons, o should survive him, his (the tors and administrators shou months after his death, pay in the deed 60,000*l.* upon them (A. and B.) as should years, and be living at the t and if neither of them, hav should attain twenty-one, th him (the testator), his execu strators. The testator reta his own possession until his communicate it either to the and B. The testator by his years later than the deed, b property upon trust for the b his sons A. and B., and his le After the death of the test covenant was found among survived the testator, and att —Held, that although the was voluntary, it nevertheles for A., and that the refusal o sue at law upon the covenant the right of A. to recover the debt out of the assets of the deed was not of a testamen being no power of revocatio covenants; that the retentio the possession of the cove absence of communication re trustees and the *cestuis que* affect its validity. *Fletcher* v 67; 14 L. J., N. S., Ch., 66;

6. A voluntary deed kept never cancelled, will not b subsequent will. *Boughton* v 625; 9 Mod. 212.

7. A voluntary deed, ne executed for purpose that completed, is considered in perfect instrument. *Cecil* v & Walk. 573.

8. A person executing a ment passes the estate out o he retained the deed in his and such settlement is not sequent voluntary deed, deli party in whose favour it is n in the absence of special ci give effect to the first leg favour of the party claiming v. *Williams*, 4 Hare 130; 11 65; 5 Jur. 1057.

9. A voluntary deed, thoug grantor until his death, hel v. *Hassel*, 32 Beav. 217.

10. A. executed a deed, m settlement of an equitable re no notice of it, and retaine afterwards destroyed the d purported to dispose of the p in the deed:—Held, that t version was bound by deed. N. S., 1166; 34 L. J., Ch., 4 495; 4 N. R. 453.

11. A settlement whereby

to a trustee to the use of the settlor for life, and afterwards in trust for volunteers, and which is not communicated to the trustee until after the settlor's death, is valid, notwithstanding the disclaimer of the trustee. A power to appoint new trustees contained in the indenture is therefore exercisable. *Jones* v. *Jones*, 31 L. T. 535; 23 W. R. 1.

3. Settlements contemplating a Future Marriage.

1. A man unmarried cannot recall a voluntary trust deed, which he executes for the benefit of future children, nor can he relieve himself from a provision in the conveyance to trustee, under which the income of the trust property is to be paid to him at the discretion of a third person. *Petre* v. *Espinasse*, 2 Myl. & K. 496.

2. A single woman, not immediately contemplating marriage, transfers a sum of stock, to which she was absolutely entitled, to trustees, upon trust to pay the dividends to her until she should marry; and after her marriage, upon trust to pay the dividends to her separate use for her life, and after her decease to pay the same to her husband for his life, or until his bankruptcy, and after his decease or bankruptcy, in trust for the children of the settlor; and if no child, for such person or persons as she should by deed or will appoint, and in default of appointment, upon trust for her next of kin. The settlement is irrevocable. *Bill* v. *Cureton*, 2 Myl. & K. 503; 4 L. J., N. S., Ch., 98.

3. Settlement in contemplation of a marriage which never took effect. A feme sole in contemplation of marriage with A. B. settled a certain fund upon trust for herself until the solemnisation (if any) of her marriage; or in case no such marriage should be solemnised, and after the solemnisation (if any) of the same marriage, upon trust for herself and her children. The fund was transferred to the trustees, but the intended marriage did not take effect, and the woman married another person:—Held, on the construction of the settlement, that it applied to any marriage, and that she could not revoke the settlement previous to her marriage; and that the trustees had committed a breach of trust for which they were answerable. *M'Donell* v. *Hesilrige*, 16 Beav. 346; 1 W. R. 71; 22 L. J., Ch., 342; 16 Jur. 1148.

See also XII. II. 2 *ante*.

4. Omission of Power of Revocation.

4. A voluntary settlement, executed by the settlor when he was, or was supposed to be, *in extremis*, was set aside, on the ground that it did not reserve to him, as it ought to have done, a power of revocation. A settlement on his family by a person *in extremis*, and not containing a power of revocation, set aside, the Court being of opinion that it was executed in expectation of his immediate death, but not with the intention that it should be operative in case of his recovery. *Forshaw* v. *Welsby*, 30 Beav. 243; 30 L. J., Ch., 331; 9 W. R. 225; 4 L. T., N. S., 170; 7 Jur., N. S., 299.

5. A settlement by an aunt on her nephew in fee of all her real estates, reserving a life estate only to herself, without any consideration except a covenant by the nephew to pay charges on the property after her death, and without any power of revocation, upheld, even as a voluntary settlement, it appearing that she had had the deed sufficiently explained to her before she executed it, that she sufficiently understood its nature and effect when she executed it, and that she intended when she executed it that it should operate and be effective according to its purport and tenor, and there being no ground for believing that she consented to execute or did execute it through or under any fraud or misrepresentation or undue influence, or by means or reason of any promise made to her, or in reliance on any promise. *Toker* v. *Toker*, 3 De G. J. & S. 487; 8 L. T., N. S., 777; 32 L. J., Ch., 322. Affirming 31 Beav. 629; 9 Jur., N. S., 370; 8 L. T., N. S., 525.

In such cases the evidence in support of the validity of the impeached deed must be clear and decisive. *Ib.*

The absence from a voluntary settlement of a power of revocation reserved to the settlor, is, in determining the validity of the impeached settlement, only a circumstance to be taken into account in connection with the other circumstances of the case. *Ib.*

The absence in the like case of advice given to the settlor as to the insertion of a power of revocation stands on the same footing. *Ib.*

6. The absence of a power of revocation is a ground upon which a voluntary deed will be set aside at the suit of a subsequent purchaser for value, though there be no trace of fraud or undue influence, if it appears that the propriety of reserving the power of revocation was not impressed upon the grantor. *Mountford* v. *Keene*, 19 W. R. 708.

An old man aged eighty executed a conveyance of freehold land in consideration of natural love and affection, to his son, to the use of himself for life, with remainder to his son in fee. The deed did not contain any power of revocation, and the propriety of inserting such a power had not been suggested to the grantor. Subsequently the grantor conveyed all his property to his daughter, who by the deed of conveyance covenanted to indemnify him against a mortgage debt, to which part of the property was subject. On a bill by the daughter to set aside the prior voluntary conveyance:—Held, that the deed must be set aside, as it contained no power of revocation, and as it was clear that the propriety of reserving such a power had not been suggested to the grantor; but without costs, as there was no evidence that the execution of the deed had been obtained by fraud S. C. 24 L. T., N. S., 925.

7. In order to support a voluntary settlement, it must be shown that all the provisions are proper and usual; or if there are any unusual provisions, that they were brought to the notice of and understood by the settlor. *Phillips* v. *Mullings*, 7 L. R., Ch., 244; 41 L. J., Ch., 211; 20 W. R., 29.

No general rule can be laid down as to the proper and usual provisions in such a settlement, but a power of revocation is not essential. *Ib.*

A young man of improvident habits, being entitled to a sum of money, was induced by the trustee of the money, and by a solicitor, to execute a settlement by which he assigned a part of the money to trustees to invest and to pay him during his life the income on such part as they should think fit, and after his death on trust to hold the same for his wife and children, if any, and subject thereto for certain cousins of his. He had no power of appointment in default of issue, and no power of revocation, and no power to appoint new trustees. The deed was explained to him, and the particular clauses were brought to his notice:—Held, that the deed could not be set aside by the settlor. *Ib.*

1. The absence of a power of revocation, and the fact that the attention of the settlor was not called to that absence, do not make a voluntary settlement invalid; they are merely circumstances to be considered in deciding on the validity of a voluntary settlement. A widow instructed a solicitor to prepare a deed settling certain houses and buildings on herself for her life, and after her death for the benefit of her children. The deed, as prepared, did not exactly correspond with the instructions, but was read over to and executed by her. There was no suggestion made to her that the deed ought to contain a certain power of revocation. Some years afterwards she burnt it, and expressed satisfaction at having got rid of it. She executed a mortgage of part of the settled property, after asking the consent of a son who was both beneficially interested and a trustee of the settlement, and made a will purporting to dispose of the whole property:—Held, that, under the circumstances, the deed of settlement was valid, and not affected by the want of a power of revocation or by the divergence from the instructions. *Hall* v. *Hall*, 9 L. R., Ch., 430; 21 W. R. 373; 42 L. J., Ch., 444; 28 L. T. 383. Reversing 27 L. T. 115; 20 W. R. 797.

2. An aged lady of weak intellect having made a voluntary settlement, containing no power of revocation, and without independent advice, under the impression that she was making a will, at the instance of some members of the family:—Held, that she was entitled to a decree to set aside the deed, and to have the stock transferred by her under its provisions, retransferred into her name. *Henshall* v. *Fereday*, 27 L. T., N. S., 743; 21 W. R. 240. Affirmed 29 L. T., N. S., 46; 21 W. R. 570.

The solicitor who drew the deed read it over to her, but admitted that he had not expressly told her that it contained no power of revocation; he was ordered to pay his own costs. *Ib.*

3. In 1872 plaintiff, in order to protect his property, executed a voluntary post-nuptial settlement of all his real and personal estate, except a sum of cash under 1,000*l.*, in favour of his wife (for her separate use) and children. The settlement contained no power of revocation. In 1880 plaintiff brought an action against the trustees and his infant children, to set aside the deed on the ground of undue influence, misrepresentation, and ignorance of its effect:—Held, that the wife must be joined as a defendant. *Henry* v. *Armstrong*, 44 L. T. 918; 18 L. R., Ch. D., 668; 30 W. R. 472.

Held, also, that the burden of proof of a sufficient ground for setting t on the plaintiff. *Ib.*

Held, also, that a power of with the consent of the trus been inconsistent with the ob and that its absence was no g the deed aside. *Ib.*

4. A voluntary settlement made by a young lady, an orp before she attained twenty-o commendation of the family executed by her eight weeks twenty-one without any inde Thereby she assigned to he an uncle as trustees the who upon trusts for herself for life to her children or testamen and in case there were no c default of appointment, to A power of raising 700*l.*, and settlor, was reserved, but the tained no power of revocatio ment by deed, and gave her investments or in the appo trustees:—Held, that althou and trustees acted really wi of benefiting the lady, the be set aside on the ground *Everitt* v. *Everitt*, 39 L. J., C Eq., 405; 18 W. R. 1020; 23

5. Other Groun

5. A., having been deser and not having heard of h married again; afterwards, h that she was alive, and b liable to be convicted of biga a deed, purporting to conve for valuable consideration. parol evidence, that the de on the understanding that B. land at A.'s disposal. No c paid by B., and A. remained possession of the land, and mortgage upon it:—Held, tha was not illegal, and that A. decree for a reconveyance o Statute of Frauds being exclu ground of fraud and of a resul the 8th section. *Davies* v. *O* 252; 13 W. R. 484; 12 L. T.,

6. A deed of settlement, wh is delivered, bound hand an property settled, into the pow cannot be maintained in eq clearest proof that it was m the request, consent, knowled the settlor; and a solicitor himself to prepare such a de by his client, without the cle the concurrence of the latte to all the consequences and deed being set aside, notw solicitor may have been influe for the benefit of his client settlement. Therefore, whe alleged by the defendant to extravagant, applied to a so certain sum on mortgage, and view to prevent the former his fortune, tied up the who and constituted himself so

Court, on bill filed by the plaintiff, alleging that the deed of settlement had been prepared without his authority, consent, or knowledge, and there not being any evidence to the contrary, declared the deed void in equity, and directed a reconveyance of the trust property by the trustee. *Moore* v. *Prance*, 9 Hare 299; 20 L. J., N. S., Ch., 468; 15 Jur. 1188.

1. A voluntary settlement which conveys real estate to a trustee for the settlor for life, with remainder to her nephew absolutely, will not be set aside upon unsupported allegations of fraud, undue influence, intimidation, and coercion. *Toker* v. *Toker*, 31 Beav. 629; 9 Jur., N. S., 370; 8 L. T., N. S., 525. Affirmed 8 L. T., N. S., 777; 32 L. J., Ch., 322; 3 De G. J. & S. 487.

The Court refused to set aside a voluntary deed at the instance of the settlor, where it appeared that it was made solely at the instance of the settlor, and by the settlor's own solicitor, who fully explained the provisions and effect of the deed. *Ib.*

2. Where donor and donee were dead at the time of the institution of a suit, the Court set aside a voluntary deed, on the ground that it was not fully explained to the donor. *Phillipson* v. *Kerry*, 11 W. R. 1034.

If a voluntary deed does not express the intentions of the parties, it cannot be rectified so as to carry out such intentions; but, if impeached, it must wholly stand or wholly fall. *Ib.*

3. A married woman living apart from her husband, by a voluntary deed appointed all her property to herself for life, with remainder to the husband of her sister, irrevocably. She had the deed read over to her before execution, and it was pointed out to her that it was irrevocable. She never again saw the deed, and kept no copy of it, and subsequently executed a settlement and will inconsistent with it. The husband of her sister had notice of the settlement, but stood by and did not produce the deed till three months after her death:—Held, that the deed must be set aside, as it was not proved to be the well-considered act of hers. *Coutts* v. *Acworth*, 17 W. R. 1121; 8 L. R., Eq., 558; 38 L. J., Ch., 694; 21 L. T., N. S., 224.

4. Trusts in a marriage settlement in favour of the children of a future marriage and of collaterals, are purely voluntary. *Wollaston* v. *Tribe*, 9 L. R., Eq., 44.

A person taking a benefit under a voluntary gift which is not subject to a power of revocation has thrown upon him the burden of proving that the gift was meant by the donor to be irrevocable. *Ib.*

A voluntary gift not subject to a power of revocation, but not meant to be irrevocable, may be set aside by the donor. *Ib.*

5. Circumstances under which a voluntary deed will be set aside. *Henshall* v. *Fereday*, 21 W. R. 570; 29 L. T. 46. Affirming 27 L. T. 743; 21 W. R. 240.

6. A voluntary deed, by which a father purported to convey his property to his son absolutely, but which did not carry into effect the whole arrangement between them, was set aside at the instance of the father after the son's death. *Hughes* v. *Seanor*, 18 W. R. 1122.

A mortgage effected by the son upon the property, the father, though in possession, allowing the son to act as if absolute owner, upheld. *Ib.*

7. Where, in an action to obtain the cancellation or modification of a voluntary deed on the ground of undue influence and want of independent advice, the plaintiff admits that he had an accurate general knowledge of what he was doing, and only refused to receive a detailed explanation of the deed because he trusted his solicitor to look into those details on his behalf, he was as much bound as if he were himself a lawyer, and had drawn the deed with his own hand. *Lovell* v. *Wallis* (No. 2), 50 L. T. 681.

8. The Court will not set aside a voluntary settlement if the settlor understood and approved of its object, and it contains the usual clauses for carrying out that object; but if the settlement contains unusual clauses, it will be set aside unless it is clearly proved that the settlor understood the effect of and approved of the insertion of the unusual clauses. *Phillips* v. *Mullings*, 20 W. R. 129; 41 L. J., Ch., 211; 7 L. R., Ch., 244.

9. Where an action is brought by the settlor against the trustees to set aside a voluntary settlement, the Court will not consider the propriety or impropriety of the clauses, except as evidence that the settlor did not understand what he was doing; the only question being whether the settlor understood what he was doing, and its effect on his position with regard to the property. But *quære*, whether this applies to cases in which there are persons claiming adversely to the settlor. Per Cotton, L. J. *Dutton* v. *Thompson*, 23 L. R., Ch. D., 278; 52 L. J., Ch., 661; 49 L. T. 109; 31 W. R. 596.

6. Duty and Liability of Solicitor.

10. It is the duty of a solicitor, in preparing a settlement executed by a person *in articulo mortis*, to reserve a power of revocation; and where such a deed was executed without a power of revocation being reserved, the Court ordered it to be cancelled. *Forshaw* v. *Welsby*, 7 Jur., N. S., 299; 30 L. J., Ch., 331; 9 W. R. 225; 4 L. T., N. S., 170; 30 Beav. 243.

11. An aged lady of weak intellect made a voluntary settlement, which was set aside as it contained no power of revocation. The solicitor who drew it admitted that he had not expressly told her of the absence of such a power:—Held, that he must pay his own costs. *Henshall* v. *Fereday*, 27 L. T. 743; 21 W. R. 240. Affirmed 29 L. T. 46; 21 W. R. 570.

12. In the absence of fraud, the Court has no jurisdiction to make a solicitor pay the costs of an action rendered necessary by his mistake or carelessness. *Clark* v. *Girdwood*, 26 W. R. 90.

The client's remedy is by an action for damages. *Ib.*

13. A. made an irrevocable voluntary settlement of his estate in favour, amongst others, of a relative, who acted as his solicitor. The Court considered that A. intended to reserve a power of revocation, but that the deed was in other respects unobjectionable. A. made his will, prepared by the solicitor, making a general devise, but not revoking the settlement. The Court then held that it was the duty of the solicitor, when he prepared the will, specifically to have asked the testator

whether he intended to revoke the deed; and not having done so, and it appearing to have been the intention of the testator that the estate should pass to his devisees, the Court decided, that although the deed would have been operative if A. had died intestate, yet that in the events which had happened, and as against all persons claiming under the settlement, the estate was subject to the trusts of the general devise obtained in the will. *Nanney* v. *Williams*, 22 Beav. 452.

1. A solicitor, acting both for donor and donee, prepared a will and several deeds containing no power of revocation, by which the donor reduced herself to absolute dependence upon the donee. The documents were afterwards set aside on the ground of undue influence, and the solicitor was ordered to pay, not only his own costs, but the costs of the suit if the estate of the donee should prove insufficient for that purpose. *Baker* v. *Loader*, 21 W. R. 167.

2. The party taking a benefit under a voluntary settlement or gift containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable. And, where the circumstances are such that the donor ought to be advised to retain a power of revocation, it is the duty of a solicitor to insist upon the insertion of such power, and the want of it will in general be fatal to the deed. *Coutts* v. *Acworth*, 8 L. R., Eq., 558; 17 W. R. 703; 38 L. J., Ch., 694; 21 L. T., N. S., 224.

3. A deed of settlement, whereby the settlor is delivered, bound hand and foot as to the property settled, into the power of his trustee, cannot be maintained in equity without the clearest proof that it was made at and with the request, consent, knowledge, or instance of the settlor; and a solicitor who takes upon himself to prepare such a deed for execution by his client, without the clearest evidence of the concurrence of the latter, does so subject to all the consequences and liabilities of the deed being set aside, notwithstanding the solicitor may have been influenced by motives for the benefit of his client in preparing the settlement. Therefore, where the plaintiff, alleged by the defendant to be young and extravagant, applied to a solicitor to raise a certain sum on mortgage, and the latter, with a view to prevent the former from dissipating his fortune, tied up the whole of his property and constituted himself sole trustee; the Court, on bill filed by the plaintiff, alleging that the deed of settlement had been prepared without his authority, consent, or knowledge, and there not being any evidence to the contrary, declared the deed void in equity, and directed a reconveyance of the trust property by the trustee. *Moore* v. *Prance*, 9 Hare 299; 20 L. J., N. S., Ch., 468; 15 Jur. 1188.

7. Other Matters.

4. A court of equity will not assist a vendor in defeating a prior voluntary settlement made by himself. *Smith* v. *Garland*, 2 Meriv. 123.

5. A voluntary deed set aside after the deaths both of donor and donee. *Phillipson* v. *Kerry*, 32 Beav. 628.

6. A voidable voluntary c
cannot be set aside as aga
from the donee, without r
paid. *Aldborough* v. *Trye*,
F. 436.

The purchase from an hei
interest will be supported, if
is paid, though that should b
given by the statute tables.

7. A. made a voluntary se
(subject to an annuity of 10
son), in trust for his eldest
which settlement did not c
of revocation; the eldest so
father made another volunt
the same lands to the use o
remainder to his youngest
mainder to trustees to preser
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The first deed came into t
eldest son's heir, and the ot
son, who brought a bill to s
Both sons having been other
it was held, that though
voluntary, yet the consider
younger child was not suffi
the first deed. *Clavering* v.
P. C. 410.

8. A woman conceiving
absolute interest in certain
in which, in fact, her chil
interested with her, made a
ment of it upon herself for li
to her children; the settl
binding upon the children, v
binding upon herself. *Croc*
Hare 451; 11 L. J., N. S., Ch

9. Voluntary settlement
wife, of wife's estate on th
remainder to J. grandson o
remainder as husband or wi
appoint; husband and wife m
to a creditor of the husband
lease, without a fine: husba
dead, and the grandson be
issue, *quære*, whether the m
against the heir of the wife.
Ambl. 654.

10. A voluntary conveyanc
of conferring a qualification
Level Act, was executed by
of his son, and registered, bu
cated to the son, who died
The legal estate was outsta
gagee:—Held (reversing 3
Jur., N. S., 509; 26 L. J., C
father was entitled to have
prised in the deed conveyed
v. *Childers*, 3 Jur., N. S., 1277

11. When a suit is institu
voluntary settlement of re
estate, and the right to the
contested, the Court will ord
of the property the subject
and direct payment of the
property so settled. *Thomp*
L. T., N. S., 809.

12. A court of equity w
actively against a volunt
medium of a person (not
value) claiming only throu
created the voluntary settle
Aylward, 4 L. R., H. L., 486

Where a voluntary settl

made, subsequent judgment creditors of the settlor cannot acquire rights in derogation of it which the settlor himself would not have possessed. *Ib.*

1. In a suit for specific performance against a vendor and those claiming under a voluntary settlement made by him previously to the contract for sale, the Court refused to declare that the settlement was void under 27 Eliz., c. 4. *Fletcher* v. *Ketteman*, 40 L. J., Ch., 624.

2. Where owner of estate in voluntary deed reserves power to himself: it is to be construed more favourably than power reserved to a stranger. *Fitzgerald* v. *Fauconberge*, Fitzg. 220.

3. If freeman of London makes voluntary deed, in consideration of love and affection only, and reserves power over estate to himself, the property still continues in him, and is subject to custom. *Smith* v. *Fellows*, 2 Atk. 62.

4. An appointment of an annuity to be paid out of an office if voluntary, is countermandable. *Young* v. *Cottle*, 1 P. W. 101.

5. After a voluntary settlement, a man cannot devise the same estate, though for payment of his debts. *Bale* v. *Newton*, 1 Vern. 464.

A settlement, though voluntary, is not revocable. *Ib.*

6. If property be conveyed by a debtor in trust for the benefit of creditors, who are neither parties nor privy to the deed, the deed merely operates as a power to the trustees to apply the property in payment of debts, and such power is revocable by the debtor. *Quære*, whether a communication by the trustees to the creditors of the fact of such a trust will not defeat the power of revocation by the debtor. *Acton* v. *Woodgate*, 2 Myl. & K. 492; 3 L. J., N. S., Ch., 83.

7. A. by a voluntary deed assigned a mortgage debt and securities to E. upon trust for A. for life, remainder upon trusts in favour of L. and her children. She afterwards assumed to cancel and revoke this deed, and to assign the property therein comprised upon trust for the sole use and benefit of E. Previously to the marriage of E. with her present husband P., the property in question was made the subject of settlement. Upon a bill filed by L. and her children to have the trusts of the voluntary settlement carried into execution:—Held, that P. was liable to make good the trust fund under the voluntary deed, in assigning which E. had been guilty of a breach of trust. *Lanham* v. *Pirie*, 5 W. R. 540; 3 Jur., N. S., 704.

8. A gift conclusively made to a volunteer, by means of a completed declaration of trust in his favour, is incapable of revocation by the donor. On the marriage of J. P. and B. L. P. certain sums of consols, the property of B. L. P., were settled in trust for J. P. for life, then for B. L. P. for life, then for the children of the marriage; and in default or failure of children, if J. P. should survive B. L. P., then, from his death and default or failure of children, as B. L. P. should by will appoint, or, in default of appointment, for her next of kin, under the Statute of Distributions; or, if B. L. P. should survive J. P., then, from his death and default or failure of children, for B. L. P. absolutely. No children were born of the marriage, and B. L. P. was past the age of childbearing:—Held, that notwithstanding the fact that the next of kin of B. L. P. were volunteers under the settlement, B. L. P. was not entited to have the settled funds transferred to her, on her petition with the concurrence of her husband. *Paul* v. *Paul* (15 L. R., Ch. D., 580) not followed; *Paul* v. *Paul* (No. 2), 19 L. R., Ch. D., 47; 51 L. J., Ch., 5; 45 L. T. 437; 30 W. R. 314. Affirmed 20 L. R., Ch. D., 742; 51 L. J., Ch., 839; 47 L. T. 210; 30 W. R. 801.

9. Court will not order delivery up of voluntary instruments, which are revocable. *Bromley* v. *Holland*, 7 Ves. 28.

10. If a conveyance is made with a power of revocation, and afterwards is revoked, he to whom the inheritance belongs may compel the deed to be delivered up to him to be cancelled, because the deed of revocation may be lost, and then it is unreasonable the other deed should be standing out. *Anon.*, Gilb. Eq. Rep. 1.

11. A. makes a voluntary settlement on B., who, after, agrees to deliver it up without consideration. This agreement shall bind in equity, for a voluntary settlement may be surrendered voluntarily. *Wentworth* v. *Deverginy*, Pre. Ch. 69.

12. Bill by an expectant heir to set aside a post-nuptial settlement of a real estate in expectancy, to trustees for his wife for life, remainder to pay annually 500*l.* to the children, remainder to herself for life, made while he was indebted, and on the suggestion of his wife's mother. Dismissed without costs. *Shafto* v. *Adams*, 4 Giff. 492; 10 Jur., N. S., 121; 33 L. J., Ch., 287; 9 L. T., N. S., 676; 3 N. R. 363.

The principle upon which the Court acts in discouraging mortgages, sales, and dealings with expectant heirs of reversionary interests, has no application to a settlement by an heir in favour of his wife and children. *Ib.*

VI. ENFORCING AND RIGHTS OF VOLUNTEERS.

1. *Bill in Equity to Enforce*, 6303.
2. *Burden of Proof*, 6305.
3. *Other Relief*, 6305.
4. *General Rights of Volunteers*, 6306.

1. Bill in Equity to Enforce.

13. Discretionary in a court of equity, whether it will aid voluntary conveyances where there is no remedy at law. *Bold* v. *Corbett*, Pre. Ch. 84.

14. Specific performance of a voluntary settlement refused. *Brownsmith* v. *Gilborne*, 2 Stra. 738.

15. Court, in general, will not decree performance of voluntary agreements. *Wycherley* v. *Wycherley*, 2 Eden 177.

16. Where deed is not sufficient to pass the estate, but party must come into equity, Court never executes a voluntary agreement. *Colman* v. *Sarrell*, 1 Ves. J. 54.

Where necessary to come to equity to raise an interest by way of trust there must be at least a meritorious consideration. *Id.* 55.

Bill to have a voluntary deed delivered up dismissed; cross-bill to execute it retained for

a year, with liberty to sue upon a covenant in the deed. *Id.* 50; 3 Bro. C. C. 12.

No costs to any party claiming under a contract, not meritorious, even though recovered upon; not even to a trustee. *Id.* 55.

1. Court will not assist volunteers without a consideration so as to constitute a trust, unless the legal conveyance constituting the trust is actually made, when it will enforce the equitable interest, though there is no consideration. *Ellison* v. *Ellison*, 6 Ves. 656.

2. A trustee under a voluntary settlement of chattels, policy of assurance, and mortgage, filed a bill against the representatives of the settlor for the recovery thereof:—Held, that if the property was legally vested in the plaintiff, he might recover it at law, and apply it on the trusts; but if otherwise, then, as the deed was voluntary, the Court could afford the plaintiff no assistance in recovering it. *Ward* v. *Audland*, 8 Beav. 201; 14 L. J., N. S., Ch., 145; 9 Jur. 384.

3. If husband, even after marriage, conveys his wife's fortune to a trustee for her separate use, and the trustee is guilty of a breach of trust, the Court will oblige him to make satisfaction to the *cestui que trust*. *Smith* v. *French*, 2 Atk. 243.

4. By a voluntary settlement a husband and wife assigned all the property which the wife then was or which she or her husband in her right might become entitled to, upon certain trusts for the benefit of the wife, the husband, and the children of the wife, by her present or any future husband. A bill filed by the wife against the husband to carry the trusts of this deed into effect was dismissed at a re-hearing, as it had been at the first hearing. *Ellis* v. *Nimmo* (Ll. & G. *temp.* Sugd. 333) observed on. *Holloway* v. *Headington*, 8 Sim. 324; 6 L. J., N. S., Ch., 199.

5. If a voluntary deed is regularly executed, and delivered over to a trustee, and so put out of the control of the party, showing the design to divest the power of revocation, the party is bound, and the person intended to be benefited by that deed, would have a right to come into this court against the trustee, to call upon him to secure the deed, and deposit it so as to be available for him. *Uniacke* v. *Giles*, 2 Moll. 267.

A voluntary deed, if perfect, will be executed after the death of the grantor, because, between the executor and the donee, there is no preferable equity. *Id.* 265.

6. Bill to enforce parol agreement not stating any consideration, and consideration being proved illicit, a general demurrer allowed. *Matthews* v. *L—e*, 1 Madd. 558.

7. The Court will not carry a voluntary conveyance by a bankrupt into execution against his assignees. *Secus*, of a conveyance for good consideration before the bankruptcy. *Tyrell* v. *Hope*, 2 Atk. 562.

8. Where a man, having, by voluntary deed, assigned to a trustee certain choses in action, and other personal chattels, in trust for himself for life, and after his death for other parties, afterwards by will disposed of the property so assigned, and the trustee and *cestuis que trustent* under the settlement filed their bill against the executors and legatees, praying that, after payment of testator's debts, the residue might be paid to the trustee, the bill was dismissed with costs; was affirmed by the Chancell that the suit might have be making the trustee a defenda ing difficulties in the way of the trusts, or by making th plaintiff, as to enable the Cou He therefore dismissed the b judice to the institution of *Ward* v. *Audland*, 8 Sim. 571 Jur. 652.

9. Court of equity will not a mere voluntary settlement upon a subsequent purchase covenant to lay out the mo uses, will not lay hold of the m v. *Pulvertoft*, 18 Ves. 93.

10. Distinction upon the wa tion upon a contract merely Court will do nothing but t upon a trust actually created against a party having a right to it by his own act under a s vocation, by analogy to the dist the cases where an entail can b and where a recovery is necess

11. A trustee executed a settl trusts of 2,000*l.* belonging to married woman), which sum truly recited to be in his hand of a promise by her to pay th of her separate estate. The paid:—Held, that neither the settlement, nor a volunteer enforce the promise. *Marler* L. R., Eq., 8; 43 L. J., Ch., 73

12. A voluntary conveyanc the property of the grant against him, as an agreement of equal value. *Carey* v. *Staff*

13. A., by deed, contracted sideration of 100*l.*, to maintai apprentice B.'s child; and if of his own, on B.'s child attai years, to give him all his re estate at his death, subject to for his widow. It appeared, fr stances of the case, probable th consideration of 100*l.* was no or intended or by either party that it was stated in the deed There was some evidence tha at A.'s house after the date o it appeared doubtful whether lived with A. in the manner contract, and he soon after wa his father (B.), and the Cour that A. and B., by agreement selves, abandoned the contract *status* of the child had not been thing done by A. in pursuance Upon a bill filed by the child, of A.:—Held, that the contra abandoned by the contracting not be enforced by the child. 5 Myl. & C. 250; 9 L. J., N. S., 165. Affirming 1 Beav. 540; 6 350.

Whether this Court would per by which a person, for a sum of m himself of the possibility of rea which he can dispose of by destroys an active motive for condition in life, *quære*. *Ib.*

Whether, if the contract had been so acted on by A. to alter the status of the child, the child could have enforced the contract, *quære*. *Ib.*

1. The testator, by a voluntary deed, covenanted with trustees that in case A. and B., his two natural sons, or either of them, should survive him, his (the testator's) executors and administrators should within twelve months after his death pay to the trustee named in the deed 60,000*l.*, upon trust for such of them (A. and B.) as should attain twenty-one and be living at the time of his death; and if neither of them, having survived him, should attain twenty-one, then upon trust for him (the testator), his executors and administrators. The testator retained the deed in his own possession until his death, and did not communicate it either to the trustees or to A. and B. The testator, by his will, dated some years later then the deed, bequeathed all his property upon trust for the benefit of his wife, his said sons A. and B., and his legitimate children. After the death of the testator, the deed of covenant was found amongst his papers. A. survived the testator, and attained twenty-one:—Held, that although the deed of covenant was voluntary, it nevertheless created a trust for A., and that the refusal of the trustee to sue at law upon the covenant did not prejudice the right of A. to recover the payment of the debt out of the assets of the testator. That the deed was not of a testamentary nature, there being no power of revocation reserved to the covenantor. *Fletcher* v. *Fletcher*, 4 Hare 67; 14 L. J., N. S., Ch., 66; 8 Jur. 1040.

2. H., by a voluntary deed, assigned, *inter alia*, moneys secured on mortgage, notes of hand, furniture, and other effects, to W. upon trust for himself the settlor for life, and after his death upon trust (among other payments) to pay 40*l.* to the plaintiff. He afterwards devised and bequeathed all his property, real and personal, upon trusts in which the plaintiff took no interest. Upon a bill filed by her to have the general trusts of the previous voluntary settlement carried into execution:—Held, that she was entitled to relief not extending beyond that portion of the trust property which was charged in her favour; and that it was not necessary that the other persons entitled under the same set of trusts should appear as plaintiffs. Held, also, that the deed was sufficient to vest in the trustee the notes of hand, etc., upon which the trust was fastened; and that the trustee, who was himself the principal *cestui que trust*, having concurred in allowing the settlor to receive moneys thereunder, and having joined with him in committing a breach of trust, was liable to the plaintiff; and, as a defendant, had no right to ask that the trust of the settlement should be carried out to an extent greater than was necessary in order to enable the plaintiff to enforce her claim. Directions as to the costs of all parties to the suit. *Parnell* v. *Hingston*, 2 Jur., N. S., 854; 4 W. R. 794.

3. Residuary estate, consisting of money in the funds, was bequeathed to a mother and daughter, in trust for the mother for life, and afterwards for the daughter absolutely. By a settlement made in contemplation of the daughter's marriage, the daughter assigned her interest under the will to trustees, upon trust for the issue of the intended marriage, and for a niece of the daughter and the issue of the niece. The daughter's husband died soon after the marriage, of which there was no issue. The mother was not a party to the settlement, but had notice of it before the husband's death:—Held, that even if the settlement was voluntary as regarded the trusts in favour of the niece, it was a complete alienation, so as to be capable of enforcement at the instance of the trustees of the settlement against the daughter, and the trustees of another settlement which she made upon a second marriage inconsistent with the former settlement. *Kekewich* v. *Manning*, 1 De. G. M. & G. 176; 16 Jur. 625; 21 L. J., Ch., 577.

4. A *cestui que trust*, though a volunteer, can enforce his rights against the trustee, as soon as the trust funds come to the hands of the trustee. A was indebted to three creditors, B., C., and D.; B. obtained a judgment and sued out a right of *fi. fa.* Before the writ was executed, A. gave a bill of sale to C., upon trust to pay himself and D., but D. was no party to the bill of sale, and had not assented to it:—Held, that, in the absence of any question arising out of the law of bankruptcy, the bill of sale gave priority to D. as well as to C. over B. *Westbury* v. *Clapp*, 3 N. R. 633. 12 W. R. 511.

2. Burden of Proof.

5. When a grantee, under a deed purporting to be a conveyance for valuable consideration, attempts to support the grant as a gift, the onus of proving that such a gift was intended and made is thrown upon the grantee, and clear evidence in support of the gift will be required. *Coultwas* v. *Swan*, 22 L. T. 539; 19 W. R. 485.

6. The party taking a benefit under a voluntary settlement or gift containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable. *Coutts* v. *Acworth*, 8 L. R., Eq., 558; 38 L. J., Ch., 694; 21 L. T. 224; 17 W. R. 703.

7. When a voluntary deed is impeached the onus of supporting it does not necessarily rest upon those who set it up. *Henry* v. *Armstrong*, 18 L. R., Ch. D., 668; 44 L. T. 918; 30 W. R. 472.

8. C., in 1855, mortgaged a house to the plaintiff in fee, handing over to him the deed of conveyance to himself, with the receipt of the vendors indorsed. In 1851 C. had made a voluntary conveyance of the house to trustees in trust for his wife and children, the consideration expressed being natural love and affection:—Held, that though evidence might be adduced to show that valuable consideration had been in fact given for the settlement, such evidence must be of a most conclusive kind, and that on the evidence adduced the mortgage must prevail. *Levy* v. *Creighton*, 22 W. R. 605.

3. Other Relief.

9. In legal conveyances, if defective, the Court will not assist against the heir, unless

there is a meritorious consideration. *Wright* v. *Englefield*, Ambl. 474; 2 Eden 239.

1. Voluntary conveyances seldom relieved in equity where defective in form at law. *Bonham* v. *Newcomb*, 2 Vent. 365.

2. Relief denied against the breach of a condition in a voluntary settlement. *Longdale* v. *Longdale*, 1 Vern. 456.

3. Omission in a voluntary conveyance not supplied in equity. *Lee* v. *Henley*, 1 Vern. 37.

4. The validity of a voluntary deed affecting freehold, which the grantor had retained in his possession, was held to be a question of law, which the Court refused to decide. *Dillon* v. *Coppin*, 4 Myl. & C. 647; 9 L. J., N. S., Ch., 87; 4 Jur. 427.

5. A voluntary bond without condition, is good in equity, if no fraud used in obtaining it. *Wright* v. *Moore*, 1 Ch. Rep. 157.

6. Equity will not take away any defence the party may have at law to a voluntary deed; but if deed for good consideration had been discharged by voluntary release, such defence would be restrained. *Praund* v. *Turner*, Fitzg. 105.

7. Equity will not carry a voluntary agreement beyond the letter. *Basse* v. *Gray*, 2 Vern. 693.

8. Bankruptcy cannot have the effect of voluntary transfer of stock under a covenant. *Exp. Alcock*, 1 Ves. & B. 179.

9. A. makes a voluntary settlement on her nephew, keeping the deed in her power, in which settlement there is no power of revocation; afterwards, one secretly, and by fraud on behalf of the nephew, gets an attested copy of this settlement, and then the party who made the settlement burns it, and settles the premises on another nephew. The first nephew's bill to establish the copy of the first settlement is dismissed with costs; upon which the second nephew, claiming under his settlement, brings a bill to have the attested copy delivered up, and has a decree for it; because such copy has been indirectly gained. *Naldred* v. *Gilham*, 1 P. W. 577.

10. Relief was given where a voluntary bond was lost. *Lightbone* v. *Weedon*, 1 Eq. Abr. 93.

11. A court of equity will not, where there has been a voluntary settlement, interfere to disturb that settlement in favour of a person whose claim is derived only through the settlor. *Dolphin* v. *Aylward*, 4 L. R., H. L., 486; 23 L. T. 636.

4. General Rights of Volunteers.

12. One that claims under a voluntary conveyance may redeem a mortgage. *Howard* v. *Harris*, 1 Vern. 193.

13. In 1860 A. sold and conveyed some property to B.; afterwards, in 1864, A. by a deed, reciting that the deed of 1860 was invalid, voluntarily conveyed the property to trustees for himself for life, with remainder to his children: —Held, that the infant children of A. could maintain a suit, as sole plaintiffs, to set aside the deed of 1860, the right to sue being incidental to the property conveyed. *Dickinson* v. *Burrell*, 35 Beav. 257. S. C. *nom. Dickenson* v. *Burrell*, *Stourton* v. *Burrell*, 1 L. R., Eq., 337; 12 Jur., N. S., 199; 14 W. R. 412; 13 L. T., N. S., 660.

The construction of, and th
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valid, are the same as if ex
Ib.

14. Persons claiming unde
tlement cannot insist on thei
the expense of a suit as th
own benefit, to set aside
accounts between himself
under which he has been fou
specific sum settled, and by v
to be bound, and which he be
rate. *Parker* v. *Bloxam*, 20

15. Where a voluntary se
holds contained a covenant
the trustees for quiet enj
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v. *Cox*, 8 L. T., N. S., 134;
Beav. 118.

The settlor, after makin
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the settlement; and after
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resettlement:—Held, that
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property, but were not entit
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See BANKRUPTCY, VIII. i
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See SETTLEM

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See SETTLEMEN

SEVERANCE.

— *Of Excess in Appointment under Powers.* See POWER, XV. VI.—XVI. VII.
— *Of Excess under a Trust for Accumulation.* See ACCUMULATION, IV.

See also JOINT TENANCY—PARTITION.

SEWERS.

— *Nuisance and Pollution of Streams by.* See NUISANCE, II. 6—WATER AND WATERCOURSE, VIII.
— *Construction of.* See LOCAL GOVERNMENT, VI.

See also CANAL—DRAINING.

Jurisdiction of Court of Chancery.] 1. Injunction against the act of Commissioners of Sewers reducing the height of water in a river, dissolved, there being a much shorter remedy by *certiorari* in the Court of Queen's Bench, who interfere with great caution. *Kerrison* v. *Sparrow*, 19 Ves. 449.

2. Bill to be relieved against order of Commissioners of Sewers. Demurrer overruled. *Box* v. *Allen*, Dick. 49.

3. Where Commissioners of Sewers, under an Act of Parliament, are proceeding to pave and make sewers to the injury of property in a case not within the Act, this Court, unless expressly excluded, has jurisdiction to interfere, although by the Act jurisdiction is given to the justices at sessions, whose judgment is not to be removed by a *certiorari* or otherwise into any of Her Majesty's courts of record at Westminster or elsewhere. *Birley* v. *Chorlton-upon-Medlock* (*Constables of*), 3 Beav. 499.

4. The Court of Chancery has jurisdiction to entertain a bill at the suit of the Commissioners of Sewers appointed under 23 Hen. 8, c. 5, notwithstanding that such commissioners are a court of record. *Crossman* v. *Bristol & South Wales Union Railway Co.*, 1 Hem. & M. 531 ; 11 W. R. 981.

Rights of.] 5. The Commissioners of Sewers are entitled to restrain a railway company by injunction until the hearing, from interfering with a natural deposit of beach, forming a protection to the country from the inundations of a tidal navigable river, within the survey of the commissioners ; and this notwithstanding a purchase by the company from the lord of the manor, under parliamentary powers, of the spot in question. *Crossman* v. *Bristol & South Wales Union Railway Co.*, 11 W. R. 981 ; 1 Hem. & M. 531.

Semble, that "banks and walls, etc.," by tidal and navigable rivers, as well as by the sea coast, are included in 3 & 4 Will, 4, c. 22. *Ib.*

6. Turning water from mills may have help in Chancery, but referred to Commissioners of Sewers. *Swain* v. *Rogers*, Cary 26.

7. The Commissioners of Sewers, acting under the powers of 57 Geo. 3, c. 29, cannot take compulsorily the whole of a house, unless they have formally adjudged that possession of the whole is necessary for the purpose of executing their powers. *Thomas* v. *Dan*, 2 L. R., Ch., 1 ; 36 L. J., Ch., 201.

8. Where, under 57 Geo. 3, c. 29, notice had been served on the owners in fee of four houses to the requiring them to treat for the sale Commissioners of Sewers, the commissioners will not be allowed to summon a jury to assess the value of one of the houses separately. *Ecclesiastical Commissioners* v. *Commissioners of Sewers*, 14 L. R., Ch. D., 305 ; 28 W. R. 824.

SHARES.

— *Whether Real or Personal Estate.* See CHARITY—STOCK AND SHARES.
— *Gift of.* See DONATIO MORTIS CAUSÂ, X. —GIFT, II. 3—LEGACY, II. III.—WILL.
— *Issue of and Transfer.* See COMPANY, XIII.
— *Sale of on Stock Exchange.* See STOCK EXCHANGE.
— *Contracts for Sale of. Performance of.* See SPECIFIC PERFORMANCE.

See also BANKRUPTCY, XVII. xxxii.—XIX. xx.

SHELLEY'S CASE. RULE IN.

— *In Case of Executory Trusts Created by Wills or Articles for Settlement.* See TRUSTS (EXECUTORY).

I. GENERAL PRINCIPLES, 6307.
II. COALESCENCE OF EQUITABLE AND LEGAL ESTATES, 6308.
III. COALESCENCE OF EQUITABLE ESTATES, 6309.
IV. ESTATE OF ANCESTOR.
  1. *Sufficiency of*, 6311.
  2. *Words Qualifying*, 6312.
V. REMAINDER TO HEIRS OR HEIRS OF BODY.
  1. *Words Qualifying*, 6314.
  2. *When Contingent*, 6316.
VI. REMAINDER TO HEIR OR HEIR OF BODY.
  1. *In General*, 6317.
  2. *Words Qualifying*, 6317.
VII. REMAINDER TO ISSUE, AND CONSTRUCTION OF ISSUE AS A WORD OF LIMITATION. See WILL.
VIII. ABSOLUTE INTEREST IN PERSONALTY WHERE ESTATE TAIL BY IN REALTY. See WILL.

I. GENERAL PRINCIPLES.

9. When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail ; the word "heir" in such case is always taken to be a word of limitation, not of purchase. *Ambrose* v. *Hodgson*, 3 Bro. P. C. 416.

10. A devise to A. for life, and to the heirs of his body, so unites the two estates as to make the first taker tenant in tail. *Sheppard* v. *Gibbons*, 2 Atk. 444, 797.

trust terminating with that life, and a remainder following to the same trustees upon the death of tenant for life for a term of years. A subsequent remainder, therefore, to the heirs of the body of tenant for life:—Held, a legal estate, united with the legal estate for life, and vesting an estate tail, according to the rule in *Shelley's case*, not an equitable estate capable of taking effect only as a contingent remainder. *Curtis* v. *Price*, 12 Ves. 89.

1. G. A., after devising part of his estate to his wife for life or during widowhood, and after devising another part to trustees for a term, to raise money for the payment of debts, etc., devised the said estates, and all the rest of his estates (subject to certain mortgages), to A. B., his eldest son, for the term of ninety-nine years, in case he should so long live; and subject thereto, to trustees during the life of his son, in trust only to support contingent remainders; and from and after the determination of the said estates, unto the heirs of the body of his said son; and for want of such issue, then over to his second son, with like limitations. G. A. by a codicil, after confirming his will, devised all his freehold and copyhold estates unto four trustees, in trust to convey unto the trustees of his marriage settlement so much of the said estates as, together with the provision in the said settlement, would make up 1,200*l.* a year as the jointure for his wife, and in trust for the payment of debts. After executing a disentailing deed, A. C. devised the estates to H. A.:—Held, that the rule in *Shelley's case* did not apply; that the devise to the heirs of the body of A. B. was a contingent remainder, which was not destroyed by the disentailing deed of 1836; and that the plaintiff, as the heir of G. C., the daughter of A. B., was entitled as equitable tenant in tail. *Coape* v. *Arnold*, 18 Jur. 506; 2 W. R. 482. Affirmed 4 De G. M. & G. 574; 1 Jur., N. S., 313; 24 L. J., Ch., 673.

2. Words Qualifying.

2. In devise to C. for life, remainder to trustees during his life to preserve contingent remainders, remainder to the heirs of the body of C.:—Held, that C. took only an estate for life, and that heirs of the body were to be construed words of purchase. *Colson* v. *Colson*, 2 Atk. 246; 2 Eq. Abr. 318.

3. W. T. devised to his wife for life, remainder to trustees to preserve contingent remainders, remainder to E. for life, remainder to trustees *ut supra*, remainder to the heirs of body of E., remainder over. In a subsequent clause he declared his intention that E. should have only a life estate; upon a bill filed by the remainderman for a conveyance in which E. should take only a life estate, it was demurred to, and the demurrer allowed, because these are all legal estates. *Thong* v. *Bedford*, 1 Bro. C. C. 313.

4. Devise to G. and heirs of his body, the males having the preference, and succeeding according to their birth, and the trustees to preserve contingent remainders during the life of G.:—Held, that G. took an estate tail. *Sayer* v. *Masterman*, Ambl. 344.

5. A. devises lands to her sister B. for life, remainder to trustees to preserve, etc., remainder to the heirs of the body of B., remainder to her other sist
remainders to trustees to
mainder to the heirs of the
ders over; B. died in testa
suffered a recovery, and t
sell estate. On a bill by C.,
it was held, that B. would h
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testatrix; and that, havi
daughter, C. could make n
fore bill was dismissed. *A*
3 Bro. P. C. 416.

When the ancestor by any
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always taken to be a word
of purchase. *Ib.*

6. Devise to T. for life,
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should die without issue
death, then over:—Held, T.
Wright v. *Pearson*, Ambl. 3

7. A gift of freehold an
to A. for life, then to tr
contingent remainders, the
successively in tail, then t
A. as tenants in common,
remainder to the "right he
on the failure of the contin
tail:—Held, to confer on A.
able interest in the leaseho
as the freehold. *Comfort*
226; 48 L. J., Ch., 318; 10

8. A. devised 10,000*l.* to
be laid out in lands, and t
for life without waste, ren
and their heirs for the lif
contingent remainders, wit
support contingent remain
to B. to make a jointure;
heirs of the body of B., ren
by the same will devises
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sues C., the executor, for
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B. was decreed to have an
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etc., son. *Papillon* v. *Voice*, 2

9. G. devised to A. for l
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life, and no longer. *Robi*
Atk. 736; 1 Burr. 38; 2 Ve

So in a cause between t

testator and his heir at law, Jekyll, Master of the Rolls, declared that A., the devisee (abovementioned), was entitled only to an estate for life, with remainder to his eldest son, and if but one for his life, and that the remainder would go over to W. R., testator's heir at law. S. C. 3 Atk. 738.

1. One devises his lands for payment of his debts, and then to A. for life, with power to make leases, etc., remainder to the heirs male of the body of A.; though this be but the devise of a trust, and executory, and expressed to be to A. for life, yet it is an estate tail in A., barrable by a fine and recovery: *secus*, in case of marriage articles, to settle an estate on A. for life, remainder to the heirs male of his body, this being an agreement to do a future act, and in which the issue are particularly considered, and looked upon as purchasers. *Bale* v. *Coleman*, 1 P. W. 142.

2. Devise to L. for his natural life, and no longer, provided he takes the name of R., and after his decease to such son as he shall have lawfully to be begotten; and for default of such issue to W. and his heirs for ever:—Held, that on construction of whole will, L. must be construed to take an estate in tail male. *Robinson* v. *Hicks*, 3 Bro. P. C. 180.

3. Devise to trustees to pay debts, then to stand seised to the use of A. for life, without impeachment of waste; after his decease, to the use of the heirs male of his body severally, respectively, and in remainder, is an estate tail in A. *Jones* v. *Morgan*, 1 Bro. C. C. 206.

4. Devise to the use of the devisor's second son A. for life, without impeachment of waste, and from and after his decease to the heirs of his body, to take as tenants in common, and not as joint-tenants; and in case of his decease without issue, to the devisor's eldest son B., his heirs, etc.; and in case both sons should die before twenty-one, over:—Held, an estate tail in the land, and absolute interest in personalty bequeathed with it. *Bennett* v. *Tankerville* (*Earl*), 19 Ves. 170.

5. Devise to W. for life; remainder to trustees during the life of W.; remainder to the heirs of the body of W., was held an estate for life, there being words of restriction that W. shall not sell for any longer than his own life, and the estate being devised to that intent:—but held, in error, to be an estate tail. *Perrin* v. *Blake*, 1 W. Bl. 672; 4 Burr. 2579.

6. Devise in trust to permit A. B. to enjoy estate during his life, and after his decease his first and other sons and daughters now living, successively for life, as they were in priority of birth, but the sons to be preferred in succession to the daughters, and the heirs of the body or bodies of such sons and daughters respectively issuing, and for default of such issue in trust to testator's own right heirs for ever:—Held, on death of A. B., his eldest son entitled to estate as tenant in tail, and not a mere life estate, and then to next child of A. B. in succession. *Green* v. *Staples*, 5 Madd. 85.

7. A father left and bequeathed his fee simple estate at B. to his eldest son R., charged with 1,000*l.* each for his sons T. and J., subject to the restrictions mentioned in his will; he also left and bequeathed houses of a freehold tenure to each of his sons and daughters, and 1,000*l.* to each of his daughters on her marriage with consent, subject to the same conditions and restrictions which he had attached to any bequest in his will; he directed that none of his sons or daughters should alien or mortgage, or incumber any of the houses or lands to which they should become entitled under his will, but that on their death his or her portion of the property should go to his or her heirs, being issue lawfully begotten of him or her so dying, and so to continue in succession from father or mother to his or her heirs being issue lawfully begotten; and, in case any of his sons or daughters should die unmarried, and without issue, or on failure of lineal descendants of his or her lawful issue, he directed that his or her portion should go to and be equally divided among the survivors: by a codicil reciting the death of his youngest son J., since his will was made, and that his daughter P. had determined to become a nun, he charged 500*l.* on the lands of B. for his son T., in addition to the 1,000*l.* given by the will, and he left the residue of his estate at B. to R., and left both sons the full power he was invested with to enforce their claims, subject to the conditions and restrictions contained in his will:—Held, first, that the estates given by the will to the testator's children, whether in possession or in remainder, were estates tail. *O'Hanlon* v. *Unthank*, 7 Ir. R., Eq., 68.

Held, secondly, that under the codicil the eldest son R. took an estate tail in B. *Ib.*

8. A testator devised to B., in trust for his (the testator's) eldest son A., a certain landed property, as also one-fourth of the issues and profits of the estate of C., as also the testator's interest in the house in which he resided, in K. street, to hold as tenant for life, remainder to his heirs lawfully begotten—"A. to be considered as strict tenant for life of all the above-stated property." The will then contained the following clauses: "To B., in trust for my son, H. M., one-fourth of the issues and profits of the estate of C., as tenant for life, and to his heirs lawfully begotten;" as also, "my interest in the two houses in K. street, Dublin, let to H. J. and R. C.; also the two houses in D. street, Dublin, all as tenant for life. . . . In case there should be default of issue in my children to inherit my freehold property in lands or houses, I bequeath, in this case, the fees and freehold to the use of M. and his heirs." The houses in K. street were held under a lease for lives renewable for ever, which was afterwards converted into a fee-farm grant:—Held, that H. M. took an estate, in quasi tail, in the two houses in K. street, devised to him. *Macnamara* v. *Dillon*, 11 L. R., Ir., 29.

9. A. testator devised his residuary real estate to his son A. and his heirs; but his will was, that his son should not have power to sell the estates devised to him. Upon the death of his son, the estates to go to his lawful issue absolutely; but if he should not leave any lawful issue him surviving, then he willed that the estates should go and be absolutely held by his, the testator's, nephew, his heirs and assigns for ever:—Held, that A. took an estate tail general in the estates. *Marshall* v. *Grime*, 6 Jur., N. S., 390; 29 L. J., Ch., 592; 8 W. R. 385; 28 Beav. 375.

trust terminating with that life, and a remainder following to the same trustees upon the death of tenant for life for a term of years. A subsequent remainder, therefore, to the heirs of the body of tenant for life:—Held, a legal estate, united with the legal estate for life, and vesting an estate tail, according to the rule in *Shelley's case*, not an equitable estate capable of taking effect only as a contingent remainder. *Curtis* v. *Price*, 12 Ves. 89.

1. G. A., after devising part of his estate to his wife for life or during widowhood, and after devising another part to trustees for a term, to raise money for the payment of debts, etc., devised the said estates, and all the rest of his estates (subject to certain mortgages), to A. B., his eldest son, for the term of ninety-nine years, in case he should so long live; and subject thereto, to trustees during the life of his son, in trust only to support contingent remainders; and from and after the determination of the said estates, unto the heirs of the body of his said son; and for want of such issue, then over to his second son, with like limitations. G. A. by a codicil, after confirming his will, devised all his freehold and copyhold estates unto four trustees, in trust to convey unto the trustees of his marriage settlement so much of the said estates as, together with the provision in the said settlement, would make up 1,200*l.* a year as the jointure for his wife, and in trust for the payment of debts. After executing a disentailing deed, A. C. devised the estates to H. A.:—Held, that the rule in *Shelley's case* did not apply; that the devise to the heirs of the body of A. B. was a contingent remainder, which was not destroyed by the disentailing deed of 1836; and that the plaintiff, as the heir of G. C., the daughter of A. B., was entitled as equitable tenant in tail. *Coape* v. *Arnold*, 18 Jur. 506; 2 W. R. 482. Affirmed 4 De G. M. & G. 574; 1 Jur., N. S., 313; 24 L. J., Ch., 673.

2. Words Qualifying.

2. In devise to C. for life, remainder to trustees during his life to preserve contingent remainders, remainder to the heirs of the body of C.:—Held, that C. took only an estate for life, and that heirs of the body were to be construed words of purchase. *Colson* v. *Colson*, 2 Atk. 246; 2 Eq. Abr. 318.

3. W. T. devised to his wife for life, remainder to trustees to preserve contingent remainders, remainder to E. for life, remainder to trustees *ut supra*, remainder to the heirs of body of E., remainder over. In a subsequent clause he declared his intention that E. should have only a life estate; upon a bill filed by the remainderman for a conveyance in which E. should take only a life estate, it was demurred to, and the demurrer allowed, because these are all legal estates. *Thong* v. *Bedford*, 1 Bro. C. C. 313.

4. Devise to G. and heirs of his body, the males having the preference, and succeeding according to their birth, and the trustees to preserve contingent remainders during the life of G.:—Held, that G. took an estate tail. *Sayer* v. *Masterman*, Ambl. 344.

5. A. devises lands to her sister B. for life, remainder to trustees to preserve, etc., remainder to the heirs of the body of B., remainder to her other siste
remainders to trustees to
mainder to the heirs of the b
ders over; B. died in testat
suffered a recovery, and th
sell estate. On a bill by C.,
it was held, that B. would ha
tail in the premises if she
testatrix; and that, havi
daughter, C. could make no
fore bill was dismissed. *A*
3 Bro. P. C. 416.

When the ancestor by any
takes an estate of freehold,
gift or conveyance an estate
mediately or immediately t
or in tail; the word "heir
always taken to be a word
of purchase. *Ib.*

6. Devise to T. for life, r
tees to preserve, etc., remai
male of T. and their heirs
should die without issue n
death, then over:—Held, T.
Wright v. *Pearson*, Ambl. 35

7. A gift of freehold and
to A. for life, then to tru
contingent remainders, then
successively in tail, then to
A. as tenants in common,
remainder to the "right hei
on the failure of the contin
tail:—Held, to confer on A.
able interest in the leasehol
as the freehold. *Comfort* v.
226; 48 L. J., Ch., 318; 10 L

8. A. devised 10,000*l.* to t
be laid out in lands, and to
for life without waste, rem
and their heirs for the life
contingent remainders, with
support contingent remaind
to B. to make a jointure;
heirs of the body of B., rem
by the same will devises la
same uses, and dies leavin
sues C., the executor, for t
to the lands that are in his
the money laid out in land
creed, that B. had but an es
lands, and so not entitled
that they were to be broug
that the lands to be bough
were to be settled on B.
remainder to his first, etc., s
B. was decreed to have an
lands devised, and conseque
to the deeds relating thereto
lands to be purchased, that
and in the power of the C
but tenant for life, with rem
etc., son. *Papillon* v. *Voice*, 2

9. G. devised to A. for li
and after his decease to su
have, lawfully to be beg
name of R., and for default
to B. and his heirs for eve
must, by necessary implica
the manifest intention of
construed to take an estate
withstanding the express d
life, and no longer. *Robi*
Atk. 736; 1 Burr. 38; 2 Ves

So in a cause between th

testator and his heir at law, Jekyll, Master of the Rolls, declared that A., the devisee (above-mentioned), was entitled only to an estate for life, with remainder to his eldest son, and if but one for his life, and that the remainder would go over to W. R., testator's heir at law. S. C. 3 Atk. 738.

1. One devises his lands for payment of his debts, and then to A. for life, with power to make leases, etc., remainder to the heirs male of the body of A.; though this be but the devise of a trust, and executory, and expressed to be to A. for life, yet it is an estate tail in A., barrable by a fine and recovery: *secus*, in case of marriage articles, to settle an estate on A. for life, remainder to the heirs male of his body, this being an agreement to do a future act, and in which the issue are particularly considered, and looked upon as purchasers. *Bale* v. *Coleman*, 1 P. W. 142.

2. Devise to L. for his natural life, and no longer, provided he takes the name of R., and after his decease to such son as he shall have lawfully to be begotten; and for default of such issue to W. and his heirs for ever:—Held, that on construction of whole will, L. must be construed to take an estate in tail male. *Robinson* v. *Hicks*, 3 Bro. P. C. 180.

3. Devise to trustees to pay debts, then to stand seised to the use of A. for life, without impeachment of waste; after his decease, to the use of the heirs male of his body severally, respectively, and in remainder, is an estate tail in A. *Jones* v. *Morgan*, 1 Bro. C. C. 206.

4. Devise to the use of the devisor's second son A. for life, without impeachment of waste, and from and after his decease to the heirs of his body, to take as tenants in common, and not as joint-tenants; and in case of his decease without issue, to the devisor's eldest son B., his heirs, etc.; and in case both sons should die before twenty-one, over:—Held, an estate tail in the land, and absolute interest in personalty bequeathed with it. *Bennett* v. *Tankerville* (*Earl*), 19 Ves. 170.

5. Devise to W. for life; remainder to trustees during the life of W.; remainder to the heirs of the body of W., was held an estate for life, there being words of restriction that W. shall not sell for any longer than his own life, and the estate being devised to that intent:—but held, in error, to be an estate tail. *Perrin* v. *Blake*, 1 W. Bl. 672; 4 Burr. 2579.

6. Devise in trust to permit A. B. to enjoy estate during his life, and after his decease his first and other sons and daughters now living, successively for life, as they were in priority of birth, but the sons to be preferred in succession to the daughters, and the heirs of the body or bodies of such sons and daughters respectively issuing, and for default of such issue in trust to testator's own right heirs for ever:—Held, on death of A. B., his eldest son entitled to estate as tenant in tail, and not a mere life estate, and then to next child of A. B. in succession. *Green* v. *Staples*, 5 Madd. 85.

7. A father left and bequeathed his fee simple estate at B. to his eldest son R., charged with 1,000*l.* each for his sons T. and J., subject to the restrictions mentioned in his will; he also left and bequeathed houses of a freehold tenure to each of his sons and daughters, and 1,000*l.* to each of his daughters on her marriage with consent, subject to the same conditions and restrictions which he had attached to any bequest in his will; he directed that none of his sons or daughters should alien or mortgage, or incumber any of the houses or lands to which they should become entitled under his will, but that on their death his or her portion of the property should go to his or her heirs, being issue lawfully begotten of him or her so dying, and so to continue in succession from father or mother to his or her heirs being issue lawfully begotten; and, in case any of his sons or daughters should die unmarried, and without issue, or on failure of lineal descendants of his or her lawful issue, he directed that his or her portion should go to and be equally divided among the survivors: by a codicil reciting the death of his youngest son J., since his will was made, and that his daughter P. had determined to become a nun, he charged 500*l.* on the lands of B. for his son T., in addition to the 1,000*l.* given by the will, and he left the residue of his estate at B. to R., and left both sons the full power he was invested with to enforce their claims, subject to the conditions and restrictions contained in his will:—Held, first, that the estates given by the will to the testator's children, whether in possession or in remainder, were estates tail. *O'Hanlon* v. *Unthank*, 7 Ir. R., Eq., 68.

Held, secondly, that under the codicil the eldest son R. took an estate tail in B. *Ib.*

8. A testator devised to B., in trust for his (the testator's) eldest son A., a certain landed property, as also one-fourth of the issues and profits of the estate of C., as also the testator's interest in the house in which he resided, in K. street, to hold as tenant for life, remainder to his heirs lawfully begotten—"A. to be considered as strict tenant for life of all the above-stated property." The will then contained the following clauses: "To B., in trust for my son, H. M., one-fourth of the issues and profits of the estate of C., as tenant for life, and to his heirs lawfully begotten;" as also, "my interest in the two houses in K. street, Dublin, let to H. J. and R. C.; also the two houses in D. street, Dublin, all as tenant for life. . . . In case there should be default of issue in my children to inherit my freehold property in lands or houses, I bequeath, in this case, the fees and freehold to the use of M. and his heirs." The houses in K. street were held under a lease for lives renewable for ever, which was afterwards converted into a fee-farm grant:—Held, that H. M. took an estate, in quasi tail, in the two houses in K. street, devised to him. *Macnamara* v. *Dillon*, 11 L. R., Ir., 29.

9. A. testator devised his residuary real estate to his son A. and his heirs; but his will was, that his son should not have power to sell the estates devised to him. Upon the death of his son, the estates to go to his lawful issue absolutely; but if he should not leave any lawful issue him surviving, then he willed that the estates should go and be absolutely held by his, the testator's, nephew, his heirs and assigns for ever:—Held, that A. took an estate tail general in the estates. *Marshall* v. *Grime*, 6 Jur., N. S., 390; 29 L. J., Ch., 592; 8 W. R. 385; 28 Beav. 375.

V. REMAINDER TO HEIRS OR HEIRS OF BODY.

1. *Words Qualifying*, 6314.
2. *When Contingent*, 6316.

1. Words Qualifying.

1. A devise to A. for life, and after his decease, to the heirs male of the body of A., and the heirs male of the body of every such heir male, severally and successively as they should be in priority of birth, etc.; remainder over, whether this be a tenancy in common in tail, or for life only. *Legate* v. *Sewel*, 1 P. W. 87; 2 Vern. 551.

2. A testator devised real estates to A., a married woman, for life, with remainder to her husband for life, with remainder to the use of the heirs of the body of A. in tail, with remainder to B. for life, with remainder to the heirs of his body in tail; and he declared, that all the aforesaid limitations were intended by him to be in strict settlement.:—Held, that, subject to the contingent life interest of the husband, the wife took an estate tail. *Douglas* v. *Congreve*, 1 Beav. 59; 8 L. J., N. S., Ch., 53; 3 Jur. 120. And see S. C. at law, 4 Bing., N. S., 11; 5 Scott 223; 7 L. J., N. S., C. P., 4. And see S. C. 1 Keen 418; 6 L. J., N. S., Ch., 5.

3. Devise of freehold and leasehold to A. for life, and after his death to the heirs of his body, and their heirs, executors, etc:—Held, this gives A. an estate tail in freehold, and absolute interest in the leasehold. *Kinch* v. *Ward*, 2 Sim. & S. 409; 4 L. J., N. S., Ch., 28.

4. Whether an estate settled to A. for life, with remainder to the heirs of his body for life, gives A. an estate for life or an estate tail, *quære*. *Slade* v. *Pattison*, 5 L. J., N. S., Ch., 51.

5. L. devises to M., eldest son of his nephew, R. M., and the first heirs male of his body, and the heirs male of his body, and in default of such issue to the second son of the said R. M., and the heirs male of his body and their issue, remainder over, etc. These words, "the second son of the said R. M.," do not mean the second son of the devisee, but John, the second son of the testator's nephew R. M. *Minshull* v. *Minshull*, 1 Atk. 411; 1 Co. 66 (*b*).

6. Devise to G. and heirs of his body, the males having the preference, and succeeding according to their birth, and the trustees to preserve contingent remainders during the life of G.:—Held, G. took an estate tail. *Sayer* v. *Masterman*, Ambl. 344.

7. Devise to trustees to pay debts, then to stand seised to the use of A. for life, without impeachment of waste; after his decease, to the use of the heirs male of his body severally, respectively, and in remainder, is an estate tail in A. *Jones* v. *Morgan*, 1 Bro. C. C. 206.

8. A., on the marriage of his son, covenants to purchase lands, and settle them to the use of his son for life, remainder to the heirs male of the body of the son. The son dies, leaving issue a son, who brings a bill against the executor of A. for the performance of the covenant. Bill dismissed in regard the plaintiff's father would have been tenant in tail, if the estate had been settled, and might have barred it. *Cann* v. *Cann*, 1 Vern. 480.

9. Devise of real and personal estate in trust for A. for life, afterwards for B. for life, and afterwards for the heirs of his for the other sons of A. suc taking testator's name; then in tail, for want of such issue in fee: B. is entitled to a con the real, and to the absolut personal; the intent being the legal operation of the taken away, and, as to the p absolutely by such limitatio tended or not. *Garth* v. *Bu*

10. Devise and bequest to his body, with limitations o such heirs:—Held, an estat estates, and an absolute int the limitations over being pressed, if he leaves no such good as confined to the time not after an indefinite failure v. *De Vandes*, 9 Ves. 197.

11. Devise to A. for life, the issue of her body, for ev and in case A. has no son t daughter, followed by a pro devise over if A. left no issu become extinct, creates an *Reece* v. *Steel*, 2 Sim. 233; 6

12. By a marriage settle limited to the wife and the l lives, with remainder to the of the husband on the body their heirs; and if more c equally to be divided among in common; and, for default the wife and her heirs:—Held did not take an estate in ta life only, and that the childre as tenants in common in *North* v. *Martin*, 6 Sim. 266.

13. Devise to W., a natural s sister, for life, and after h heirs of his body in such sha as W. by deed, etc., shall want of such appointment, t body of W., share and shar in common, and if but one to such only child, and f issue to the heirs of the de an estate tail vested in W *Jesson* v. *Doe*, 2 Bligh 1; 5 M

14. A testator gave leasehol on trust for his son Benjami until he should attain twen on trust to support contin and subject thereto on trus life, remainder for the heirs remainder to the second Benjamin, and the heirs ma with remainder over of a like other children of the testat —Held, that this would ha tail in the son of Benjamin, alty, he would have taken a *Lewis* v. *Hoppins*, 3 Drew. 6

15. Devise to A. for life, re to preserve contingent rema to the heirs of his body, wit for life, and in tail male, respective devises to A., e respective heirs male," ar taking the testator's name; personal property bequeathe the age of twenty-four, to under twenty-four, without

testator and his heir at law, Jekyll, Master of the Rolls, declared that A., the devisee (abovementioned), was entitled only to an estate for life, with remainder to his eldest son, and if but one for his life, and that the remainder would go over to W. R., testator's heir at law. S. C. 3 Atk. 738.

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2. Devise to L. for his natural life, and no longer, provided he takes the name of R., and after his decease to such son as he shall have lawfully to be begotten; and for default of such issue to W. and his heirs for ever:—Held, that on construction of whole will, L. must be construed to take an estate in tail male. *Robinson* v. *Hicks*, 3 Bro. P. C. 180.

3. Devise to trustees to pay debts, then to stand seised to the use of A. for life, without impeachment of waste; after his decease, to the use of the heirs male of his body severally, respectively, and in remainder, is an estate tail in A. *Jones* v. *Morgan*, 1 Bro. C. C. 206.

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6. Devise in trust to permit A. B. to enjoy estate during his life, and after his decease his first and other sons and daughters now living, successively for life, as they were in priority of birth, but the sons to be preferred in succession to the daughters, and the heirs of the body or bodies of such sons and daughters respectively issuing, and for default of such issue in trust to testator's own right heirs for ever:—Held, on death of A. B., his eldest son entitled to estate as tenant in tail, and not a mere life estate, and then to next child of A. B. in succession. *Green* v. *Staples*, 5 Madd. 85.

7. A father left and bequeathed his fee simple estate at B. to his eldest son R., charged with 1,000*l.* each for his sons T. and J., subject to the restrictions mentioned in his will; he also left and bequeathed houses of a freehold tenure to each of his sons and daughters, and 1,000*l.* to each of his daughters on her marriage with consent, subject to the same conditions and restrictions which he had attached to any bequest in his will; he directed that none of his sons or daughters should alien or mortgage, or incumber any of the houses or lands to which they should become entitled under his will, but that on their death his or her portion of the property should go to his or her heirs, being issue lawfully begotten of him or her so dying, and so to continue in succession from father or mother to his or her heirs being issue lawfully begotten; and, in case any of his sons or daughters should die unmarried, and without issue, or on failure of lineal descendants of his or her lawful issue, he directed that his or her portion should go to and be equally divided among the survivors: by a codicil reciting the death of his youngest son J., since his will was made, and that his daughter P. had determined to become a nun, he charged 500*l.* on the lands of B. for his son T., in addition to the 1,000*l.* given by the will, and he left the residue of his estate at B. to R., and left both sons the full power he was invested with to enforce their claims, subject to the conditions and restrictions contained in his will:—Held, first, that the estates given by the will to the testator's children, whether in possession or in remainder, were estates tail. *O'Hanlon* v. *Unthank*, 7 Ir. R., Eq., 68.

Held, secondly, that under the codicil the eldest son R. took an estate tail in B. *Ib.*

8. A testator devised to B., in trust for his (the testator's) eldest son A., a certain landed property, as also one-fourth of the issues and profits of the estate of C., as also the testator's interest in the house in which he resided, in K. street, to hold as tenant for life, remainder to his heirs lawfully begotten—"A. to be considered as strict tenant for life of all the above-stated property." The will then contained the following clauses: "To B., in trust for my son, H. M., one-fourth of the issues and profits of the estate of C., as tenant for life, and to his heirs lawfully begotten;" as also, "my interest in the two houses in K. street, Dublin, let to H. J. and R. C.; also the two houses in D. street, Dublin, all as tenant for life. . . . In case there should be default of issue in my children to inherit my freehold property in lands or houses, I bequeath, in this case, the fees and freehold to the use of M. and his heirs." The houses in K. street were held under a lease for lives renewable for ever, which was afterwards converted into a fee-farm grant:—Held, that H. M. took an estate, in quasi tail, in the two houses in K. street, devised to him. *Macnamara* v. *Dillon*, 11 L. R., Ir., 29.

9. A. testator devised his residuary real estate to his son A. and his heirs; but his will was, that his son should not have power to sell the estates devised to him. Upon the death of his son, the estates to go to his lawful issue absolutely; but if he should not leave any lawful issue him surviving, then he willed that the estates should go and be absolutely held by his, the testator's, nephew, his heirs and assigns for ever:—Held, that A. took an estate tail general in the estates. *Marshall* v. *Grime*, 6 Jur., N. S., 390; 29 L. J., Ch., 592; 8 W. R. 385; 28 Beav. 375.

their natural lives; but in case of the death of either without issue, her share to go to the survivor; but if either should die leaving issue, the share of her so dying to be paid to her children in equal proportions, if more than one; and if but one, then to such only child; and after the death of both A. and B., the residuary estate to be paid to "the heirs of the body" of A. and B., share and share alike, or to the survivor or survivors of them, if more than one; and if but one, then to such only child:—Held, from the general context of the will, that "heirs of the body" must be construed to mean "children." *Ib.*

1. A testator by his will devises all his real estate to his executors for the purposes thereinafter stated; and after empowering them either to continue his business or to dispose of it, he gives the profits of it in the one case, and the interest of the moneys arising from the sale in the other, and also the interest of the securities on which the rest of his capital should be invested, to his daughter for life, her receipt to be a discharge. He then gives her the rents and profits of all his real estates during her life; and at her decease he devises and bequeaths to her heirs all his estates real and personal as tenants in common; if his daughter has but one child, such child is to possess the whole; but if she should die without issue, then at her decease he gives certain legacies. He next directs all his goods and effects to be sold, his said legacies to be paid, and a sum invested sufficient to purchase 150*l.* a year, which is to be paid to the husband of the daughter. He then orders his real estates to be sold at the decease of his daughter, or at the decease of his brothers and sisters, according as a particular event may turn out; and he gives over to certain persons all the residue of his personal estate, including the proceeds of the sale of the real estates when sold, and the rents of them until they are sold. The daughter died without having had issue:—Held, the daughter took an estate tail in the freeholds; that the real and personal estate being given over together, she took the personal estate absolutely; that the annuity of 150*l.* was charged both on the real and personal estate. *Dunk* v. *Fenner*, 2 Russ. & M. 557.

2. "I. J. H., bequeath to my nephew E. 1,000*l.* sterling; to my nephew F. 1,000*l.* sterling; to C. of B. 200*l.* sterling, with remainder to his eldest daughter, in case he shall not live to receive the same: I give, etc., to W., son of C. of M., and to his heirs male according to their seniority in age, on their respectively attaining twenty-one, all my estates real and personal, in lands, houses, and tenements, not hereinbefore disposed of, the elder son surviving of the said W. and the heirs male of his body lawfully begotten always to be preferred to the second or younger son; and in case of the failure of issue male in the said W. surviving him, or their dying unmarried and without lawful issue male attaining twenty-one, then to T., brother of the said W., and his heirs male lawfully begotten on attaining twenty-one, the elder to be preferred to the younger; and in case of the death or failure of the issue male of the said T. lawfully begotten, and their not attaining twenty-one, then to my right heirs for ever: and I do hereby empower the said T., when in possession, to charge and encumber the said estates a provision for a younger ch him lawfully begotten, w exceeding 3,000*l.* sterling, i as he shall by deed or wi want of such direction, or i of the sons of the said T. i estates or properties, then to be equally divided betw children, be they son or daughters; and if but one y the entire said 3,000*l.* to etc., etc. At the time of t will, on the 26th April 182 and had issue male of his bo the lessor of the plaintiff, W. H., his second son, then will named, died on the 3rd C. H., his eldest son and heir second and only younger so only daughter, him survivi died in June 1829. Upon th a special verdict:—Held, tha estate tail to W., which lap Whereupon an estate tail defendant in error. *Jack* v. N. S. 257. S. C. *nom. Fether* 3 Cl. & F. 67.

3. A father left and be simple estate at B. to h charged with 1,000*l.* each fo J., subject to the restrictions will; he also left and bequ a freehold tenure to each daughters, and 1,000*l.* to eac on her marriage with conse same conditions and restricti attached to any bequest in hi that none of his sons or daug or mortgage, or incumber a or lands to which they shoul under his will, but that on t her portion of the property or her heirs being issue law him or her so dying, and s succession from father or mo heirs, being issue lawfully b case any of his sons or dau unmarried, and without issu lineal descendants of his or he directed that his or her p to and be equally divided am by a codicil reciting the deat son J., since his will was m daughter P. had determined he charged 500*l.* on the land T., in addition to the 1,000*l.* and he left the residue of to R., and left both sons the invested with to enforce the to the conditions and restric his will:—Held, first, that by the will to the testator's in possession or in remain tail. *O'Hanlon* v. *Unthank*,

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of the death of any or either of such children under the age of twenty-one and without issue; and if there should not be any child of A., or if any or all such children should die under twenty-one and without issue, a devise to the heirs and assigns of A., although A. had no child at the date of the will or at the death of the testator:—Held, that the gift to the heirs of A. was a contingent remainder. *Crofts* v. *Middleton*, 2 Kay & J. 194; 1 Jur., N. S., 1103; 25 L. J., Ch., 513; 8 De G. M. & G. 192.

1. A wife being equitably entitled, subject to her husband's life interest therein, to freehold lands, of which the legal estate was outstanding in mortgagees, gave them by will, subject to the mortgage and life interest, to the use of trustees, their heirs and assigns, upon trust to pay the rents to W. for her separate use for life, and after her death to the use of her husband for his life, and after the death of the survivor of W. and her husband, to the use of E., if she should be then living, but if E. should be then dead, to the use of such person as W. should appoint by will, and in default of appointment to the use of the heirs of W.:—Held, that by the rule in *Shelley's case*, the estates limited to W. coalesced, and that under the will she took an equitable estate in fee simple. *Crofts* v. *Middleton* (2 Kay & J. 194; 1 Jur., N. S., 1103; 25 L. J. Ch., 513; 8 De G. M. & G. 192) commented on. *Re White and Hindle*, 26 W. R. 124; 7 L. R., Ch. D., 201; 47 L. J., Ch., 85.

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A devise to a man for life, and if he died without heir male, remainder over, makes an estate tail. The words, "for want of such issue," make an estate tail by implication. *Id.* 465.

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2. A deed is construed more strictly than a will, according to the legal import of the words. Therefore in a marriage settlement, after life estates to the husband and wife, a remainder to the heir male of her body by him to be begotten, and to his heirs, and for want of such to the daughters, and if there should be no issue of the marriage to the right heirs of the husband:—Held, a contingent remainder in fee in such person as should be heir male of the wife at her death. *Bayley* v. *Morris*, 4 Ves. 788.

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1. On the 20th August the sheriff, under a *fi. fa.* against A., took possession of B.'s furniture in A.'s house. Both before and after seizure B. gave formal notice to the sheriff that the furniture was his, and on the 23rd issued the writ in this action against the sheriff for an injunction and damages. On the 25th August the sheriff issued an interpleader summons, under which an issue was directed and an order made for the sheriff withdrawing from possession on payment of 100*l.* into court. The sheriff accordingly withdrew from possession on the 1st September. B.'s title was afterwards admitted by the judgment creditor, and the 100*l.* paid out of court to B. B. now brought this action to trial against the sheriff for damages and costs:—Held, that the sheriff had not exceeded the scope of his duty in retaining possession till ordered to withdraw under the interpleader order, and that the action must be dismissed, but without costs, on the ground that the sheriff might have applied to the judge, under the interpleader order, to dispose of the matters in question between him and the plaintiff. *Aylwin* v. *Evans*, 52 L. J., Ch., 105; 47 L. T. 568.

2. Although the sheriff is an agent for those who put writs into his hands to execute, he is also a public functionary, having at the same time duties to perform towards whom such writs are directed. *Hooper* v. *Lane*, 6 H. L. Ca. 443; 3 Jur., N. S., 1026; 27 L. J., Q. B., 75; 6 W. R. 146. Affirming 10 Q. B. 546; 17 L. J,. Q. B., 189.

If the sheriff, having two writs in his hands, one valid, the other invalid, arrests on both at the same time, he may rely on the valid writ, and treat as detainers any number of valid writs which he may then have, or which may afterwards come to his hands. *Ib.*

But if, having two such writs, he arrests on the invalid writ alone, he cannot afterwards justify the arrest by the good writ. *Ib.*

The sheriff cannot, while a person is unlawfully in his custody by virtue of an arrest on an invalid writ, arrest that person on a good writ; to permit him to do so would be to allow him to take advantage of his own wrong. *Ib.*

Distinction on this point between writs against the person and against goods. *Ib.*

Action against a sheriff for neglecting to arrest B. on a *ca. sa.* of L. There was a second breach, that the sheriff wrongfully arrested B. under the illegal pretence of another writ, which never existed, by reason of which B. was ordered by a judge to be discharged, whereby the sheriff deprived himself of the means of taking or detaining B. The sheriff pleaded not guilty, and traversed that he could have arrested B. The evidence was, that long after the delivery of L.'s writ to the sheriff, another writ (void for defects on the face of it), at the suit of A., was delivered to the sheriff, who thereupon issued his warrant, under which his officer arrested B., but had no other warrant at that time in his possession. B. was discharged from custody under the void writ by a judge, and on the sheriff detaining him under L.'s writ, he was discharged from that also by a second judge's order. The judge directed the jury that there had been no arrest at the suit of L., and left it to them to say whether there was culpable negligence on the part of the sheriff in arresting B. on the void writ, in that the sheriff could with reasonable care have discovered it to be void. He also ruled that B. was set free from all writs by his discharge by the judge, and that such discharge was no justification to the sheriff. The jury found for L. on all the issues except the second breach, and as to that not guilty for the sheriff. On exception, the Exchequer Chamber upheld the ruling of the judge:—Held, that the first arrest being illegal, the detainer on the second writ was equally unlawful; that there was evidence for the jury that the sheriff was guilty of a breach of duty in arresting on the void writ; and that there was no such inconsistency in the findings of the jury on the first and second breach as to make a *venire de novo* necessary. S. C. 3 Jur., N. S., 1026.

Mode and Place.] 3. A sheriff's officer, in execution of available writ, peaceably obtained entrance by the outer door, but before he could make an actual arrest was forcibly expelled from the house, and the outer door fastened against him. The officer obtained assistance, broke open the outer door, and made the arrest:—Held, that the officer was justified in so doing. Held, also, that demand of re-entry under such circumstances was not requisite to justify his breaking open the outer door. *Aga Kurboolie Mahomed* v. *Reg.*, 4 Moo. P. C. 239.

Quære, if indictment for an assault and false imprisonment will, under such circumstances, lie against the sheriff's officer. *Ib.*

4. Hampton Court Palace is a royal palace, but not a royal residence, and therefore is not exempt from execution within it of civil process. *Att.-Gen.* v. *Dakin*, 4 L. R., H. L., 338; 39 L. J., Exch., 113; 23 L. T. 1; 18 W. R. 1111.

Where, therefore, a *fi. fa.* had been levied in some of the apartments in the palace:—Held, that the sheriff was not liable to an information for intrusion. *Ib.*

5. Where a writ of attachment has issued against a party to an action for contempt of court in non-compliance with an order for the delivery over of deeds and documents, the officer charged with the execution of the writ may break open the outer door of the house in order to execute it. *Harvey* v. *Harvey*, 26 L. R., Ch. D., 644; 51 L. T. 508; 33 W. R. 76.

Interference with Receiver.] 6. Judgment was entered up against a railway company at the suit of a creditor. In a suit by creditors against the company a receiver was, by the consent of all parties, appointed over the property of a company. Afterwards the judgment creditor issued a writ of *fieri facias* against the company, under which the sheriff levied execution. A motion was made by the plaintiffs for the committal of the sheriff for contempt of court, in having interfered with the receiver, but the execution creditor was not served with notice:—Held, that he must be served. *Russell* v. *East Anglian Railway Co.*, 14 Jur. 967.

Property in the possession of a receiver appointed by the Court, in a suit, was in two instances seized by the sheriff under writs of *fieri facias* issued by judgment creditors of the

defendant. On motions in the suit to commit the sheriff:—Held, that he was not warranted in making the seizures, and that he could not justify the seizures by questioning the propriety of the order under which the receiver was appointed; and on the submission of the sheriff an order was made in each case for him to withdraw from possession and to pay the costs, the Court considering this order as sufficient under the circumstances for the maintenance of its jurisdiction. The Court at the same time protected the sheriff against proceedings by the judgment creditor, in one of the cases where the judgment creditor had been served with notice and appeared on the motion, but refused to make this addition to the order in the other case, where the judgment creditor had not been served and was not present. S. C. 3 Macn. & G. 104; 6 Rail. Ca. 501; 20 L. J., N. S., Ch., 257; 14 Jur. 1033.

1. When the sheriff entered, a receiver, appointed by the Court, was in possession of the partnership premises and effects. The sheriff took out an interpleader summons against the receiver and partnership creditor. Ordered, that the sheriff and creditor must pay the costs consequent on the contempt, and also of the summons, without prejudice to any question which might arise as between themselves. *Lane* v. *Storne*, 10 W. R. 555; 3 Giff. 629; 9 Jur., N. S., 320.

2. After an order for, but before the actual appointment of, a receiver in a suit for dissolution of partnership, the sheriff had taken possession of part of the partnership property under a *fieri facias*, and afterwards refused to quit possession when the receiver was appointed; a motion to commit the sheriff for contempt was refused with costs. *Defries* v. *Creed*, 11 Jur., N. S., 360; 34 L. J., Ch., 607; 12 L. T., N. S., 262; 13 W. R. 632.

Delay and Negligence.] 3. If a sheriff refuse to try to execute an attachment which has issued to compel an appearance in an equity suit, he will be attached. *Morgan* v. *Copeland*, 1 Jones 248.

4. The Court, on motion, will order a sheriff to pay such a sum of money as it appears has been lost in consequence of his refusing or neglecting to execute, with due diligence, an attachment issued out of the court, and directed to him. *Re Comyns*, 1 Ir. Eq. R. 72.

Attendance at Quarter Sessions, where the chairman threatened to fine the sheriff for absence, will not be admitted as any excuse for delaying to execute the process of this Court. *Ib.*

II. RETURN OF WRITS.

5. Mode of enforcing the sheriff's return to a writ of *fieri facias* issuing out of Chancery. *Davies* v. *Evans*, 7 Beav. 81.

6. *Quære*, whether the Court will at one and the same time order the Chancellor of the Duchy of Lancaster to return the writ, and the sheriff to return the mandate which has been issued to him. *Anon.*, 1 L. J., Ch., 117.

7. Defendant committed to Fleet on confession of rescue, allowed to prosecute action of false return. *Bonvill* v. *Bonvill*, Cary 106.

8. Where an order for a messenger has been issued against a she
in not returning an attac
defendant for not putting in
attachments having been is
peremptory; and the Court
order, although it go to affe
office at the time of the
neglect: nor will they cons
time allowed by the orde
order to the high sheriff to
may be served on his under
service will be good. No
enlarge the time limited by
a case. *Thomas* v. *Matthias*

9. Day given to sheriff
ment upon pain of *5l.* *Cro*
Cary 77. See also *Hambey*

10. Sheriff amerced *5l.* for
inventus, he having been in
pany. *Stradling* v. *Pembro*

11. Where, on attachmen
turned *cepi corpus* and *langu*
was awarded, upon which h
languidus. On affidavit that
at the time of the return n
but goes abroad, the sheriff a
Wy. Pr. Reg. 394.

A sheriff amerced for not
ments, upon affidavit that
returned and delivered to th
discharge the amerciaments
yet estreated; and it was g
Harr. Pr. 118.

12. Where the sheriff ha
an attachment for non-paym
court pursuant to order, an
of custody on giving bail, t
his liability to be terminate
ants paying into court, to
cause, the sum mentioned
depositing *20l.* in the sheri
relator's costs occasioned b
thereupon discharged the
Gen. v. *Mills*, C. P. C. 261.

13. Where an attachment
a person, and the sheriff tak
his appearance, and delivers
the Court will discharge a ru
sheriff to show cause why
in the body; for the plaint
remedy, as he may move
returned for a messenger to
the person lives. *Anon.*, 2 A

14. The high bailiff of the
Yorkshire, after receiving a
causis against defendant, dis
the Insolvent Act. He was
committed for the contem
shown, and such order wa
shortly afterwards. *Kendal* v

15. Defendant, who had b
an attachment for nonpayme
discharged under an Ins
marshal of the King's Bench
custody in an action of deb
charge him without leave
Wheldale v. *Wheldale*, 16 Ve

16. Defendant, who reside
palatine of Chester, being
want of answer, an attachme
to the chamberlain of the c
his deputy, commanding him
the sheriff of the city of
defendant. The writ not

another order was made, directing the chamberlain, or his deputy, to return the writ forthwith, whereupon he returned that he had issued his writ, but that the sheriff had made no return. Plaintiff then moved that the sheriff might make a return on the writ (which, however, could not be, as the writ was returned in court); and after searching precedents, the sheriff was ordered to return the chamberlain's mandate within six days, which he did accordingly. *Clough* v. *Cross*, Dick. 555.

Three orders are said to be necessary to compel the sheriff to return the writ: first, that he do return it; secondly, that he return it in a certain number of days, or stand committed; thirdly, that he do stand committed. *Ib.*

1. Plaintiffs sued out a *teste scire facias* against defendant, directed to the chancellor of the county palatine of Lancaster, or his lieutenant or deputy; the chancellor issued his precept to the sheriff of the county, who made no return. The question was, whether plaintiffs were to call on the sheriff in open court, or to move that the chancellor might return the writ of *scire facias*. The latter method was adopted, and an order made accordingly. It was agreed that the next step must have been against the sheriff, praying that he might return the precept. *Seddon* v. *Curghey* cited, Dick. 555.

2. To a writ of extent in aid against a bankrupt, sued out long after the issuing of the commission, the sheriff returned that the bankrupt was entitled to a sum standing in the name of the accountant in bankruptcy in the books of the Bank of England, that the accountant held the money in trust for the bankrupt, and that the sheriff had seized such money. On this return the Court of Exchequer made an order, that the sheriffs should pay over to the prosecutor of the extent the amount of his debt. On a petition by the sheriffs to the Court of Review to order this money to be paid over to them by the accountant in bankruptcy, a conditional order for payment having been previously made:—Held, that the finding of the inquisition, and the sheriff's return, were alike erroneous, and the Court, therefore, refused to make any such order. *Exp. Magnay, Re Austen*, 2 M. D. & De G. 671.

3. The sheriff's return of a caption and rescue is a sufficient ground, without affidavit, for an absolute order of commitment for contempt. *Blackwell* v. *Tatlow*, 2 Myl. & K. 321; Coop. *temp.* Brough. 186.

4. Equity will relieve against a fraudulent and partial assignment of dower by the sheriff. *Hoby* v. *Hoby*, 1 Vern. 218; 2 Ch. Ca. 160.

5. An attachment issued against defendants in a county palatine for not making an affidavit of documents. The sheriff, after caption, let the defendants out on bail, they having filed the affidavit. The sheriff being afterwards ordered to return the writ, made default, and on a motion that he should return the writ or stand committed:—Held, that it was not competent for the sheriff to object to the first order, on the ground that it ought to have been directed to the Chancellor of the county palatine of Lancaster, and not to the sheriff. *Sugden* v. *Hull*, 23 Beav. 263.

Held, secondly, that the Court would not, on this occasion, allow him to enter into the merits, to show that the plaintiff had not been prejudiced by the irregularity, but that a return must be made. *Ib.*

6. The sheriff of a colony is liable, without proof of malice or want of probable cause, in an action for a false return of rescue made by him upon a writ of *capias ad respondendum* for the damage which results to the plaintiff therefrom. *Brasyer* v. *Maclean*, 6 L. R., P. C., 398; 44 L. J., P. C., 79; 33 L. T., N. S., 1.

Such return was conclusive at that stage of the proceedings as to the truth of the alleged rescue by the plaintiff, whom it rendered liable to attachment for a contempt of court without being allowed to show that the facts returned were untrue, and constituted a misfeasance by a public ministerial officer in the discharge of his duties. *Ib.*

7. Where a sheriff had failed to make any return to a writ of *fi. fa.*, notwithstanding an order of course directing him to make his return forthwith, he was, upon an application *ex parte* against him for an order *nisi*, directed, upon the authority of *Davies* v. *Evans* (7 Beav. 81), to pay both the costs of the order *nisi* and of the previous order of course. *Re Heiron's Estate, Hall* v. *Ley*, 12 L. R., Ch. D., 795; 48 L. J., Ch., 688; 27 W. R. 750.

III. ESCAPE.

8. Sheriff taking party on attachment for contempt for not paying costs, and suffering party to go at large, ordered himself to pay those costs, and costs of contempt. *Solly* v. *Greathead*, 11 Ves. 170. S. P. *Levett* v. *Letteney*, Beam. Costs, 138. n. 352; 11 Ves. 170. n.

9. A defendant to an action, in which the East India Company were plaintiffs, having had a verdict given against him, and judgment signed for damages and costs, was imprisoned in the gaol at Bombay under a writ of *capias ad satisfaciendum*. The medical officer in attendance having reported that a temporary release from confinement was necessary for his health, the Government at Bombay gave orders to the sheriff and the superintendent of police that he should be permitted temporarily to reside outside the gaol, under such surveillance as might prove as little irksome as possible to the prisoner while consistent with its perfect efficiency. On being informed of the proposal the defendant gave a written reply, "I shall be grateful for any change, and the consideration for my health is indeed most welcome." He was removed to a residence outside the gaol, under the charge of the sheriff's peons, and after remaining under their charge for some months he was remitted to the gaol. An application was made to the Supreme Court at Bombay that he should be discharged from custody, and was refused:—Held, on appeal, by the Judicial Committee of the Privy Council, that the removal of the defendant to a residence outside the gaol did not, under the circumstances, operate as a discharge; that the custody continued; and that the defendant, having assented to such removal, was estopped from alleging that he did not continue in the custody of the sheriff; and that the judgment of the Court below must be affirmed. *Haines* v. *East India Co.*, 5 W. R. 159.

1. The bill had been dismissed at the hearing, with costs, which the plaintiff refused to pay; he was taken under an attachment. Afterwards, but before the costs were paid, the sheriff let the plaintiff out of custody, upon bail, but re-took him before the writ was returnable. The Court refused to order the sheriff to pay the costs. *Collard* v. *Hare*, 5 Sim. 10; 1 L. J., N. S., Ch., 180.

2. Where the sheriff had taken parties on an attachment for nonpayment of money into court pursuant to order, and let them go out of custody on giving bail, the Court allowed his liability to be terminated by the defendants paying into court, to the credit of the cause, the sum mentioned in the order, and depositing the 20*l.* in the sheriff's hands, for the relator's costs occasioned by the default, and thereupon discharged the defendants. *Att.-Gen.* v. *Mills*, C. P. C. 261.

3. Escape lieth not against the warden of the Fleet, for escape of one in execution for breach of a decree. *Anon.*, 2 Freem. 146.

4. The liability in equity of a sheriff for an escape, is the loss actually sustained, and the Court will ascertain the amount of damages. *Moore* v. *Moore, Re Moyley*, 25 Beav. 8; 4 Jur., N. S., 250; 27 L. J., Ch., 385; 6 W. R. 288.

The principle on which the amount is to be ascertained is, by charging the sheriff with the debt, and throwing on him the onus of proving that less would have been recovered if the debtor had remained in custody or given bail. *Ib.*

A person was taken upon an attachment for nonpayment of money. The sheriff, without taking bail, allowed him to go at large on his promise to surrender. The sheriff's officer, having called on him to surrender, he shot himself before a recapture, but the officer retained his body:—Held, that the sheriff was liable as for an escape. *Ib.*

IV. PAYING OVER MONEYS LEVIED.

5. Motion granted, that the sheriff of Kent might be ordered to pay the party money under an attachment for not paying costs, with the costs of the motion. *Anon.*, 11 Ves. 170; *Solly* v. *Greathead*, Beam. Costs 353. S. P. *Levett* v. *Letteney*, *id.* 352.

6. A bill in equity does not lie by the assignees of a bankrupt against a judgment creditor and the sheriff, for moneys levied under an execution upon a judgment by *nil dicit*. *Mitchell* v. *Knott*, 1 Sim. 497.

7. An attachment for costs was issued by A. and B. (A.'s solicitor), against C., who paid the amount to the sheriff, and lodged with him a sequestration for a larger amount against A.:—Held, that the sheriff was not justified in paying the amount received on the attachment to the sequestrators, without the order of the Court. *Williams* v. *Reeves*, 12 Ir. Ch. R. 173.

8. The sheriff, having taken a defendant under an attachment for nonpayment of a large sum of money, in obedience to an order of the Court, received part of the amount, and a deposit of title deeds as security for payment of the balance on the return of the writ. At the return of the writ the defendant did not pay the balance. U
the sheriff, the Court permit
sum he had received into c
an attachment in the nam
without prejudice to the
liability to them; he also i
against consequent costs, a
allow the defendant inspe
deeds deposited as security.
2 De G. & Sm. 264.

V. ACTIONS AND OTHE
AGAINST

9. An application by a s
execution of a *fi. fa.* for cos
of May 1839, had seised
claimed as the property of
protected from an action, a
ants might come in *pro int*
the sheriff not being, like
officer of this court, and th
to him by the Interpleader
to execution of process at
2 Ph. 691. Affirming 2 De

10. A sheriff seized goo
Notice was given to him
longed to another person,
take proceedings at law to
sheriff filed a bill to restra
and for an interpleader.
injunction, the Court, witho
the sheriff could file a bill
Held, that there being n
bill that the sheriff knew t
to the person upon whom
the plaintiff not having us
filing the bill, the motio
with costs. *Tufton* v. *Ha*
116; 29 L. J., Ch., 225.

11. The Court of Chanc
cretion in permitting acti
it will never permit its d
tioned in a court of law.
thwait, 1 Dr. & Sm. 49.

Therefore, where an ac
brought against a sheriff
under a writ of assistance,
of an order of the Court
junction was granted,
proceedings in such act
action also sought damage
the sheriff in taking chatt
the order. *Ib.*

12. Under a writ of *fi. f*
sheriff seized goods of hi
house his son lived. The
goods there, except some w
writ was indorsed with a st
lived at a certain address,
the father's house, thoug
did not state this. The
notice to the bailiff that h
and the next day the she
pleader summons. Meanw
commenced an action agai
claiming an injunction to
remaining in possession,
without requiring notice
execution creditor, grant
The sheriff appealed, and
ecution creditor, on the h
pleader summons, had

goods seized were the father's. No misconduct on the part of the sheriff was proved:—Held, that the action was premature; that the father ought to have waited to see the result of the interpleader proceedings; and that he must bear his own costs of the motion for the injunction in both courts. *Hilliard* v. *Hanson*, 21 L. R., Ch. D., 69; 47 L. T. 342; 31 W. R. 151.

Held, also, that the Vice-Chancellor ought not to have granted the injunction without hearing the execution creditor, who should have been made a party to the action, or at any rate served with notice of it. *Ib.*

VI. FEES AND SALARY.

1. A recognisance of a tenant under the court, and his sureties, is not a debt due to the Crown; and upon the execution of a *levari* grounded on such recognisance, the sheriff is only entitled, under the equity of the 6 Ann., c. 7, to such fees as by that Act he should have upon the execution of a *ca. sa.* or *fi. fa.* at suit of a subject, *i.e.*, to 1*s.* on the first 100*l.*, and 6*d.* on the residue of the sum levied by virtue of the writ; the 21 & 22 Geo. 3, c. 20 not applying to such an execution. *Creed* v. *Creed*, 4 Ir. Eq. R. 299.

The *levari* having been marked for 944*l.*, the sheriff, on the 21st December 1839, levied 139*l.* 3*s.* on account; and on the 11th June 1840 received the balance, 624*l.* 17*s.*, but did not pay over the amount until the 1st May 1841; it further appeared that he had received from the defendant in execution the sum of 73*l.* 10*s.*, as and for his fees upon the execution, and a further sum of 50*l.* for forbearance, and afterwards deducted from the sum levied 49*l.* 14*s.* for his fees upon the execution. The Court declared him entitled to the sum of 26*l.* 2*s.*, and no more, for fees, and ordered him, within ten days, to refund the 73*l.* 10*s.* and the 50*l.*, and also the difference between 49*l.* 14*s.* and 26*l.* 2*s.*, with interest at 6 per cent. from the time of the payments, and also to pay interest on the sum levied for the time he held it in his hands, and all the costs of the motion as between solicitor and client. *Ib.*

2. A deed of deputation, by which high-sheriffs appoint a sub-sheriff, and which provides that the first 2,400*l.* received by the sub-sheriff for fees in the office, are to be paid to the high sheriff, then the surplus (if any) to the extent of 800*l.* to the sub-sheriff as a salary, and the further surplus (if any) to the high sheriff, is not illegal, nor in violation of 12 Geo. 1, c. 4. *Drummond* v. *Ponder*, 1 Ir. Eq. R. 223.

3. Where the goods of a trader have been taken in execution for a sum exceeding 50*l.*, and, bankruptcy ensuing, the sheriff has been restrained from selling, the sheriff is entitled to be paid by the trustee out of the estate of the bankrupt all expenses properly incurred by him in keeping and taking possession of the goods and preparing for a sale, notwithstanding that no sale has taken place. *Re Craycroft, Exp. Browning*, 47 L. J., Bky., 96; 8 L. R., Ch., 596; 26 W. R. 559; 38 L. T., N. S., 364.

VII. OTHER MATTERS.

4. Goods formally seized by the sheriff under an execution remain in the apparent possession of the debtor within the meaning of the Bills of Sale Act. *Exp. Mutton, Re Cole*, 14 L. R., Eq., 178; 41 L. J., Bky., 57; 26 L. T. 916; 20 W. R. 882.

5. Agreement to procure the performance by a sheriff of an act which would be a violation of his duty:—Held, illegal. See *Moher* v. *O'Grady*, 4 L. R., Ir., 54.

6. Assignment by the sheriff proved by the bill of sale of the under-sheriff, without proof of the authority by the sheriff to the under-sheriff. *Wood* v. *Rowcliffe*, 6 Hare 186; 11 Jur. 707, 915.

7. When a sheriff had under a pressure of a writ extorted different sums from the person against whom the execution had issued, the Court ordered him to refund the money with interest at 6*l.* per cent. *Creed* v. *Creed*, Fl. & K. 396; 4 Ir. Eq. R. 299.

SHIFTING CLAUSES.

See CONDITION—VESTED CONTINGENT AND FUTURE INTERESTS.

SHIFTING USE.

See CONDITION—VESTED CONTINGENT AND FUTURE INTERESTS.

SHIPPING.

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I. JURISDICTIO

1. *Over Admiralty Court*
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2. *Damages under Mer*
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1. Over Admiralty

1. The Court of Admiralty year round to applications by restrain the sailing of ship consent, until security given t the respective shares; but w are not ascertained that Cou diction: and, in such case Chancery will exercise a c diction, by injunction, to res of a ship until the share of plaining shall be ascertaine given to the amount of it. In referred to the Master to m and to settle the security acc v. *Goodson*, 2 Meriv. 77.

2. Control of Court of Chan ralty Courts. *Blad* v. *Bamfi* 670.

3. Letters of marque and vacated in Chancery. *Rex* v. 669.

4. Common injunction doe ceedings in Admiralty Cour moved for specially. *Macnam* Dick. 223.

5. No relief in equity ag given for performing the sent Admiralty, although reversed Court to which appeal had having jurisdiction. *Denew* 662. See *Love* v. *Baker*, 1 Ch.

6. Where jurisdiction was of a particular kind of proce passed before the passing o Acts, to the Court of Chance a later Act, still before the Judicature Acts, the jurisdicti to the Court of Admiralty, th sion now has jurisdiction u ture Acts. *Re Santon*, 26 W.

2. Damages under Merchant

7. By the Act 53 Geo. 3, c. of a shipowner for damage without his fault or privity, is limited to the value of th damage, and her appurtenanc Held, that the value of the damage is the price at whi sold; and that price must b by making deductions from proportioned to her age, bu and appraisement, and that be ascertained as at the time *Dobree* v. *Schroder*, 2 Myl. & 6 Sim. 291.

8. In a suit under the 53 was held that where an A required that, to all bills whi under its provisions, an affid form should be annexed, a the affidavit had been sworn

the bill was filed was overruled. *Walker* v. *Fletcher*, 1 Ph. 115; 11 L. J., N. S., Ch., 103; 12 Sim. 420; 6 Jur. 4.

1. In a bill filed under the provisions of the Merchants Shipping Act 1854, to stay actions in other courts for damages occasioned by a collision with the plaintiff's ship, and to have the alleged damage ascertained, the plaintiff must aver that he has incurred liability in respect of some damage. *Hill* v. *Audus*, 1 Kay & J. 263; 24 L. J., Ch., 229; 3 W. R. 230; 3 Eq. Rep. 422.

2. Form of order made on motion for injunction in a suit by shipowner to restrain actions for damage occasioned by loss of the ship and cargo under the provisions of the Merchant Shipping Act 1854, part 9. *Re African Steamship Co.*, 1 Kay & J. 326; 3 W. R. 316.

3. The value of a ship, within the meaning of the Merchant Shipping Act, 17 & 18 Vict., c. 104, s. 504, is not the value which the owner would have set upon his ship; nor is the sum for which the owner may have recently insured his ship the only criterion, although it is one of many criteria of its value; but, under ordinary circumstances, and, with the exception of a case where there is no market for a ship of the kind, such value will be taken to be what the ship would have fetched if sold immediately before her loss. *African Steamship Co.* v. *Swanzy*, 2 Kay & J. 660; 25 L. J., Ch., 870; 4 W. R. 210, 692.

Semble, in the excepted case, the Court would ascertain the price given for a ship, and the subsequent deterioration. *Ib.*

Shipowners, being under a contract to replace their ship immediately, if lost, insured her for 10,000*l.*, two months after which the ship was lost:—Held, that they were not estopped from proving in a suit instituted by them under the 514th section that the value of the ship, at the time when she was lost, did not exceed 5,900*l.* *Ib.*

In a suit instituted by a shipowner under the 514th section of the Merchant Shipping Act, to determine the amount of his liability in respect of the losses there mentioned, to have such amount distributed ratably amongst the several claimants, and to stop actions at law in relation to the same subject-matter, there being no adverse litigation amongst the claimants themselves, nor any other special circumstance occasioning an increase of costs, and over which the plaintiff has no control, the shipowner, as the party eased by the proceedings, must pay all the costs of all claimants whose claims are established, including the costs of actions at law commenced by any of such claimants, but stayed by injunction in the suit. *Ib.*

In such a suit, the Court has no power to give interest upon money ordered to be paid into Court. *Ib.*

4. The provisions of the 504th section of the 17 & 18 Vict., c. 104, limiting the liability of a shipowner to the value of his ship and freight, and the provisions of the 514th section, giving the Court of Chancery jurisdiction to stop actions and suits pending in any other court in relation to the same subject-matter, are applicable, notwithstanding the circumstances that the adverse claimant has obtained a definitive sentence or judgment of the Court of Admiralty condemning the ship; and the utmost to which the latter is entitled under such a judgment, in respect of the loss he has sustained, is to share ratably with the other claimants in the value of the ship and freight. *Leycester* v. *Logan*, 3 K. & J. 446; 26 L. J., Ch., 306; 5 W. R. 334.

But a court of equity has no control over the ship itself, and cannot prevent the party who has obtained such a judgment from proceeding to a sale of the ship, and retaining out of the proceeds such costs as he may be entitled to retain under the order of the Admiralty Court. *Ib.*

Subject, however, as above mentioned, the shipowner is entitled to an injunction, under the 514th section, restraining the party who has obtained such a judgment from proceeding further in the Court of Admiralty. *Ib.*

The value of a ship within the meaning of the 17 & 18 Vict., c. 104, s. 504, is what she would have fetched if sold immediately before the collision, without deduction in respect of costs of sale. S. C. 4 Kay & J. 725; 6 W. R. 849.

Therefore, when a ship had run down another, and was afterwards sold, and her owners claimed the benefit of the Act:—Held, that they were accountable for the gross proceeds of the sale, without deduction in respect of disbursements and fees retained by the Admiralty. *Ib.*

5. Where damage is done by a ship both to persons and goods, the ship is to be estimated at not less than 15*l.* per ton, for the purpose of adjusting the compensation to be paid to claimants in respect of loss of life or personal injury. *Nixon* v. *Roberts*, 1 John. & H. 739; 7 Jur., N. S., 820; 30 L. J., Ch., 844; 9 W. R. 890; 4 L. T., N. S., 679.

But where all demands in respect of personal injury or loss of life have been settled, and the only claimants against the ship are the owners of property, which has been damaged, the ship is not to be estimated at more than her actual value, notwithstanding the fact that loss of life or personal injury has occurred. *Ib.*

Where claimants of both kinds appear, the owners of property are entitled to have the compensation for loss of life and personal injury marshalled, so as to throw it primarily on the excess (if any) of the value at 15*l.* per ton over the actual value of the ship. *Ib.*

Rule as to interest on value of ship. *Ib.*

6. The Court of Chancery will follow the practice of the Court of Admiralty as to giving interest upon the amount recoverable in cases of damage to vessels or goods. *Straker* v. *Hartland*, 10 Jur., N. S., 1143; 34 L. J., Ch., 122; 11 L. T., N. S., 622; 5 N. R. 163.

The owners of a ship causing a collision are liable to pay interest upon the sum payable as damages, although such damages may amount to the maximum sum limited by 25 & 26 Vict., c. 63, s. 54. *Ib.*

A vessel in ballast was cut down by a steamship. A bill having been filed by the owners of the steamer for the protection of the Court:—Held, that they ought to pay into court, in addition to the limited amount of damages for which they were liable, interest upon that amount calculated from the date of the collision, payment having been delayed. *Ib.*

7. The 17 & 18 Vict., c. 120, did not repeal,

but only modified, the 9 & 10 Vict., c. 93, so far as the latter created liability for the loss of life by collision at sea. *Glaholm* v. *Barker*, 1 L. R., Ch., 223; 12 Jur., N. S., 82; 35 L. J., Ch., 259; 14 W. R. 296; 13 L. T., N. S., 653. Affirming 34 Beav. 305; 11 Jur., N. S., 434; 34 L. J., Ch., 533; 13 W. R. 671; 12 L. T., N. S., 317; 6 N. R. 14.

The 25 & 26 Vict., c. 63, s. 54, fixing the limit of liability of the owner of a ship "in respect of loss of life or personal injury caused by the improper navigation of his ship to persons carried in another ship," extends to the crew of such other ship as well as to other persons carried thereby. *Ib.*

By the joint operation of the 9 & 10 Vict., c. 93, and the 25 & 26 Vict., c. 63, the liability of the owner of a sailing vessel for loss of life occasioned by collision with another vessel at sea is limited to 15*l.* per ton of the registered tonnage of his vessel. *Ib.*

The liability of a shipowner in respect of loss of life to the seamen of a vessel run down by his ship, is not limited to 30*l.* for damages payable in each case of death; and this rule applies to all cases, whether the Board of Trade does or does not institute proceedings in respect of such loss of life. S. C. 2 L. R., Eq., 598; 12 Jur., N. S., 764; 35 L. J., Ch., 657; 14 W. R. 1006; 14 L. T., N. S., 880.

Where the damage sustained by all the claimants exceeds in the aggregate the whole amount for which the shipowner is liable (viz. at the rate of 15*l.* per registered ton of his ship), the fund must be distributed ratably amongst all the claimants in proportion to the damages sustained by them respectively; but where the whole amount of damages is less than the whole amount for which the shipowner is liable, the amount of damages sustained by each claimant is to be paid in full. *Ib.*

1. A railway company carrying passengers and goods partly by railway and partly by its own ships, is entitled to the limitation on the liability of shipowners imposed by the Merchant Shipping Acts. *London & South-Western Railway Co.* v. *James*, 8 L. R., Ch., 241; 42 L. J., Ch., 337; 28 L. T., N. S., 48; 21 W. R. 151.

A railway company, known to be also shipowners, contracted to carry passengers and goods from London to Guernsey. The passengers and goods were taken by railway from London to Southampton, and were there put on board a ship which belonged to the company. The ship, on her way to Guernsey, came into collision with another ship and sank with several of the passengers and all the goods. Actions were brought against the company by surviving passengers for loss of luggage and for delay, by shippers of goods for loss of goods, and by the administrators of lost passengers for damages:—Held, that, as to all the damages (except those for delay), the liability of the company was, by the Merchant Shipping Acts, limited to the amount of 15*l.* per ton on the tonnage of the ship; that the amount so payable should be distributed by the Court of Chancery, and that all the actions against the railway company (except those for delay) should be restrained. *Ib.*

2. In an Admiralty action for damages caused by a collision, the defendants put in a counter-claim for damages, and judgment was given declaring both ships condemning each in a moiet caused to the other. The brought an action in the Ch under s. 514 of the Mercha 1854, against the plaintiffs limit the amount of their lia an order of Court paid into of their statutory liability, ar directed to ascertain the pa prove against the fund. The Admiralty action claimed to s due from them to the defen damages due to them from th to prove for the balance aga court; but the defendants insi discharged their liability by court, and were entitled to b damages due to them. The M having decided that the plain to the set-off they claimed phrase "answerable in dama section of the Merchant Sh meant the aggregate dama one ship by the improper other, and that it was in respe that limited liability was g and not in respect of the which under the procedure of jurisdiction might be payab adjustment of all matters o out of the collision. Therefo no set-off. *Chapman* v. *R Steamship Co.*, 48 L. J., Ch. 554; 4 L. R., P. D., 157.

Held, also, *semble*, that the and the owners of the carg writers in their place, and crew of the same ship, must against the fund in court i moiety of their respective los

3. Two ships, V. and K., collision, the owners of the action *in rem* in the Ad against the owners of the claimed, and both ships wer The owners of the K. broug the Admiralty Division to lir under the Merchant Shipp Act 1862 (25 & 26 Vict., c paid the amount of their lia The damage to the V. was gr the K., and the fund in court to satisfy all the claims for of the K. were answerable in (by a majority of the Court), the V. were entitled to prove for a moiety of their damage the damage sustained by th paid in respect of the bala after such deduction, *pari* other claimants out of such v. *Royal Netherlands Steam* (4 L. R., P. D., 157), overr *Maatschappy Nederland* v *Oriental Steam Navigation* Cas., 795; 52 L. J., P. C., 1; W. R. 249.

4. The right of the under ship for damages against merely to make the same insured might have made. *Si* 38 L. T., N. S., 1; 3 L. R., Ap

In the case of a collision

belonging to the same owner, by which one was totally lost through the exclusive fault of the other :—Held, that the underwriters could make no claim against the sum paid into court, under the Merchant Shipping Act 1862 (25 & 26 Vict., c. 63, s. 54), the insured being himself the person who had caused the damage. *Ib.*

1. A collision took place on the high seas between two foreign ships, by which one was sunk. The owner of the sunken ship recovered judgment in the Admiralty Court, whereupon the owners of the other ship filed a bill, praying an injunction, and to have the value of their ship and her cargo ascertained. To this bill a demurrer was put in, and the V. Ch., in allowing the demurrer, decided as follows: that in construing an Act of Parliament the Court is bound by the verbal construction of the section in question, if plain and simple; but if there is any doubt upon that, it is entitled to look, first, at the circumstances attending the passing of the Act; next, to the preamble; and, lastly, to the whole purport and scope of the Act, beyond the section immediately under consideration; that, *primâ facie*, the Acts of an independent legislature must be supposed to deal with those matters only which are within its own jurisdiction; that part ix. of the 17 & 18 Vict., c. 104, limiting the liability of shipowners, in case of loss or damage to any other ship, has no application where one of such ships is a foreign vessel, and, therefore, none where both are foreign, and that the *lex loci* applies only to the form of procedure, and not to the substance of the proceeding itself:—Held (affirming 6 W. R. 537; 4 Kay & J. 367; 4 Jur., N. S., 451), that, excepting when foreign ships are expressly mentioned, the 17 & 18 Vict., c. 104, part ix., applies only to British ships. *Cope* v. *Doherty*, 4 Jur., N. S., 699; 27 L. J., Ch., 600; 2 De G. & J. 614; 6 W. R. 695.

2. The provisions of the 17 & 18 Vict., c. 104, limiting the liability of the owners of seagoing ships, apply in the case of damage done by a British ship to a foreign vessel, when such damage occurs within three miles of the coast of this country. *General Iron Screw Collier Co.* v. *Shurmans*, 1 John. & H. 180; 6 Jur., N. S., 883; 8 W. R. 732; 4 L. T., N. S., 138.

Semble, that such provisions would not apply to a case of damage done by a British ship to a foreign vessel where such damage occurred on the high seas beyond three miles from the coast of this country. *Ib.*

A British ship came into collision with a foreign vessel within three miles of the English coast, causing loss of life to those on board, and complete destruction of the ship and cargo of the foreign vessel:—Held, that the owner of the British ship was only answerable to the extent of the value of such British ship as against the owners of the foreign ship and cargo, although the owners of the foreign ship had proceeded in the Admiralty Court and recovered damages for the value of the foreign ship and her cargo. *Ib.*

3. Section 54 of the Merchant Shipping Act Amendment Act, 1862, which limits the liability of the "owners of any ship, whether British or foreign," applies to a British ship which has run down a foreign ship on the high seas, and is not to be interpreted as though the phrase "within the jurisdiction" were inserted in the clause. Foreign, as well as British ships, are entitled to the benefit of the limited liability provided by the Act. This Act has expressly provided for the case suggested in *Cope* v. *Doherty* (4 K. & J. 381), and *General Iron Screw Collier Co.* v. *Schurmann* (1 John. & H. 180). *The Amalia*, 2 N. R. 533.

II. CO-OWNERS, RIGHTS OF, INTER SE.

See also XVI. *post*—BANKRUPTCY, XVII. xxxi.—XIX. xxi. 6.

4. Part owners of a privateer must bear costs proportionally of an illegal seisure of a prize at sea. *Walton* v. *Hanbury*, 2 Vern. 592.

5. In all sea-adventures the acts of the majority of partners shall bind the whole. *Falkland* v. *Cheney*, 5 Bro. P. C. 476.

6. An account of the profits of a voyage settled by the major part of the part owners shall conclude the rest. *Robinson* v. *Thompson*, 1 Vern. 465.

7. Part owners are tenants in common of a ship, but jointly interested in her use and employment; and the law as to the earnings of a ship, whether as freight, cargo, or otherwise, follows the general law of partnership. *Green* v. *Briggs*, 6 Hare 395; 17 L. J., N. S., Ch., 323; 12 Jur. 326.

A part owner of a ship has a right to require the gross freight to be applied, in the first place, in payment of the expense of the outfit of the ship for the voyage in which the freight was earned, notwithstanding he might sue his co-owners for their proportion of the expenses before the adventure ends. The same rule applies to the expenses of repairs to the hull of the ship, where such repairs were done with a view to the particular adventure in which the earnings were made, and without which that adventure could not have been undertaken; and it would seem that the circumstance that such repairs are not exhausted in the adventure does not create any exception to the rule. *Ib.*

8. Part owners of a ship are tenants in common, not joint tenants; the other partners have no lien, therefore, on the share of one, a bankrupt, having been also managing owner for outfit, freight, etc. *Exp. Younge*, 2 Ves. & B. 242; 2 Rose 78. n.

9. The owners of a ship are not interested in it as joint tenants, but as tenants in common: upon a bankruptcy, therefore, the bankrupt's share passes to the creditors under the bankruptcy, without being liable specifically to the claims of the other part owners, in respect of their disbursements and liabilities for the ship. *Exp. Harrison*, 2 Rose 76.

10. One part owner of a ship freighted against the express dissent of the other: the ship and cargo are lost; the loss falls wholly on the partner who freighted. *Horn* v. *Gilpin*, Ambl. 255.

11. Thirty shares in a privateer remaining unsubscribed for and taken by the managers of the concern on their own account, after a valuable capture, held to be the exclusive property of the managers. Bill on behalf of the other subscribers dismissed; since, if there had been a loss, they could only have been answerable to the amount of their own shares. *Blunt* v. *Cumyns*, 2 Ves. 331.

1. Money paid to part owners for their votes in the appointment of a captain is no profit of the ship. *Moffatt* v. *Farquharson*, 2 Bro. C. C. 338.

2. A., one of three part owners of a ship, refuses to navigate; B. and C., the other two, navigate without his consent, and ship is lost in the voyage. A. shall bear his proportion of the loss, for he would have been entitled to an account of the profits. *Strelly* v. *Winson*, 1 Vern. 297.

3. A part owner of a ship, which had been let to the East India Company for a voyage to India, after the other part owner had expended a large sum in repairing and fitting it out for the voyage, arrested the ship by process out of the Admiralty Court, and compelled the other part owner to give security for his share; the ship afterwards sailed to India, and returned home:—Held, that the part owner who had taken the security was not entitled to any share of the profits of the voyage, but was bound to pay his portion of the repairs and outfit. *Davis* v. *Johnston*, 4 Sim. 539.

4. Powers and duties of the managing owners of a ship, as between themselves and the other part owners. *Darby* v. *Baines*, 9 Hare 369; 21 L. J., N. S., Ch., 801.

Construction of an agreement, entered into by the part owners of a ship, with regard to the management of the ship, and the allowance for brokerage and commission. *Ib.*

No question arises as to the jurisdiction of this Court in enforcing the rights of some against the other part owners of a ship, with regard to the management of the ship and the possession of the certificate of registry, where those rights are regulated by an agreement entered into between all the owners of the ship. *Ib.*

5. The managing owner of a ship chartered by the East India Company, receives the warrants for the freight, and pays them into a banker's in his own name, drawing cheques from time to time for various sums out of the proceeds, part of which are applied for the use of the ship, and part for other purposes:—Held, that the other part owners have no lien on this fund in the hands of the bankers, nor any claim against the bankers as their debtors. *Exp. Gribble*, 3 Dea. & Ch. 339.

6. Certain persons entered into an agreement in writing for forming themselves into a company, one of their rules being to manage the affairs by a committee, but no time being fixed for the duration of the company. Four of the members took upon themselves the exclusive management of a ship, the property of the company, and were about to send her on a voyage disapproved of by some of the members, whereupon the latter filed a bill to restrain the four from proceeding otherwise than under the direction of the committee, and to obtain delivery up of books, etc. A demurrer for want of equity was allowed. *Miles* v. *Thomas*, 9 Sim. 606.

7. A court of equity will not interfere by injunction to restrain a part owner of a ship from retaining part of the machinery of the ship, unless the Admiralty Court has been previously applied to, and refused to interfere. *Brennan* or *Brenan* v. *Preston*, 1 W. R. 69; 1 W. R. 112, 322.

But a court of equity will interfere by injunction when another C primarily jurisdiction, can o tory and inadequate relief. 1 W. R. 115; 10 Hare 331.

Upon the purchase of a st agreed among the purchasers should be the ship's husba not be removed except on specified in the agreement. T thus appointed obtained a her, and they privately stipul payment, by way of commissi in addition to the weekly su terms of the charterparty. May following, the captain, owner, had a conversation w charterers, in which an ob latter led him to suspect tha underhand bargain; but the s the conversation removed t October he acquired corre what had been done, and, t other part owners, except the gave the ship's husbands no The ship's husbands denied th them, and they possessed th of the machinery of the ship, engineer's for repairs. The c thereupon filed a bill, and m junction to restrain the ship interfering with her sailing b machinery, and for a receiver —Held, that the application and, on it appearing that a de could not be obtained in the C by reason of the plaintiffs be of the hull, or at all even obtained in time to enable t her engagement:—Held, th Chancery had jurisdiction appoint a receiver of the m direct possession of it to be d and an order was made captain being appointed rec S. C. 2 De G. M. & G. 813.

A case in which the Co on an interlocutory applica ship's husband at the suit of owners of a ship as against were, under a contract, ship's as part owners. S. C. 10 Ha

8. A., B., and C. being jo vessel, it was agreed that A. ship's husband and broker, a commission on "gross freig of gross negligence or fraud that B. and C. might put an ment by notice and purcha A. effected a charterparty o charterer paying all expens week for the ship, and 4*l.* a in the accounts he rendered presented the amount paid only:—Held, that the conce ceipt of the 4*l.* a week was s and C. that it entitled them the agreement; that the fr justified on the ground that, party been effected on the u owners of the vessel paying t of the ship, A. could have b large a sum by way of com freight. *Brenan* v. *Preston*,

Semble, that B., having once

to put an end to the agreement, could not afterwards withdraw. *Ib.*

1. A suit between two shipowners, and the mortgagee of one, was dealt with as in an administration suit, by first directing the payment of all the costs (except the mortgagee's) out of the fund, and distributing the residue *pro ratâ*. *Alexander* v. *Simms*, 20 Beav. 123; 24 L. J., Ch., 618.

2. Part owner of a ship in the East India Company's service is liable to pay the bills of the tradesmen employed by the husband of the said ship in fitting her out. *Tolson* v. *Hallett*, Ambl. 269.

3. The plaintiffs (who were part owners of the ship), having founded their title to relief on their rights as charterers, and stated that they were managing owners, not for the purpose of relief as managing owners, but in order to protect their rights as charterers, are not entitled to an injunction founded merely on their right as managing owners, but can only be so on the foundation of their rights as charterers. *Lidgett* v. *Williams*, 4 Hare 464; 14 L. J., N. S., Ch., 459.

A ship was chartered to proceed to such places on the west coast of Africa as the charters should direct, and there load from their factor a full cargo of guano, and proceed to a port of the United Kingdom, to be paid at a certain freight per ton. The ship was directed to Ichaboe. The factor there, one of the charterers, endeavoured to provide a full cargo, but failed to procure more than a small quantity. The master of the ship, who was also a part owner, after waiting thirty-one days, seeing no probability of obtaining a full cargo from the factor, applied himself to complete the cargo by his own exertions and at his own expense, and finally succeeded in doing so, after having been ninety-three days at Ichaboe:—Held, on motion for an injunction, that the charterers were not entitled to that part of the cargo which had been procured by the exertions of the master without the assistance of the factor, and which the master claimed to hold as the property of the owners, and not of the charterers. *Ib.*

4. A being interested in a moiety of a cargo, and having entered into a contract with B. to let him have half his share, wrote to C. and D., the consignees, informing them and authorising them to sell the cargo, and carry the proceeds to their separate accounts. The consignees acted upon this, and made advances to B., and B. also charged his interest in favour of E. It had been agreed between A. and B. that they should pay for the cargo by two bills, each to be paid by one of them. B. did not pay his bill. It did not appear whether A. had paid it or not:—Held, that A. had no lien on the proceeds of B.'s share, either as against him or as against C. and D., or against E. *Holroyd* v. *Griffiths*, 3 Drew. 428.

5. C. A., a part owner of the ship D., entered upon the duties of a ship's husband without any special agreement on the subject of commission; but he knew that his predecessor, also a part owner, had been paid by commission, and, as alleged, without any special agreement. C. A. rendered certain accounts of the earnings of the ship, and of payments made on her behalf, all of which were signed by the plaintiff, but he did not charge any commission for his services as ship's husband. Afterwards an account was rendered by C. A., in which he charged commission. On bill praying, *inter alia*, for an account, and that C. A. might not be allowed to charge any commission, it was ordered, that in taking the accounts of the dealings and transactions of C. A. as ship's husband, a reasonable commission should be allowed to him in respect of his labour and services as such, the chief clerk to have regard not only to the commission paid to C. A.'s predecessor, but to the nature and amount of the services performed by C. A. himself. *Salter* v. *Adey*, 1 Jur., N. S., 930.

6. One of several co-owners of a ship, who acts as ship's husband, is only entitled to charge the cost price of supplies to the ship furnished by him in the course of his business. *Ritchie* v. *Couper*, 28 Beav. 344.

7. As to the right of a part owner or partner in ships, who acts as ship's husband, to charge the usual commission. *Semble*, that, in the absence of any agreement, express or implied, he is not entitled. In a case in which no express agreement appeared, and the books showing the usual course of dealing were not produced at the hearing, an inquiry was directed. *Miller* v. *Mackay*, 31 Beav. 77.

The plaintiff and the defendant were partners; they were joint owners, with B., of some ships, as to which B. acted as ship's husband, but the duties were principally performed for him by the defendant. There being no agreement on the subject between the parties:—Held, that B. was entitled to the profits derived as ship's husband, and that the plaintiff was not, as partner, entitled to participate in any share of them received by the defendant, by arrangement with B. S. C. 34 Beav. 295.

8. The managing owner of a ship is competent to appoint himself to act as broker to the ship in collecting and distributing the freight, there being no incompatibility between those services (as, *semble*, there would be between the services of ship's chandler or ship's carpenter) and his fiduciary character as managing owner. *Smith* v. *Lay*, 3 Kay & J. 105.

But, before allowing him a commission in respect of the services in question, the Court directed an inquiry whether, according to the custom of shipowners or otherwise, he, being managing owner, was entitled to any and what commission in respect of duties performed by him, and which duties are ordinarily performed by shipbrokers. *Ib.*

9. M. contracted with his co-owners for use of their ship on a voyage to S., and he shipped in her some thousands of bricks, which, on the arrival of the ship, were reduced to dust. No freight was paid at S., nor was the dust removed, but the agent of the other owners at S. used it as ballast on a voyage by the same ship from S. to C., where it was sold for a small sum. In taking the accounts between them, the chief clerk charged the ship's husbands with the freight of the bricks, although they had received no part of it; and a motion by them to vary was dismissed, with costs. *Garrett* v. *Melhuish*, 4 Jur., N. S., 943.

10. T. was captain of a ship; S. & Co. were the ship's husbands; and S. & Co. and T. were the owners of the ship. S. & Co., to

secure a debt due to W. & Co., gave them an order for the whole freight to arise from the ship's next voyage. W. & Co. remitted the order to the plaintiffs at L. S. & Co. had accepted bills in payment of repairs done for them to the ship. S. & Co. failed, and the bills were dishonoured. The ship arrived at L., and T. proceeded to get in the produce of the cargo, which realised more than was sufficient to pay the debt due to W. & Co., and T.'s expenses of the voyage. S. & Co. filed a bill for, and obtained, an injunction to restrain the captain from receiving the freight, without, however, alleging in the bill that he intended to misapply the freight when received :—Held, that a part owner, who is ship's husband, has not the right, as against other part owners, of making an assignment of the whole freight to secure moneys advanced to him; that the legal right to receive the freight was in the captain, and that, in the absence of any sufficient allegation and proof that he was about to misapply it, the injunction ought not to have been granted. *Guion* v. *Trask*, 1 De G. F. & J. 373; 6 Jur., N. S., 185; 29 L. J., Ch., 337; 8 W. R. 266.

1. Some of the joint owners of a ship, acting as managers on behalf of the owners generally, furnishing supplies for the voyage, are entitled to sue for an account of the transactions between themselves and the other owners. *Vanner* v. *Frost*, 39 L. J., Ch., 626.

Purchase of by Partner.] 2. A ship was purchased by a partner for himself, but was paid for out of the partnership assets. The firm became bankrupt :—Held, that the firm had no interest in the ship, or any lien on it for the amount of the purchase money. *Walton* v. *Butler*, 29 Beav. 428.

III. REGISTRATION.

See also IV. 3, V. 5, and XIX., *post*.

1. *Title by*, 6330.
2. *What Names*, 6330.
3. *Unjustifiable*, 6330.
4. *Foreign Ships*, 6331.
5. *Certificate of*, 6331.

1. Title by.

3. The registry of a ship is conclusive evidence of the property upon the policy of the Registry Acts; even against the claim of creditors upon a joint purchase and various acts of apparent ownership, within the Bankrupt Act (21 Jac. 1, c. 19), s. 11. *Exp. Yallop*, 15 Ves. 60.

4. The registry of a ship is conclusive evidence of the property, even between creditors; excluding all trusts created by acts of the parties, as by payment of money on a purchase in the name of another. Distinction as to trusts arising by operation of law upon bankruptcy or death. *Exp. Houghton, Exp. Gribble*, 17 Ves. 251; 1 Rose 177.

5. A purchaser under a judicial sale of a beneficial interest in a British ship is not entitled to be registered as owner of it. *Chasteauneuf* v. *Capcryon*, 7 L. R., App. Cas., 127; 51 L. J., P. C., 37; 46 L. T. 65.

2. What Names.

6. Ships, purchased by one partner, held

separate property, as betwee
his bankruptcy, and death o
circumstances, particularly t
made in the name of one p
being afterwards continued
purpose. *Curtis* v. *Perry*, 6

7. Under a commission of b
two partners, ship registered
one of them, but in the orde
of both, forms part of the jo
Burn, 1 Jac. & Walk. 378.

8. A ship, the property of
registered in the name of th
within the 3 & 4 Will. 4, c. 5
therefore be dealt with as an
ship property. *Exp. Howden*
2 M. D. & De G. 574.

9. Where a ship belongs
the names of all the partners,
particular shares, should be
registry: and accordingly, w
C. were partners trading u
A. & B., and a ship purchased
ship assets was registered in
and B. only, as partners tra
firm of A. & B. :—Held, that C
in the ship. *Slater* v. *Willis*,

10. Agreement between A.,
they shall purchase ship to
names of A. and B., is against
demurrer allowed to bill for
transaction. *Battersby* v. *Smy*

3. Unjustifiable

11. The registered owners of
facie alone liable, though so re
their knowledge. *Exp. Mack*
216; 1 Rose 447.

12. A bill stated, that the v
executed a bill of sale to a
was to be handed to him upo
consideration in a manner stip
he took it away with some
it was supposed, by mistake,
returned it, saying, he could
the terms. The bill further a
plaintiffs, the vendors, had dis
defendant, the purchaser, had
of his accidental possession o
to make himself the registere
ship, and was about to sail
that the alleged fraud would
Court to interfere, and a dem
was allowed. *Fullett* v. *Delany*
235; 17 L. J., N. S., Ch., 254;

13. Where a person, having
procures it to be registered i
Court will compel him to re-t
rightful owner, and account fo
even though there has been
notwithstanding the 17 & 18
Holderness v. *Lamport*, 29 Be
N. S., 564; 30 L. J., Ch., 489;

14. Under the 17 & 18 Vict.,
registry of a bill of sale, whi
porting to be valid, so that th
no alternative but to register i
valid, and gives no title, even
person thereby registered as so
ship. *Orr* v. *Dickinson*, 1 Jo
N. S., 672; 28 L. J., Ch., 516.

Therefore where a bill of sa
cuted by the person named fo

by the plaintiff the then owner of the ship, and purporting in all other respects to be made in conformity with the certificate of sale, was, in fact, made for less than the minimum price specified in the certificate, and the ship was registered in the name of the purchaser as sole owner:—Held, that the registry was void; and the ship having been sold by arrangement pending a suit, that the plaintiff was entitled to the net proceeds of the sale. *Ib.*

Quære, whether under the 17 & 18 Vict., c. 104, s. 79, and 18 & 19 Vict., c. 91, s. 10, the Court of Chancery has jurisdiction to interfere with a title required at law by the registration of a valid bill of sale of a ship. *Ib.*

The 65th section of the 17 & 18 Vict., c. 104, does not deprive the Court of Chancery of its ordinary jurisdiction to protect property during litigation. *Ib.*

1. Equitable relief may be given against the registered owner of a ship in cases of fraud. *Armstrong* v. *Armstrong*, 2 W. R. 678.

4. Foreign Ships.

2. *Semble*, that the stat. 3 & 4 Will. 4, c. 55, s. 33, which authorises a particular mode of registering vessels belonging to joint-stock companies, does not apply to a joint-stock company in which foreigners are shareholders. *Benson* v. *Heathorn*, 1 Y. & Coll. C. C. 326.

3. *Semble*, that where a ship does not belong wholly to British subjects, the jurisdiction of the Court of Chancery is not excluded by the Ship Registry Acts. *Two Sicilies (King of)* v. *Willcox*, 1 Sim., N. S., 334; 19 L. J., N. S., Ch., 202; 14 Jur. 163.

It is not a fraud to cause a ship, in fact belonging to foreigners, to be registered in the names of British subjects. S.C. 19 L. J., N. S., Ch., 488; 14 Jur. 751.

4. A ship built in a foreign port in India, in 1817, within the limits of the company's charter, by foreigners, and which sailed under foreign flags until 1838, when it was then and thereafter owned by and belonged to British subjects resident at Bombay, is entitled, under the proclamation of the Governor-General in Council, and the act of the Legislative Council of India, No. X. of 1841 (passed in pursuance of the powers granted by the stat. 3 & 4 Vict., c. 56), to be registered at Bombay as a British ship for the purposes of trade, within the limits of the company's charter. *Crawford* v. *Spooner*, 6 Moo. P. C. 1.

5. Certificate of.

5. The Ship Registry Act (8 & 9 Vict., c. 89) does not prevent a lien being created on certificate of original registry, deposited by unregistered owner to secure advances for the use of the ship. Upon motion by plaintiff claiming such a lien, a party who, without a lawful title, had procured himself to be registered as owner of a ship, was restrained by injunction from prosecuting a complaint made under s. 30 against plaintiff for wilfully detaining and refusing to deliver up the certificate of the ship's registry, and from instituting any other proceeding against plaintiff to compel him to deliver up the certificate. *Clarke* v. *Batters*, 1 Kay & J. 242.

IV. SALE.

See also IX. 4, *post*—BANKRUPTCY, XIX. xxi. 1.

1. *In General*, 6331.
2. *By Court*, 6332.
3. *Registry Acts, Effect of*, 6333.

1. In General.

6. An agreement was entered into for the sale of a ship to A. and B. (one-third to A. and two-thirds to B.), at the price of 750*l.*; and, if default should be made by the purchasers, for the re-sale of the ship, the deficiency, if any, upon the re-sale to be made good by the defaulting purchasers. Possession of the ship was delivered to the purchasers by the vendors, who received 250*l.* from A., and two bills of exchange, drawn by them, and accepted by A. for the remaining 500*l.* In the bills of sale, by which the agreement was carried into effect, the purchase money for the one-third and two-thirds of the ship was expressed to have been paid by A. and B. respectively. The acceptances of A. were dishonoured and he became bankrupt. On a bill filed by the vendors, who had become entitled to the whole interest in the purchase money, against B., who had become the sole owner of the ship by purchase from A.'s assignee, praying specific performance of the agreement by B., or that the ship might be sold, and the proceeds applied in payment, the Court held that it had jurisdiction, and decreed an account and payment of the unpaid purchase money by B., or a re-sale of the ship, in default of payment in a limited time. *Lynn* v. *Chaters*, 2 Keen 521.

7. When the vendor of a share in a ship has executed the bill of sale, and a receipt for the purchase money, without its being in fact paid, a court of equity will give relief as well as discovery. *Ryle* v. *Haggie*, 1 Jac. & Walk. 234.

8. No jurisdiction in bankruptcy to compel bankrupt to perfect bill of sale of a ship. *Exp. Stewart*, 1 G. & J. 344.

9. The owner of a ship proposes to his agent, to whom he was indebted on account, to transfer the ship to him, provided the agent would answer the owner's draft for repairs, in respect of which the owner was indebted to a third party not named. The ship was, in pursuance of this proposal, transferred to the agent, and the vendor afterwards became bankrupt, without having drawn on the purchaser, and without any communication of the terms of the purchase having been made to the creditor to whom the vendor was indebted for the repairs. There is no consideration between the purchaser and the vendor's creditor to entitle the latter to recover from the purchaser the amount of the repairs. *Rattenbury* v. *Fenton*, 3 Myl. & K. 505; 3 L. J., N. S., Ch., 203.

10. Assignment of outward-bound ship without possession and delivery of bills of lading, policies, etc., good against creditors. *Brown* v. *Heathcote*, 1 Atk. 160.

11. Bill of sale of a whaler, then absent on a fishing adventure, together with all masts, etc., boats, oars, and appurtenances:—Held, not to pass the cargo of oil, etc., acquired during the adventure. *Langton* v. *Horton*, 5 Beav. 9; 11 L. J., N. S., Ch., 233; 6 Jur. 357, 594.

12. R., trading under the name of R. & Co., contracted with a company for the sale and

delivery to them of two vessels, to be sent by him to the Danube; and he undertook to advance a sum not exceeding 1000*l.* to furnish them for the voyage. The purchase money was paid in part, and the remainder was to be secured by a mortgage of the vessels. The plaintiffs were directors of the company. In order to further the objects of that company, they, on its behalf, and at the request of R., accepted, indorsed, and handed to him certain bills of exchange. R., on his part, gave them a guarantee that they should not be called upon to pay more than a portion of the amount for which they had so become sureties; and not that until a time that was named in the guarantee. No transfer of the vessels from R. to the company was ever completed, and no mortgage of them was executed to R. R. treated himself as the agent of his own firm of R. & Co., and of the company in the matter; but instead of sending the vessels from Newcastle-on-Tyne, where they were registered, to the Danube direct, as agreed upon, dealt with them as if he had been the complete owner of them, speculated with them, mortgaged one of them, indorsed over some of the bills of exchange, sent one of the vessels to a port which was far away from the Danube, after having freighted it with contraband of war for the use of the Circassians, and did all those acts without the knowledge of the plaintiffs. Upon a suit instituted by them, to be relieved from the liabilities incurred by them on behalf of the company, in respect of the two vessels: —Held, that as the dangerous nature of the cargo, which exposed the vessel to extraordinary risk, was concealed from the company by R., he could not have enforced the agreement against the company, and that the plaintiffs were entitled to be relieved from their liability. *Burke* v. *Rogerson*, 12 Jur., N. S., 635; 14 L. T., N. S., 780. Affirming 13 L. T., N. S., 415.

Held, also, that the delivery of a vessel by a vendor to a purchaser means, that the purchaser is to have the control of the vessel, and not necessarily that he is to be put into the manual possession of it. To complete the delivery he must be able to direct where the vessel shall go, what it shall do, what performances it shall be required to undertake; in fact, to have exactly the same power over it as exists with respect to any other chattel which is sold and delivered to a purchaser. *Ib.*

1. B. contracted to purchase a barge of H., the purchase money to be paid by instalments. Part of the money so to be paid was paid, and H. gave notice to B. that he had sold the barge to another person, and he must give it up, and gave a formal notice to that effect. On petition under the Merchant Shipping Act 1854, s. 65, to restrain the dealing with the barge until a day specified, order made on the terms of bringing the arrears of instalments into court, and giving security for the completion of the contract. *Exp. Baker*, 18 L. T., N. S., 313.

2. A shipowner of Hamburg made, at Hamburg, an agreement with a domiciled Englishman for the sale to the Englishman of a Hamburg ship whenever she might return from the voyage on which she then was. The ship returned, and was by the owner ordered to proceed to Sunderland. T
ship, who was authorised by
act as his agent in the sale
the ship except on certain
chaser filed a bill against t
master for specific performa
leave to substitute service
the owner, and moved for
restrain the defendants fr
ship out of the jurisdiction
Court had jurisdiction to re
ants from removing the shi
granted. *Hart* v. *Herwig*, 8
21 W. R. 663; 29 L. T., N. S

Held, that substituted ser
was effectual and proper. *I*

3. A ship was, whilst in a
colony, repaired and furnishe
for the voyage. The capt
owner for the amount du
never accepted. The ship
scribed voyage, and before
entered a French port. The
to a French subject, who su
it, and obtained in the Trib
a judgment against him,
freed him from personal ar
the debt "privileged on t
priority over others). The
possession of by the French
this judgment. While the
voyage, and before its arriv
port, the owner had execut
the ship to a creditor. Ne
owner nor the mortgagee
personally cited in the actio
not be actually sold till the
the district had confirmed
ment. It was confirmed,
owner and his assignee (fo
meantime become bankrup
before the Civil Tribunal,
disregarded the opinion of
as to what would be the rela
holder of a bill of exchang
of a bill of sale of the
signee of the mortgage afte
before the Civil Tribunal
nature of a replevy of the
the process, and the ship
that there had been a judgm
French court, and that the
of the ship (an Englishman)
wards be disturbed in this co
v. *Imrié*, 4 L. R., H. L., 414
350; 23 L. T. 48; 19 W. R. 1

4. A ship which had been
of alleged piracy, and whic
ceedings had been taken by
been sold by her owners at a
a *bonâ fide* purchaser, was af
by the Crown:—Held, that
and goods of pirates are
forfeited to the Crown, ye
pirate which has not been
and which before convictio
ferred to an innocent purch
to seizure by the Crown. *R*
The Telegrafo or Restaurac
673; 40 L. J., Adm., 18; 24

2. By Court

5. Under the Merchant Sh

ss. 62-64, the Court will order a particular sale to be carried out, instead of making an order for sale generally, if that course is shown to be preferable. *Re Santon*, 26 W. R. 810.

Where a petitioner under those sections claims as sole executor and general legatee of the registered owner, and makes the application within a year, though more than four weeks after the occurrence of the event on which the transmission took place, it is not necessary to serve the Crown or any other person. *Ib.*

Where jurisdiction was given in respect of a particular kind of proceeding, by an Act passed before the passing of the Judicature Acts, to the Court of Chancery alone, but, by a later Act, still before the passing of the Judicature Acts, the jurisdiction was extended to the Court of Admiralty, the Chancery Division now has jurisdiction under the Judicature Acts. *Ib.*

1. A purchaser under a judicial sale of a beneficial interest in a British ship is not entitled to be registered as owner of it. *Chasteauneuf* v. *Caperyon*, 7 L. R., App. Cas., 127; 51 L. J., P. C., 37; 46 L. T. 65.

3. Registry Acts, Effect of.

2. Sale of a ship at sea valid, notwithstanding the bankruptcy of the vendor before her arrival in port; and, therefore, before the title is complete by the indorsement on the certificate of registry, if the other requisites of the Ship Registry Act were previously complied with. *Mestaer* v. *Gillespie*, 11 Ves. 639.

Whether, the legal title under an assignment of a share in a ship failing under the Ship Registry Acts (26 Geo. 3, c. 60, 34 Geo. 3, c. 88), or for want of the indorsement upon the certificate, within ten days after the return of the ship to port, if that was prevented by fraud, relief can be had in equity, *sed quære*, in what form, and *quære* whether it may not be had as to the freight, if not as to the ship, though both were comprised in the same bill of sale. *Id.* 621.

3. Sale of a share of a ship is good without actual delivery. Whether an executory agreement for the sale of a ship must recite the registry under the 26 Geo. 3, c. 18, s. 17, *quære*. *Addis* v. *Baker*, 1 Anstr. 222.

4. If on sale of a ship there is no bill of sale or indorsement of certificate of registry, no relief can be given in equity on ground of accident or fraud. *Thompson* v. *Leake*, 1 Madd. 39.

5. Transfer of a share in a ship to another part owner, void by not procuring the indorsement upon the certificate, within the time prescribed by the Registry Acts after the arrival of the ship. *Speldt* v. *Lechmere*, 13 Ves. 588.

6. The bill of sale passes the absolute property in a ship at sea, subject only to be devested in case the indorsement on the certificate of registry not being made within ten days after the return of the ship to port; power of attorney to sign an indorsement on the certificate not revoked by bankruptcy of the vendor, subsequently to the execution of the power, but previously to the indorsement, being a power only to do a mere formal act, which the bankrupt himself might have been compelled to execute, notwithstanding his bankruptcy, and for a valuable consideration; therefore, in this case, the indorsement on the certificate being made within the ten days, under a power of attorney, the grantor of which had since become bankrupt:—Held, a sufficient compliance with the terms of the Registry Act. *Dixon* v. *Ewart*, 3 Meriv. 322.

7. A bill of sale of a ship was made a collateral security, and the papers, etc., delivered, but there was no recital in the bill of sale of the registry, pursuant to Act 26 Geo. 3, c. 60. This cannot be supplied against assignee of a bankrupt, and bill for that purpose dismissed. *Hibbert* v. *Rolleston*, 3 Bro. C. C. 571.

8. No relief given to aid a defective contract, etc., not conformable to the Ship Registry Acts. *Curtis* v. *Perry*, 6 Ves. 745.

9. Agreement for sale of a ship void under the Registry Acts (26 Geo. 3, c. 60, and 34 Geo. 3, c. 68), for want of the certificate of registry being duly recited in the memorandum of sale, although a copy of such certificate was thereto annexed. The policy of these acts prevents a Court from looking on one who has not strictly complied with their provisions in the light of a purchaser. *Brewster* v. *Clarke*, 2 Meriv. 75.

10. The vendor of a ship, with a covenant for title, retains after the sale (in order that he may fulfil his contract, and defend himself against an action brought upon his covenant) such an interest in the certificate of registry as enables him to sustain a suit for its delivery against a party unlawfully detaining it. *Gibson* v. *Ingo*, 6 Hare 112.

11. The non-registration of a ship, required by the 8 & 9 Vict., c. 89, ss. 37, 38, by the first purchaser, did not affect the title of a subsequent *bonâ fide* purchaser. *Lapraik* v. *Burrows*, 13 Moo. P. C. 132.

12. The transfer of a British ship is governed by the express provisions of the Merchant Shipping Acts, which make a clear distinction between the legal estate and mere beneficial interests therein:—Held, that a sale by licitation of a British ship (or of a share therein) without a conveyance by bill of sale did not create such an interest in the purchasers as rendered it compulsory on the registrar, under the Merchant Shipping Act 1854, to register them as owners, and that the registrar was right in refusing so to do, and to erase from his books the inscriptions contained in the register against the ship in the names of the mortgagees. *Chasteauneuf* v. *Caperyon*, 7 L. R., App. Cas., 127; 51 L. J., P. C., 37; 46 L. T. 65.

13. There is nothing in the policy of the Ship Registry Acts to prevent a third party not having any registered share in a ship from acquiring from the owner an interest in the proceeds of the sale of the ship in the hands of a purchaser, when the ship shall have been sold, the Court not being required to recognize any interest in such third person in the ship itself, *semble*. *M'Calmont* v. *Rankin*, 8 Hare 1; 19 L. J., N. S., Ch., 215; 14 Jur. 475.

But whether, under a contract by which a party has an interest in the proceeds of the sale of a ship, such party can compel the owner to sell the ship, or obtain a decree for the sale, *quære*. *Ib.*

The provisions of the Ship Registry Acts apply equally to contracts as to sales; and the whole frame of these Acts negatives any equity resulting out of the doctrine of notice.

An unregistered agreement, therefore, with the registered owner of a ship, which the owner subsequently transfers for value to another person who has notice of the agreement, cannot be enforced either as against the ship or its proceeds. S. C. 2 De G. M. & G. 403; 22 L. J., Ch., 554.

Whether upon such a contract an action for damages could be sustained, *quære*. *Ib.*

How far actual fraud in such a case would be relievable in equity, *quære*. *Ib.*

1. According to the proper construction to be put upon the 34th section of 8 & 9 Vict., c. 89, a court of equity will not enforce specific performance of a contract for the purchase of a ship, although such contract does not affect to make a transfer of the ship, but is merely executory. *Quære*, whether an action may not now be maintained at law on such a contract, although it would have been void under the old Registry Acts (26 Geo. 3, c. 60, and 34 Geo. 3, c. 68). *Hughes* v. *Morris*, 2 De G. M. & G. 349; 16 Jur. 603; 21 L. J., Ch., 761.

On a sale by auction of shares in a ship, part of a bankrupt's estate, one of the conditions was, that the purchase money should be paid to the solicitor of the assignees on or before a certain day, when the purchase was to be completed, and the purchaser to have possession, and a bill of sale; the purchaser paid part of the purchase money to the solicitor before the day appointed for the completion of the purchase, and had possession, but not a bill of sale:—Held, that the payment, and the execution of the bill of sale, ought, in pursuance of the condition, to have been contemporaneous; that the assignees, not having received the money from the solicitor, or executed the bill of sale, would not be restrained from taking proceedings to recover possession of the ship; and that the purchaser was not entitled to a decree for specific performance of the contract, by the execution of the bill of sale by the assignees, upon payment to them of the balance of the purchase money. S. C. 9 Hare 636.

A contract for the sale of a ship, or a portion of a ship, cannot be recognized in a court of equity, unless it has been registered, in conformity with the provisions of the Ship Registry Act, 8 & 9 Vict., c. 89. S. C. 16 Jur. 603; 21 L. J., Ch., 761.

Whether upon such a contract an action for damages would lie, *quære*, per Lord Cranworth, L. J. *Ib.*

2. The policy of the Ship Registry Act (8 & 9 Vict., c. 89), in disregarding interests not appearing on the register, is inapplicable both to the money arising from the sale of a ship, and to the produce of the freight. *Armstrong* v. *Armstrong*, 21 Beav. 78; 1 Jur., N. S., 859; 24 L. J., Ch., 659; 3 W. R. 563; 3 Eq. Rep. 973.

When a party who appears on the registry to be the absolute owner of a ship, enters into an agreement for valuable consideration, admitting he is a trustee, and engaging to sell the ship, and hand over the produce to the true owner, the Court, notwithstanding the 8 & 9 Vict., c 89, ss. 34-39, will enforce the agreement. *Ib.*

Shares in a ship purchased with A.'s money were registered in B.'s name. After A.'s death, B. entered into an agreement with his representatives, admitting their rig
consideration agreeing to s
end of twelve months, an
representatives for the proc
sold to C. :—Held, that th
c. 89 prevented the repres
any right against the ship
were entitled to recover t
in the hands of C. *Ib.*

Between the date of a b
of a ship, and the entry of
register, the purchaser h
vendor, though the share
his name, was a trustee.
a *primâ facie* appearance
granted an interim injunc
purchaser from dealing
indorsing the transfer or
registry, so as to insure the
tion of the questions at th
Beav. 71.

3. Looking to the great
forms of transfer and mo
the 17 & 18 Vict., c. 104,
Legislature intended that
others, should be used.
Bank v. *Turner*, 1 John.
N. S., 935; 29 L. J., Ch.,
Affirmed 3 L. T., N. S., 494
30 L. J., Ch., 379.

V. MORTGAGE A

See also VIII. 4—IX. 7—X
4, *post*—BANKRUPTC

1. *Priority*, 6334.
2. *User of Ship by Mort*
3. *Right of Mortgagee t*
4. *Rights of Mortgagor*
5. *Registry Acts. Effec*
6. *Sale*, 6339.
7. *Lien. How enforced*
8. *Other Matters*, 6341.

1. Priorit

4. Equitable agreemen
security upon a share of a
with a covenant for a fut
if the ship should be sold
payment out of the purc
poned to a subsequent
possession taken as far as
to the builder's possessio
v. *Russell*, 14 Ves. 393.

5. A mortgagee of a s
a prior unregistered eq
registers: the prior equi
postponed to him. *Coom*
Drew. 193; 1 Jur., N. S., 27

The registry is conclus
being in a fit state to be r
8 & 9 Vict., c. 89, altho
evidence to show that the
pleted at the time of the re

A vessel in course of
gaged to G., and then with
C. by assignment, with p
mortgagor afterwards, and
still incomplete, registers
himself as sole owner, the
and B. as master (B. not
only lending his name). T
by bill of sale (absolute i

tended only as a security), assigns the vessel to G., and notice of such assignment is indorsed on the certificate of registry. G. afterwards transfers his security (the mortgagor joining) to third persons, and C. files a bill against those third persons and the mortgagor for payment of his incumbrance, and an injunction to restrain selling, or, if sold, parting with the proceeds, on the ground of notice, and that the registry was void, the ship not being in a condition to register, and the representations as to ownership, etc., being false:—Held, that this Court has no jurisdiction to relieve against even manifest fraud in the case of a ship, nor does the equitable doctrine of a notice apply to the Ship Registry Acts. The registry is conclusive evidence of the title, and an endorsement on that registry good against a prior equitable mortgagee, although the party subsequently obtaining registry of his incumbrance had full notice of the prior charge. Bill dismissed without costs. S. C. *nom. Coombs* v. *Mansfield*, 3 W. R. 345; 3 Eq. Rep. 566.

1. Registered first mortgagees of a ship, with power of sale, took from the mortgagor, by an unregistered document, a declaration that the mortgage should be a security, not only for the mortgage debt, but for such sums as might, for the time being, be due from the mortgagor, either alone or with any partner to the mortgagees or their firm, however composed. Subsequently another incumbrancer took a registered mortgage, expressed to be subject to the first mortgage, but not referring to the unregistered charge, of which, however, the last mortgagee did not deny having had notice when he took his security:—Held, that the unregistered document was not merely a further charge but a new security, and that the Shipping Act, 8 & 9 Vict., c. 89, s. 34, excluded it from priority over the last mortgage. *Parr* v. *Applebee*, 7 De G. M. & G. 585; 24 L. J., Ch., 767.

But *quære*, if the memorandum of further charge had been for the benefit of the first mortgagees exclusively, whether they could not have tacked it to their security, although unregistered. *Quære* also, if the first mortgage had been a distinct trust for sale, and the further charge a mere charge upon the produce, whether the further charge ought to have been registered. S. C. 3 W. R. 645.

2. A. mortgaged a ship for 1,200*l.* to B., who transferred the mortgage to C. A. afterwards executed a second mortgage for 400*l.* B. afterwards paid off C., and C. signed a statutory receipt instead of a re-transfer. This receipt was produced to the registrar, who made an entry in the register-book, under the Merchant Shipping Act 1854, s. 68, to the effect that the mortgage had been discharged. C. afterwards executed a deed purporting to be a re-transfer of the 1,200*l.* mortgage to B., which was registered, and at the same time a note was made by the registrar against the entry of the receipt, stating that the receipt was signed in error, and the mortgage was afterwards again transferred to C., to secure a balance on account current, and this deed remained in C.'s hands, after satisfaction of all that was due on the account. B. then took a fresh mortgage from A. for 2,500*l.*, which included the 1,200*l.* and 400*l.*, and had since been transferred to the plaintiff. After the new mortgage, B. agreed with C. that the mortgage for 1,200*l.* should be a security for advances on an account current. The transfer of the mortgage to the plaintiff was not registered until after this agreement. Upon a question of priority between C. and the plaintiff:—Held, that the plaintiff's security had priority over that of C.:—Held, also, that the receipt with the entry on the register operated as a discharge of the first mortgage, and the same could not afterwards be revived by the note made by the registrar. *Bell* v. *Blyth*, 38 L. J., Ch., 178; 4 L. J., Ch., 136; 17 W. R. 194; 49 L. T., N. S., 662. Affirming 6 L. R., Eq., 201; 16 W. R. 885.

3. The jurisdiction conferred on the Court of Admiralty by the Admiralty Court Act 1861 (24 Vict., c. 10), s. 5, "over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs," does not create a maritime lien, or render the ship chargeable for necessaries. *Johnson* v. *Black, The Two Ellens*, 4 L. R., P. C., 161; 41 L. J., Adm., 33; 26 L. T. 1; 20 W. R. 592; 8 Moo. P. C., N. S., 398. Affirming 3 L. R. Adm., 345; 40 L. J., Adm., 11; 24 L. T. 592; 19 W. R. 983.

A British colonial vessel was mortgaged by her owners. The mortgage was duly registered under the Merchant Shipping Act 1854. In February 1868, whilst lying in the port of London, the material men, on the order of the master, did work and furnished supplies to the ship necessary to put her in a seaworthy condition. In July 1868 the mortgagee executed an instrument transferring the mortgage to B. This transfer was without any valuable consideration, and was not registered, being made to enable him to take charge of the ship for the mortgagee. In the same month B. took possession of the ship. The material men having instituted a suit against the ship to recover the amount due to them for the work and supplies, B. intervened. At the time of the institution of the suit, the ship was under the arrest of the Court, at the instance of two of her crew who had instituted a cause of wages; the owners of the ship were domiciled in Nova Scotia. The ship having been sold, the proceeds were found insufficient to satisfy the claim of the material men and the mortgage debt:—Held, that the assignee of the mortgagee was entitled to have his mortgage debt satisfied before the material men were paid the amount of their claim. *Ib.*

4. The legal title of a mortgagee of a ship who, for the purpose of facilitating a sale by the mortgagor, conceals his mortgage, cannot prevail in equity against a purchaser for valuable consideration without notice. *Hooper* v. *Gumm*, *M'Lellan* v. *Gumm*, 36 L. J., Ch., 282; 2 L. R., Ch., 282; 15 W. R. 464; 16 L. T., N. S., 107. Affirming 15 L. T., N. S., 187.

Certain shipbuilders in America built several ships, mortgaged them there, sent them to England for sale, sold them there, and paid the mortgagees in America. The mortgages were duly registered in America; but notice of the mortgage having been indorsed on the certificate of registry in one case, and having impeded the sale, it was agreed that no such notice should be indorsed in future. Another ship was accordingly sent over and sold; the

shipbuilders received the purchase-money, and failed, leaving the mortgagee unpaid. The mortgagee filed a bill to establish his claim against the purchaser:—Held, that the rights to the ship acquired under American law must be recognized; but that the purchase, having taken place in this country, must be governed by English law. *Ib.*

A ship is not like an ordinary chattel, which passes by delivery, and there is no market overt for ships. *Ib.*

The purchaser of a foreign ship is bound to make inquiries as to the title. *Ib.*

Held, also, that that which furnishes the title to a ship in America will furnish the title to the ship in this country. *Ib.*

2. User of Ship by Mortgagee.

1. *Semble,* a mortgagee of a ship has power, under the 70th section of the 17 & 18 Vict., c. 104, to use as well as sell the ship. *European & Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.*, 4 Kay & J. 676; 5 Jur., N. S., 310.

Where a mortgagee claimed under a special contract, which did not contemplate a sale by him until two months had elapsed after a demand for payment:—Held, upon the construction of the agreement, and especially having regard to the circumstance that the ship would otherwise remain useless in that interval, that he was at liberty to use the ship. *Ib.*

In such a case, the circumstance of the mortgagee being registered as absolute owner is not conclusive as to the rights of the parties. *Ib.*

2. A. took a mortgage of a ship, with a power of sale, with full notice that the ship was under contract by charter-party to carry a cargo for B. from N. to S.:—Held, that B. was entitled to an injunction to restrain A. from doing anything to interfere with the voyage of the ship from N. to S.; B. undertaking to abide by any order the Court might think proper to make as to damages. *De Mattos* v. *Gibson*, 5 Jur., N. S., 347; 28 L. J., Ch., 165; 7 W. R. 152; 32 L. T. 268.

Where property, either immovable or movable, is disposed of, with notice of a prior contract entered into by the person disposing of it for its use in a particular manner, the person taking it with such notice may be restrained from using it otherwise. S. C. 4 De G. & J. 276.

Semble, a mortgagee of a ship is entitled to take possession and sail her, and upon doing so becomes an owner within the meaning of 17 & 18 Vict., c. 104, and subject to all the liabilities consequent thereon. *Ib.*

Where, on granting an injunction against the use of a ship by an owner, an undertaking for damages is given, the measure of damages would include the loss of profit by the detention of the ship. S. C. 1 John. & H. 79; 7 Jur., N. S., 282; 30 L. J., Ch., 145.

But where an injunction was against a mortgagee of a ship, which was an insufficient security, who had declared his intention to sell, and had not suggested the loss of possible profit as part of the damage anticipated:—Held, that the loss of such profit was too speculative to be taken into account; and that the measure of damage was
volved in the custody of t
deterioration which she had
with interest in the meantim

3. Where a mortgagee of
possession of her, and used
poses of a speculation which
and subsequently sold her d
—Held (affirming 2 Giff. 4
155; 3 L. T., N. S., 538), tha
bear such loss, and be charg
of the vessel at the time he
her. *Marriott* v. *Anchor R*
Giff. 457; 7 Jur., N. S., 71
571; 9 W. R. 726; 4 L. T.,

4. The Court will, under
c. 104, s. 65, restrain a mo
from dealing with the ship
as would enable him to obta
fraudulent preference, and
power of restraint for a def
out requiring the applicant
Regatta, 6 N. R. 248.

3. Right of Mortgagee

5. Under an assignment
present and future cargo, fre
by the owner, for securing t
moneys which they had ad
become liable to pay, on acc
and her cargo, which they
means of purchasing:—Held,
were also the ship's agents, we
a bill which was given for th
of the homeward cargo, and
not endorsed, to them by th
standing he denied that it
payment, and stated that th
and, contrary to an expre
had left him personally liab
debts incurred in fitting ou
an injunction which had bee
assignees, restraining an ac
the bill, was continued u
Curtis v. *Auber*, 1 Jac. & W

6. A part owner of a ship
subject to a mortgage, agre
part owner (whose share w
any mortgage), but without
the mortgagee, to purchase
account of the two part ow
in the ship to England. On
the voyage, and when the c
be discharged, the mortgage
—Held, that he had no claim
of the mortgaged share for
at the utmost, only claim t
gagor's contract, and stood
the profits of the adventure,
expenses. *Alexander* v. *Si*
G. 57; 23 L. J., Ch., 721; 2

7. By the mortgage of
17 & 18 Vict., c. 104, the
freight is transferred. *Dol*
10 Ir. Ch. R. 327.

Therefore, where a mortg
effected with a power of s
to be exercised until the
and the vessel was charter
March 1858 by the mortg
1st of April, made an equit
the freight, and the ship w

power of sale:—Held, that the purchaser was entitled to the freight. *Ib.*

1. Before the mortgagee of a ship obtained possession, and after the arrival of the ship in port, the agent of the owner, who was also the agent for the charterers and consignees, made an arrangement with the charterers and consignees, by which the freight was to be discharged by a sale by him of a portion of the cargo, instead of being paid in the manner provided by the charterparty; and the cargo was landed and stored with wharfingers upon this arrangement:—Held, that the mortgagee's lien for freight was at an end. *Belfast Harbour Commissioners* v. *Lawther*, 17 Ir. Ch. R. 54.

Where a portion of the cargo of a vessel is shipped on account of the owner, a mortgagee who takes possession under his mortgage cannot claim freight with respect to that portion. *Ib.*

2. A., a shipowner, mortgaged a ship, then on her road home, to B., and afterwards gave a written authority to C., to whom he was indebted, to receive the ship's freight. A., becoming bankrupt, his assignees, under an order in bankruptcy, sold the equity of redemption in the ship, and, after deducting the amount due to them, paid the balance into court under the Trustee Relief Act:—Held, that C.'s claim for freight could not be sustained, no notice of the assignment by A. having been given to the charterers or their agents. *Re Pride of Wales and Annie Lisle*, 15 L. T., N. S., 606; 15 W. R. 381.

Held, also, that it was not necessary that the mortgagors should admit the accuracy of the mortgagee's account, in order to entitle them to payment of the fund in court. *Ib.*

3. An owner of a ship assigned twenty-four sixty-fourth parts to A., and the remaining forty sixty-fourth parts to B., and afterwards, representing himself to be the owner of the ship, gave C. a charge upon the freight then being earned. A. registered the transfer to him prior to the date of C.'s charge, but B. did not:—Held, that C. had a lien upon the freight in priority to B. *Lindsay* v. *Gibbs*, 2 Jur., N. S., 1039; 22 Beav. 552; 4 W. R. 788.

Held, also, that the expenses incurred in earning the freight were the first charge upon it. *Ib.*

The wages of the captain and seamen of a ship, being the expenses which produce the income thereof, are proper deductions to be made from the gross freight, as between the part owners of the ship and the assignees of the freight belonging to the other co-owners. S. C. 5 Jur., N. S., 376; 28 L. J., Ch., 692. Affirming 3 De G. & J. 690; 26 Beav. 51; 4 Jur., N. S., 779.

A., owner of a ship, which was on a voyage under a charterparty, transferred to B., in November 1854, three-eighths of the ship, and the transfer was registered in the same month. In December he gave a charge to C. on the freight. Before this he had transferred his other shares in the ship to other persons, but their transfers were not registered till January 1855. C. gave notice of his charge to the charterers, but did not search the register, nor ascertain any of the charges in the ownership of the ship, and none of the transferees from A. had any notice of C.'s charge until after the end of the voyage. In February 1855 the ship's brokers, by the authority of the owners, insured the ship and freight, and on the termination of the voyage paid the wages of the captain and seamen. It having been decided that B. was entitled to three-eighths of the freight, and C. to the remaining five-eighths:—Held, that as against C. the wages of the captain and seamen, and the expenses of insurance, must be allowed as deductions from the gross freight. *Ib.*

4. A vessel was chartered to proceed to A., there take in a cargo to be shipped by the charterers, and return direct to London. After the ship's arrival in the port of London, and whilst the cargo was in course of delivery, a mortgagee, under an ordinary statutory mortgage made prior to the date of the charterparty, took possession:—Held, that he thereby acquired a right to the freight in priority to an assignee of the freight by a deed executed subsequently to the charterparty, notice of which had been given to the charterers. *Brown* v. *Tanner*, 37 L. J., Ch., 923; 3 L. R., Ch., 597; 18 L. T., N. S., 624; 16 W. R. 882.

5. The first registered mortgagee of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight, and to retain thereout not only what is due on his first mortgage, but also the amount of any subsequent charge which he may have acquired on the freight, in priority to every equitable charge of which he had no notice; and it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight. *Liverpool Marine Credit Co.* v. *Wilson*, 7 L. R., Ch., 507; 41 L. J., Ch., 798; 20 W. R. 665; 26 L. T., N. S., 717.

6. The mortgage of a ship carries with it a right to receive the freight earned by the ship; and although the mortgagee cannot recover back from the mortgagor freight which he has allowed the mortgagor to receive, yet he may at any time intercept the freight by giving notice to the mortgagor, consignee, or charterer that he intends to exercise his right of property, and to require the freight to be paid to him. *Wilson* v. *Wilson*, 14 L. R., Eq., 32; 41 L. J., Ch., 423; 20 W. R. 436; 26 L. T., N. S., 346.

The owner of a British ship assigned by deed all freight then or thereafter to be earned by her to A. as security for an advance. This assignment, not being within the Merchant Shipping Acts, was not registered. The owner subsequently mortgaged the ship to B. without notice of A.'s rights. The mortgage to B. was duly registered. Freight subsequently became payable on the arrival of the ship at Marseilles by certain consignees there. Before the ship arrived at Marseilles, B. took possession of her, and also gave notice of his rights to the consignees:—Held, that he was entitled to receive the freight. *Ib.*

Semble, that B. would equally have been entitled to the freight, although he had not taken possession of the ship, so long as he gave notice of his rights to the consignees before they paid the money. *Ib.*

7. By the terms of a charterparty it was provided that the charterers should advance necessary funds for the ship's disbursements, not exceeding a specified amount at the port of lading. Previously to entering into the charterparty the owner had mortgaged the ship and freight. The charterers made ad-

vances for the ship's disbursements, considerably in excess of the amount specified in the charterparty. Before the freight became due the mortgagee took possession of the ship, and stopped the cargo for freight:—Held, that the charterers were not entitled to deduct from the amount due for freight the advances made by them in excess of the sum provided by the charterparty. *Tanner* v. *Phillips*, 27 L. T., N. S., 480; 21 W. R. 68; 42 L. J., Ch., 125.

Disbursements charged against the freight of a vessel, but not expressed in the charterparty, are mere loans, and cannot be properly deducted. *Ib.*

1. A mortgagee of a ship does not, ordinarily speaking, obtain, by the mortgage alone, a transfer, by way of contract or assignment, of the right to freight. The mortgagor remains the *dominus* of the ship, with regard to everything relating to its employment or non-employment, or to any rate of freight to be earned by its employment, until the mortgagee takes possession. The mortgagee on taking possession becomes the owner, and it is by virtue of that ownership, and not by virtue of any antecedent contract or right, that he is entitled to receive the freight, which, by contract or otherwise, is lawfully payable. *Keith* v. *Burrows*, 2 L. R., App. Cas., 636; 46 L. J., C. P., 801; 37 L. T., N. S., 291; 25 W. R. 831. Affirming 2 L. R., C. P. D., 163; 46 L. J., C. P., 452; 36 L. T., N. S., 567; 25 W. R. 446, which reversed 1 L. R., C. P. D., 722; 45 L. J., C. P., 876; 25 W. R. 43; 35 L. T., N. S., 508.

M. mortgaged his ship, then in California, to K. & Co., but the mortgage was not registered. A cargo was afterwards put on board in California on account of the ship, and bills of lading were drawn for a nominal freight of 1*s.* per ton. Before the ship arrived in England, B. & Co., without notice of the mortgage, advanced money to M. on the security of the cargo, and then sold the cargo to J. by a contract containing the following clause: "As cargo is coming on ship's account, freight is to be computed at 55*s.* per ton, and invoice to be rendered accordingly." M. paid for the cargo, and received the bills of lading, and handed them to B. & Co. with an assignment indorsed of his interest in "the within freight," expressed to be "at the rate of 55*s.* per ton, and not the nominal amount of 1*s.* per ton." K. & Co. registered their mortgage, and on the arrival of the ship took possession, and claimed freight at the rate of 55*s.* per ton:—Held, that the sum of 55*s.* per ton was not really freight, but was part of the price of the cargo kept back till the arrival of the ship, and that the mortgagees were not entitled to more than 1*s.* per ton, the freight specified in the bills of lading. *Ib.*

4. Rights of Mortgagor in Possession.

2. Under the Merchant Shipping Act 1854, so long as the mortgagee of a ship does not take possession, the mortgagor, as the registered owner, subject to the mortgage, retains all the rights and powers of ownership, and his contracts with regard to the ship will be valid and effectual, provided that his dealings do not impair the mortgagee's security. *Collins* v. *Lamport*, 4 De G. J. & S. And see *Keith* v. *Burrows*, 636; 37 L. T., N. S., 291; L. J., C. P., 801.

R., owner of a ship, ha to the defendants, contract sale of the ship to him, an finally bound by the contr a charterparty with the pla vessel started on her voyag ment, whereupon the mor towards selling the ship. the terms of the charte damage the security, an in any dealings with the ship the terms of the charterpa the suit of the plaintiffs. 497; 11 Jur., N. S., 1; 34 W. R. 283.

The effect of the 17 & 18 71, upon the status of th ship, is as follows:—It fir mortgagee is not the own mortgagor has not ceased then that the mortgagor s save so far as may be ne the ship an available securi debt. *Ib.*

Therefore a mortgagor o in possession has full po contracts with respect to they do not impair the mortgagee may at any ti benefit of such contracts his having required payme

3. A mortgagee out of po is not entitled as against t assignee of the cargo to a use of the ship. *Langton* 9; 11 L. J., N. S., Ch., 233

5. Registry Acts.

4. Mortgage of ship at Registry Act being observ injunction granted to pr indorsement on certificate *Thompson* v. *Smith*, 1 Mad

5. Where the captain o her whilst on her voyage, become unseaworthy by st sold, and a bill for the pu the purchaser, and indorse the captain; the Court, the bill represented the injunction against the d threatening to put in for his claim of lien:—Held case, the non-compliance Will. 4, c. 55, by indorsing certificate of registry, did of the mortgagee. *Lister*

6. Where the mortgage to procure the indorseme of registry as required b and after that period th became bankrupt:—Held equitable right to restrain sale of the ship, distinct and depending upon the r the bankrupt's having th sition. *Campbell* v. *Tho* 7 Jur. 59.

1. A., the owner of forty-eight shares in a ship belonging to the port of Liverpool, gave a power of attorney to B., the other part owner, empowering him to sell A.'s share of the ship. The ship then sailed from Liverpool under the command of B., having on board her certificate of registry and the power of attorney. While she was at sea A. mortgaged his forty-eight shares in the ship and all future freight to the plaintiffs, who had no notice of the power of attorney, and a memorandum of the mortgage was entered in the Liverpool Register. Subsequently B. sold all the shares in the ship and cargo at Sydney (as to A.'s shares by virtue of the power of attorney) to C., who had no notice of the mortgage made by A. The ship was thereupon registered *de novo* at Sydney, and was freighted by C. at his own expense with a new cargo for England. She sailed, and arrived in London without having been to Liverpool. The plaintiffs took possession of the ship and cargo in the London docks, and gave notice at all the wharves of their claim to forty-eight shares of the ship and freight. The defendants afterwards also took possession:—Held, that the plaintiffs had the better title under the Registry Act to forty-eight shares of both the ship and freight, and that they had properly taken possession of them under the circumstances. *Cato* v. *Irving*, 5 De G. & Sm. 210; 21 L. J., N. S., Ch., 675; 16 Jur. 161.

2. An assignment of a ship by way of mortgage, which is defective by not having complied with the Registry Act, cannot be made good in equity. *Exp. Bulteel*, 2 Cox 243.

3. Bill of sale of a ship, though absolute in its terms, may, notwithstanding the Ship Registry Act, be in equity held a mortgage, if such appears to have been the real intention of the parties. *Langton* v. *Horton*, 5 Beav. 9; 11 L. J., N. S., Ch., 233; 6 Jur. 357, 594.

4. The owner of eight sixty-fourths of a vessel, in consideration of 100*l.*, assigned them by bill of sale; contemporaneously with its execution, a memorandum was endorsed thereon, signed by an agent of the assignee, stipulating that, on the assignor repaying to the assignee the 100*l.* and interest, the bill of sale should be void. Subsequently, the assignee received interest, and gave a receipt for it, as for interest on 100*l.* advanced on security of the bill of sale. The registry at the custom-house was of an absolute sale. The assignee sold the eight sixty-fourths, and the bill of sale to the purchaser was duly executed; but, before its registry, a bill to redeem by the original owner was filed, and the Court restrained the registry of the bill of sale, and made a decree for redemption on payment of the 100*l.* and interest, with costs so far as they were increased by the dispute of the plaintiff's right to redemption. *Whitfield* v. *Parfitt*, 4 De G. & Sm. 240; 15 Jur. 852.

5. Although the 17 & 18 Vict., c. 104 contains no provision negativing the validity of a mortgage made otherwise than according to the terms of the Act, the whole scope of the Act is to that effect, and an equitable mortgage is still invalid. *Liverpool Borough Bank* v. *Turner*, 2 De G. F. & J. 502.

Under the 17 & 18 Vict., c. 104, mortgages of ships can only be made in the manner prescribed by the Act. S. C. 1 John. & H. 159; 6 Jur., N. S., 935; 29 L. J., Ch., 827; 8 W. R. 730. Affirmed 3 L. T., N. S., 494.

Therefore, an unregistered contract to assign an interest in a ship when required as a security for past and future advance is inoperative. *Ib.*

6. There is no provision in the Merchant Shipping Acts which authorises the registrar to erase entries of mortgages. In case of their having been duly discharged, an entry to that effect may be made under s. 68 of the Act of 1854. *Chasteauneuf* v. *Caperyon*, 7 L. R., App. Cas., 127; 51 L. J., P. C., 37; 46 L. T. 65.

7. In August 1874 a shipbuilder, having overdrawn his account with his bankers, offered to give them a security over a ship which he was then building. This offer was declined in the first instance, with the intimation, however, that circumstances might arise which might render it desirable for the bank to have the security offered, whereupon he promised that whenever he was required to give it he would do so. Two months later, his account being still largely overdrawn, the bankers requested him to give them the promised security. Accordingly he deposited with them the builder's certificate of the ship, which was still unfinished, and the following day they put a man in possession. At the same time he, in consideration of 770*l.* then advanced to him, assigned to the bankers a trade debt of 2,384*l.* 2*s.* 8*d.*, as a further security for the general balance of his account. Two days afterwards he filed a petition for liquidation:—Held, that the deposit of the builder's certificate was a good equitable mortgage of all his property and interest in the ship, and that although unfinished, it did not require registration under the Bills of Sale Act 1854. *Exp. Winter, Re Softley*, 33 L. T., N. S., 62; 24 W. R. 68; 44 L. J., Bky., 107; 20 L. R., Eq., 746.

Whether a ship not yet finished, and therefore incapable of registration under the Merchant Shipping Acts, is properly called a ship or not, it is a thing capable of assignment by certificate in the usual way. *Ib.*

See also 1 *supra.*

6. Sale.

8. A mortgagee of a ship had a power of sale by his security. The ship subsequently arrived at Glasgow, and the mortgagee advertised her for sale by public roup in Scotland. An interdict of the Scotch court was obtained to suspend the sale. In the meantime, the parties claiming other interests in the ship, proposed to the mortgagee to enter into a charterparty for a voyage of the ship, pending the disputes which had arisen. The mortgagee refused to enter into such charterparty. The ship afterwards arrived, and was then, at Liverpool:—Held, that the mortgagee had a clear right to refuse, as being a speculation which could not be imposed upon him. *Samuel* v. *Jones*, 7 L. T., N. S., 760.

Held, also, that the interdict having thrown a cloud upon the mortgagee's title, he was entitled to a decree for a sale, and an account as against all parties claiming an interest in the ship. *Ib.*

By 25 & 26 Vict., c. 63, s. 3, the Court has

jurisdiction over all equitable rights and claims of owners and mortgagees of ships. *Ib.*

1. A merchant at Gibraltar acted as agent for L., a merchant in Liverpool, and also for M., another merchant in the same place, L. and M. having also dealings together. The Gibraltar merchant was accustomed to send to L. monthly accounts of sales of coal which L. had sent to Gibraltar, giving him credit for the proceeds, and debiting him with commission and other expenses. In 1854 L. applied to M. to make him advances, which he agreed to do, provided L. would give orders to the Gibraltar merchant to remit him out of the proceeds of the sale of L.'s coals the sum he might advance. The Gibraltar merchant having a general account with M., instead of actually remitting these advances to him, entered to his credit the amount which he was instructed from time to time by L. to remit, and in the course of his business remitted bills to M. for collection, including some drawn on L. In March 1856, M. requiring further security for any future advances he might make, L. gave him a mortgage on a ship for them, he having previously given him security on the ship for two sums, which had been advanced to him. In August 1856 L. assigned the equity of redemption in the ship to the plaintiff, and on the 2nd September he became bankrupt. On the 4th September the plaintiff sent to Gibraltar to take possession of the ship, tendering to M. 900*l.*, being the amount he thought due to him. The ship, which had previously been advertised for sale, was sold to the defendants, who were registered as owners. Some of the bills drawn by the Gibraltar merchant on L., and remitted to M., were dishonoured, but the amounts credited to M. by the Gibraltar merchant remained undiminished and undisturbed. Upon the plaintiff filing a bill to have the sale of the ship set aside, and for an account:—Held, that as M. had consented to substitute for the remittance a credit in the general monthly account, and as the bills remitted were not in respect of those particular items, but indiscriminately for collection, he had no right to select any particular item of credit, and attribute the dishonoured bill to that item, so as to prejudice third parties. *M'Larty* v. *Middleton*, 9 W. R. 861; 4 L. T., N. S., 852.

Held, that M. was not justified in selling the ship on the 19th September, as nothing was due to him at that time beyond the 900*l.*; he was, therefore, liable to pay the plaintiff the value of the ship beyond that sum. *Ib.*

Held, also, that the equitable title to the ship would not prevail against the legal title of the registered owners, the 17 & 18 Vict., c. 104 not having altered what was previously the national policy with respect to shipping. *Ib.*

2. A first mortgagee of a ship, with the concurrence of the second mortgagee, sold the ship and received the proceeds. The second mortgagee, being unable to obtain an account, filed a bill for an account, also charging that the defendant was liable for stores which he had improperly allowed the mortgagor to retain. The defendant alleged that the proceeds of the sale were not sufficient to pay off his mortgage. The chief clerk, by his certificate, found in favour of the defendant as to the stores, but that he had received more than was due to him upon his mortgage. A motion by the defendant to vary the ce
fused. Upon the question of c
the defendant must pay the co
but no costs of the suit on eith
v. *Heard*, 3 Jur., N. S., 427.

3. The mortgagees of a sh
it and advertised it for sale
brought an action against the
and moved for an injunction
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allowed expenses incurred b
and holding possession of the
it for sale, and effecting insu
head of "just allowances." V
7 L. R., Ch. D., 188; 47 L. J.,

4. The contract of mortga
vided that interest should be
in advance. The mortgage
shortly before a half-yearly
of interest, and received the
chase-money (covering his
three days after that half-ye
that he was only entitled to i
of the three days for that ha
v. *Berridge*, 18 L. R., Ch. D.,
630; 44 L. T. 680; 29 W. R. 8

7. Lien. How enf

5. The proper mode of enfo
lien on a vessel belonging to
has been ordered to be wo
proceeding in the winding-
proceeding *in rem* in the
Re Australia Direct Steam
L. R., Eq., 325; 44 L. J., Ch.,

The arrest of a vessel by the
is a sequestration within the
Companies Act 1862, s. 163.

6. The master of a ship
company drew a bill on t
necessaries supplied to the
accepted, but was dishonou
He paid the bill, and claimed
mortgagees who had taken
ship. On the following day
for winding up the compa
then applied in the windin
take proceedings in the Adm
obtained an order giving
liquidator applied to dischar
an order was made for the
into court to a separate acc
claim 150*l.*, which exceeded
interest, the master undertaki
in the Admiralty Court; th
without prejudice to any app
increase the amount. The
and he applied to increase th
cover the costs of defending
against him by the holder o
costs of the application in
The Vice-Chancellor ordered
interest on the bill to be paid
of the 150*l.*, and the residue

liquidator:—Held, that though if there had not been mortgagees in possession of the ship the proper mode of enforcing the master's lien on the ship would have been by application in the winding-up, the order giving leave to proceed in the Admiralty Court was a proper order, the mortgagees not being parties to the winding-up; and that the master was entitled to all his costs before the Vice-Chancellor as costs properly incurred by a mortgagee in enforcing his security. *Re Rio Grande Do Sul Steamship Co.*, 5 L. R., Ch. D., 282; 46 L. J., Ch., 277; 36 L. T. 603; 25 W. R. 328.

1. The owner of a British ship, having mortgaged it in England, employed a Liverpool firm to consign it to their agents at New Orleans. As the New Orleans firm happened to be creditors of the owner, the Liverpool firm, in consideration of their having the consignment, instructed their agents not to proceed against the ship at New Orleans, but to remit the proceeds to the mortgagees. Afterwards, the Liverpool firm getting into difficulties, some of the mortgagees insisted on the consignments being changed, and the Liverpool firm withdrew their instructions. When the ship arrived, the New Orleans firm brought actions in their courts against the owner; and, as the courts of Louisiana do not recognize the rights of mortgagees without possession, writs of attachment were obtained, under which the ship was seized. The mortgagees then, to prevent the ship being sold, gave to the New Orleans firm bonds for the amounts to be recovered in the actions, upon which the ship was released. The mortgagees filed a bill to restrain the holders of the bonds from suing on them, and to have the bonds delivered up:—Held, that the Court had no jurisdiction to stay proceedings on the bonds; first, because the Court would not have restrained execution of the attachment at New Orleans, as it could not have placed all the creditors, foreign and domestic, on an equal footing; secondly, because if it could have done so, the mortgagees should have sought to restrain the attachment, and not have placed themselves in a worse position by giving the bonds; and, thirdly, because if the prayer was granted, the courts of New Orleans would never in future release an English ship on the bond of a mortgagee. *Liverpool Marine Credit Co.* v. *Hunter*, 4 L. R., Eq., 62; 15 W. R. 758; 36 L. J., Ch., 567; 16 L. T., N. S., 447. Affirmed 3 L. R., Ch., 479; 37 L. J., Ch., 386; 16 W. R. 1090; 18 L. T., N. S., 749.

8. Other Matters.

2. Mortgage of a ship in the port of Dublin, and delivery of muniments; the mortgagee insured her there, and made a second mortgage; the second mortgagee took possession as soon as he was informed she was in an English port; this is a sufficient possession to take it out of the stat. 21 Jac. 1, c. 19. *Exp. Batson*, 3 Bro. C. C. 362.

3. Mortgage of a ship at sea good in bankruptcy, notwithstanding the stat. of Jac. 1, if the party procures the bill of sale, etc.; *contra*, if he is incautious or negligent, as by suffering the ship to come back and go on another voyage. *Exp. Matthews*, 2 Ves. 272.

4. A registered mortgagee of a ship having deposited with a creditor the instrument of mortgage thereof, and subsequently become bankrupt:—Held, that such deposit took the ship out of the order and disposition of the bankrupt, and constituted the creditor equitable mortgagee of the ship. *Lacon* v. *Liffen*, 32 L. J., Ch., 25; 11 W. R. 135; 7 L. T., N. S., 411; 1 N. R. 44.

P. & Co. being registered mortgagees of ships, deposited on the 20th December 1858, before bankruptcy, the instruments of mortgage with their bankers, to secure the amount of an overdrawn account. On 22nd December two cheques were presented by P. & Co. for payment, but the bankers refused to pay them; and thereupon a bill of sale was executed by P. & Co. of their goods and effects, to secure the balance due, and further advances. On the 23rd December the bankers paid the cheques. Transfers of the mortgages were not executed to the bankers. On the 28th the bankers sold under the bill of sale some of the effects. On the 30th P. & Co. were adjudicated bankrupts:—Held, that the bill of sale being an assignment of all the trader's property, as a security for an antecedent debt as well as for future advances, was an act of bankruptcy. S. C. on appeal, 9 Jur., N. S., 477; 32 L. J., Ch., 315; 11 W. R. 474; 7 L. T., N. S., 774.

5. T. lent D. 600*l*. D. assigned a one-sixteenth in a ship, and, by defeasance, it was declared that T., out of the earnings, should pay himself 600*l*., and should account to D. for the surplus, but there was no covenant for payment of the money. The ship was lost, and T. brought his bill against D.'s executrix for the debt; she denied assets *prætor* to satisfy specialty debts. Decreed, she should account for testator's estate, and T. to account for the earnings, and to be allowed for the outfit of the ship, though cast away. *Tyrell* v. *Thomas* (*Lady*), 1 Vin. Abr. 183, pl. 5.

6. Moneys were advanced by the plaintiffs to M. M., upon the agreement that they should be reimbursed by the proceeds of a ship then about to be launched in New Brunswick, and of her cargo, which were to be consigned by M. M. to the plaintiffs for sale; and a bill of lading of the cargo, and a power of attorney from the registered owner, enabling the plaintiffs to sell the ship, were transmitted by M. M. to the plaintiffs. M. M. afterwards transferred the ship and cargo to the firm of C. & G. The ship was thereupon registered in the names of C. & G. C. & G. sold the ship and cargo to the firm of R. & P., and the ship was then registered in the name of P. A new master was appointed, and a new bill of lading signed, and the ship and cargo were consigned by R. & P. (with a power of attorney from P. to sell the ship) to R. & G., in which firm all the members of the firm of R. & P. were partners, except P. The plaintiffs filed their bill against C. & G., R. & P., and R. & G., and the assignees of M. M., to establish a lien on the proceeds of the ship, and on the cargo, under their agreement with M. M. The defendant R., one of the partners in the firms of R. & P. and R. & G., was alone within the jurisdiction and served with the subpœna:—Held, that in the absence of P., who appeared to be the registered owner of the ship, the Court could not make any decree establishing the plaintiffs'

lien on the proceeds of the sale of the ship; that, although it appeared by the result of an inquiry directed before the Master, that the ship had been sold by R. & G., pending the suit, under the power of attorney from P., and that the proceeds had been accounted for by R. & G. to R. & P., no fraud being proved in the transactions under which those firms had acquired the ship and the proceeds, the plaintiffs were not entitled to any relief in respect of the proceeds of the sale in the suit in which R. only appeared; that the claim of the plaintiffs in equity to the proceeds of the ship would not be assisted by proof of notice by P. of the transactions between the plaintiffs and M. M. *M'Calmont* v. *Rankin*, 8 Hare 1; 19 L. J., N. S., Ch., 215; 14 Jur. 475.

1. B., the owner of a ship registered in his name, entered into a treaty with A. for the sale of a moiety of the ship; payment to be made one-half by bill of exchange, and one-half in cash. A. agreed to purchase, and sent to B. his acceptance for half of the purchase-money, but did not pay any portion of the cash. Subsequently the transaction ended in the conveyance by B. to A. of one-fourth of the ship. During the early part of this transaction C. supplied the ship with goods. C. claimed to establish his demand for such goods against the estate of A. in bankruptcy. The Court, being of opinion that at the date of the supply of the goods there was no completed contract between A. and B., disallowed the claim. *Anon.*, 1 Ir. R., Eq., 2160.

By Guardians of Infants.] 2. The guardian of an infant shipowner has no power under the Merchant Shipping Act 1854, 17 & 18 Vict., c. 104, s. 99, to mortgage or sell a ship of which such infant is the owner. *Michael* v. *Fripp*, 38 L. J., Ch., 29; 19 L. T., N. S., 257; 17 W. R. 23.

VI. BOTTOMRY.

See also USURY.

3. The Court possesses, and will exercise jurisdiction over a bottomry bond in a case of fraud, and will for that purpose restrain proceedings upon the bond in the Admiralty Court by injunction. *Glascott* v. *Lang*, 3 Myl. & C. 451; 8 Sim. 358; 2 Jur. 909.

Semble, a bottomry bond given by the captain of a ship at a foreign port is not necessarily void because there was time during the ship's stay at such port for the captain to have written home to his employers, and to have received an answer. S. C. 2 Ph. 310; 16 L. J., N. S., Ch., 429; 11 Jur. 642. Reversing 11 Jur. 179.

4. Jurisdiction of the Court of Chancery to restrain proceedings in the Admiralty Court on bottomry bonds. *Duncan* v. *M'Calmont*, 3 Beav. 409; 10 L. J., N. S., Ch., 335; 5 Jur. 262.

5. Before taking a bottomry bond from the master of a vessel, a party is bound to use reasonable diligence in inquiring whether the wants of the vessel can be supplied by the personal credit of the owner, and for want of such diligence (in a case where the sufficiency of the personal credit might very easily have been ascertained) a bond was held void on appeal, reversing the judgment of the Court below. *Heathorn* v. *Darling*, 1 Moo. P. C. 5.

6. A bottomry bond may though void for the residue. a bottomry bond was given New York, as well for advar discharge from arrest, at t consignees, on account of da voyage to part of the cargo, the port duties and other dis sary to enable the ship to pro the Judicial Committee (rev the decision of the Admiralt the bond *in toto*) sustained t tent of the sums advanced plies and payments of the po v. *Gould*, 4 Moo. P. C. 21.

7. Bottomry bond given upon a threat of arrest, for s furnished on his personal *Gore* v. *Gardiner*, 3 Moo. P.

8. To authorise a captain ship or freight for repairs, such hypothecation must ex an agent of the shipowner, has sufficient funds in his ha the captain cannot hypot *Hicks*, 27 Beav. 616.

9. A master has power to cargo as well as the ship for pose only, for the benefit of t *Hussie* v. *Christie*, 13 Ves. 5

10. The only ground upon of a ship is justified in reso bonds, and upon which the tion to enforce such bonds, the master to obtain mon credit for refitting the ship, the repairs and dispatch of sale of a bottomry bond by a port at the lowest rate offere charterers and sole owners of at the same port, expressed advance what was necessary credit of the owners; thoug that the bondholders had no the time the bond was giv Court pronounced against sentence was affirmed on a *Rahn*, 3 Moo. P. C. 1.

11. A., intending to go a v a bottomry bond, but the s voyage, but lying all along London, the Court decreed th lose the premium, and accep with usual interest. *Deguil* Vern. 263.

12. A bottomry bond exec of a ship cannot be supp owners if the master, at the the bond, had other resource necessary supplies for the *Lyall*, 2 Ph. 323. n.; 3 Myl. & N. S., Ch., 115; 11 Jur. 179.

Semble, that payment of is a good consideration for bond. S. C. 8 Jur. 969.

The inquiry before the sum of money, on a partic and payable upon a certain b what was necessary for disc demands against the ship as be discharged, and of defray as it was necessary to incur to proceed home:—Held, th of the captain was not with

the inquiry, although it might prevent his returning with the ship. *Ib.*

Held, secondly, that a sum of money, which was required for the purchase of stores and payment of wages at a port into which the ship put on the homeward voyage, was within the meaning of such inquiry, although, on the particular day named, such sum could not be definitely foreseen. *Ib.*

Thirdly, that a sum which became payable for seamen's wages, dues, and other expenses, immediately upon the completion of the homeward voyage, was also within the meaning of the inquiry. *Ib.*

The obligee in a bottomry bond also chartered the ship for the homeward voyage:—Held, that, from the time the charterparty was made the sum that would become due for the freight was a resource of the captain, applicable to procuring such sums as were necessary to discharge the expenses mentioned in the inquiry. *Ib.*

1. The authority of a master to pledge by bottomry, for the purpose of raising money for the absolute necessaries of the ship, only arises when he cannot obtain the necessary advances upon the personal credit of the owner, and such power to raise money by bottomry is vested in the master, although the owner resides in the same country, provided there are no means of communication with the owners, and the exigency of the case requires it. *Wallace* v. *Fielden*, 7 Moo. P. C. 398.

2. Bottomry bond upon ship, freight, and cargo, taken up by the master of a small Swedish vessel at a port in Sweden. Part of the cargo was consigned to England:—Held, that, considering the distance between Sweden and England, and the means of communication, it was essential to the validity of the bond, so far as the cargo was concerned, that the master should communicate with the owners of the cargo before resorting to hypothecation of the cargo, as he could have obtained an answer within a period not inconvenient with the exigency of the circumstances of the case. *The Bonaparte*, 8 Moo. P. C. 459.

A Swedish vessel, bound from a port in Sweden to Hull, was driven, by stress of weather, to put back into another port in Sweden. This took place in November 1848. Ten days afterwards the cargo was unladen, and the ship found to be greatly damaged. The repairs were completed, and the cargo reloaded. The master at once communicated with the owners of the ship resident at Sweden who, being without funds, consented to the master taking up a bottomry bond for payment of the necessary repairs, and the British consul at the port where the vessel lay wrote on behalf of the master, and as his agent, to the consignees at Hull, informing them of the damage sustained by the vessel, but made no application for money, nor referred to the necessity of repairs. No answer was made to this letter, and the master, in March 1849, hypothecated the ship, freight, and cargo, for the money borrowed for the repairs:—Held, that such letter to the consignees was a sufficient notice to authorise the master raising money by bottomry on the cargo. *Ib.*

3. A master cannot bottomry a ship without communication with his owner, if communication is practicable, and, *à fortiori*, he cannot hypothecate the cargo without communicating with the owner of it, if communication with such owner is practicable. Such communication must state not merely the necessity for expenditure, but also the necessity for hypothecation. *Kleinwort* v. *Casa Marittima of Genoa*, 2 L. R., App. Cas., 156; 25 W. R. 608; 36 L. T., N. S., 118.

A statement by the master of the injuries sustained by a ship and of the repairs necessary is not a sufficient communication with the owners to justify him in giving a bottomry bond upon the ship and cargo, if unaccompanied by a statement that such bond is necessary. *Ib.*

The mere receipt by the owners of the cargo of general information that the ship is damaged and in need of repairs does not impose upon them the duty of supplying money for such repairs without further information. *Ib.*

4. A bottomry bond is not invalid merely because the advance secured by the bond is made by agents of the ship, provided that they could not be expected to advance on the personal credit of the owners, and gave the master an opportunity of obtaining an advance on the owners' personal credit elsewhere by refusing such an advance. *Smith* v. *Bank of New South Wales, The Staffordshire*, 4 L. R., P. C., 194; 41 L. J., Adm., 49; 27 L. T. 46; 20 W. R. 557; 8 Moo. P. C., N. S., 443; 25 L. T. 137.

A bottomry bond can only hypothecate something which is in danger of perishing by maritime risk during the time that the bond is running, and therefore cannot validly pledge freight to be earned on a voyage after that maritime risk is ended and the bond is forfeited. *Ib.*

A ship being mortgaged to G., sailed on a voyage to Melbourne and back. On her arrival at Melbourne she required necessary repair, and the agents having refused to make further advances upon credit, the master entered into a bottomry bond, hypothecating the ship and her freight to Melbourne and back, and drew bills on G. for the amount secured by bottomry. Before the bills arrived in England G. died, and the holders of the bond and bills failing to obtain either acceptance or payment took proceedings on the bond:—Held, that they having failed in obtaining acceptance or payment of the bills were entitled to sue upon the bond, but that the bond could not validly hypothecate freight which had not been earned at the time the bond was payable. *Ib.*

Held, also, that the bond was not invalidated by the absence of a previous communication between the master and the co-owner. *Ib.*

Held, also, that the mortgagee of a ship cannot, for the purposes of such previous communication as is necessary between the party hypothecating the ship and the owner, be deemed an owner; though it may be otherwise if the mortgagee is also the ship's agent and agent for the owner. *Ib.*

5. Before resorting to bottomry for raising necessary supplies, it is absolutely necessary, where practical, that notice should be given by the master to the owner of the vessel, and an allegation that such owner was insolvent is no excuse for not communicating to him, unless he has been judicially declared insolvent, and the ownership of the vessel vested in his assignees, to whom such notice must then be given. *The*

Panama, Barron v. *Stewart*, 3 L. R., P. C., 199; 39 L. J., Adm., 37; 23 L. T. 12; 18 W. R. 1011; 6 Moo. P. C., N. S., 484.

1. Where the master, in consequence of damage sustained on the voyage, and the ship becoming unseaworthy, and no advances on loan or bottomry could be obtained to repair her, sold her to the plaintiffs, who repaired and sent her with a cargo to her registered port in England, but the owners refusing to ratify the sale, or consent to the registry of the ship in the plaintiff's names, put men on board to take possession of her and the cargo:—Held, that the bill of sale of the ship could not be treated as in the nature of a bottomry bond, as it was not intended so to operate. *Ridgway* v. *Roberts*, 4 Hare 106.

VII. BUILDING AND REPAIRS.

See also BANKRUPTCY, XIX. xxi. 5.

1. *Contracts for*, 6344.
2. *Liability of Registered Owner*, 6344.
3. *Advances for*, 6344.
4. *Lien for*, 6345.

1. Contracts for.

2. A firm of shipbuilders agreed to lengthen and repair an iron steamship; the object being that she might be classed 100 A 1 at Lloyd's. The specification forming part of the contract contained this stipulation,—"Iron work:—The plating of the hull to be carefully overhauled and repaired, *but if any new plating is required the same to be paid for extra* (fourteen words deleted, signed A. and J. I., D. G.). Deck beams, ties, diagonal ties, main and spar deck stringers, and all iron work, to be in accordance with Lloyd's rules for classification": —Held, that the shipbuilders were bound to supply without extra charge any new plates required to enable the vessel to be classed 100 A 1 at Lloyd's; and that neither the letters of the parties before the contract was signed, nor the initialed deleted words in the contract, could be considered for the purpose of interpreting the intention of the parties. *Inglis* v. *Buttery*, 3 L. R., App. Cas. (Sc.), 552.

Held, also, the costs of Lloyd's survey, and the Board of Trade tonnage measurement, should be borne by the shipowner. *Ib.*

3. A shipbuilding company, at the time of being wound up, was under a contract with a steam-packet company to do certain repairs to a ship within a given time, and under orders obtained in the matter of the winding up the official liquidator was authorized to complete the repairs, the rights of all parties being reserved. The repairs not having been completed within the stipulated time, leave was given to the steam-packet company to go in under the winding-up order and prove in respect of any damage that might have accrued from the delay:—Held, that the measure of damages was the net profits which the steam-packet company might have made if the contract had been completed in time, but that the company was not entitled under the order to prove for damages arising from imperfect workmanship during the delay. *Re Trent and Humber Shipbuilding Co.*, 38 L. J., Ch., 38.

2. Liability of Registe

4. The registered owners o
facie alone liable for repairs;
tered without their knowledg
2 Ves. & B. 216; 1 Rose 447.

5. G. having entered into
purchase of a ship not bindi
gistry Acts agreed with the
should set up engines in her,
a specified price if a certain s
but if not, to be removed by t
plaintiff, with the knowledge
of Y., the registered owner, s
which did not enable the ve
required speed. Y. then refu
the stipulated price, or allow
remove the engines:—Held, t
remedy against Y., if any, wa
there was no ground for equit
Rennie v. *Young*, 2 De G. &
Ch., 753.

3. Advances f

6. A mercantile house at
house at Quebec to contract f
a ship, for which they (the Ne
send out the rigging. The Q
into a contract with some shi
ingly. The Newry house the
respondent at Liverpool to sen
he does so; and, it having
livered to the Quebec house
property in it was vested in
and that the Quebec house ha
it against the Liverpool corr
count of their lien on it for
the builders, and payment of
penses, although, previously
they had obtained an assignm
themselves from the builde
tered it in the name of one o
their house. *Rogerson* v. *R*

7. By an agreement in 1
ecuted till the 11th April
agreed to build a schooner fo
April the agreement was assi
tiff to secure 500*l.* already
for the purpose of enabling
her, and future advances
amount, and the vessel wa
plaintiff, to be held by him
advances and interest. On
agreement between the buil
put an end to, and on the
into a new contract with the
plete and sell the vessel to
of which the advanced 500*l.*
part payment. No registra
ever took place, but on t
builders certified, according
of the 17 & 18 Vict., c. 104, t
the schooner for the plainti
did not appear to have be
sively upon the vessel, and be
the builders had discharged t
were virtually insolvent, th
proved to have been brought
knowledge. The vessel was
2nd June, when they were
rupts, and on the 19th the
chosen assignees. On a bill
force the lien, as to the instr

April:—Held, that the lien under it was destroyed, if not by the cancellation of the agreement with F., yet by the fact that the 500*l.* thereby secured was merged into and taken as part payment of the purchase money, under the agreement of the 20th May. *Swainston* v. *Clay*, 11 W. R. 811; 8 L. T., N. S., 563; 1 N. R. 307.

As to the memorandum of the 20th May:—Held, that under it the plaintiff was entitled to a lien on the unfinished ship for the 500*l.* actually advanced. *Ib.*

Held, also, that no registration under the 17 & 18 Vict., c. 36 was necessary. *Ib.*

Quære, whether but for the cancellation A. would not have had a lien under the deed, although the ship was not in existence at its date, and the deed was not registered as a bill of sale under the 17 & 18 Vict., c. 36. S. C. 2 N. R. 345.

Held, also, that the vessel was not within the order and disposition of the builders at the time of their bankruptcy. *Ib.*

1. L., who was executor of H., and manager of a bank, agreed to take a security on the ship E., belonging to F., in lieu of a security given by F. to H. on another ship, and he abstracted money from the bank, which he advanced to F. to enable him to complete repairs on the ship E., taking from F. a security on the ship to himself, as executor, for these advances, as well as for the sum advanced by H. The bank, having discovered L.'s improper abstraction of their money, required security for it, and L. assigned to them the securities on the ship. The ship was sold for a sum much less than the amount originally advanced by H.:—Held, first, that as the bank took the assignment from L. to secure a pre-existing debt due from him personally to them, and had notice that the securities belonged to the estate of H., they could have no better title against the estate than L. would have had if he had advanced his own money, instead of that of the bank. *Collinson* v. *Lister*, 2 Jur., N. S., 75; 25 L. J., Ch., 38. Affirming 20 Beav. 356.

Held, secondly, that L. would in that case have had no claim against the estate, as he had not advanced the money for repairs from necessity and *bonâ fide*, and therefore could not set up his claim in respect of these advances against the security for the sum lent by H. *Ib.*

Held, thirdly, that the bank could not claim a lien on the proceeds of the sale of the ship on the ground of following trust moneys of theirs improperly disposed of by L., for that they had, by taking the security from him, treated the transaction as a loan from them to him; and moreover, as he was their agent, they were affected by his acts in making the advances. *Ib.*

Held, fourthly, that whether the title to the ship could or could not be affected by the trusts of the mortgage from F. to L., the moneys received from the sale of it were subject to those trusts, and that the registered transfer of the securities to the bank did not enable the bank to retain the moneys discharged from those trusts. *Ib.*

4. Lien for.

2. *Bill of sale* of a ship assigns the property. The contractor, who had been only paid half of the expenses of the building, having thereby the legal and equitable interest, is entitled to be paid the whole demand, and the parties interested, or their estates, must settle their proportions or rights between themselves. *Walker* v. *Preswick*, 2 Ves. 622.

3. On a ship's being repaired in the river Thames, and fitted out there with new rigging and apparel, the ship itself is not liable, but the owners; *secus*, if repaired or fitted out at sea, where the master alone may hypothecate. *Watkinson* v. *Bernadiston*, P. W. 367.

4. No lien on a ship abroad can be created by parol, nor by bills of exchange drawn by the master; unless, upon mistake clearly established, the instrument can be corrected, as in the case of a joint bond intended to be joint and several. *Exp. Halkett*, 19 Ves. 474.

Lien on a ship for repairs done abroad without hypothecation; as to advances for any other purposes, *quære*. S. C. 3 Ves. & B. 135; 2 Rose 194, 229.

5. A ship, while the possession of it is retained, is specifically chargeable in respect of the expense incurred in repairing it; but the possession being parted with the lien is lost. *Exp. Bland*, 2 Rose 91.

6. No lien on a ship or proceeds from sale of it for repairs done, except in course of a voyage; liberty given to bring an action as to the personal liability of the part owners who received the benefit. Lord Hardwick's decision in *Doddington* v. *Hallet* (1 Ves. 497) has been overruled, and now settled that part owners in a ship are not to be considered as partners. *Buxton* v. *Snee*, 1 Ves. 154.

7. A ship belonging to the defendants, registered in the port of London, sustained serious damage on her voyage to New Zealand, and on her arrival there was surveyed and pronounced not seaworthy. The master was unable, either by loan or bottomry, to raise money for her repair, and he at length sold the ship to the plaintiffs, and on receiving payment of the purchase money by a bill of exchange in London, executed to them a bill of sale of the ship. The plaintiffs repaired the ship, and sent her to England with a cargo. The defendants refused to ratify the sale or consent to the registry of the ship in the plaintiffs' names, and on the arrival of the ship in the port of London the defendants put several men on board to take possession of the ship and cargo for them. The plaintiffs thereupon applied for an injunction to restrain the defendants from interfering with the ship, or removing her out of the jurisdiction, and for a manager and receiver of the ship and cargo:—Held, that the plaintiffs had no equitable, as distinct from a legal, title to the ship, and inasmuch as their title (if they had acquired any) was a purely legal one, and the case of interference, if wrongful, was therefore a mere trespass, the Court could not interfere in favour of the plaintiffs by injunction. That the plaintiffs, according to the case made on the motion, if they failed at the hearing to establish their right to the ship, would be entitled to equitable relief in respect of the bill of exchange given for the purchase money, and that they were entitled to have the trial of the legal right put in a course for determination, and to have the property protected in the mean

time. *Semble*, in such case, independently of the relief in respect of the bill of exchange, if engagements had been contracted of which the conduct of the defendants would prevent the fulfilment, and if there could be no adequate compensation to the plaintiffs in damages, or if the defendants were about to carry away or destroy the property, the Court might interfere by injunction. *Ridgway* v. *Roberts*, 4 Hare 106.

Held, also, that if the plaintiffs had acquired no legal title by the purchase, they had no lien in respect of the moneys laid out by them in the repairs, nor could the bill of sale of the ship be treated as in the nature of a bottomry bond, as it was not intended so to operate. *Ib.*

1. A shipwright is not entitled to be paid for the use of his dock while he detains a ship under a lien against the will of the owner. *Somes* v. *British Empire Shipping Co.*, 6 Jur., N. S., 761; 8 W. R. 707.

2. A lien upon chattels confers no right of sale upon the person holding such lien, though the retention of the chattels may be attended with expense; and therefore, where shipbuilders, having a lien for the unpaid purchase money on a ship built by them according to contract, filed a bill to enforce their lien by a sale, a demurrer to such a bill was allowed. *Thames Ironworks and Shipbuilding Co.* v. *Patent Derrick Co.*, 1 John. & H. 93; 6 Jur., N. S., 1013; 29 L. J., Ch., 714; 8 W. R. 408.

VIII. PASSENGER SHIPS.

3. In an action, in which one of the questions between the parties was, whether the defendant was justified in expelling the plaintiff from a berth in a steamer, it was proved that the plaintiff placed his coat upon the berth while it was vacant, afterwards applied at the office of the company to which the steamer belonged for the purpose of engaging the berth, and caused the company's clerk or agent, then in attendance at the office, to enter the plaintiff's name on the way-bill opposite the number of the berth, but that the defendant having also applied for the same berth, another agent or clerk of the company altered the way-bill by inserting the defendant's name opposite the berth, and allotting another one to the plaintiff, and that the plaintiff, upon returning to the berth in dispute, after the steamer had started, found the defendant's servant at the door, who refused to allow him to enter. The plaintiff afterwards entered the berth and was removed by the defendant. Evidence was also given that, according to the usage on board the steamer, the rights of the passengers *inter se* to berths during the voyage were to be determined by the way-bill as finally settled and sent on board, and that disputes during the voyage with respect to passengers' accommodation should be decided by the captain or steward:—Held, first, that the plaintiff was not entitled to a direction that he was in possession of the berth in dispute. *Dysart* v. *Montgomery*, 8 Ir. R., Eq., 245.

Held, secondly, that the way-bill, as finally settled and delivered to the officers on board, determined the right to the berth as between the plaintiff and the defendant. *Ib.*

Held, thirdly, that the jury having found that the way-bill, as finally settled for the purpose of the voyage, all
defendant; and that he w
the time of the alleged assa
in removing the plaintiff,
necessary violence, upon h
the berth. *Ib.*

4. A passenger on paying
a ticket from the clerk of t
on the back of which was
exonerating the company
loss, injury, or delay to the
luggage, however caused.
dence that the passenger had
of this condition before or a
took the ticket. During the
was lost by the negligence
the company, and the passe
gage and suffered other dam
ence:—Held, that, in the ab
the passenger had assented t
condition indorsed on the
defence to an action by him
he had sustained. *Hender*
L. R., H. L. (Sc.), 470; 32 L

5. A railway company ca
and goods partly by railw
its own ships is entitled to
the liability of shipowners
Merchant Shipping Acts.
Western Railway Co. v. *Ja*
241; 42 L. J., Ch., 337; 28
R. 151.

IX. MASTE

See also XIV. 3

1. *General Authority*, 6
2. *Barratry*, 6347.
3. *Infringement of Pate*
4. *Sale of Ship or Carg*
5. *Private Trade*, 6348.
6. *Lien for Wages and D*

1. General Auth

6. A shipowner, in his w
to a captain, directed him,
gency, to apply to certain fi
would give him any assist
Held, that this did not aut
to do anything not includ
power and authority as c
Hicks, 27 Beav. 616.

To authorise a captain to b
or freight for repairs, the
hypothecation must exist;
agent of the shipowner, in
sufficient funds in his hand
the captain cannot hypothec

7. Master of a ship buys
ship, and has money from
for the provisions, but fail
the money. The owners ar
proportion to their respecti
ship. Master of the ship i
the owners. *Speerman* v. *De*

8. In a voyage, the mast
owner's servant, and his dut
provide necessaries for the s
owner's interest that they sh
therefore, what the Master ne
(though not on bottomry)
that purpose, the owners m
White, 5 Bro. P. C. 325.

1. Where the master of a ship on behalf of the owner lets the ship on charterparty to A., and the owner becomes bankrupt, and his assignees give notice to A. not to pay any further sums of money on account thereof to the master; this notice will affect A. as to all sums paid afterwards by him to the master, beyond what the master had actually paid or stood engaged for on account of the ship, at the time of the notice; but will not defeat payments made to that extent. *Wilkins* v. *Mure*, 1 Cox 150.

2. A ship pledged abroad by the master for expenses, etc., well hypothecated, and the part owners liable. *Samson* v. *Braggington*, 1 Ves. 443.

3. Whoever lets a ship to hire, must take care that the hirer is substantial, for if he be not competent the master must pay for his neglect; yet a factor may retain goods to pay custom for salvage. *Paul* v. *Birch*, 2 Atk. 621.

4. The master of a ship who had expended all the money furnished to him by his employers, entered into a contract abroad for the purpose of obtaining funds to enable him to lay in the cargo which constituted the main object of his voyage:—Held, under the circumstances, and upon its appearing that the owners had derived benefit from the contract in question, that they had no right to repudiate the claim of the party by whom the advance was made, upon the ground that the master had exceeded his authority in the transaction, or that he had obtained the advance by means of representations to the lender the truth of which the latter was not in a position to prove. *Ashmall* v. *Wood*, 5 W. R. 397; 3 Jur., N. S., 232. And see 4 W. R. 694; 2 Jur., N. S., 827.

2. Barratry.

5. A master of a ship, without the owner, entered into a charterparty with plaintiff to undertake a voyage on certain terms, and for due performance he bound the ship, tackle, etc., valued at 300*l*. The master deviated, and committed barratry, for which plaintiff obtained a sentence against him in Spain. The owner brought trover for the ship, and an action against plaintiff for the freight. *Per cur.*, the master is liable for the deviation and barratry, but the owner is not liable beyond the sum at which the ship was valued in the charterparty. *Anon.*, 2 Ch. Ca. 238.

6. When a master ships and carries Polynesian native labourers without a licence, against the provisions of the Kidnapping Act 1872, 35 & 36 Vict., c. 19, proof that the master, although he may never have seen the Act itself or the proclamation thereof in the Australasian Colonies, was informed before shipping the labourers that such an Act existed, and that it was illegal to carry them, is sufficient evidence to justify a jury in finding that he shipped and carried the labourers wilfully and with knowledge of the prohibition, so as to make his act barratrous. *Australian Insurance Co.* v. *Jackson*, 33 L. T., N. S., 286.

3. Infringement of Patent.

7. An action was brought against the master of a ship to restrain him from using pumps which were an infringement of the plaintiff's letters patent. He denied having used any pumps which were an infringement of the patent, and did not suggest that the owners ought to be parties. It was shown that the ship was fitted up exclusively with pumps which were an infringement of the letters patent, but had been so fitted up before the defendant, who was not a part owner, had taken command of her; he had nothing to do with putting them on board, and they had never been worked in British waters:—Held, that the injunction was rightly granted on the ground that the defendant, being in command of a ship exclusively fitted up with pumps which were an infringement of the letters patent, was intending to use the patented invention. *Adair* v. *Young*, 12 L. R., Ch. D., 13; 40 L. T. 598.

4. Sale of Ship or Cargo.

8. The master of a vessel has no power to sell her so as to affect the insurers, except under circumstances of stringent necessity: such circumstances as, after sufficient examination of her condition, and after every exertion in his power, within the means at his disposal, to extricate her from peril or to raise funds for the repair, leave him no alternative but to sell her as she is. *Cobequid Marine Insurance Co.* v. *Barteaux*, 6 L. R., P. C., 319; 32 L. T., N. S., 510; 23 W. R. 892.

9. On the 19th of April an Austrian ship, with a valuable cargo on board, ran upon a rock on the eastern side of Algoa Bay, distant fifty miles by sea, and about eighty by land, from Port Elizabeth. The Austrian consul at Port Elizabeth came to the spot, and, there being no hope of getting the vessel off, he advised the master to sell her with the cargo. The master accordingly advertised the ship and cargo for sale, and they were sold in one lot by auction on the 30th of April for 9,500*l*. after a brisk competition. The purchaser got some part of the cargo out of the wreck, but on the 19th of June the ship went to pieces with the rest of the cargo on board. The owners of the cargo having abandoned it to the underwriters as a total loss, the underwriters filed their bill to have the goods which had been brought to land delivered to them as not having been effectually sold. The master had not gone to Port Elizabeth, nor endeavoured to procure funds to enable him to save the cargo; nor had he made any effort to induce any persons to undertake the salvage of the cargo. Several witnesses at Port Elizabeth deposed that in their opinion no person could have been induced to undertake the salvage; others gave their opinion that offers to save the cargo could have been obtained if a large percentage of the net proceeds had been offered. There was a good deal of evidence to show that, in the opinion of persons on the spot, the course which had been adopted of selling the wreck and cargo was the most advisable one in the interest of all parties concerned:—Held, that no such necessity was proved to have existed as would make the master the agent of the owners of the cargo to effect a sale; that the sale was void; and that the plaintiffs were

entitled to the cargo saved, subject to a proper allowance for salvage and other expenses. *Atlantic Mutual Marine Insurance Co.* v. *Huth*, 16 L. R., Ch. D., 474 ; 44 L. T. 67 ; 29 W. R. 387.

1. Where a master has no authority from the owner to sell a ship, there must be a strong case of necessity to justify the sale. The necessity which the law contemplates is not an absolute impossibility of getting the vessel repaired, for if the ship, being in a foreign port, cannot be sent upon her voyage without repairs to be done at such a great cost as no prudent person could venture to incur, that will constitute a case of necessity, and justify the master in selling. *Lapraik* v. *Burrows*, 13 Moo. P. C. 132.

Unnecessary delay on the part of the owner, dissatisfied with the sale of the ship by the master, may import acquiescence in the sale. *Ib.*

If there has been acquiescence by the owner, however unauthorized the sale might have been at the commencement, it amounts to a ratification by the owner. *Ib.*

The *onus probandi* to establish such necessity is upon a first purchaser. How far such onus attaches to a second purchaser depends upon the circumstances of each particular case. *Ib.*

The fact of the purchasers being surveyors, employed by the master to survey the ship, does not necessarily invalidate the sale. *Ib.*

2. The authority of the master to sell the goods of an absent owner is derived from the necessity of the situation in which he is placed ; and consequently, to justify his selling, he must establish a necessity for the sale ; and an inability to communicate with the owner. *Australasian Steam Navigation Co.* v. *Morse*, 4 L. R., P. C., 222 ; 27 L. T. 357 ; 20 W. R. 728 ; 8 Moo. P. C., N. S., 482.

Under these conditions, and by force of them, the master becomes the agent of the owner, not only with the power, but under the obligation (within certain limits) of acting for him ; but he is not, in any case, entitled to substitute his own judgment for the will of the owner, in selling the goods, where it is possible to communicate with the owner. *Ib.*

The possibility of communicating with the owner depends on the circumstances of each case, involving the consideration of the facts which create the urgency for an early sale, the distance of the port from the owner, the means of communication which may exist, and the general position of the master in the particular emergency. *Ib.*

Such a communication need only be made when an answer can be obtained, or there is a reasonable expectation that it can be obtained, before the sale. *Ib.*

When, however, there is no ground for such an expectation, every endeavour, so far as the position in which he is placed will allow, should be made by the master to obtain the owner's instructions. *Ib.*

The master is bound to employ the telegraph as a means of communication, where it can usefully be done ; but the state of the particular telegraph, the way in which it is managed, and the possibility of transmitting explanatory messages, are proper subjects to be considered in determining the question of the practicability of communication. *Ib.*

5. Private Tra

3. The master of a ship is his whole time and attentio his employer, and *semble*, such master to trade on hi during the voyage cannot *Gardner* v. *M'Cutcheon*, 4 I

4. A master of a ship, who to employ the vessel on fr advantage, but not to purch owner's account, and being remunerative freight, loaded cargo of his own :—Held, lia the owners for all profits ma the cargo, and not merely fo *Shallcross* v. *Oldham*, 2 Jo W. R. 291 ; 5 L. T., N. S., 8

The general principle, tha make a profit for himself t trust property, applies to a with a ship or other chattel using it for the owner's bene

6. Lien for Wages and

5. *Quære*, whether the cap ordinary disbursements, on t ship, the bill given by the got into his hands. *Lister* 348.

6. Lien of a master of a sh and payments made for abroad in the prosecution of t no instrument of hypothec *Christie*, 13 Ves. 594.

7. The master of a ship ha certificate of registry either for moneys disbursed by him ship ; nor have the stockbro the certificate of registry for them to the owner for the The master of a ship has no cruing freight either for his w disbursed by him for the *Gibson* v. *Ingo*, 6 Hare 112.

8. A master mariner clai wages and disbursements u property of the arranging de clared himself insolvent, ca be arrested under the warr of Admiralty. The Court of an application to restrain th of the Court of Admiralty i vessel declined to do so, terms of lodging in court a answer the claim and costs ; a to abide any further order further sum which might be costs or otherwise. *Re T. C* 151.

9. A ship's husband, who outfits and disbursements o considerably exceeding the under the charterparty at th of the voyage, had, before delivered, obtained a loan charterparty to relieve him vances on account of the ship of the part owners to restra band from receiving or d freight refused with costs, t being entitled to receive the f

his disbursements, and his conduct not having been so improper as to justify the restraint of this right. *Harris* v. *Reynolds*, 4 W. R. 278.

1. A master of a ship has no lien on the ship or freight for wages, or for any expenditure which he may make in the ordinary discharge of his duties as master, however necessary for the performance of the voyage. But the case becomes one of ordinary principal and agent, where he makes a special contract, in itself *ultra vires*, in order to fulfil which he incurs special expenses; if the owner adopts the benefit of that contract, he must, in equity, also bear its burthens. *Bristow* v. *Whitmore*, 9 H. L. Ca. 391; 9 W. R. 621; 4 L. T., N. S., 622; 8 Jur., N. S., 291; 31 L. J., Ch., 467. Affirming 1 Johns. 96; 4 De G. & J. 325; 6 Jur., N. S., 29. Reversing 28 L. J., Ch., 801; 1 L. T., N. S., 173.

Where, therefore, the master of an ordinary sea-going ship entered into a charterparty, under seal, to carry troops from the Mauritius to England, and stipulated, on his own responsibility, in the charterparty, that he would make certain alterations in the ship, in order to enable him to carry the troops, and at the Cape of Good Hope entered into another charterparty, not under seal, to a similar effect, and made the specified alterations, and paid money, and drew bills to meet the expenses necessary to the making of these alterations, and the voyage was performed:—Held, that, in equity, the master was first entitled out of the freight earned under these charterparties to be repaid the sums advanced, and to be indemnified against the bills, and that the owner (or his mortgagee) was only entitled to the net freight after deducting these charges. *Ib.*

2. The master of a ship belonging to a company drew a bill on the company for necessaries supplied to the ship, which was accepted, but was dishonoured at maturity. He paid the bill, and claimed repayment from mortgagees who had taken possession of the ship. On the following day an order was made for winding up the company. The master then applied in the winding-up for leave to take proceedings in the Admiralty Court, and obtained an order giving him leave. The liquidator applied to discharge this order, and an order was made for the liquidator to pay into court to a separate account to meet the claim 150*l.*, which exceeded the principal and interest, the master undertaking not to proceed in the Admiralty Court; the payment to be without prejudice to any application by him to increase the amount. The 150*l.* was paid in, and he applied to increase the amount so as to cover the costs of defending an action brought against him by the holder of the bill, and his costs of the application in the winding-up. The Vice-Chancellor ordered the principal and interest on the bill to be paid to the master out of the 150*l.*, and the residue to be paid to the liquidator:—Held, that though if there had not been mortgagees in possession of the ship, the proper mode of enforcing the master's lien on the ship would have been by application in the winding-up, the order giving leave to proceed to the Admiralty Court was a proper order, the mortgagees not being parties to the winding-up; and that the master was entitled to all his costs before the Vice-Chancellor as costs properly incurred by a mortgagee in enforcing his security. *Re Rio Grande Do Sul Steamship Co.*, 25 W. R. 328; 5 L. R., Ch. D., 282; 36 L. T., N. S., 603; 46 L. J., Ch., 277.

Held, also, that the case was not within the rule that an appeal will not lie as to costs. *Ib.*

X. WAGES.

See also IX. 6 *ante*—BANKRUPTCY, XXV. vi.

3. Contract that if ship miscarries party shall lose his wages is unreasonable. *East India Co.* v. *Atkyns*, 1 Com. 348.

4. The captain of a ship on an outward-bound voyage, takes bonds from his seamen to himself in 200*l.* penalty, conditioned, that they shall not demand any wages until the ship arrives in the port of London. The ship is lost, and the seamen sue the captain for their wages:—Held, that those bonds were unjust and void in law. *Buck* v. *Rawlinson*, 1 Bro. P. C. 138.

The owners of a ship let it out to freight, and by the charterparty it was agreed, that no freight should be paid to the owners until six days after the ship should return to the port of London, and make a full delivery of her lading, but the master might detain the imprest money; and if the ship should be lost in her voyage, the master and owners should not expect any other satisfaction than the imprest money for the freight and demurrage of the ship. The ship was lost; and upon a question who was liable to pay the seamen's wages:—Held, that the master was liable in the first instance, as having hired them, but that he had his remedy against the owners. *Ib.*

5. East India Company takes bond from the mariners and officers of the ships, etc., not to demand their wages unless the ship returned to the port of London. The ship arrives at a delivery port, and is afterwards taken by the French. The seamen and officers shall have their wages to the time of the arrival of the ship at the delivery port. *Edwards* v. *Child*, 2 Vern. 727.

6. A seaman assigns his wages as a security for money, and dies indebted to other persons. This assignment specifically binds the wages, and the money secured thereby shall be paid preferably to all other debts. *Crouch* v. *Martin*, 2 Vern. 595.

7. A seaman assigned his wages to J. as a security for a debt he owed to J., and died intestate; it was insisted that this was only an agreement in nature of a letter of attorney, and determined by the seaman's death, and that there were bond debts. Decreed J. shall be paid in due course of administration. *Mitchell* v. *Edes*, 2 Vern. 391; Pre. Ch. 125.

8. The captain of a ship served a notice on the trustees of the docks, in which the cargo of the ship was being discharged, not to suffer its removal till the freight was paid, and wrote to the owners of the ship to inform them that he had stopped the cargo till the wages of himself and the seamen had been paid. In a suit between the owners and the mortgagee of one of them, the captain was made a party, and did not, by his answer, disclaim. The chief clerk found that certain sums were due to him in respect of wages, but that other sums claimed were not due:—Held, that the plaintiff was justified in making the captain a party, and

that the latter was justified in not disclaiming, and was therefore entitled to his costs. *Alexander* v. *Simms*, 20 Beav. 123 ; 24 L. J., Ch., 618.

1. A shipowner assigned fifteen-sixteenths of a ship to his creditor, in trust to sell and retain his debts, and afterwards became bankrupt. The ship was afterwards sold :—Held, that the creditor must bear his proportion of the seamen's wages and other expenses on account of the ship. *Douglas* v. *Russell*, 4 Sim. 533.

2. Payment of wages, and the expense of insuring a ship, are proper deductions to be made from gross freight, as between the owners of the ship and the assignee of the freight. *Lindsay* v. *Gibbs*, 3 De G. & J. 690 ; 5 Jur., N. S., 376 ; 28 L. J., Ch., 692. Affirming 26 Beav. 51 ; 4 Jur., N. S., 779.

XI. BILL OF LADING.

See also BILLS OF EXCHANGE, XV.—STOPPAGE IN TRANSITION.

1. *Form*, 6350
2. *Signature*, 6350.
3. *Conditions*, 6350.
4. *Transfer*, 6351.
5. *With Bills of Exchange annexed*, 6352.
6. *In Sets*, 6354.
7. *Other Matters*, 6354.

1. Form.

3. *Semble*, that a bill of lading, in which the words "or order or assigns" are omitted, is not a negotiable instrument. *Henderson* v. *Comptoir d'Escompte de Paris*, 5 L. R., P. C., 253 ; 21 W. R. 873 ; 29 L. T., N. S., 192.

When goods have been delivered to the person to whom the bill of lading was made out, and they have then been delivered to indorsees of the bill of lading, so that the indorsees unite in themselves a legal and an equitable title to the goods, the omission of the words "or order or assigns" in the bill of lading is not sufficient to give the indorsees constructive notice of some equitable arrangement between the person to whom the bill of lading was made out and the consignors. *Ib.*

4. A bill of lading, in mentioning the freight payable for a cargo, did not use the ordinary words "he or they paying freight for the same," but, after giving the names of the consignees to whose order the cargo was to be delivered, employed the words "freight for the goods 4*l.* 5*s.* per ton or 20 cwt. net, delivered, with primage and average accustomed":—Held, that the two forms of expression were in effect the same, and constituted the ordinary condition that the goods were to be deliverable only on paying freight. *Weguelin* v. *Cellier*, 6 L. R., H. L., 286 ; 42 L. J., Ch., 758 ; 22 W. R. 26.

2. Signature.

5. The master of a vessel may properly sign bills of lading in favour of the shipper of goods without production of the mate's receipts for the goods, if he is satisfied otherwise that the goods are on board the vessel, and has no no notice that any one but the shipper claims any interest in them. *Hathesing* v. *Laing*, *Laing* v. *Zeden*, 17 L. R., Eq., 92; 43 L. J., Ch., 233 ; 29 L. T., N. S., 734.

The holder for value of given has a better title th the mate's receipts. *Ib.*

A local custom of trade w at Bombay, by virtue of receipts for goods shipped are negotiable instruments, perty in the goods in the sa of lading, and that masters to have the mate's receipt before signing any bill of la mentioned in that receipt; tain signed a bill of lading and delivery to him of the the goods, he would be bou tion of that receipt, to si lading, and to deliver the producing the mate's recei goods mentioned in the re delivered to the person w second bill of lading :—Hel tom, if proved to exist, wo as against the captain and t

6. A bill of lading, stati been shipped in good ord but indorsed by the maste "quality and quantity unk admit as against the shipow were shipped in good order a *Ida*, 32 L. T., N. S., 541.

There is no rule of law signee of goods under a bill goods to have been shipped condition, but containing th and quality unknown," is bo the goods were shipped in goo tion, or fail in his suit against damage done to the cargo; b the condition of the cargo consignee is bound to show which it sustained is traces which the shipowner is respo

7. Bills of lading signed *primâ facie* evidence that th therein were received on bo onus of rebutting this presum ing that a less quantity th was received, lies on the shi v. *Fleming*, 2 L. R., H. L. T. 317.

3. Condition

8. By a bill of lading mad the master of an English sh ages of tea were "to be de ship's deck, where the shi shall cease, at the port of M the Grand Trunk Railway them to be forwarded thenc the station nearest to Toronto said station delivered to the their assigns." The instrum addition to a long list of exce whether arising from negligence the following condition: "No be insured against will be any claim whatever be admi before the goods are remove in Lower Canada against th the value of damage done during the voyage, it appeare landed, placed in shipping she from to railway freight sheds

finally delivered to the consignees in Toronto. No notice of damage was given until thirteen days after the delivery was completed:—Held, that the condition, though in its first clause limited to insurable damage, clearly applied, as regards its second clause, to all damage, whether apparent or latent, which could, by examination of the packages conducted with reasonable care and skill at the place of removal, have been discovered. *Moore* v. *Harris*, 1 L. R., App. Cas., 318; 45 L. J., P. C., 55; 34 L. T., N. S., 519; 24 W. R. 887.

The bill of lading in this case was a contract to be governed and interpreted by English law, and therefore no substantive defence arising from delay in making the claim could be made apart from the express condition contained therein, notwithstanding the provisions of Article 1680 of the Canadian Civil Code. *Ib.*

1. A condition in a bill of lading provided, in effect, that, on the arrival of the vessel in dock, the consignee of a portion of the cargo should be ready to receive the goods, and that, in default, the master or agent of the ship should be at liberty to land the goods and warehouse them at the consignee's risk and expense. The vessel arrived, and the agent of the consignee made an immediate application for the goods, but was told that it was not known in what part of the ship they were. On receiving the same answer on the following day, the agent withdrew, handing to the mate a notice desiring him to give twenty-four hours' notice of his readiness to deliver the goods, in accordance, as the notice alleged, with 25 & 26 Vict., c. 63, ss. 66, 67. No such notice of readiness was given, and, there being no one to receive the goods, they were placed in a warehouse by the master of the ship, a charge of 5*l.* 17*s.* 3*d.* being thereby incurred. The consignee having threatened to charge his agent with the value of the goods unless he obtained delivery of the same, the agent paid the said sum under protest, and brought this action against the shipowner to recover such sum:—Held, that the special contract in the bill of lading excluded the operation of the Merchant Shipping Act Amendment Act; and that the Act did not apply to a case where the shipowner was in *bonâ fide* ignorance of the position of the goods, regard being had to the premature demand of the agent of the consignee. *Oliver* v. *Colven*, 27 W. R. 822.

2. In the absence of express words to the contrary a bill of lading implies a warranty of seaworthiness, and all the exceptions in it must be taken to refer to a period subsequently to the sailing of the ship with the goods on board. *Steel* v. *State Line Steamship Co.*, 3 L. R., App. Cas. (Sc.), 72; 37 L. T. 333.

When special clauses in a bill of lading exonerate the shipowner from the liability of even the perils induced by the negligence of his servants, it is necessary that the jury should find whether the vessel was or was not seaworthy when starting on the voyage. *Ib.*

A cargo of wheat was shipped at the port of New York for conveyance to Glasgow, and a specially worded bill of lading contained clauses excepting "peril of the seas of whatever nature or kind soever and howsoever caused," including negligence of the crew. On the voyage the sea burst through an insufficiently fastened port hole, damaging the cargo. A jury found by special verdict that this porthole had been insufficiently fastened, but did not find whether this happened before starting on the voyage:—Held, that there was an implied engagement to supply a seaworthy ship. *Ib.*

Held, also, that the jury not having found whether the vessel started on her voyage in a seaworthy condition, there was no finding upon which judgment could be entered; therefore the case must be reheard. *Ib.*

Whether the ship was seaworthy was a question of fact which lay at the very root of this case; but no answer to this question was found in the special verdict; therefore there was no finding on which the judgment could be entered either way. *Ib.*

4. Transfer.

3. Indorsement of bill of lading is not a valid assignment, unless goods are directed to be delivered to assignee. *Brown* v. *Heathcote*, 1 Atk. 160.

4. A., a merchant in London and in Hong Kong, purchased goods for shipment from B., and paid for them by his acceptance of B.'s draft against the shipment, on the terms that A. should send them to his firm at Hong Kong, and that the proceeds should be remitted to A. in bills specially to meet such acceptance. A.'s firm at Hong Kong owed a large sum to C., and were under engagement to secure the debt by depositing shipping documents with him. Being threatened by C. with immediate legal proceedings, they promised him that if he would forbear to take such proceedings, and would release them from their obligation to deposit shipping documents, they would deposit with him a bill of lading for goods of a certain value, upon the understanding that the bill of lading, or the goods represented therein, should be returned to them upon payment of a sum equivalent to the value thereof. The bill of lading of the goods purchased from B. was accordingly indorsed to C., who had no knowledge of the terms made with B., and it was returned by C. according to agreement, on receipt of an equivalent sum:—Held, that C. by such forbearance and release gave valuable consideration; that the legal interest in the goods passed by the indorsement of the bill of lading, and that B. could not enforce his claim against the proceeds of sale received by C. in respect thereof. *Chartered Bank of India, Australia, and China* v. *Henderson*, 5 L. R., P. C., 501; 30 L. T., N. S., 578.

5. When goods are at sea, the parting with the bill of lading, which is the symbol of the goods, is parting with the ownership of the goods themselves. *Barber* v. *Meyerstein*, 4 L. R., H. L., 317; 39 L. J., C. P., 187; 22 L. T. 808; 18 W. R. 1041.

The same principle applies to goods which for the convenience of parties have been landed at a sufferance wharf. *Ib.*

As long as the engagement of the shipowner has not been completely fulfilled, the bill of lading is a living instrument, and the transfer of it for value passes the absolute property in the goods. *Ib.*

It has not been fulfilled when the goods, though actually landed at a wharf, are subject to a stop order. *Ib.*

The person who first gets the bill of lading (though only one of a set of three) gets the property which it represents; he need not do any act to assert his title which the transfer of the bill of lading of itself renders complete, and any subsequent dealings with the others of the set are subordinate to the rights passed by that one. *Ib.*

Though the shipowner or wharfinger, having no notice of the transfer of one bill of lading, may be excused for delivering the goods to a person who produces to him another bill of lading, which has in reality been subsequently taken, that does not affect the legal ownership of the goods as between the holders of the two bills of lading. *Ib.*

1. A. having ordered goods from B., a firm at Calcutta, through C., their agent in this country, received an invoice of the goods, with a notice that B. had drawn upon him for the price at six months. On calling at C.'s office, A. was met by C.'s messenger, who handed to him for his acceptance the bill of exchange drawn upon him in respect of the goods, and the bill of lading, which was pinned to the bill of exchange. A. accepted the bill of exchange, and afterwards deposited the bill of lading with E. as a security for an advance, together with a policy of insurance upon the goods effected by himself in his own name, C. having declined to part with the original policy on the ground that it included other goods besides those purchased by A. A. having become bankrupt, and unable to take up his acceptance, the goods were claimed by B. and C., on the ground that the bill of lading had been improperly pledged, having come into A.'s hands irregularly, and without their knowledge, and contrary to an alleged custom amongst East India merchants not to part with the bill of lading of goods until the vendee has taken up his acceptances on account thereof:—Held, that the alleged custom of trade was merely exceptional, and was not established by the evidence as being the usual course of business; and that the title of E., as *bonâ fide* assignee for value, must prevail over any claim by the unpaid vendors. *Coventry* v. *Gladstone*, 4 L. R., Eq., 493; 37 L. J., Ch., 30; 16 W. R. 304.

2. A cotton broker of New Orleans was in the habit of sending cotton over to England, and the plaintiff was in the habit of accepting his bills, in consideration of the assignment to him of bills of lading of the cotton. In 1870, in the course of this business, a bank to whom two bills of the cotton broker on the plaintiff were indorsed sent them for the plaintiff's acceptance, and with the bills they sent a memorandum, "The bank holds bills of lading for 504 bales of cotton." The plaintiff thereupon accepted the bills, and retiring them before they became due received the bills of lading, and went to the captain of the ship on his arrival and presented the bills of lading, which turned out to be forgeries:—Held, that, notwithstanding the representation contained in the memorandum sent by the bank, the plaintiff could not call on the bank to repay him the value of the bills. *Leather* v. *Simpson*, 40 L. J., Ch., 177; 19 W. R. 431; 11 L. R., Eq., 398; 24 L. T., N. S., 286.

3. K., a miller in England, agreed with F. & Co., a firm in California, that they should send him cargoes of wheat, of exchange against the b cargo was sent, and a bill bill of exchange annexed, agents in England of F. & the acceptance of K. to th was subsequently negotiate lading deposited by F. & lading were drawn, and on advertently, as F. & Co. a who deposited it with a b way of security. K. faile filed by the bank, claiming t the holders of the other bill that F. & Co. had full righ bill of exchange with the bill and that the bank must at t made an advance on the b known that there would b lading, and that one could without the other. The therefore, no priority. *Gilb* L. T., N. S., 733; 8 L. R., C

4. B., having sold 500 sa consigned them to him by to sell on commission. Th vessel executed and handed bills of lading, expressed t assigns;" and one of them warded by B. to H. unindo the 9th February 1878, d discount company (who car the same town as himself) t of 600*l.* then made to him. ruary H., who, in the mean informing B. of the trans had obtained from him the lading duly indorsed, deposi company, at whose instanc further executed to them a dated the 9th, upon the who both of the 600*l.* advance an amount of certain bills of e discounted for him by the reaching maturity. The ve afterwards, and the compa H. was owner of only half t B. having brought an actio half relieved from the comp that the plaintiff was ent sought. *Blake* v. *Belfas* L. R., Ir., 410.

5. With Bills of Exch

5. N., a timber merchan dealings with D., a mercha sent him cargoes of timber of on a *del credere* commissi of which N. drew bills on 1853 the accounts betwee settled, but D. claimed a co as due to himself. On the wrote to say that he expec from two captains (whom h he had drawn for a certa On the 24th October H. & London, received through the manager of their busi letter from N., in which he D., whereby he drew on D. he claimed as due to himse letter to H. & Co., N. desi

might be handed to D.; and on his accepting the draft, and acknowledging the correctness of an accompanying account, and the fact that N. had duly delivered all the cargoes of timber contracted for between them, except one, particularly named, that then H. & Co. were to hand to D. the three bills of lading of three ships, also named; but if he would not accept the draft, nor give the required acknowledgment, that H. & Co. were to insure the cargoes and sell them; and N. drew on H. & Co. drafts to the amount of 1,300*l.* This letter was read to D., who hesitated to accept the draft for 1,312*l.*, declaring that he was largely in advance to N. It was left in his bill-box for acceptance on the morning of the 24th October, and a formal letter, demanding compliance with the conditions of N., was written to him from H. & Co. In the course of the same day D. wrote to H. & Co., requesting the loan of the bills of lading, saying, "We will return them to you, if from any cause we do not accept the bill for 1,312*l.*" They were sent to him on the same day; but after D.'s request had been complied with, H. & Co. accepted the first of N.'s drafts, and wrote to him that they would "give protection" to all. On the morning of the 25th October a clerk of H. & Co. learned at D.'s counting house that the draft for 1,312*l.* had not been accepted; but in the middle of that day it was sent to H. & Co., accepted. D. however refused to give up the bills of lading, and on the advice of a solicitor (obtained before he had accepted the draft for 1,312*l.*) attached the goods in the hands of H. & Co. They brought an action against him to recover the bills of lading, and he filed a bill to stay the action:—Held, that he had not such equitable right on account of anything occurring before the 24th October as would prevail against the legal rights which H. & Co. acquired on that day. *Hoare* v. *Dresser*, 7 H. L. Ca. 290; 5 Jur., N. S., 371; 28 L. J., Ch., 611; 7 W. R. 374; 33 L. T. 63.

1. B., a merchant at Newcastle, agreed to accept bills of exchange drawn by C., a merchant residing in Prussia, on receipt of a bill of lading. C. sent a forged bill of lading with the bills of exchange, which were accepted by B. C. then indorsed the bills of exchange to D. for value. On discovering the fraud B. applied to D. to deliver up the bills of exchange, which he refused to do. B. thereupon filed a bill for an injunction to restrain D. from proceeding against him at law, and praying that the bills of exchange might be delivered up to be cancelled. The Vice-Chancellor granted the injunction (1 Giff. 142; 5 Jur., N. S., 855; 7 W. R. 627; 33 L. T. 298), but, on appeal, the injunction was refused, and the bill dismissed with costs. *Theidemann* v. *Goldschmidt*, 1 L. T., N. S., 50.

2. Goods were sold by D. to A., to be paid for on delivery, and were delivered on board a ship, which was to take them to the East Indies, but not paid for. The bill of lading was delivered to B., the agent of A. A. bought the goods, in fact, as agent of C. D. filed a bill to restrain B. from parting with the bill of lading, alleging that A. was insolvent, and that the mode of obtaining the goods was a fraudulent contrivance, by which C. was to obtain satisfaction of a debt owing to him by A. There being no proof of fraud:—Held, that the bill could not be maintained, and D. was ordered to pay the costs. *Straker* v. *Ewing*, 34 Beav. 147; 13 W. R. 286; 11 L. T., N. S., 588.

3. A cotton broker of New Orleans was in the habit of sending cotton over to England, and the plaintiff was in the habit of accepting his bills, in consideration of the assignment to him of bills of lading for the cotton. In 1870, in the course of this business, a bank to whom two bills of the cotton broker on the plaintiff were indorsed, sent them for the plaintiff's acceptance, and with the bills they sent a memorandum—"The bank holds bills of lading for 504 bales of cotton." The plaintiff thereupon accepted the bills, and retiring them before they became due received the bills of lading, and went to the captain of the ship on his arrival and presented the bills of lading, which turned out to be forgeries:—Held, that, notwithstanding the representation contained in the memorandum sent by the bank, the plaintiff could not call on the bank to repay him the value of the bills. *Leather* v. *Simpson*, 11 L. R., Eq., 398; 40 L. J., Ch., 177; 24 L. T. 286; 19 W. R. 431.

4. A bank presented a bill of exchange to the drawees for their acceptance, accompanied by a ticket representing that the bank held bills of lading to cover it. The drawees thereupon accepted the bill, relying on the statement that the bank held bills of lading which both parties thought to be genuine. The bills of lading had been forged by the drawer of the bill of exchange:—Held, that the drawees were not entitled to demand from the bank genuine bills of lading before paying the amount of the bill of exchange. *Baxter* v. *Chapman*, 29 L. T. 642.

5. B. consigned a cargo of maize to O. & Co. for sale by them on a joint speculation of himself and them, and he drew upon them against the cargo six bills of exchange for sums amounting to 1,500*l.* He wrote them a letter advising them of the bills, and sent them the bill of lading of the cargo, and asked them to protect the bills on presentation. They replied that they would do so. The bills of exchange were on the face of them expressed to be on account of the cargo. B. afterwards indorsed three of the bills to R. & Co. Before the bills were presented to O. & Co. for acceptance they had heard that B. had stopped payment, and when the bills were presented they declined to accept them:—Held, that R. & Co. were not entitled to any lien upon the cargo as against O. & Co. in respect of the three bills indorsed to them. *Robey & Co.'s Perseverance Iron-works* v. *Ollier*, 7 L. R., Ch., 695; 27 L. T. 362; 20 W. R. 956.

6. When a bill of lading, and a bill of exchange to cover the goods included in the bill of lading, are sent in a letter to a vendee of the goods, it is a well-understood rule that the bill of exchange must be accepted, or the bill of lading cannot be retained. *Shepherd* v. *Harrison*, 5 L. R., H. L., 116; 40 L. J., Q. B., 148; 24 L. T. 857; 20 W. R. 1.

When the bill of exchange is not accepted, but the bill of lading is retained, the bill of lading, acquired in that manner, gives no right of property to the person so acquiring it. *Ib.*

7. Bills were drawn against cotton consigned to England. The cotton was hypothecated,

by means of a letter in favour of a bank which bought the bills; at the same time bills of lading and a policy were handed to the bank. The letter contained a power to keep insured, and a power to sell the cotton in case of non-payment, and to apply any balance, after satisfaction of the bills, towards other debts due from the consignor to the bank:—Held, that money received on the policy could not be applied in payment of anything beyond what was due on the bills. *Latham* v. *Chartered Bank of India, China, and Australia*, 17 L. R., Eq., 205; 43 L. J., Bky., 612; 29 L. T. 795.

6. In Sets.

1. When goods are shipped under a bill of lading drawn in parts, to be delivered to the consignee "or his assigns, the one of which bills being accomplished, the others to stand void," the master, or the warehouseman who has the custody of the goods under the Merchant Shipping Act 1862, ss. 66—78, is justified in delivering to the consignee on production of one part, although there has been a prior indorsement for value to the holder of another part; provided the delivery be *bonâ fide* and without notice or knowledge of such prior indorsement. *Glyn, Mills, & Co.* v. *East & West India Dock Co.*, 7 L. R., App. Cas., 591; 52 L. J., Q. B., 146; 47 L. T. 309; 31 W. R. 201, 580. Affirming 6 L. R., Q. B. D., 475; 50 L. J., Q. B., 62; 43 L. T. 584; 29 W. R. 316.

Goods having been shipped for London consigned to C. & Co., the shipmaster signed a set of three bills of lading marked "First," "Second," and "Third," respectively, making the goods deliverable to C. and Co., or their assigns, freight payable in London, the one of the bills being accomplished, the others to stand void. During the voyage C. & Co. indorsed the bill of lading marked "First" to a bank, in consideration of a loan. Upon the arrival of the ship at London the goods were landed and placed in the custody of a dock company in their warehouses; the master lodging with them notice under the Merchant Shipping Act 1862, s. 68, etc., to detain the cargo until the freight should be paid. C. & Co. then produced to the dock company the bill of lading marked "Second" unindorsed, and the dock company entered C. & Co. in their books as proprietors of the goods. The stop for freight being afterwards removed, the dock company *bonâ fide* and without notice or knowledge of the bank's claim delivered the goods to other persons upon delivery orders signed by C. & Co.:—Held, that the dock company had not been guilty of a conversion, and that the bank could not maintain any action against them. *Fearon* v. *Bowers* (1 H. Bl. 364) reflected on. *Ib.*

See also 4 *supra.*

7. Other Matters.

2. A bill of lading, in mentioning the freight payable for a cargo, did not use the ordinary words "he or they paying freight for the same," but, after giving the names of the consignees to whose order the cargo was to be delivered, employed the words "freight for the goods 4*l.* 5*s.* per ton of 20 cw with primage and average Held, that the two forms of e effect the same, and constitu condition that the goods were only on paying freight. *We* 6 L. R., H. L., 286; 42 L. W. R. 26.

Though freight may not be of a man's own goods conv ship, it becomes so if he mak who have advanced him mone of those goods, and the goods lading deliverable to their ord

H., a shipowner, obtained Co., merchants and bankers, for his account in favour of quantity of rice to be shipp China to England in H.'s ow & Co., in their letter of credi stipulated that the drafts to their acceptance should be co documents. It was assumed were agents for H. They p and shipped it in the *Java*, o and drew on T. B. & Co. accompanying their drafts wi of the rice. These bills of la rice as shipped by H. B. & or their assigns, "freight fo per ton," and they bore an in captain, "Received from H. being the amount of ship's Akyab, the amount to be d freight on this bill of ladin on receipt of this, accepted they paid at maturity. In had given C. P. & Co. a char then being earned by the *Ja* money advanced. The *Jav* and C. P. & Co. put a stop on freight, and gave T. B. & C claim:—Held, that whatever the original impression of T the rice being freight free, that they would make the ad documents; that having acc lading as such shipping doc bound by the terms of thos C. P. & Co. were entitled to the freight from them, less th disbursements paid to the ca no rule in law to prevent reserving freight in bills of goods when carried in his ow dealing with the freight wh from consigning the goods freight. *Ib.*

The holders of a bill of against the assignees of the debt due to them from the the goods, who was also th freight. *Ib.*

3. Where the owner of a owner of the cargo on board, earned by the voyage, and t owner of a ship and cargo h drawn reserving a nominal security of which he obtaine exchange:—Held, that the bills had no claim against t sale of the cargo. *Cellier* v. 184; 17 L. T., N. S., 341.

The consignees in the bills

bankers of the owner of the ship, at whose request the consignment was made. The consignors drew bills upon them for the price of the cargo, which they paid at maturity :—Held, that they did not thereby become owners for the purpose of freight, and were entitled to the first charge on the proceeds of the cargo. *Ib.*

1. Captain of ship may file interpleader where parties claim adversely under bill of lading ; but otherwise where paramount to it. *Lowe* v. *Richardson*, 3 Madd. 277.

2. By a printed regulation of the London Dock Company orders for delivery cannot be acted upon unless signed by the party in whose name the goods stand in the company's books, or by a person duly authorised, in writing under the hand of the principal, to sign them. Wine was entered in the books of the company in the name of S., clerk to W., but the bills of lading were in the hands of H., the consignee of the wine. The wine not having been approved by W., H. agreed to take it back, and applied to W. to return a part of it; but W. refused to do so until his acceptance for the wine should be returned to him. H. then exhibited the bills of lading to the company, which informed W. that it would deliver the wine to H. unless it should be restrained from so doing. W. and S. thereupon filed a bill against the company and H. for an injunction to restrain the company from delivering the wine to H. without the written order of W. and S., or one of them, and praying that the company and H. might be ordered to pay the costs of the suit :—Held, that as the legal title to the wine was in H. by virtue of the bill of lading, the company was entitled to its costs, which, under the circumstances of the case, were ordered to be paid equally by W. and S. and H., W. and S. and H. also bearing their own costs equally. *Wright* v. *London Dock Co.*, 5 Jur., N. S., 1411. Reversing 4 Jur., N. S., 1134.

Where a public company receives goods, and undertakes with the public to hold them upon certain terms, it will not be allowed to deal with questions that may arise in respect of goods committed to its care otherwise than according to its printed regulations. S. C. 4 Jur., N. S., 1134.

3. When a vessel about to sail is advertised as a general ship, an intending shipper is not bound to inquire as to the existence of any charterparty. *Peek* v. *Larsen*, 12 L. R., Eq., 378 ; 40 L. J., Ch., 763 ; 25 L. T. 580 ; 19 W. R. 1045.

A person who, without notice of any charterparty, has placed goods on board a vessel which has been advertised as a general ship, is entitled to have his goods returned to him if the captain refuses to sign bills of lading except subject to a charterparty containing objectionable provisions. *Ib.*

XII. CHARTERPARTY.

1. *Construction*, 6355.
2. *Seaworthiness*, 6355.
3. *Unloading and Demurrage*, 6355.
4. *Enforcing in Equity*, 6657.

1. Construction.

4. It is important not to give to mercantile instruments such as a charterparty an unnecessarily strict construction, but such a construction as with reference to the context and the object of the contract would effectuate the obvious and expressed intention of the parties. *Dimech* v. *Corlett*, 12 Moo. P. C. 199.

5. An agreement between the owners and the merchants for the employment of the ship on a certain voyage, not in writing, but acted upon by the parties, is equivalent to a charterparty. *Lidgett* v. *Williams*, 4 Hare 462 ; 14 L. J., N. S., Ch., 459.

2. Seaworthiness.

6. A ship was chartered to sail to Manilla for orders to load there, or at Yloilo, a full and complete cargo of sugar in bags, hemp in compressed bales, and/or measurement goods, and therewith to sail to Cork, etc., the freight to be at the rate of 4*l.* 2*s.* 6*d.* for dry sugar, 4*l.* 5*s.* for wet sugar, and 4*l.* 15*s.* for hemp or measurement goods ; the master engaging that the vessel before and when receiving cargo should be a good risk for insurance, and that during the voyage he would take all proper means to keep the vessel tight, staunch, and strong, and in every way fitted and provided for the voyage. At Yloilo the charterer provided a full cargo of wet sugar in bags. In the course of loading it was found that the quantity of molasses which had drained, and which might have been expected to drain, from the wet sugar was so great as to render the ship unseaworthy unless removed, and that the ship's pumps were unable to remove it. The ship was in all other respects seaworthy, but could not have been rendered seaworthy for that cargo without a delay which would have frustrated the objects of the voyage: —Held, that the charterer was entitled under the charterparty to supply a full cargo of wet sugar, and to have a ship provided which was fit for such a cargo. *Stanton* v. *Richardson*, 24 W. R. 324 ; 45 L. J., C. P. D., 78.

3. Unloading and Demurrage.

7. A charterparty for a ship to sail to "London Surrey Commercial Docks" is not satisfied by the ship arriving at the gate of the docks, but not entering into the docks. *Dahl* v. *Donkin* or *Nelson*, 6 L. R., App. Cas., 38 ; 50 L. J., Ch., 411 ; 44 L. T. 381 ; 29 W. R. 543.

The provision in a charterparty that a ship is to be brought to a particular place, "or as near thereto as she may safely get," refers to the ship being prevented from getting to her primary destination by any permanent obstacle other than an accident of navigation ; not merely by an obstacle endangering her safety. S. C. 12 L. R., Ch. D., 568.

There is no established custom in the port of London by which the charterer of a timber-loaded ship is bound to secure for the vessel, on its arrival in the river, and in close contiguity to the docks named, the authority to enter into the docks. The charterparty was to "London Surrey Commercial Docks, or as near thereto as she may safely get, and lie always afloat." As the docks were full the ship could not be given a discharging berth, and the dock manager therefore refused it entrance into the

docks. Both parties having named these docks in the charterparty, this refusal of the dock authorities was held not to be the fault of either party. The cause of the delay as to being admitted into the docks was immaterial; the length of the delay was material. The charterer would not name any other docks to which the ship might be taken. The ship's master therefore took it to the Deptford Buoys (the nearest place to the Surrey Commercial Docks where it could lie in safety afloat), and there discharged the cargo by lighters, carrying the timber into the Surrey Commercial Docks, where it was afterwards sorted and put in order on the wharf:—Held, that under the circumstances existing in this case, the delay in discharging the cargo was to be attributed to the charterer, who therefore became liable to demurrage, and to the charges for unloading. *Ib.*

The contract in the charterparty as to demurrage was this:—The cargo was to be supplied as fast as it could be taken on board, "and to be received at port of discharge as fast as steamer can deliver as above . . . and ten days' demurrage over and above the said laying days" (there were no laying days mentioned in the charterparty) "at 30*l.* per day, payable day by day, it being agreed that for the payment of all freight, dead freight and demurrage, the owner shall have absolute charge and lien on the said cargo. . . ." "The cargo to be brought to and taken from alongside the ship at merchants' risk and expense." The ship did not fulfil the engagement in the charterparty to proceed to the Surrey Commercial Docks by merely going to the gates of the docks, but when it had fulfilled the alternative to go as near thereto as it could safely get, the charterer was bound to take the cargo from alongside at his risk and expense. The shipowner was not bound to wait for an unreasonable period, until the dock authorities should be able to assign the ship a discharging berth in the docks. When that difficulty arose about the ship being admitted into the Surrey Commercial Docks, and the charterer would not name any other docks or place where the vessel might be unloaded, the shipowner gave notice to the charterer of the discharge of the cargo by lighters, and, on taking the timber into the docks, gave notice to the dock authorities that it was delivered there subject to the claim for freight, demurrage, and delivery charges:—Held, that he was warranted in so doing. *Ib.*

1. The duty of providing, and making proper use of sufficient means for the discharge of a cargo, when a ship, which has been chartered, arrives at its destination and is ready to discharge, lies upon the charterer. But that general duty may be qualified by words in the charterparty, and by the circumstances of the case. If, by the terms of the charterparty, the charterer has agreed to discharge the ship within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it. If there is no fixed time, the law implies an agreement, on his part, to discharge the cargo within a reasonable time. *Postlethwaite* v. *Freeland*, 5 L. R., App. Cas., 599; 49 L. J., Exch., 630; 42 L. T. 845; 28 W. R. 833.

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for damage to cargo caused
Anderson v. *San Roman* (
P. C., 301; 42 L. J., Adm., 4
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Affirming 3 L. R., Adm., 583
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reason of an insufficient supply of coal, the ship was delayed:—Held, that the charterers were responsible for the delay. *Elliott* v. *Lord*, 52 L. J., P. C., 23; 48 L. T. 542.

4. Enforcing in Equity.

1. Parties who have mutually bound themselves, will be restrained from doing any act inconsistent with a charterparty which they have entered into *bonâ fide*. *Levin* v. *Deslandes*, 7 Jur., N. S., 837; 30 L. J., Ch., 457; 9 W. R. 218.

The Court has jurisdiction to deal with questions relating to charterparties; and so when a charterparty has been entered into *bonâ fide*, it can, on a sufficient case being made, grant an injunction to restrain the breach of such a contract. S. C. *nom.* *Serin* v. *Delandes*, 3 L. T., N. S., 461.

2. The master of an American vessel arriving in England, authorised by the owners to sell or charter the ship, entered into a charterparty with the plaintiff for a voyage to Ceylon and back. A few days afterwards the defendant purchased the ship from a party acting under a power of attorney from one of the owners to sell her. The greater part of the cargo had been put on board under the charterparty. The defendant attempted to stop the sailing of the ship:—Held, that the master having authority to charter the ship, which he had done, and the defendant knowing of the charterparty, an injunction would lie to restrain the purchasers from interfering with the sailing of the ship, in pursuance of the charterparty. *Messageries Imperiales Co.* v. *Baines*, 11 W. R. 322; 7 L. T., N. S., 763.

3. A vessel having been chartered to convey a cargo of coals to China, and having become damaged, the master was forced to discharge the cargo, and the owner declined to re-ship it, on the ground that, having become wet, it was liable to spontaneous combustion. On a bill by the charterers to restrain the owner from employing the ship in any manner inconsistent with the charterparty, the Court directed an inquiry as to the state of the cargo, and granted an injunction pending such inquiry. *Heriot* v. *Nicholas*, 12 W. R. 844.

4. The Court of Chancery cannot decree the specific performance of a charterparty, but it can restrain the parties from employing the ship in a manner inconsistent with the rights under a charterparty. *Le Blanch* v. *Granger*, 35 Beav. 187.

5. Although a court of equity cannot enforce the specific performance of a charterparty, yet it will restrain the employment of the vessel in a different manner, whether such employment is expressly or impliedly forbidden. *De Mattos* v. *Gibson*, 5 Jur., N. S., 555; 28 L. J., Ch., 498; 4 De G. & J. 276; 5 Jur., N. S., 347; 28 L. J., Ch., 165.

C. mortgaged a ship to D., with a power of sale. The ship was under contract by charterparty, to carry a cargo from U. to S., of which the mortgagee had notice. On a bill filed by the charterer of the vessel for a specific performance against the mortgagor, and for an injunction to restrain the mortgagee from interfering to interrupt the voyage:—Held, that the contract was not enforceable in a court of equity, and that the charterer was bound to show that the mortgagee had done or threatened to do some act which had interfered with the performance of the contract, to entitle him to an injunction. *Ib.*

6. A shipowner entered into a contract to carry a cargo of coals from Birkenhead to Bombay. The charterparty contained the ordinary exception of perils of the sea. The ship, soon after sailing, was overtaken by a storm and put into Belfast. The master of the ship had the coals unshipped, and, being advised that they were in too dangerous a state to be reshipped, he had them sold. The charterers filed a bill to restrain the shipowner from using the ship in a manner inconsistent with the charterparty. The Vice-Chancellor granted an injunction accordingly, with the intention of compelling the shipowner to send the ship back to Birkenhead to take on board a new cargo of coals for Bombay:—Held, upon appeal, that no such injunction could be granted. *Adamson* v. *Gill*, 16 W. R. 639; 18 L. T., N. S., 278.

XIII. CARGO.

See also BANKRUPTCY, XIX. xxi. 3 and 4.

1. *Rights of Holders and Consignees*, 6357.
2. *Lien on*, 6358.

1. Rights of Holders and Consignees.

7. A lien is a right to possess or retain. A. consigns a cargo to B., with a direction to pay to C., out of the proceeds, a sum of money, and writes C. to that effect; C. has no lien on the proceeds. *Exp. Heywood*, 2 Rose 355.

8. A., by deed, assigns the cargoes of two ships to B. and C., but has no charterparty or bill of lading to deliver to them. On the arrival of one of the ships, he assigns to another person, and afterwards commits an act of bankruptcy:—Held, that B. and C., not having been ready to take possession of the ship on her arrival, had thereby permitted A. to continue reputed owner under the stat. 21 Jac. 1. *Philpott* v. *Williams*, 2 Eden 231.

9. Under an assignment of a ship and her present and future cargo, freight, and earnings, by the owner, for securing to the assignees all moneys which they had advanced, or might become liable to pay, on account of the vessel and her cargo, which they had furnished the means of purchasing:—Held, that the assignees, who were also the ship's agents, were entitled to retain a bill which was given for the purchase of part of the homeward cargo, and was remitted but not indorsed to them by the owner; notwithstanding he denied that it was remitted in payment, and stated that they had not paid, and, contrary to an express understanding, had left him personally liable to some of the debts incurred in fitting out the vessel; and an injunction which had been obtained by the assignees, restraining an action of trover for the bill, was continued until the hearing. *Curtis* v. *Auber*, 1 Jac. & Walk. 526.

10. Observations on an opinion expressed by Lord Cottenham, that when a merchant enters into a charterparty in his own name, containing a clause that no goods shall be taken aboard without the consent of the freighter or his agent, and that the vessel shall be consigned to

the freighter's agent, both in England and abroad, a third party may deal with the correspondent abroad with respect to the cargo, without enquiring as to the rights and relations existing between the charterer and his correspondent. *Zulueta* v. *Tyrie*, 15 Beav. 577.

A. chartered a ship in his own name, and consigned it to B. in Cuba, under an agreement that B. should ship goods and consign them to A., and that A. should accept B.'s bills for their value. After B. had accepted bills on the faith of the agreement, B. sold the cargo to C., who had notice of the terms of the charterparty, and it was consigned to another person :—Held, that assuming that the fact of A.'s appearing principal on the charterparty made it incumbent on C. to ascertain the relations between A. and B., yet that, as B. was actually the principal, and not the agent of A., C. could safely deal with him for the cargo, and that the circumstance that B. had committed a fraud on A. did not prevent C. from obtaining a good title to the goods. *Ib.*

A merchant in Cuba sold part of a cargo shipped by him to B., and C. (who was A.'s correspondent in England), being informed thereof by B., made no claim until four months afterwards, when he insisted on a paramount right over B. to the cargo :—Held, that even assuming he had originally such right, his conduct had been such, that a court of equity would not allow him to enforce it against B. *Ib.*

1. When by a bill of lading goods are made deliverable to the shipper, or his order, and not to the consignee, the *jus disponendi*, or control over the property in the goods shipped, remains with the shippers, although the invoice states that the goods were shipped "on account of and at the risk of" the consignee; such statement being not conclusive, of itself, that the right to the possession of, as well as the property in, the goods was intended to be unconditionally passed to the consignee. *Shepherd* v. *Harrison*, 5 L. R., H. L., 116; 40 L. J., Q. B., 148; 24 L. T. 857; 20 W. R. 1.

The burthen of showing the existence of a different state of things lies on the person who contradicts what would be the ordinary legal conclusion from the transaction. *Ib.*

2. Goods which, by the terms of the bill of lading, have been carried upon a nominal amount of freight, can be lawfully demanded, by the holder of the bill of lading, on payment of that amount. *Keith* v. *Burrows*, 2 L. R., App. Cas., 636; 46 L. J., C. P., 801; 37 L. T. 291; 25 W. R. 831.

The owner of a ship cannot, by his subsequent acts, give to his mortgagees, as against the holder of a bill of lading, rights different from those possessed by himself under it. *Ib.*

2. Lien on.

3. If the consignee of a cargo, by agreement with the owner, charter a ship, and expend the money necessary and proper in order to enable her to fetch the cargo, he is, without any special agreement to that effect, entitled to a lien on the proceeds of such cargo in his hands for the advance so made, and a person who is not the consignee has, under such circumstances, a similar lien on the proceeds of the cargo, if he

can arrest such proceeds bef
the hands of the shipper of t
v. *Neill*, 32 Beav. 529; 9 Ju
W. R. 1052; 9 L. T., N. S., 9

A. B. chartered nine vesse
fetch C. D.'s timber from N
an agreement between them
was to be the consignee. C
the contract, consigned the
persons, but A. B. arrested t
of them in the hands of the co
of an injunction :—Held, t
maintain a bill against C. D.
to enforce his lien on the proc
and that such lien exten
properly expended by him
nine ships, and to all pecu
liabilities, but not to commi
profits, or damages for br
tract. *Ib.*

4. The plaintiffs advanced
money to S. M. & W. on the
ments coming to them as r
from their correspondents
shipments they directed the
consign to the plaintiffs. T
was informed of the contra
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insure a part of the cargo on
and informed W. that a part
intended for him, which W.
the plaintiffs. The reside
Haytian house died in Jun
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signed, and his administrat
cargo to B. in London, unde
was sold, and by whom th
received in December 1842.
tors of the Haytian house, o
1842, attached by foreign at
ing to the custom of Londo
Haytian house in B.'s hands.
the 7th September 1842, the
in the Haytian house direct
cargo for S. M. & W. in cer
bill and motion to restrain t
S. & Co. against B., in the Lo
—Held, that the right of the
was an equitable and not a
the plaintiffs were entitled
court in the trial of the ri
proceedings in the Lord May
be restrained by injunctio
Stephens, 4 Hare 185.

5. W. & L., owners, emplo
of a ship, and directed him
coast of Africa with, as alleg
money and merchandise, and
was, while on that coast, int
money for a certain purpose
it in completing his cargo,
saries, repairing the ship, a
and he forwarded to A. a
on W. & L. for the whole
a collateral security a bill
specified portion of the car
fused their acceptance of the
which was subsequently
they repudiated the whole tr
B. and A., alleging that B.
by them with a sufficient a

meet the entire expenses of the voyage. Upon a bill filed by A. against W. & L. and B., praying that the money, with interest thereon from the time it was applied by B., might be paid by W. & L., or, in default, that it might be declared that A. was entitled to a lien on the specified portion of the cargo comprised in the bill of lading:—Held, that A. had no legal or equitable right to any part of the cargo in specie, but that he was entitled to equitable relief; and as W. & L. had had the benefit of the contract, though not adopted by them, A.'s right to have the proceeds of it must be recognised; and an inquiry was directed as to the extent to which W. & L. had been actually benefited by the use of the money by their agent, in order that they might be charged with the amount. *Ashmall* v. *Wood*, 2 Jur., N. S., 827; 4 W. R. 694.

The chief clerk certified that of the 5,000 dollars 4,798 dollars were paid or applied for the benefit or use of W. & L., in or towards the purchase of palm oil:—Held, that as W. & L. had had the benefit of the plaintiff's money (though lent upon a contract unauthorised by them), the plaintiff was entitled to a decree, with costs, in accordance with the finding of the chief clerk. S. C., 3 Jur., N. S. 232; 5 W. R. 397.

XIV. FREIGHT.

See also V. 3 *ante*—BANKRUPTCY, XIX. xxi. 3 and 4.

1. *Assignment*, 6359.
2. *When Earned and Payable*, 6360.
3. *Lien of Master*, 6361.
4. *Lien of Owner*, 6362.
5. *Other Cases*, 6363.

1. Assignment.

1. An assignment by the owners of a ship of freight to be earned is good. *Douglas* v. *Russell*, 4 Sim. 524. Affirmed 1 Myl. & K. 488.

A shipowner assigned to B. the freight earned and to be earned by one of his ships, and afterwards chartered her to C., for a voyage to S. The outward freight was paid to A. before the ship sailed. The charterparty afterwards was delivered to B., by A.'s direction, and B. gave notice of the assignment to C. Afterwards, but before the ship returned, A. became bankrupt:—Held, that the homeward freight was not in A.'s order and disposition at his bankruptcy; and, therefore, that B. was entitled to it. *Ib.*

2. Under a charterparty, entered into by a broker, on behalf of the owner of a vessel, whose name did not appear on the charterparty, the freight was to be paid to the broker, on behalf of the owner. The owner assigned the freight to A., who gave notice of the assignment to the broker, but not to the Lords of the Treasury, by whom the freight was to be paid:—Held, that after such assignment and notice, the freight was no longer in the order and disposition of the owner, and consequently did not, on his subsequently becoming bankrupt, pass to his assignees:—Held, that the money due to the charterparty was not in his order and disposition at his bankruptcy. *Gardner* v. *Lachlan*, 4 Myl. & C. 129; 8 L. J., N. S., Ch., 82; 2 Jur. 412, 1056. Affirming 8 Sim. 123; 5 L. J., N. S., Ch., 332. And see S. C. 6 Sim. 407 on motion for an injunction.

3. A shipowner on the 20th March 1857 chartered his ship to A. for a voyage to Hong Kong. The freight was payable "by approved bills on London, at three months' date, or cash under discount, following the delivery of a certificate to the charterers, signed by the consignees," of the delivery of the cargo. On the 24th March the shipowners assigned the freight to C., who gave no notice to A. until November following. It turned out that on the 23rd March A. had sub-chartered the ship to B., whose agent at Hong Kong had paid the freight to the agent there of the shipowner:—Held, that A. was liable to C. for the freight, and that C.'s laches in giving notice had not deprived him of his rights. *Young* v. *Lindsay*, 27 Beav. 405.

4. The assignee of a particular freight who gives to the charterers notice of his security, is entitled in priority to the general assignee of all freight to be earned by the same ship, who is prior in date, but gives no notice, and takes no steps to enforce his mortgage until after the particular assignee has given notice to the charterers, and the cargo has been in part discharged. *Brown* v. *Tanner*, 2 L. R., Eq., 806; 12 Jur., N. S., 791; 14 W. R. 911; 14 L. T., N. S., 825.

A. took an assignment of a ship by way of mortgage, which was duly registered at the custom house in 1862, and which referred to an assignment of all freights and earnings, of even date, given as an additional security, but not registered. Subsequently B. took an assignment by way of mortgage of the freight of a particular voyage. A. and B. were both ignorant of each other's claims, but B. gave notice of his claim to the charterers before the termination of the voyage, while A. did not give notice of his claim till after the ship had broken bulk:—Held, that B.'s claim on the particular freight must prevail over the general claim of A. *Ib.*

5. The right to freight is incidental to the ownership of the vessel which earns it, and therefore a transfer of a share in a ship passes the corresponding share in the freight, under an existing charter-party, without the mention of the word "freight." *Lindsay* v. *Gibbs*, 22 Beav. 522; 2 Jur., N. S., 1039.

In equity an assignment of freight to be earned is valid. *Ib.*

A ship was chartered by her owner. Afterwards, in June 1854, he sold twenty-four shares of the ship to A., and the remaining forty shares to B., and in December he assigned the freight to C. A. registered before, and B. after, C.'s assignment; but C. gave the first notice to the charterers:—Held, that C.'s right to the freight had priority over B., but not over A. *Ib.*

One who is interested in the freight alone saved from the ship held liable to contribute his proportion of the expenses incurred by the ship in earning the freight. *Ib.*

6. A. was the owner of a vessel. B. was to charter it for a particular voyage to seek a particular cargo. Its tonnage was larger than B. required. A. was willing to undertake the half risk, and was to have half the profits. A charterparty was executed on the 24th April

1845, by which the vessel was declared to be let to freight, at 16*s.* a ton per month to B., and bills were to be given, and payments from time to time made by B., which taken together would cover one-half of the amount stipulated for the freight. On the arrival of the ship at home, B. was to give a bill at ninety days' date for the remainder of the freight. Two other instruments were executed on the same day; by the first of which A. was to join in the adventure, and, "after payment or deduction of the freight, and all incidental expenses," the profit or loss was to be borne by the parties in equal moieties; and by the other, A. gave to B. a guarantee for the due performance by the clerk of the stipulations he had entered into. On the 1st December 1845, while the ship was on the voyage, A. assigned to C. the charterparty, and wrote on the margin thereof a note addressed to B., requesting him to pay "what is due." C. gave B. notice of this assignment and note. The notice was in the ordinary form, and C. made no inquiries of B. B. continued the payments which by the stipulations in the charterparty he was bound to make. The vessel returned in August 1846, and the adventure turned out a loss. B. claimed, as against C., to balance the accounts of profit and loss, as he would have been entitled to do with A. had the charterparty not been assigned:—Held, that in equity he was entitled to do so. *Mangles* v. *Dixon*, 3 H. L. Ca. 702. Reversing 1 Macn. & G. 437; 1 H. & Tw. 542; 19 L. J., N. S., Ch., 240.

2. When Earned and Payable.

1. Though freight may not be payable in respect of a man's own goods conveyed in his own ship, it becomes so if he makes third persons, who have advanced him money, the consignees of those goods, and the goods are by the bill of lading deliverable to their order. *Wequelin* v. *Cellier*, 6 L. R., H. L., 286; 42 L. J., Ch., 758; 22 W. R. 26.

T. & Co., who acted as the London bankers for Holm, of Stockholm, consented to open a credit in his favour with merchants at Akyab for the purchase of "rice for the English market shipped by vessels of my own, the *Java*, etc., at, etc., f. o. b." The rice was purchased, and shipped on board the *Java*, and made deliverable to the order of T. & Co., who accepted bills to cover the purchase. The bill of lading was indorsed to them; it described the goods "to be delivered in like good order, etc., unto T. & Co., or their assigns; freight for the goods 4*l.* 5*s.* per ton of 20 cwt. net, delivered with primage and average accustomed." While the *Java* was on its voyage, Holm obtained advances from C. & Co., to whom he assigned the freight as security:—Held, that, under these circumstances, C. & Co. were entitled to the freight, and T. & Co. were, like all other consignees of a cargo, liable to pay it under the terms of the bill of lading, although the cargo was in fact brought to England in Holm's own vessel, the *Java*. *Ib.*

2. Goods, which by the terms of the bill of lading have been carried upon a nominal amount of freight, can be lawfully demanded by the holder of the bill of lading, on payment of that amount. *Keith* v. *Burrows*, 2 L. R., App. Cas., 636; 46 L. J., C N. S., 291; 25 W. R. 831.

The owner of a ship ca quent acts, give to his mo the holder of a bill of lad from those possessed by hi

3. If a shipper of good reason of the misconduct shipowner or his agents, his and he cannot resist payme ground that the goods were they arrived at the port of v. *Melhuish*, 4 Jur., N. S.,

4. The freight upon a earned until the unloadin the whole cargo has been v. *Tanner*, 37 L. J., Ch., 92 18 L. T., N. S., 624; 16 W.

5. A ship with a genera London for Havre with board. Under the bill o owner was to deliver the and it was to be taken o within twenty-four hours Havre, or ten guineas a da demurrage. On the ship's the authorities of the por take her away in consequer being on board. Thereupo bouring ports, but was n there. Returning to Havr general cargo, and no bil been presented to him, having been made to him the petroleum, he brought On the shipowner clai freight, demurrage, and ex he was entitled to freight expenses. Freight is earn and arrival of the goods re to the merchant, so that, alt could not be landed at H port a reasonable time, owner might have received was accordingly earned. *Gaudit* v. *Brown*, 5 L. R., 745; 21 W. R. 707.

Where no application f the captain may land and at the expense of the me that is forbidden by the port, he is not justified cargo; but, in the absence take it to such a place as most convenient for the charge to the merchant a incurred; consequently, was entitled to back fre The demurrage and the e the ineffectual attempt to bouring ports were not looked on as part of th voyage. *Ib.*

6. A charterparty made merchants at Valparaiso, Prussian ship, provided t proceed and deliver carg named by the charterers on the Continent between The charterer named Dunk of the ship off Dunkirk, formed by a pilot that between Prussia and F thereupon took the ship

refused to deliver the cargo without payment of full freight. War was not in fact declared until three days afterwards:—Held, first, that the master was entitled to a reasonable time to make inquiries as to the war, and that the time taken was not unreasonable. *Duncan* v. *Köster, The Teutonia*, 4 L. R., P. C., 171; 41 L. J., Adm., 57; 26 L. T. 48; 20 W. R. 421; 8 Moo. P. C., N. S., 411.

Held, secondly, that as the port named by the charterer was an unsafe port, and Dover was a port which might have been named within the terms of the charterparty, the owners were entitled to full freight. *Ib.*

3. Lien of Master.

1. Master being turned out of possession upon the vessel's being captured does not deprive him of his lien for the freight in case of her re-capture. *Exp. Cheesman*, 2 Eden 181.

2. When by a charterparty and bill of lading, freight is "to be paid on unloading and right delivery of the cargo," the master having a lien by common law for freight and general average, and a lien by contract for demurrage, the payment of the freight and the delivery of the goods are concurrent acts in which all that is required from the owner of the cargo is readiness and willingness to pay at the time of delivery: and before paying any sum for general average, the owner of cargo is entitled to be satisfied that the amount claimed is the result of a proper adjustment; and if the owner of cargo on arrival of the ship in port, and before discharge, refuses to pay the amount claimed for freight and general average before the amount due is finally ascertained, but offers to pay a large proportion of the freight, and, there being no doubt as to his solvency, to sign an average bond for the payment of the general average when ascertained, but the master, nevertheless, insists upon retaining the cargo on board ship until his lien for freight and general average is satisfied, detention by the master is not wrongful. *Miedbrodt* v. *Fitzsimon, The Energie*, 32 L. T., N. S., 579; 23 W. R. 932; 6 L. R., P. C., 306; 44 L. J., Adm., 25.

3. Freight is the reward payable to a carrier for the safe carriage and delivery of goods. It is payable only on safe carriage and delivery. If the goods are safely carried, the master of the ship has a lien on the goods for the amount of the freight due for such carriage, and cannot be compelled to part with the goods till such freight be paid. *Kirchner* v. *Venus*, 12 Moo. P. C. 361; 5 Jur., N. S., 395; 7 W. R. 455; 33 L. T. 81.

Where parties, instead of trusting to the general rule of law with respect to freight, make a special contract for a payment which is not freight, it must depend upon the terms of that contract whether a lien does or does not exist. When the contract made gives no lien, a court of law will not supply one by implication. *Ib.*

D. & Co. of Liverpool shipped goods for Sydney. The bill of lading stated the goods to be to the shipper's order or assigns, "he or they paying freight for the goods here as per margin." In the margin it was stipulated as follows: "Freight payable in Liverpool to M., one month after sailing, vessel lost or not lost." The bill of lading passed into the hands of K. & Co., as indorsees for value. On the ship's arrival at Sydney, the port of delivery, the master was advised by the shipowner that the sum agreed to be paid as freight at Liverpool had not been paid; and he refused to deliver the goods to K. & Co., the assignees of the bill of lading, unless the freight was paid, claiming a lien on the goods for the unpaid freight:—Held, first, that the amount agreed to be paid by the shippers at the port of shipment, one month after sailing of the ship, did not acquire the legal incident of freight, though described under that name in the bill of lading, it being merely money to be paid for taking goods on board and undertaking to carry, and not for carrying the goods; and that there was no right of lien on the goods by the shipowner in respect of such sum of money being unpaid. *Ib.*

Held, secondly, that as the bill of lading provided that the freight was payable to a third party, M., and not to the shipowner, payment for freight to the master or shipowner would be no answer to an action in England by M., in the name of the shipowner, for non-payment of freight. *Ib.*

Evidence was admitted of a custom in Liverpool, that a lien on goods for a sum agreed to be paid there as freight continued:—Held, also, that as the assignees of the bill of lading were resident in Sydney, in New South Wales, and there was no evidence that they were acquainted with the local usage in Liverpool, such evidence of custom was not admissible for the purpose of explaining the effect of the memorandum in the bill of lading, or of showing the terms on which the goods were shipped, in the construction of such bill of lading. *Ib.*

4. The loss of part cargo having been occasioned by perils of the seas:—Held, that under the bills of lading and charterparty the master's lien on the residue for freight extended to the entire lump freight without deduction. *The Norway*, 1 B. & L. 404.

5. W., a London merchant, shipped on board a French ship (the *Galam*) at Hayti, a cargo of wood, to Europe. The *Galam* became unseaworthy at Terceira, was there condemned, and the cargo discharged and stored, and the captain then raised 1,000*l.* from M., on a respondentia bond on the cargo, payable on arrival at Falmouth, but did nothing to forward the cargo. W., hearing of the accident, chartered the *Mary Jane* to go to Terceira and bring home the cargo, and to call at Scilly for orders, which was done; but on reaching Scilly she ran ashore, and expenses were incurred in saving ship and cargo. W., in order to defeat the respondentia bond, ordered the cargo to proceed to Hamburg, instead of Falmouth, and discharge the cargo; but before the *Mary Jane* started, M., the respondentia bondholder, instituted a suit and arrested the cargo at Scilly, by warrant out of the Admiralty Court. The cargo was afterwards removed to London for sale, and fetched 808*l.*:—Held, that the master of the *Mary Jane*, not having known of the respondentia bond, and being prevented by the orders of the Court of Admiralty, occasioned by the default of the owner of the cargo, from carrying the cargo on to Hamburg, had a lien for freight on such cargo. *Cleary* v.

Macandrew, The Cargo ex Galam, 9 L. T., N. S., 550.

Held, secondly, that the master having complained and obtained a settlement from his underwriters for a total loss, they were entitled in his right to such lien. *Ib.*

Held, thirdly, that the master's lien for freight was preferable to the claim on the respondentia bond, for the carrying on of the cargo was essential for making the bond available, and the bondholder had done nothing towards forwarding the cargo. *Ib.*

Held, fourthly, that the master's claim for general average was also preferable to the respondentia bond, for he had a possessory lien for such average at common law, and the sale at London did not displace this lien. *Ib.*

4. Lien of Owner.

1. It was provided by a charterparty that 250*l.*, part of the freight, should be advanced in cash on signing bills of lading and clearing at the custom-house, and that for the security and payment of all freight, dead freight, demurrage and other charges, the master or owners should have an absolute lien and charge on the cargo. The ship was loaded and cleared at the custom-house, but the 250*l.* was not paid, and consequently the captain did not sign bills of lading, and the ship never started on her voyage. The charterer having become insolvent, his trustee in liquidation gave notice to the owner that he disclaimed all interest under the charterparty. The owner claimed a lien on the cargo for the 250*l.* as freight :—Held, the ship never having earned or commenced to earn freight, no lien arose. *Exp. Nyholm, Re Child*, 43 L. J., Bky., 21 ; 22 W. R. 174 ; 29 L. T., N. S., 634.

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5. The Court will entertain a suit for an account of the freight of a ship grounded on a contract which also contains stipulations affecting to give an ultimate right of property in the ship, and which may not be capable of being recognised or enforced as a whole, for want of being registered; provided the title to the freight is distinct from, and does not necessarily depend upon a title to the ship claimed under such contract. *Davenport* v. *Whitmore*, 2 Myl. & C. 177; 6 L. J., N. S., Ch., 58.

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Macandrew, The Cargo ex Galam, 9 L. T., N. S., 550.

Held, secondly, that the master having complained and obtained a settlement from his underwriters for a total loss, they were entitled in his right to such lien. *Ib.*

Held, thirdly, that the master's lien for freight was preferable to the claim on the respondentia bond, for the carrying on of the cargo was essential for making the bond available, and the bondholder had done nothing towards forwarding the cargo. *Ib.*

Held, fourthly, that the master's claim for general average was also preferable to the respondentia bond, for he had a possessory lien for such average at common law, and the sale at London did not displace this lien. *Ib.*

4. Lien of Owner.

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over the whole cargo, but of half the whole gross freight; that half of the whole remained to be paid abroad on right delivery of the cargo; that that half had been lost through perils of the sea, and that the shipowner was entitled on his policies on freight to recover as for the total loss of that half. *Ib.*

1. When the charterers of a ship stipulate that they shall be entitled to insure their advances "against freight," at the owner's expense, and when they fail to insure, they have, in the event of the ship perishing, no claim against the owners for repayment. *Watson & Co.* v. *Shankland*, 2 L. R., H. L. (Sc.), 304; 29 L. T., N. S., 349.

By a charterparty made at Bombay a ship belonging to merchants at Greenock was to proceed from Bombay to Calcutta, and there load a cargo to be conveyed to the United Kingdom. A clause in the charterparty was as follows: "Sufficient cash for ship's ordinary disbursements to be advanced the master against freight; subject to interest, insurance, and 2½ per cent. commission; and the master to indorse the amount so advanced upon his bills of lading." While the ship was at Calcutta preparing for the voyage, various advances for the ship's ordinary disbursements were made by the indorsees of the charterparty, and the master gave them on account of such advances a bill drawn on the shipowners. They refused to accept the bill, on the ground that the master had no power to give it, and that under the charterparty the indorsees should have effected an insurance on freight to the amount of their advances. No such insurance was, however, effected, though they had time to insure after notice of the refusal to accept the bill. The ship having been lost on the voyage to the United Kingdom, the indorsees brought an action to recover the amount of their advances:—Held, that under the charterparty the shipowners had a right to rely on an insurance upon the advances being made by the indorsees, who had stipulated for and received the right to charge the premium; and that they having chosen not to insure must bear the loss. *Ib.*

XV. AVERAGE.

2. Lien for general contribution to individual loss by property thrown overboard for the safety of the ship under the right of the master to require security, not extended to an injunction against delivering the cargo, receiving the freight, and parting with any share of the ship. The mode of adjustment not confined by usage to arbitration. *Hallett* v. *Bousfield*, 18 Ves. 187.

3. The captain of a ship in need of repairs granted a respondentia bond for the required amount, payable, with maritime interest, at the first port of destination, which was declared to be Falmouth. In the meantime the owner of the cargo chartered a second ship to fetch and import the cargo which had been previously unshipped. The second ship was stranded, and much expense incurred in getting her to port. Notice was given to the owner of the cargo, who ordered the captain to carry on the cargo to Hamburgh. The cargo was seized by the holders of the respondentia bond at Scilly, and sold in
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N. S., 477; 12 W. R. 495.

XVI. ACCOU

4. Agreement between A.
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and demurrer allowed to h
such transaction. *Battersby*
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5. A. and B., British subje
repaired an American-built
speculation, with a view to
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forthcoming. *Sharp* v. *Tayl*

1. A bill for an account of the earnings of a ship described some of the owners as resident in England and the others in India, and stated the ship to have been built by B. & Co., of Newcastle; but it did not contain any positive averment that the ship was British built:—Held, that for want of such averment, a demurrer founded on the Ship Registry Acts could not be supported. *Smith* v. *Small*, 14 Sim. 119.

2. T. lent D. 600*l*., D. assigned one-sixteenth in a ship, and by defeasance it was declared, that T. out of the earnings should pay himself 600*l*. and should account to D. for the surplus, but there was no covenant for payment of the money. The ship was lost, and T. brought his bill against D.'s executrix for the debt; she denied assets, *præter* to satisfy specialty debts. Decreed, she should account for testator's estate, and T. to account for the earnings, and to be allowed for the outfit of the ship though cast away. *Tyrrel* v. *Thomas* (*Lady*), 1 Vin. 183, pl. 5.

3. A., one of three part-owners of a ship, refuses to navigate; B. and C., the other two, navigate without his consent, and ship is lost in the voyage. A. shall bear his proportion of the loss, for he would have been entitled to an account of the profits. *Strelly* v. *Winson*, 1 Vern. 297. But see *Horn* v. *Gilpin*, Ambl. 255.

4. Captain of a ship dies leaving money on board: the mate becomes captain, and improves the money; he shall, on allowance made him for his care in the management of the money, account for the profits and not the interest only. *Brown* v. *Litton*, 1 P. W. 140.

5. By statute 59 Geo. 3, c. 3, navy agents are entitled to make the usual charge for passing accounts before that Act, and to charge commission on the full amount of pay, without being limited to the money passing through their hands: the defendants having received a sum as returned premiums, without bringing it to account for many years, alleging, that they waited the final adjustment of average; it was referred to the Master to enquire whether they were entitled to retain it, according to the custom of merchants. *Drury* v. *Atkins*, Taml. 75.

6. A part owner of a ship, which had been let to the East India Company for a voyage to India, after the other part owner had expended a large sum of money in repairing and fitting it out for the voyage, arrested the ship by process out of the Admiralty Court, and compelled the other part owner to give security for his share; the ship afterwards sailed to India and returned home:—Held, that the part owner who had taken the security was not entitled to any share of the profits of the voyage, but was bound to pay his proportion of the repairs and outfit. *Davis* v. *Johnston*, 4 Sim. 539.

7. Certain consignments of oil were made from Columbo, to certain persons resident in England. During the voyage several of the casks in which the oil was contained leaked; some part of the oil which so escaped was wholly lost, but the greater part was collected together, and sold in one mass by the captain, in the course of the voyage, for 750*l*. The consignees then agreed to share the proceeds in proportion to their respective losses:—Held, first, that a bill in equity was sustainable, by the consignees against the shipowner, for an account of the oil lost and the oil sold; and that several actions having been brought by the shipowner against the consignees to recover freight and average, they might all join in one bill against him for an account and equitable set-off. *Jones* v. *Moore*, 4 Y. & Coll. 351; 10 L. J., N. S., Exch. Eq., 11; 5 Jur. 431.

8. A., in 1799, purchased shares in a ship of G. R., who, having also shares in the same ship, was intrusted by A. and the other part owners with the whole management of the ship, and to keep the accounts relating to it from the time of the purchase until the ship was sold by G. R. with the consent of all the owners in 1805. Upon the occasion of the sale, G. R. stated and settled accounts with W., one of the part owners, and paid him the balance due upon the earnings of the ship and the proceeds of the sale. In 1824 G. R. died. Upon a bill filed by A. in March 1826, for an account against the executors of G. R., it appeared by a ledger (found in a room wholly disused by G. R.) containing the accounts of the ship, that the credit and debit account between him and A. was not carried beyond 1805. On the debit side there were two items, one in 1811, and another in 1812. It appeared in evidence that A. left England in 1820, and some time after his departure his brother-in-law (a witness for A.) called several times upon G. R. with messages from A., and on those occasions asked him to come to a settlement with A. respecting the ship, that G. R. evaded the subject, but never stated that he was not indebted to A. Under these circumstances an account was decreed against the executors of A., and that decree affirmed on appeal. *Robinson* v. *Alexander*, 8 Bli. N. S. 352; 2 Cl. & F. 717.

9. An agreement recited that A. was desirous of purchasing, and B. of selling to A., the half of a schooner for 200*l*., and that B. had agreed to lend A. 370*l*., on having the repayment and the interest secured by a mortgage of a rent-charge to which A. was entitled, and of the dividends of certain stock, and by a policy of insurance and two houses; and B. agreed to dispose of the schooner to A., and to execute the necessary deed for that purpose, the 200*l*. purchase money of the schooner to be part of the 370*l*., for which the mortgage was to be given by A., and that A. should execute a mortgage of the schooner to B. as a further security for the 370*l*., which A. was to pay back by annual instalments of 50*l*., until the principal and interest should be paid; and if A. neglected to pay off all or any of the instalments, with interest, B. should have power and authority to call in the 370*l*., or so much as should be then due. The schooner proved unseaworthy, and was by mutual consent returned to B. A. afterwards assigned the other property comprised in the agreement to C., who had notice of the agreement:—Held, that a suit could be maintained against C. for an account of the sum due on foot of the 170*l*. actually advanced, and for a sale, although the agreement quoad the schooner had been rescinded. *Murphy* v. *Moorehead*, 16 Ir. Ch. R. 454.

Held, secondly, that the return of the schooner to B. was not to be considered as a payment of instalments. *Ib.*

XVII. WRECK.

1. A governor of an island near which a ship was cast away, on pretence of recovering the cargo for the seamen, seized it all to his own use as wreck-fishing. On his return to England he was decreed to account for the whole. *Trott* v. *Le Clé*, Colles' P. C. 219; Pre. Ch. 239.

XVIII. INJUNCTION AGAINST SAILING.

2. The Court of Admiralty is open all the year round to applications by part owners, to restrain the sailing of ships without their consent, until security given to the amount of the respective shares. But where the shares are not ascertained, the Court of Chancery will exercise a concurrent jurisdiction, by injunction, to restrain the sailing of a ship, until the share of the party complaining shall be ascertained, and security given to the amount of it. In this case it was referred to the Master to make the inquiry, and to settle the security accordingly. *Haly* v. *Goodson*, 2 Meriv. 77.

3. Injunction to restrain the sailing of vessel, containing goods sold to a person who had become insolvent, but over which the plaintiff retained a right of stoppage *in transitu*, refused. A court of equity has not jurisdiction in any case to stop goods *in transitu*, *semble*. *Goodhart* v. *Lowe*, 2 Jac. & Walk. 349.

4. Injunction to restrain the sailing of a ship, upon the application of a part owner, refused, where the ship was intended to sail the next day, and it did not appear by the affidavit filed in support of the motion that there were any circumstances to account for the plaintiff's delay in applying. *Christie* v. *Craig*, 2 Meriv. 137.

5. The Court will not restrain a ship from sailing, on the application of the part owner of the smaller ascertained share. The proper application is to the Court of Admiralty, to compel the larger part owner to give security. This Court interferes only where the shares are unascertained. The application to restrain is too late when the ship is on the point of sailing with emigrants. *Hallaran* v. *Donal*, 9 Ir. Eq. R. 217.

6. A bill, by several members of a shipping company dissoluble at any moment, to prevent a vessel being sent on a voyage they disapproved, cannot be sustained. *Miles* v. *Thomas*, 9 Sim. 606.

Semble, that the Court will interfere between co-partners to prevent a destruction of the partnership property, although a dissolution of the partnership may not be prayed. *Ib.*

7. *Semble*, the Court of Chancery will not, in a case within its jurisdiction, interfere beyond or otherwise than the Court of Admiralty would interfere, at the suit of some part owners, to restrain the sailing of a ship, or control her management; there being no question as to the ownership, and the only dispute being as to the powers of the owners *inter se*. *Castelli* v. *Cook*, 7 Hare 89; 18 L. J., N. S., Ch., 148; 13 Jur. 675.

Quære, whether the Court of Chancery has a concurrent jurisdiction with the Court of Admiralty to restrain the sailing of a ship at the suit of the minority or some of the part owners, until security be give *Ib.*

If relief, which is a prop jurisdiction of another Cou upon relief to be given in thi relief, which is properly a Court, cannot be given, exce longs to another jurisdicti this Court, to prevent mul may give both kinds of relie which is sought in a suit be within the jurisdiction of di independent of each other, to the same transaction, t Court to one kind of relief w draw along with it the right therefore, where the bill by ship, against the master and prayed an account of the pa ship to which the plaintiff right to that relief afford going on to restrain the sa until security, according to t Admiralty Court, was given shares. *Ib.*

8. The master of an Ame ing in England, authorised sell or charter the ship, ente party with the plaintiff for a and back. A few days afte ant purchased the ship fro under a power of attorney owners to sell her. The g cargo had been put on board party. The defendant atte sailing of the ship:—Held, having authority to charte he had done, and the defe the charterparty, an inju to restrain the purchasers with the sailing of the shi the charterparty. *Messager* v. *Baines*, 11 W. R. 322; 7

9. Whether the Court wi tion restraining a party fro any other than a certain por compelling him to proceed t *Lidgett* v. *Williams*, 4 Ha N. S., Ch., 459.

10. A shipowner of Hambu burg, an agreement with a dor for the sale to the Englishm ship whenever she might re age on which she then was. and was by the owner ord Sunderland. The master of authorised by the shipowner in the sale, refused to deliv on certain terms. The pu against the owner and the performances. He obtained service on the master for the for an injunction to restra from removing the ship out —Held, that the Court had strain the defendants from and injunction granted. L. R., Ch., 860; 29 L. T. 47

Held, that substituted ser was effectual and proper.

11. The defendant, a Spa Santander, in Spain, a mor Spanish vessel, of which he secure the repayment by t

B., or whoever in future might represent his right, a sum of money and interest; and the mortgage deed contained a proviso that A. B., or whoever might represent him, might exact payment of the loan and interest at any time and in any manner. The plaintiff was the transferee of the mortgage, and the defendant and the vessel being at the port of Q., within the jurisdiction, the plaintiff commenced an action against the defendant to enforce the mortgage, and for an injunction to restrain the defendant from removing the vessel out of the jurisdiction, and duly served the defendant with a copy of the writ. He now moved for an interlocutory injunction to restrain the defendant from removing the vessel out of the jurisdiction until the hearing:—Held, that the Court had jurisdiction to grant such an injunction, and it was granted accordingly. *Clavering* v. *Aguire*, 5 L. R., Ir., 97.

XIX. REGISTRATION (LLOYD'S).

1. The defendants were an association for the registry of iron ships, and classed the ships in a register of merit according to the reports of their own surveyors. A list from the register might be obtained by any one. The plaintiffs were members of the association and the owners of a ship which in 1870 was ranked in the highest class in the register. The plaintiffs in 1870 made an alteration in the ship, and submitted her to the defendants' inspection, who, not approving of the alteration, entered in the register, "Class suspended, 1871," and refused to restore the previous first-class entry unless some further alteration was made. The advisability of the alteration was a matter of opinion, as since the alteration the vessel was classed in the highest rank at Lloyd's (London). The plaintiffs continued to use the vessel, but it was proved that her value had depreciated in consequence of the entry in defendants' register. On a bill being filed by the plaintiffs in November 1873 to restrain the defendants from disposing of any copies of their list containing the words "Class suspended 1871":—Held, that the plaintiffs were not entitled to relief, first, because the entry was the *bonâ fide* opinion without malice of the society to whose judgment the plaintiffs had submitted the vessel; secondly, because of their laches in applying to the Court for relief. *Clover* v. *Roydon*, 29 L. T., N. S., 639; 17 L. R., Eq., 190; 43 L. J., Ch., 665; 22 W. R. 254.

Held, also, that the committee was justified in notifying to their subscribers and the public their honest opinion as to the merits of the ship, and had a right to suspend the class until the plaintiffs should have altered the ship according to their requirements. *Ib.*

2. A firm of shipbuilders agreed to lengthen and repair an iron steamship; the object being that she might be classed 100 A 1 at Lloyd's. The specification forming part of the contract contained this stipulation,—"Iron work:—"The plating of the hull to be carefully overhauled and repaired, but if any new plating is required the same to be paid for extra (fourteen words deleted, signed A. and J. I., D. G.). Deck beams, ties, diagonal ties, main and spar deck stringers, and all iron work, to be in accordance with Lloyd's rules for classification": —Held, that the shipbuilders were bound to supply without extra charge any new plates required to enable the vessel to be classed 100 A 1 at Lloyd's; and that neither the letters of the parties before the contract was signed, nor the initialed deleted words in the contract, could be considered for the purpose of interpreting the intention of the parties. *Inglis* v. *Buttery*, 3 L. R., App. Cas. (Sc.), 552.

Held, also, the costs of Lloyd's survey, and the Board of Trade tonnage measurement, should be borne by the shipowner. *Ib.*

SHORT BILLS.

See BANKRUPTCY, XVII. iii. 6.

SHORT CAUSE.

See PRACTICE (TRIAL OR HEARING).

SHORT DAY ORDER.

See PRACTICE (SHORT DAY ORDER).

SHORTHAND NOTES.

See SOLICITOR, XVI. XVIII. 17.

SIERRA LEONE.

See COLONIES AND COLONIAL LAW, X. XXXII.

SIGNATURE.

— *Of Bankrupt's Certificate.* See BANKRUPTCY, XXXI. xii.
— *To Answer.* See PRACTICE (ANSWER).
— *Of Plea.* See PRACTICE (PLEA).
— *Of Counsel.* See PRACTICE (SIGNATURE OF COUNSEL).

SIMONY.

See ECCLESIASTICAL PERSONS AND PROPERTY, III.

SIX CLERKS.

See PRACTICE (OFFICERS OF COURT)—PRACTICE (SERVICE)—SOLICITOR.

SLANDER.

See DEFAMATION.

SLAVERY AND SLAVE TRADE.

Right of Property in Slaves. Nature of.] 1. Slaves in Antigua cannot be equitably mortgaged by a deposit of a registered title-deed, containing a schedule of slaves, if the memorandum accompanying the deposit, which is registered, do not contain a list of the slaves. *Exp. Borrodaile*, 2 Mont. & A. 398. Reversing S. C. *sub nom. Exp. Rucker*, 1 Mont. & A. 481; 3 Dea. & Ch. 704.

By the laws of Antigua, slaves were declared to be inheritance and affixed to the inheritance; and by 59 Geo. 3, c. 120, s. 9, no deed or instrument conveying any interest in slaves was valid, unless the registered names and descriptions of the slaves were set forth in the instrument or in some schedule thereof. The bankrupts deposited with R. & Co., as security for a loan of money, a deed of conveyance to the bankrupts of a plantation and slaves in Antigua, with a written memorandum accompanying the deposit. The deed contained a schedule of the registered names and descriptions of the slaves, but they were wholly omitted in the memorandum of the deposit:—Held, that this was not a good equitable mortgage of the slaves mentioned in the deed; and secondly, that the slaves, being real property in the island of Antigua, could not be considered as within the order and disposition of the bankrupts at the time of their bankruptcy. *Ib.*

2. A testator resident in Jamaica devised the rents, issues, and profits of his estate, called Islington and Cove's Pen, in that island, to A. and B.:—Held, that the estate and the slaves, mules, cattle, and machinery thereon, passed under this devise. *Stewart* v. *Garnett*, 3 Sim. 398.

3. The compulsory manumission or sale of slaves effected by the Abolition of Slavery Act (3 & 4 Will. 4, c. 73), so impressed slaves with the character of personal estate from the passing of the Act, that the compensation money for slaves passed under the will of a testator, made after the passing of the Act, and who died before the period of manumission had arrived, although the will was not attested so as to pass real estate. *Richards* v. *Jamaica* (*Att.-Gen.*), 13 Jur. 197; 6 Moo. P. C. 381.

4. In estimating the compensation due for the loss of sugar estates unduly held under sequestration for a number of years, and of the actual produce of which during that time there was no evidence:—Held, that the allowance of 10*l.* per annum for each negro on the estate is not a right principle to proceed upon. *Semble*, that the proper principle to proceed on, under such circumstances, would be to ascertain the average number of hogsheads of sugar such estates usually produced, and to award compensation for the value of that number in each year, after deducting a proper sum for the expenses of cultivation. A country reconquered from an enemy reverts to the same state that it was in before its conquest. The British inhabitants of a part of the French dominions which was conquered by the Dutch, and afterwards reconquered by the French, ought therefore to have had, after its reconquest, the same protection that they were entitled to under the treaty of commerce of 1786; and were awarded compensation in respect of losses, after the reconquest, by sequestration of their property, in contravention
the French Government.
Knapp, 369.

Compensation under Slave
5. The consignee of a West
though appointed by the Co
during the continuance of h
the balance due to him out o
money awarded under the Ac
of Slavery. *Farquharson*
210.

6. The consignee of a Wes
had, out of his own moneys,
account of an annuity char
was held entitled to be rei
ments out of compensation
been awarded under the Ac
of Slavery. *Shaw* v. *Simpso*
732

Quære, whether such a co
on the *corpus* of the estate fo
by him in its cultivation.

7. Lessee of slaves held en
of the money awarded und
Compensation Act, notwithst
in the lease to refer to arb
loss by abridgment of the l
diminution of the returns,
Act of Parliament or regulat
legislature; the Act for the
slavery not having been co
parties. *Gordon* v. *Bruce*,

See also COLONY AND CO

Trafficking in Slaves.] 8.
was fitted out in the port
sent to the coast of Africa,
adventure for trafficking in
ship was sent at the same
parties, with arms and amm
the disposal of the supercarg
ship; security having been
miralty that they were to be
on the coast of Africa. On th
ships in the river Congo, the
nition were transhipped on b
ship, which was thereupon
privateer, and ultimately c
traband:—Held, that the
was illegal, and that no acti
or account, in regard theret
tained by any of the parties
the others. *Stewart* v. *Gib*

9. It is necessary, to justif
imposing forfeiture and pe
of the 5 Geo. 3, c. 113, tha
regards the ship, that she
contravention of the object
that she was employed wit
of the owner, and as to th
goods had been shipped by
knowingly for the purpose
in the slave trade. *The New*
155; Swabey 317. S. C.
Reg., 6 W. R. 310.

10. As proceedings under
suppression of the slave tra
offence charged being a cri
onus probandi is upon the
that the law has been infri
2 Moo., P. C., N. S., 181;
L. T., N. S., 133. S. C.
Dionisis v. *Reg.*, 6 N. R. 32

Offences against the Slave Trade Acts may be established by circumstantial evidence; but the circumstances must be such as to satisfy a reasonable mind that the suspicion as to the character of the vessel is well founded. *Ib.*

Where articles of merchandise usually employed for the purpose of the slave trade, but capable of being employed for lawful commerce, are found on board a vessel seized on suspicion of being so employed, it is not sufficient to consider merely of what the cargo of the vessel accused of being implicated in the unlawful trade consists, but all the circumstances of the case, and more especially the locality in which the vessel may be found, must be taken into consideration. *Ib.*

A native of the Ionian Islands purchased an American ship, and, upon a declaration that he was a British subject, obtained from the British consul at Cuba a provisional registry of the ship as British. The ship was afterwards seized and condemned for a breach of the Slave Trade Acts. Upon a preliminary objection taken on appeal to the jurisdiction of the Court below, on the ground of the national character of the owner of the ship and cargo:—Held, first, that the registry, flag, and pass of a ship carry with them the presumption that they are true and correct, and that the owner was estopped from proving that he was not a British subject, and consequently that the registry of the ship was void. *Ib.*

Held, secondly, that even if he could have established that the registry was void, and the ship not entitled to claim the protection of any flag or nation, yet that the ship was, by 2 & 3 Vict., c. 73, liable to be adjudicated upon by a Vice-Admiralty Court for a violation of the Slave Trade Acts. *Ib.*

1. An Italian merchant ship was seized by an officer (acting unofficially) in the harbour of Sierra Leone, under the impression that she was a slaver, and had violated the provisions of the 5 Geo. 4, c. 113. The master applied to the Vice-Admiralty Court of Sierra Leone for the release of his ship, and for damages and costs for its detention:—Held, that the seizure of the vessel was quite unjustifiable, and that the master ought to recover damages and costs for its detention. *The Ricardo Schmidt*, 1 L. R., P. C., 268; 12 Jur., N. S., 895; 36 L. J., P. C., 3; 4 Moo. P. C., N. S., 121.

2. The O., a Portuguese vessel, was seized on the 5th December 1876, whilst lying at anchor in the harbour and port of F., in Sierra Leone, as liable to be forfeited for offences committed against the provisions of 5 Geo. 4, c. 113, and 36 & 37 Vict., c. 88 (the Slave Trade Act 1873), but was subsequently released by the Court on it appearing that she was not engaged in the slave trade, but was chartered and intended to carry free immigrants:—Held, on appeal, that the seizor was rightly condemned in costs and damages. Although certain articles on board (*shackles*, an extraordinary number of empty casks, an extraordinary quantity of rice and *mats*) are included among the equipments which are declared to be *primâ facie* evidence of a vessel being engaged in the slave trade, both by the treaty between England and Portugal, carried into effect by 6 & 7 Vict., c. 53, and by the Slave Trade Act 1873; yet the seizor having had the means from the surrounding circumstances and from the ship's papers of informing himself of the true character of the vessel, and the true condition of the men on board who were alleged to be slaves, had no reasonable grounds for the suspicion that the vessel was engaged in or fitted out for the purpose of the slave trade. *Reg.* v. *Casaca*, 5 L. R., App. Cas., 548; 49 L. J., P. C., 41; 43 L. T. 290.

The obligation upon a seizor to justify the seizure under the Slave Trade Acts of a vessel plainly engaged in *bonâ fide* trade within a harbour is a very strict obligation. *Ib.*

The Ricardo Schmidt (1 L. R., P. C., 268; 4 Moo. P. C. 121) approved. *Ib.*

A reasonable suspicion that the alleged slaves had been kidnapped on board with the object of carrying them as free labourers, and not of consigning them to slavery, would not have justified the seizure and detention of the vessel. *Ib.*

According to the true construction of the Portuguese treaties, the consent on the part of Portugal that certain articles mentioned in the first schedule to the Slave Trade Act 1873, when found on board a Portuguese vessel, shall be considered as *primâ facie* evidence of her being engaged in the slave trade, relates only to vessels on the high seas, and does not extend to vessels in a foreign port or foreign territorial waters. The fourth section, therefore, of the Act cannot be extended to a Portuguese vessel lying in British waters. *Ib.*

3. Proceedings taken against a vessel seized under the 2 & 3 Vict., c. 73, are to be according to the rules and regulations established under the 2 & 3 Will. 4, c. 51, and not according to the forms of the civil law. *Guimaraens* v. *Preston*, 4 Moo. P. C. 167.

SMOKE AND NOXIOUS VAPOURS.

See NUISANCE, II. 8.

SMUGGLING.

See CONTRABAND.

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